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The Role of Traditional Justice in Uganda, given Rwanda's Experience of Gacaca

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The Role of Traditional Justice in Uganda, given Rwanda’s Experience of Gacaca

Jean-Rodolphe Fiechter

“There can be no healing without peace; there can be no peace without justice; and there can be no justice without respect for human rights and rule of law.”

- KOFI ANNAN¹

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INTRODUCTION

On 24 July 2009, the Rwandan government announced “that it will stop taking new gacaca cases as of 31 July 2009 and that it intends to wind down gacaca operations within five months”. While the Rwandan experiment with modernized traditional justice, adapted to achieve mass justice over mass atrocity, is about to end, Uganda is setting up a transitional justice framework including traditional justice mechanisms such as mato oput, to address the atrocities committed during the last 20 years in the north of the country.

I take the opportunity, after examining shortly the role of criminal prosecution in the ambit of transitional justice, and exposing the main characteristics of traditional justice, to have a close look at the mechanisms set up by Rwanda. What goals did the government pursue, how did it implement gacaca and how did this mechanism work in practice? The lessons from gacaca will help us to understand what priorities Uganda should set on its way to peace, if and how it should implement mato oput, and what pitfalls ought to be avoided.

THE ROLE OF PUNISHMENT IN TRANSITIONAL JUSTICE

Transitional justice

After the occurrence of human rights abuses, mass atrocity or other forms of severe social trauma, including genocide or civil war, transitional justice is the framework used to confront these past abuses, in order to make sure that they never occur again. Achieving justice is more than prosecuting and punishing criminals; transitional justice combines prosecution with a variety of other goals, such as establishing the truth, granting reparation, preserving peace and building or strengthening democracy and the rule of law.

The role of criminal prosecution in spite of its disadvantages

According to Paul van Zyl, “the debate in international law regarding state obligations in the wake of mass violations has tended to focus too much on the ‘duty to punish’, with the unfortunate consequence of drowning out the exploration of other strategies that deal with the past”.

It is true that many reasons speak in favor of the pursuit of criminal accountability: (1) Retribution – also described as ‘combating impunity’ or ‘bring perpetrators to justice’ - is deemed to provide a legitimate way in which to impose severe punishment on the perpetrators of mass atrocities. The horrible crimes they committed may not go unpunished. The international community insists on punishment, because the committed crimes are not only an assault on the victims or on the local society but on humanity as a whole. (2) The goal of deterrence is to prevent future human rights abuses, by scaring potential abusers to act. (3) The goal of rehabilitation is to have curative powers, such as establishing the truth, thanks to high evidentiary standards imposed on trials. (4) Restorative justice, though strictly speaking not a theory of punishment, is viewed as a conflict resolution and compensating mechanism.

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4 Joseph Yav Katshung, «Mato Oput versus the International Criminal Court (ICC) in Uganda», Pambazuka News, no. 271 (28 September 2006): “Talking about ‘justice’, one should note that it is a flexible concept. Justice in situations of transition is not self-defining. It is about what is required and what is possible in a given situation. (...) Each has a time and a place in a given situation and no one model of justice covers all needs.”
8 See preamble of the Rome Statute of the International Criminal Court: “Recognizing that such grave crimes threaten the peace, security and well-being of the world, Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished, ...”
9 Auckerman, p. 63
10 Auckerman, p. 72
11 Auckerman, p. 77
However, in the reality of transitional justice, these theoretical goals can be achieved only partially, if at all, through criminal prosecution. (1) Some of the problems with retribution are that the sanction will never be proportionate to the perpetrated crimes (even death penalty would not be enough, but it has anyway and fortunately been banned by the international community) and that prosecution will only reach a few of the culpable, thus leaving many perpetrators unpunished. (2) There is no evidence that deterrence works (or, conversely, that it does not work) on the level of massive human rights abuse, as such crimes continued to occur after Nuremberg (while other atrocities might have been prevented thanks to the deterrent effect). Other mechanisms such as political pressure, diplomatic isolation, economic sanctions and military intervention are possibly more stringent. (3) As to the goal of rehabilitation, one must be conscious that trials are always focused on one defendant. Truth will be sought only in his relationship to the victims, in order to convict or acquit him, not with respect to the society as a whole. To establish the truth as a whole, truth commissions, such as the Truth and Reconciliation Commission of South Africa are certainly better suited. (4) Regarding the restorative aspect, it has to be repeated that prosecution is focused on the sole defendant. However, he might not want to reveal the truth. Regarding compensation, many victims who deserve it might not appear at trial or be forgotten. Furthermore, the defendant might not have the means to grant compensation. Therefore, the truth has to be established through other mechanisms and the intervention of the State seems necessary for (at least symbolic) compensation such as the delivery of death certificates and the construction of tombstones.

Finally, Martti Koskenniemi, with reference to John Borneman, suggests that there is a “much more complex understanding of the role of criminal trials as not merely about punishment or retribution, nor indeed about deterrence, but as an aspect of a larger ‘transitional justice’ that (...) sometimes perform a successful ‘final judgement’ in the religious sense (...). Under this view, it is the symbolism of the criminal trial - and the eventual judgement - that enables the community ritually to affirm its guiding principles and thus to become a workable ‘moral community’.”

As we can see, criminal prosecution and punishment are necessary elements of closure in any transitional justice framework, but they have to be complemented by other mechanisms. Is one of the available options the recourse to traditional, participative justice mechanisms?

Recourse to traditional justice mechanisms

The UN Security Council, speaking about the development of national justice systems, emphasizes that “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.”

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Auckerman, p. 70
UN-Report, paragraph 47
UN-Report, paragraph 36
Similarly, the international press and some scholars, see traditional justice mechanisms as a good alternative to punitive, procedural, Western-style justice\(^a\). While noting the tension between the high international standards of due process and the informality of traditional courts, Neil J. Kritz sees the advantage in informal-traditional methods for some post-conflict societies in the potential to deal with the commonly overwhelming number of perpetrators of mass abuses and the achievement of a degree of justice and reconciliation\(^b\).

As posed by Lars Waldorf, traditional justice has three key attributes: “(1) it focuses on groups rather than on individuals, (2) it seeks compromise and community ‘harmony’, and (3) it emphasizes restitution over other forms of punishment. In addition, local justice is often characterized by accessibility, economy, and public participation”\(^c\). Charles Villa-Vicencio confirms this enumeration but also underlines the symbolic importance of traditional rituals and ceremonies in Africa: “Such social practices and structures constitute an important space within which discussion on guilt, responsibility and restoration can happen.”\(^d\)

Kritz thought that if the gacaca experiment in Rwanda were reasonably successful, it would likely stimulate other variants\(^e\). As Rwanda’s gacaca experience is about to end and Uganda is setting up a transitional justice framework to address the atrocities committed during the last 20 years, we will take the opportunity to examine Rwanda’s legacy.

**THE USE OF TRADITIONAL JUSTICE IN RWANDA**

**History of the conflict**

The history of the conflict in Rwanda is complicated and goes back to colonialism, where identity cards were imposed on the people in order to distinguish between the ethnic identities Hutu (majority) and Tutsi (minority). These ethnicities were then instrumentalized by the post-colonial Hutu regimes\(^f\).

In October 1990, the Rwandan Patriotic Front (RPF), a rebel movement composed mainly of Tutsi refugees in Uganda attacked the country. It entailed three years of civil war and eventually a peace accord with President Juvenal Habyarimana, which would not hold. On 6 April 1994, while he was returning from a regional peace summit in Tanzania, President Habyarimana was assassinated when a missile struck his plane. The same day, Hutu extremists seized control of the Rwandan government and military and began the genocide. Civilians, the military, the police, militia groups and civilians

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\(^e\) Kritz, p. 80

\(^f\) Waldorf, III.A.
slaughtered at least five hundred thousand Tutsis (three quarters of all Rwanda’s Tutsis), as well as thousands of Hutus, including opponents of the genocide. Furthermore, RPF-soldiers killed tens of thousands of Hutus. At the end of the 100-day massacre, in July 1994, RPF won the civil war. As Waldorf summarizes, the “Rwandan genocide was marked by its speed, low-tech brutality, and large-scale participation.”

International prosecution and adaptation of traditional justice

Upon request of the Government of Rwanda, the United Nations Security Council took care in prosecuting the heads of the genocide by setting up the International Criminal Tribunal for Rwanda (ICTR) in November 1994.

The government did not want to see only the leaders of the genocide prosecuted, but all those who participated in it, including all accomplices and bystanders (i.e. a very broad definition of who actually participated). It rejected the idea of a truth commission on the model of the one set up in South Africa, and insisted instead that only retributive justice could end the prevailing culture of impunity. During a visit to New York in December 1994, Vice-President Paul Kagame made clear that “There can be no durable reconciliation as long as those who are responsible for the massacres are not properly tried.” This policy resulted in the incarceration of 120'000 people by 2000.

Obviously, neither the ICTR nor the domestic courts would have been able to try these detainees, many of whom were incarcerated on the base of scant evidence, if any at all. All these persons could not be held indefinitely in prison without trial. This is why the government announced in 2000 that the vast majority of genocide suspects would be tried by local courts known as gacaca. These courts were established nationwide in 2005 after a pilot period.

_Gacaca_ (pronounced ‘gachacha’) translates as “justice in the grass” in the Kinyarwanda language. It was originally designed to resolve property, inheritance and family law disputes. Only occasionally did it deal with minor criminal offenses. This traditional system, which operated before, during and after the colonial rule but which was practically obsolete by the end of the genocide, was traditionally presided over by “inquunangumugavo”, the community elders - only men, as women were not even permitted to speak. Gacaca traditionally imposed a variety of sanctions, which were however not individualized; family members were also held responsible. There was no imprisonment sanction. As a contribution towards reconciliation, the offending party had to pay reparations and to offer a calabash of banana beer to the community.

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22 Rettig, p. 29
23 Waldorf, III.A.
25 Waldorf, III.C.
27 Waldorf, FN 218
29 Gordon, p. 11
30 Rettig, p. 30
Overall, gacaca aimed at “restoring social order, after sanctioning the violation of shared values, through re-integration of offender(s) into the community”\(^\text{31}\).

Given the many detainees to release or to punish, the nature of the crimes committed, and the willingness of the government to avoid impunity, gacaca had to be adapted to become a somewhat more formal and judicial body. These new courts, called inkiko-gacaca (hereinafter simply called gacaca, as we focus on them), still have the following objectives, apart from eradication of the culture of impunity and speeding up genocide trials: to reveal the truth about what happened, to reconcile the Rwandans and reinforce their unity, and to prove that the Rwandan society has the capacity to settle its own problems through a system of justice based on the Rwandan custom\(^\text{32}\). But overall, as the experience showed, gacaca became more retributive than anything else.

The Gacaca Law of 2001, successively amended in 2002, 2004, 2007 and 2008, created approximately 11 000 local courts with some 260 000 elected judges, of which one-third of women. There are three levels of gacaca courts, cell, sector and appeals. Retaining the central features of the Genocide Law of 1996, i.e. four categories of genocide crimes (category 1 encompassing the worst crimes)\(^\text{33}\) and the common law practice of plea-bargaining, it gave gacaca courts jurisdiction over the cases of categories 2 to 4. However, these categories have been modified twice since the introduction of gacaca, and now even leaders of the genocide are sent to gacaca courts instead of military tribunals or ordinary domestic courts\(^\text{34}\). For all categories, gacaca begins with pretrial phase at the cell level, where the accused are put into categories and sent to the appropriate court. The very schematic sanctions include life imprisonment, community service, _dégradation physique_ (stripping-off of certain civic rights, such as the right to vote or to be elected), and restitution\(^\text{35}\). Although instituted in the Gacaca Law, death penalty has been abolished in the meantime; the last death sentences were imposed in 2003, but the last executions had taken place in 1998\(^\text{36}\). As we see, these new courts are all but traditional”\(^\text{37}\). According to Jacques Fierens, “the only resemblance lies in the fact that the institutional framework for conflict resolution involves local and non-professional judges, and, even then, they are elected in the reinvented gacaca system, whereas traditional judges were appointed by consensus between the concerned parties.”\(^\text{38}\)

The lessons from Gacaca

As the gacaca experience tends towards its end, it is time to look at its achievements. In his article, Lars Waldorf had emphasized several structural weaknesses and outlined several problems”\(^\text{39}\). They were confirmed in Max Rettig’s comprehensive field study
conducted over ten months in 2006-2007 in Sovu, a community in Rwanda’s South Province*. They can be summarized as follows:

(1) No reparations for genocide survivors: The Compensation Fund for Victims of the Genocide and Crimes Against Humanity, foreseen in the 1996 Genocide Law and the 2001 Gacaca Law and supposed to pay some of the damages awarded by gacaca and the ordinary courts, has still not been created; in fact, the 2004 amendment has deferred the issue of reparations. This has two consequences: (a) the survivors, who are desperately poor and relied on the reparation, are less stimulated to participate in the proceedings; and (b) the community service component remains the only compensating element. But do victims really want to employ former torturers on their fields? Are these people really willing to work ‘for free’? Waldorf further suggests that there is a risk to assimilate the current situation to the one that prevailed during colonialism, where Hutus had to work for Tutsi patrons, thus exacerbating ethnic tensions once again#

(2) No accountability for RPF war crimes and politicization of gacaca: The prosecutions have focused on the Hutu, whereas the Tutsi soldiers, supposed to be tried by military tribunals, have been factually shielded. Even the ICTR did not issue any RPF indictments, due to pressures of the Rwandan government#. It is likely that this has caused the lack of Hutu participation and, unfortunately, that it will impede long-term peaceful coexistence, namely due to the imposition of collective guilt on the Hutu majority instead of fostering general reconciliation#

(3) Inappropriate venue for victims of sexual violence: Gacaca courts are public. Hence, victims cannot bear witness that they have been raped or abused, since it can be perceived as humiliating. In 2004, the law was adapted to grant more privacy and to remove the cases to state courts.

(4) Lack of participation: Many Rwandans did not want to or were not able to involve themselves in the proceedings, thereby causing the failure of gacaca as participating justice. Since gacaca hearings take place once a week##, over years, it makes it difficult for people who work to attend. As a matter of fact, similar problems are encountered in countries where juries have to sit for weeks. Earning food in the current situation of utmost poverty is the first priority. And those who attend gacaca are mostly passive bystanders, such as mothers watching their children. Another reason for the lack of attendance by Hutus, imbalanced prosecution and discriminatory treatment based on ethinac criteria, has been mentioned above###. The situation has only become worse when the state made attendance compulsory and imposed fines as of April 2007####, thereby affecting, as much as low participation rates do, the objectives of truth, justice and reconciliation. Finally, it must be noted that the fear of being accused on their turn

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* Rettig
* Waldorf III.E.1
* Waldorf, FN 346
* Waldorf, III.E.2. and its FN 350, and III.E.4
* As of February 2008, local officials in Sovu planned to hear cases even five times a week, to speed up the trials. (Rettig, p. 42)
* See also Rettig, p. 40
* Rettig, p. 37

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or to become a victim of retaliation after telling the truth is yet another reason to remain silent.

(5) Problems with truth telling: Rettig’s survey shows that “70% of nonsurvivors and 90% of survivors and returnees say that people tell lies at gacaca, and the process is distinctly adversarial, not cooperative.” While not unusual in courts per se, apart probably from the high figure, systematic lies are highly problematic in a restorative system that presupposes social trust and the willingness of survivors, perpetrators, bystanders and witnesses to appear and to give testimony; it undermines gacaca. It is even more problematic than in Western-style courtrooms, since judges are not as well trained to hear evidence, and the procedural safeguards are completely absent. This is especially problematic where sanctions include long-term imprisonment. The record shows that judicial errors and unfair trials are not an exception; they entail most serious consequences. Although confessions are critical to gacaca’s success as a restorative system – “they were meant to give solace to survivors and heal the community by exposing how loved ones died and encouraging perpetrators to apologize” –, the same problems apply to them: “nearly 40% of the time judges deem confessions incomplete and impose prison terms at or near the maximum – on the average, twenty-five years”, i.e. much more as one would get thanks to plea bargaining in exchange for a sincere confession. Finally, the urge to speed-up gacaca proceedings in order to conclude them has led to more superficiality, thereby making it even more difficult to distinguish between truth and falsehood.

(6) No reconciliation: The hope that gacaca would bring reconciliation to Rwanda has been confounded. While Marc Drumbl thought that gacaca would promote reconciliation through “reintegrative shaming”, as contrasted with the private nature of incarceration, rather the opposite has occurred, as, generally speaking, Hutus were not willing to shame and Tutsis not able to forgive. Family disputes have arisen because of gacaca, which leads to mass hatred. Rettig’s interviewees suggest that there is security

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* Waldorf, III.F.1
* i.e. persons who did not identify themselves as survivors and who lived in Rwanda in 1994
* Rettig, p. 39
* Rettig, p. 40
* Judges received a 3-day training. (Rettig, p. 31)
* See for instance the case of François-Xavier Byuma, a Rwandan human rights activist, who was sentenced to 19 years of prison on genocide-related charges. Both Rwandan law and the principle of fair trial before an impartial tribunal have been blatantly violated. The accused had previously investigated allegations that one of his judges had raped a girl. Recusation of the judge, although required by law, was denied. Byuma was found guilty of participating in weapons training and in several counts for which he had not been charged, including assaulting and abducting a woman, which then gave contradictory evidence at the trial. He was not allowed to present witnesses in his defense. Two others on trial with Byuma and accused of the same charges were acquitted, although one had admitted his guilt. The gacaca appeals court upheld the 19-year prison sentence, without giving any reason (Sources: Human Rights Watch, http://www.hrw.org/en/news/2007/05/30/rwanda-gacaca-trial-condemns-activist-prison and http://www.hrw.org/en/news/2007/08/22/rwanda-appeals-court-confirms-sentence-against-activist). See for instance the case of François-Xavier Byuma, a Rwandan human rights activist, who was sentenced to 19 years of prison on genocide-related charges. Both Rwandan law and the principle of fair trial before an impartial tribunal have been blatantly violated. The accused had previously investigated allegations that one of his judges had raped a girl. Recusation of the judge, although required by law, was denied. Byuma was found guilty of participating in weapons training and in several counts for which he had not been charged, including assaulting and abducting a woman, which then gave contradictory evidence at the trial. He was not allowed to present witnesses in his defense. Two others on trial with Byuma and accused of the same charges were acquitted, although one had admitted his guilt. The gacaca appeals court upheld the 19-year prison sentence, without giving any reason (Sources: Human Rights Watch, http://www.hrw.org/en/news/2007/05/30/rwanda-gacaca-trial-condemns-activist-prison and http://www.hrw.org/en/news/2007/08/22/rwanda-appeals-court-confirms-sentence-against-activist).
* Rettig, p. 39
* Rettig, p. 39
* Rettig, p. 42
* Waldorf explains that “reintegrative shaming assumes ‘a sufficiently coherent and engaged community’ capable of reintegrating wrongdoers – exactly what is so often missing after mass atrocity.” Waldorf, III.E.3.
today but no peace; a breakdown in the government’s control could incur the return to violence.” He concludes that “although more than two-thirds of Sovu residents say that reconciliation is taking hold, there is considerable evidence suggesting that gacaca has not eradicated mutual distrust in the community and may even have exacerbated it. (...) Finally, several people in the community identified the end of gacaca as the point where reconciliation can begin: ‘Maybe there can be reconciliation when gacaca finishes.’”

The gacaca experience shows that we should not idealize traditional justice as a reconciling instrument, especially if it is completely adapted to work mainly as punishing mechanism. Rather, this should not at all be the main scope of reinvented traditional justice mechanisms. The government’s ideal to punish all those who participated in the genocide, including all ‘accomplices’, was too audacious and inadequate for a situation where a majority of the population was involved and where victims mainly requested reparation and peace. Instead of keeping tens of thousands of prisoners in jail for years, at least those who confessed should have been liberated and sent to their families, to their work. New accusations should have been limited during a certain time frame, thus preempting the escalation of false accusations as retaliation. Plea-bargaining in exchange for reduced sentences should have been introduced from the beginning. Sentences of long-term or life imprisonment should have been avoided, if the goal was to reconcile society. Finally, all genocide perpetrators should have been treated the same way, without exceptions for RPF-soldiers, instead of making justice look like victor’s justice.

In case traditional justice is to be used in other societies, it should not focus on punishment, but truly on reintegration. If it is empowered with judicial functions, then it should keep those which it exercised traditionally, e.g. over property issues, thus excluding jurisdiction over unknown crimes such as genocide and war crimes. In assessing lower crimes entailing lower sanctions, lower standards of due process are more likely to be acceptable. Finally, for the goal of collecting and preserving truth, other bodies such as truth commissions are certainly better suited than courts, even traditional, participative courts.

THE POTENTIAL USE OF TRADITIONAL JUSTICE IN UGANDA

History of the conflict and current situation

Uganda suffered under a brutal dictatorship until the mid-1980s. Since President Yoweri Museveni’s National Resistance Movement (NRM) took power in 1986, and until 2006, the north of the country has been ravaged by civil war. The government had to fight the Lord’s Resistance Army (LRA), an armed rebel group backed by Sudan. According to the United Nations and numerous reports by NGOs, “the situation in northern Uganda has been characterized as one of the world’s worst humanitarian crises.” Over 20’000 children were abducted to serve as soldiers and to serve as sexual slaves, tens of thousands civilians were killed by the conflict and the humanitarian

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58 Rettig, p. 42
59 Rettig, p. 44
60 Rettig, p. 45
situation, and over 1.5 million people displaced. The economy has been devastated. According to the United Nations\(^{62}\), “the most disturbing aspect of this humanitarian crisis is the fact that this is a war fought by children on children - minors make up almost 90% of the LRA’s soldiers. Some recruits are as young as eight and are inducted through raids on villages. They are brutalized and forced to commit atrocities on fellow abductees and even siblings. Those who attempt to escape are killed. For those living in a state of constant fear, violence becomes a way of life and the psychological trauma is incalculable.”

The resolution of the conflict through a military campaign launched in 2005 failed. Since June 2006, the Government of Southern Sudan has conducted mediation talks in Juba between the Government of Uganda and the LRA. On 26 August of the same year, the parties signed a Cessation of Hostilities Agreement. In June 2007, the parties signed an Agreement on Accountability and Reconciliation, and in February 2008, they agreed on a Permanent Ceasefire and amended the Agreement on Accountability and Reconciliation and the Agreement on Comprehensive Solutions\(^{63}\).

As we will see below, one of the major problems in the eyes of the rebels were the ICC indictments. After the agreement was reached, people could feel relief, as expressed in several opinions: James Obita, one of the rebel negotiators told that “It is a great turnaround that we have managed to have an alternative to the International Criminal Court indictments against some of the fighters. (...) The deal will please the fighters who had said they would not leave their bush hide-out unless the indictments by the ICC had been withdrawn.”\(^{64}\). More skeptical, Richard Dicker HRW’s international justice programme director, said “Today’s agreement could be a major step toward peace and justice for northern Uganda, but the true test lies in how the agreement is put into practice.”\(^{65}\)

As a matter of fact, the signature of the agreements of February 2008, which was scheduled for 10 April 2008 for Joseph Kony and four days later for Yoweri Museveni in Juba, never took place. Kony did not turn up and postponed signature several times, arguing that he needed further clarification on the protocols\(^{66}\). Explaining the failure of the peace deal, President Museveni said northern politicians misled Kony. He regretted the failure of the 2-year peace talks, of which Kony took advantage to recruit 240 fighters and conscript additional abductees\(^{67}\).

Nevertheless, the cessation of hostilities and the agreement of February 2008 have permitted the return of over one million displaced people, but they found their homeland totally altered, and peace has yet to be established\(^{68}\). Their economy has been devastated; there are no intact infrastructures. Although the Government of Uganda has significantly increased the means allotted to the reconstruction and the

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\(^{62}\) Cited in the CRS Report, p. 4.
\(^{63}\) CRS Report, p. 7 et seq. This amendment is called “Annexure”.
\(^{65}\) Cited in Integrated Regional Information Networks
\(^{66}\) International Crisis Group, Northern Uganda: The Road to Peace, with or without Kony, (Africa Report n° 146 - 10 December 2008), p. 1
\(^{67}\) BBC Monitoring Africa, «Ugandan president promises amnesty to senior rebel commander», 11 February 2009.
\(^{68}\) International Crisis Group, p. 1 and FN 15: “Kony also reiterated his commitment to peace on 12 June 2008, in his first interview with the international media.”
development of the north and has expanded civilian protection, it is unpopular in northern Uganda, among other things because the northern Ugandans perceive themselves as marginalized and less considered in reason of their ethnicity.

While the conflict has ceased in Uganda, it appears to have spread across the borders, to Southern Sudan (to Eastern and Western Equatoria and to the capital region of Juba), where civilians are reported to have been attacked by LRA-soldiers. Furthermore, the presence of LRA-soldiers has been acknowledged by the Congolese government.

International prosecution and complementarity

Uganda is a party to the International Criminal Court (ICC), which aims to help end impunity for the most serious crimes of concern to the international community. In December 2003, President Yoweri Museveni referred the situation to the court. It was the first state referral since the foundation of the ICC. In October 2005, the ICC unsealed arrest warrants for LRA-leader Joseph Kony and LRA-commanders Vincent Otti, Okot Odhiambo, Dominic Ongwen, and Raska Lukwiya. It accused them of establishing “a pattern of brutalization of civilians by acts including murder, abduction, sexual enslavement, mutilation, as well as mass burnings of houses and looting of camp settlements; that abducted civilians, including children, are said to have been forcibly recruited as fighters, porters and sex slaves and to take part in attacks against the Ugandan army (UPDF) and civilian communities.” The effect of the arrest warrants has been much disputed, domestically and on international level. On one hand, the issuance of arrest warrants has certainly helped to bring the LRA-leaders to the negotiation table for peace talks in 2006. On the other hand, the ICC investigation has been said to hinder the pursuit of the peace agreement, since Kony wanted the ICC proceedings to be dropped as a precondition to peace.

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69 CRS Report, p. 6
71 Art. 1 of the Rome Statute of the International Criminal Court
72 ICC Press Release, «President of Uganda Refers Situation concerning the Lord’s Army (LRA) to the ICC», 29 January 2004.
73 The warrants of arrest, the first to be issued by the ICC, were issued on 8 July 2005 but kept under seal for safety reasons and to “prevent the disclosure of the identity or whereabouts of any victims, potential witnesses and their families”. It must be noted that the ICC has not issued any warrants against the Uganda People’s Defence Forces (UPDF) commanders or Ugandan government officials. In the meantime, Raska Lukwiya and Vincent Otti have been killed (on 12 August 2006, respectively 8 October 2007).
75 This debate is well presented in “The Reckoning - The Epic Story of the Battle for the International Criminal Court”, 2009, a documentary film by Pamela Yates (director), Paco de Onís (producer) and Peter Kinoy (editor); www.thereckoningfilm.com.
77 This argumentation is strongly refuted by the Prosecutor of the ICC, who says that Kony used the peace talk to re-arm his forces (Source: Michael Wambi, «Droits-Ouganda: ‘Notre mission est de mettre fin à l’impunité’ - Moreno Ocampo», Inter Press Service News Agency, 15 July 2009).
It is clear that the Government of Uganda cannot withdraw the arrest warrants on its own. It would be even less justified, as the government itself referred the situation to the ICC. At the most, the government can try to challenge the LRA cases’ admissibility before the ICC under the principle of complementarity, which awards primacy of jurisdiction to a member state’s national courts. However, this decision lies alone with the ICC. According to Art. 17 (1) of the Rome Statute, the Court can declare a case inadmissible, i.e. leave it to the national jurisdictions, inter alia, if the case is being prosecuted by a state which has jurisdiction over it, unless the state is unwilling or unable genuinely to carry out the investigation or prosecution. The Court determines ‘unwillingness’ according to Art. 17 (2). This is the case if the State is shielding the person concerned, if there is undue delay or if the proceedings are inconsistent with an intent to bring the person concerned to justice. Pursuant to Art. 19 (2), challenges to the admissibility of a case on the grounds referred to in Art. 17 or challenges to the jurisdiction of the Court may be made by a State which has jurisdiction over a case, on the ground that it is investing or prosecuting the case. This cannot be said of Uganda at the current stage.

In order to satisfy the LRA-leaders’ request to avoid international prosecution, the Ugandan government imagined a general framework for accountability and reconciliation in the agreement of February 2008. Although unsigned, we will draw upon it, as Kony might never sign it and closure is needed. The envisaged framework is the only at hand and it is a good basis to study the current situation. According to the agreement, the government will set up a special division of the High Court of Uganda to try “individuals who are alleged to have committed serious crimes during the conflict”. Prosecutions “shall focus on individuals alleged to have planned or carried out widespread, systematic or serious attacks directed against civilians, or who are alleged to have committed grave breaches of the Geneva Conventions”. This wording is obviously intended to address the categories of crimes against humanity or the most serious war crimes, which apply usually only to international armed conflicts, not to civil wars like that in northern Uganda. As we shall see below, lesser crimes are to be administered according to traditional justice mechanisms.

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78 See Gordon, p. 29. He warns the ICC from complicity with governments who use self-generated referrals as help in dealing with rebel groups.

79 Additionally, Art. 20, titled “Ne bis in idem”, prevents persons from being tried or punished twice for the same crime; it is a sort of retrospective complementarity protection.

80 Annexure to the Agreement on Accountability and Reconciliation (in CRS Report), Section 7.

81 Section 11

82 Anthony Dworkin, «The Uganda-LRA War Crimes Agreement», 25 February 2008; International Crisis Group, p. 9: “The government established a 50-member working group chaired by Justice Ogoola of the High Court and involving all government stakeholders. (...) The working group is using the Rome Statute and the Geneva Conventions to identify and define the relevant crimes. But the NRM-dominated parliament will have to pass a law either to incorporate those treaties or produce its own definitions, as well, most importantly, to determine the period and scope of investigations and the sanctions applied for each crime. Juba only decided there would be no capital punishment.” In fact, the question of non-rettroactivity of criminal law is really the crux. According to an article of New Vision/Africa News, published on 30 June 2009, Uganda: Traditional Justice Not Applicable to War Suspects, “Uganda committed itself to enact an ICC law by September this year, according to the Speaker, Edward Ssekandi. (…) ‘Uganda should have domesticate the Rome Statute, which will be one of our country’s contributions against impunity and crimes against humanity’”. In a former article of The Saturday Monitor/Africa News, published on 4 October 2008, “Justice Ogoola said ‘The ICC Statute cuts us off from 2002’ [date of entry into force of the Rome Statute]. (…) This is contrary to the wishes of the people of northern Uganda and their representatives in Parliament who want the court to try cases of crimes.
This special tribunal for war crimes and crimes against humanity could be a viable alternative to the ICC. However, it exists so far only on an unsigned peace agreement. Rightly therefore, the ICC Prosecutor has clearly refused to drop the LRA prosecutions.83

For some reason, the BBC reported on 11 February 2008 that President Yoweri stated that LRA-deputy commander Okot Odhiambo “will benefit from amnesty”, and that “Kony would also have been forgiven had he signed the peace agreement in Juba in April 2008”.84 This may be consistent with the Amnesty Act for LRA-rebels85 passed in 2000 and the view of Archbishop Odama of Gulu Diocese and Bishop Ochola of Kitgum Diocese that forgiveness is the utmost goal after what happened; but blanket amnesties are contrary to his own declarations of 9 February 200886 and clearly contravene international law87. It would definitely prevent the ICC from deferring the cases to Uganda. In fact, the BBC-report must rather be read in the sense that Odhiambo escaped the ICC and was ‘welcomed’ back to Uganda rather than sent (directly) to the Hague. He will not escape justice, but be judged in Uganda, inasmuch as this is possible. Insofar, it was certainly wrong to use the term ‘amnesty’. This view was indirectly confirmed in the news on 15 July 2009, where the Ugandan minister of international affairs, Henry Okello Oryem, stated that [as opposed to Odhiambo] the LRA-leader Kony and his indicted colleagues will not benefit from domestic trials but will be sent directly to the Hague, if intercepted, since they refused to sign the peace agreement in Juba88.

Since the government does not object any more to the trial of the LRA-leaders89 at international level, the question of challenging the ICC’s jurisdiction has become obsolete, except for the case of Okot Odhiambo. If a credible war crimes court is established in near future and investigation proceedings are conducted in good faith, the ICC might then drop his case and leave it to Uganda.

committed by the worrying parties since 1986.” Provided crimes against humanity, as defined in Art. 7 of the Rome Statute, constitute customary international law – which is far from clear –, the perpetrators could be prosecuted on this base; see Michael P. Scharf, «The Amnesty Exception to the Jurisdiction of the International Criminal Court», Cornell International Law Journal, 1999: 307-327, p. 519 et seq.
85 According to this law, the government will not prosecute or punish LRA members if they report to the nearest local or central government authority, renounce and abandon involvement in the war or armed rebellion, and surrender any weapons in their possession. See Gordon, FN 249. According to the Final report of the Workshop on accountability and reconciliation in Uganda: Juba peace talks (6-7 May 2008), p. 19 et seq., it is “still applicable for those in the bush when they give up rebellion”; to that date 23’000 reporters all over the country had benefited from amnesty.
87 Van Zyl, p. 60 et seq. A derogation from the obligation to prosecute and punish those guilty of human rights abuse is acceptable only under very strict conditions, enumerated on p. 66 et seq. Gordon, p. 26, correctly defines Uganda’s amnesty granted to LRA rebels as unqualified.
88 Van Zyl, p. 60 et seq. A derogation from the obligation to prosecute and punish those guilty of human rights abuse is acceptable only under very strict conditions, enumerated on p. 66 et seq. Gordon, p. 26, correctly defines Uganda’s amnesty granted to LRA rebels as unqualified.
89 Vincent Otti, deputy LRA commander, was killed on 8 October 2007. “He had become the public face of the LRA, perceived as a guarantor of the rebels’ commitment to the peace process.” (Source: International Crisis Group, p. 1). Raska Lukwya was killed in fighting on 12 August 2006 with the government UPDF.
Traditional justice in Uganda

Together with the special division of the High Court, the agreement of February 2008 entrusts traditional justice with an important role: “Traditional justice shall form a central part of the alternative justice and reconciliation framework identified in the Principle Agreement.” and the special division of the High Court must recognize “traditional and community justice processes in its proceedings”.

The traditional justice system will deal with the ‘small crimes’, but the precise division between those and the more serious ones to be tried at the special tribunal is not laid down in the agreement.

In addition to traditional justice, a special body shall be established to consider and analyze the history of the conflict, to gather and analyze information on those who have disappeared during the conflict, to promote and encourage the preservation of the memory of the events and victims of the conflict and to promote truth-telling in communities, in liaison with traditional or other community reconciliation interlocutors.

One of the elders in the Internally Displaced People’s camp at Opit, Gulu, in northern Uganda, said “the amount of death in Acholi should not be equated to the pursuing of five LRA-commanders” and added “the Acholi people have a system that is capable of delivering justice in the region”, referring to mato oput. As we have seen in the Rwandan case, it is counterproductive to prosecute half of the population or several ten thousand people. But punishing only five or less perpetrators is not appropriate either. We shall therefore investigate the existing traditional justice mechanisms and evaluate how they can be implemented to achieve justice.

Mato oput, performed by the Acholi People, translates roughly as “drinking a bitter potion made from the leaves of the oput tree”. This ceremony puts an end to a lengthy reconciliation process between the parties in conflict. “Mato oput is not a happy ceremony. The moods of all present express the seriousness of the occasion. The process involves the guilty acknowledging responsibility, repenting, asking for forgiveness, paying compensation and being reconciled with the victim’s family through sharing the bitter drink. The victim’s clan must accept the plea for forgiveness for the reconciliation to be complete. Mato oput is to be distinguished from other ceremonies, particularly the nyono tong gweno (stepping of the egg) ceremony that is a [welcoming] ritual that has been adapted for the reintegration of returnees. The latter is not a reconciliation ceremony that involves any measure of accountability or admission of

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90 Section 19
91 Section 9 (e)
92 Nonetheless, clarifying various clauses of the main agreement, Barney Afako, the lead facilitator, held that “The special division won’t try 100 people or even 20. It will try particular individuals who are responsible for the most serious crimes, i.e. the top people for ordering, therefore only a handful. Most LRA will not be held liable.”, cited in Final Report, p. 18.
93 Section 4
95 The word in brackets replaces “cleansing”. The author must have confounded this ceremony with the cleansing of the body ritual to get rid of evil spirits (moyo kum). See Final report of the Workshop on accountability and reconciliation in Uganda: Juba peace talks, 6-7 May 2008, (Final report), p. 10, 11.
guilt.” Noteworthy, many offenses were traditionally resolved by reconciliation, including homicides.

The entire process involves three stages: (1) A separation of the affected clans, “during which time the clans are forbidden to intermarry, trade, socialize, or share food and drink.” (2) A mediation process, “which allows the affected families to create an account of the facts which emphasizes the perpetrator’s voluntary confession, including the motives, the circumstances of the crime, and an expression of remorse.” (3) “Finally, in the last step, the family of the perpetrator pays compensation raised through the contributions of clan members.” At the end of the process the actual mato oput reconciliation ceremony takes place during an entire day. It is “presided over by the local chief (twot moo) and involves an elaborate set of final, symbolic acts.”

The potential role of Mato Oput in Uganda’s transitional justice framework

Now that we know that the LRA-commanders will be tried by the ICC with the cooperation of the Government of Uganda and that the a selection of second worst LRA-leaders will be tried by the special division of the High Court of Uganda, we will examine if and how the overwhelming majority of the perpetrators shall be held accountable, using the described traditional justice mechanism, possibly with some modifications. The survey conducted from April to June 2007 in eight districts of northern Uganda on 2'875 interviewees will be our point of origin:

(1) Priorities and Accountability: “Only 3 percent of respondents mentioned justice as a top priority at the time of the survey.” More important priorities include peace, food, health, land, education and money. “However, more than two-thirds of the respondents (70%) said those responsible for committing violations of human rights and international humanitarian law in northern Uganda should be held accountable. (...) 52% preferred options such as forgiveness, reconciliation or reintegration of LRA-leaders. (...) The majority of respondents (77.9%) said that the rank-in-file LRA should be forgiven (...) while 55% said the Ugandan military should face trial and or be punished.” (p. 4, 5)

“Less than half the respondents said that trials would contribute to peace, security and justice. A majority (76%) said that pursuing trials at the present time would endanger the peace process.” (p. 6)

“Over 81% said amnesty would help achieve peace. (...) However, given the chance, a majority of the respondents would like to have some form of accountability for past crimes. (...) In the Acholi districts, 20% said they should submit to traditional

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96 Wedi Djamba
97 Eric Blumensohn, cited in Wedi Djamba, under FN 27
98 Gordon, p. 18
99 Gordon, p. 19
100 Id.
101 Id. The entire ceremony is described there.
102 It remains to be seen what happens to the granted amnesties (see FN 85 supra). Although they are prohibited, from an international perspective, they cannot be taken back without causing domestic trouble. If high-ranking LRA-leaders (except the 5 indicted by the ICC) were granted amnesty, they should at least take part in truth-telling and reintegrative ceremonies.
cere monies, compared to 3% in the Teso and Lango districts.” (p. 8) Only a fraction of a percentage (0.1% Acholi, 0.3% total) said those who received amnesty could not come home. “Over half of the respondents (57%) agreed with the proposition that those responsible for abuses should participate in traditional ceremonies and that they are needed to deal with the situation in northern Uganda (48%). Similarly, 47% said traditional ceremonies are needed before the LRA can come back to their community, and that they are necessary to bring peace and justice.” The most frequently named ceremony was mato oput (68% in Acholiland vs. 8.7% in Lango districts and 16.4% in Teso districts). Stepping on an egg is less known (43.8% in Acholiland). “About 9% said no ceremonies were useful.” (p. 9).

The vast majority of respondents (95%) said a written historical record of what had happened during the war in northern Uganda should be prepared, and 89% were willing to talk openly about their experiences in a court or in a public hearing. (…) Almost half of respondents (49%) stated that they had already participated in a truth-telling process. (…) We found that two camps in the north organized a community truth-telling event.” (p. 10)

(2) Victims and Reparations: “Not surprisingly given the high level of exposure to violence reported above, almost all the respondents identified themselves as victims (95%).” Asked what should be done for them, they mainly asked to be provided with financial compensation (51.8%). (p. 11, 12)

(3) Reintegration of the LRA: “Most respondents felt comfortable living in the same community with former LRA lower ranking combatants (70.1%).” 54% said that LRA-leaders had the same rights as anyone else, and if elected, they should be allowed to govern (45.8%). “75% said that former LRA-leaders and lower ranking can form part of the national army.” (p. 13)

Given this informative data, and comparing it with the experience of Rwanda’s gacaca, we draw the following conclusions:

(1) Mato oput shall by no means become a substandard formalized courts system and shall not endeavor to perform mass justice for mass atrocity. Northern Ugandans, as the Rwandans, have other far more important priorities than to spend time and their scarce resources in litigation. Mato oput shall remain what it is: a traditional mechanism that works through trust, voluntariness, truth-telling, compensation and restoration, enhanced with several symbolic ceremonies. Admittedly, an impressive workload expects the persons in charge of mato oput, which will require a minimum of standardization, resources and formalism. The problem with the traditional roots, some argue, lies in the fact that after over 20 years of civil war, there remains only little tradition, if it has not completely been forgotten. This argument is defeated by the survey; people are attached to their roots, want to return to them and are willing to use local ceremonies. There are still elders and other well-respected persons in the respective communities. It is true that society evolves and that there can be changes, for instance in clan and family structures. Such evolutions can be taken into account in shaping modernized ceremonies. Women could certainly be part of the evolution, in acting as Ludito Kwor or mediator104.

104 Art. 20 of the Annexure expressly states that the government shall consider the role and impact of traditional justice mechanisms on women and children. As we have seen under Rwanda, women should
Another point to underline is that not all perpetrators and victims were Acholi, although they represent the vast majority. Mato oput is not the tradition of the Langi, Teso, Kakwa, Lugbara, Alur and Madi, who have their respective kao cuk, ailuc, ajije, aajufe aja and tolu koka, amongst others. To deploy its symbolic power, such as the mechanism to prevent a recurrence of violence, the ritual must be fully accepted by the respective community. However, like Colonel Walter Ocora, the district commissioner of Gulu, the main Acholi area, suggested, it must be possible to find a common ground and to “blend the different ethnic reconciliation ceremonies into one”, possibly through a law passed by the national parliament. Gordon seems overly pessimistic when he states “mato oput could have a negative holistic effect on the transitional justice project (...) it will not be able to accommodate non-Acholi victims of the LRA’s violence. This could alienate large sectors of Ugandan society and ultimately have a detrimental effect on the reconciliation process.” Most importantly, as opposed to Rwanda, the root of the civil war does no lie in the confrontation of different ethnic groups who were bread to hate each other and fought against each other. On the contrary: “the majority (...) recognize that most combatants in the LRA were forcibly abducted and have themselves been victims. Combined with a profound weariness with the war and the suffering it has caused, this creates a moral empathy with the perpetrators and an acknowledgement that the formal justice system is not sufficiently nuanced to make the necessary distinctions between legal and moral guilt.”

The crimes at issue are a source of concern, as, like in Rwanda, they were not known by traditional bodies. Gorge Omona, from Koc Goma in southwestern Gulu, confirmed that mato oput has not been designed to try gross violations of human rights, such as abduction, child enrollment, sex slavery and mass killings. While the special division of the High Court would have its own investigation unit “to identify individuals who are alleged to have planned or carried out widespread, systematic, or serious attacks directed against civilians (...) and who shall be prosecuted as well as those who are alleged to have committed grave breaches of the Geneva conventions”, the traditional justice mechanisms shall take care of the other perpetrators. Traditional mechanisms will nevertheless inevitably have to deal with crimes committed on a large scale and crimes of a grave or gruesome nature, even though they are not yet prepared for it. Cases will be classified into three levels, level 1 being the highest and level 3 dealing with straightforward cases, such as one-on-one killings. Unlike Rwanda, “Acholi has a set of written laws which show the procedures to be followed when

be involved in shaping the judicial mechanisms, especially given “the practical difficulties that victim of such gender-based violence can experience if they testify against the perpetrators” (Source: International Crisis Group, p. 11).

Art. 21 of the Annexure; Final report, p. 10.


Gordon, p. 30. He acknowledges, however, that “it is not as if Uganda would be proposing the use of one alternative mechanism alone. The possible use of both mato oput and a truth commission in tandem could shore up certain deficiencies in one mechanism that may not be present in the other and vice versa.”

Katshung

“The Mato Oput did not envisage monstrous crimes against a community, like killing of hundreds of people by Kony rebels.”, cited in Wedi Djamba.

Annexure, Section 13

“The Paramount Chief of Acholi will preside over cases at this level after they have been identified by elders and clan leaders at the community level”, Final report, p. 13

Final report, p. 13
addressing any given crime.” These crimes include, for example, (a) loss of life, where the ritual involves drinking the bitter drink at the mato oput ceremony, in case the crimes were committed intentionally; (b) ambushes, categorized as intentional, thus holding perpetrators accountable; (c) rape, arson, theft; (d) child abduction, where, inter alia, moyo kum (cleansing of the body ritual) will be conducted for the child.

(4) The main difference with Rwanda has to be seen in the fact that there will be no criminal sanctions such as the death penalty or lifetime or 25 year long imprisonment. One could potentially innovate and include the concept of civic exclusion, analogous to the Rwandan dégradation physique, since it would be supported by half of the population, as opposed to banishment from the army. But the fact that there will be no Western-style punishments will definitely set aside the tremendous problems of due process encountered in Rwanda. The actual punishing element in mato oput is compensation. “Ker Kwaro Acholi has a set of written rules which sets the amount of symbolic compensation depending on the circumstances surrounding the crime.” The amount is symbolic because it should not block reconciliation nor incriminate clans. But “the inability of perpetrators to make meaningful reparations to victims is one of the biggest challenges facing the use of traditional justice mechanisms.” The perpetrator shall not escape justice. As an alternative, he could provide reparation through community work. Like in Rwanda, a reparations fund has also been considered, to top up the minimum amount, but should be avoided as a matter of principle, since the perpetrator should use hard earned resources to compensate the victims.

(5) As we have seen in Rwanda, truth telling can be a serious problem where the whole mechanism is based on voluntarism. “Forgiveness will only come when the truth is revealed.” What happens when a suspected perpetrator does not reveal the truth or remains silent? Will he thereby escape any form of accountability? What happens if victims are not able to forgive? It is suggested that “It will be the responsibility of clans to ensure that their clan members reveal crimes that they committed during the conflict. Every clan in Acholi has clan leaders and elders who will ensure that this is done. Clan elders will hold closed sessions with returnees in their clans with a view of getting them to confess.” (...) The Ludito Kwor in each clan will in turn forward cases that require mediation between their clan and others to a neutral clan for mediation.” It has to be seen how this will work in practice. Given the absence of sanctions such as long-term

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113 Id.
114 Id.
115 Id.
116 Final report, p. 14
117 Id.
118 Bishop Ochola in Final report, p. 14
119 However, sincere confessions are not likely to be imposed. As Francis Onyago wrote, “Mato oput requires that the offenders admit guilt and unequivocally ask the victims for forgiveness. Vincent Otti has so far given a half-hearted apology for the actions of the LRA, none of the other three have individually asked Ugandans for forgiveness.” (Francis Onyango, «Mato Oput Not a Viable Alternative to the ICC», New Vision, 11 July 2007). At the workshop held on 6-7 May 2008, a participant in the discussion suggested that the legal system should come in where the perpetrators who undergo traditional justice fail to conduct themselves according to the community’s expectations (p. 15 of the Final report). In my opinion, this risks to render the traditional mechanisms too judicial, too compulsory, i.e. not voluntary any more. In any case, if the perpetrator does not confess or the victim does not forgive, it will make it hard for the perpetrator to continue to live in his community.
120 Final report, p. 11
imprisonment, it is however likely to work better than in Rwanda. As to revenge-killings, deemed inevitable\(^{121}\), there will need to be legal formal proceedings alongside the traditional justice mechanisms.

Since truth telling in a criminal procedure is always selective and directed against the perpetrator or the victim, it is not suited to elucidate the origins of the conflict, nor to document history as a whole. This is especially true where there are no ‘high evidentiary standards’ like in ordinary courts (see footnote 10 above). Therefore, mato oput will definitely have to be complemented by a truth commission, as opposed to the exclusively punishment-driven variant chosen by Rwanda. Such a body has been outlined by the agreement of February 2008\(^{122}\), but unfortunately the government is believed to be reluctant to give it birth\(^{123}\). In any case, mato oput ceremonies will have to be documented, in order to keep a trace for posterity, but also as a means of proof for the perpetrator, that he has acknowledged his guilt and has dealt with it according to the customs.

6) Regarding participation, every member of the respective community will have to participate somehow in the ‘proceedings’, by telling what he knows to the mediator, but unlike Rwanda, there will not be weekly trials to attend. In any case, this system seems really participative, since information sources will include LRA-combatants who have returned, families, clans and close relatives whom returnees are likely to confide in, community members. Additional information will be sought with government courts and other agencies, NGOs and social workers\(^{124}\). Cross-examinations should be available at the request of the ‘defendant’, without problem, as opposed some cases in Rwanda (see footnote 52 supra).

While the importance to assist the reconciliation ceremonies has to be stressed, it has to be reminded that rendering them compulsory is counterproductive. However, without participation of the community in such crucial moments, the rituals lose all their particular power. The community, if led by good and influential elders, will recognize the importance of such moments. As to the participation over time, law shall fix a timeframe. To accelerate the proceedings, it has been proposed, for instance, to crush only one egg for a whole group of perpetrators to step on, in the nyono tong gweno ritual.

7) Finally, and most importantly, members of the government forces have to be treated exactly like the LRA-combatants, since they were not exempt from committing atrocities, such as extrajudicial killings, rape and sexual assault, forcible displacement of civilians and recruitment of children under the age of 15 into government militias, in connection with its war against LRA\(^{125}\). Under these circumstances, and given the long-lasting tensions between the north and the government, peace will undoubtedly be threatened in case the government envisages to treat both perpetrating parties differently, i.e. to

\(^{121}\) Final report, p. 15, regarding the co-existence, support and cooperation with the legal judicial system of accountability.

\(^{122}\) Section 4 of the Annexure

\(^{123}\) “This body is likely to be the single most important tool for reconciliation and should be empowered accordingly, but neither the government nor the LRA really wanted a genuine truth and reconciliation process that might reveal the history and reality of the suffering both inflicted on northern Ugandans over 22 years. They reluctantly agreed to a mostly toothless body with an imprecise mandate.” (Source: International Crisis Group, p. 10)

\(^{124}\) Final report, p. 12

\(^{125}\) Gordon, p. 49 and FN 399 and 400
prosecute only LRA-rebels. The government contends that martial courts have already dealt with crimes committed by the army\textsuperscript{126}. On his side, the ICC Prosecutor has made efforts to enlarge the scope of his investigations to crimes committed by the Ugandan forces, but no new warrants have been issued\textsuperscript{127}. The lack of confidence in the government and the unwillingness to forgive government forces that violated human rights in northern Uganda has been underscored by the survey. This major point of concern has to be solved as part of the transitional justice program for Uganda\textsuperscript{128}.

**CONCLUSION**

Thanks to the previous experience of Rwanda in implementing traditional justice as an element of transitional justice, the road to be followed in Uganda to achieve peace and stability is clearer, although the situations of two countries having encountered mass atrocities can never be assumed as identical. Whereas punishment of the main perpetrators is necessary, as well from an international perspective as from the perspective of the victims, it is illusory - for reasons of resources, due process and participation - and negative overall for society to bring all of them to justice. There are other more vital priorities, such as peace, food and education, but a blanket amnesty or forgiveness without counterpart is not conceivable.

The individuals responsible for the worst atrocities must be tried by formal courts, at national level or at the ICC, depending on the state’s capacity and willingness to do so. Uganda has expressed the desire to try the LRA-leaders itself but has not yet set up the special division of the High Court nor enacted the laws to adequately prosecute them. It is therefore too early to request the deferral of the cases currently investigated at the Hague.

After minor adaptations, such as a certain standardization and opening towards women and different ethnic groups, traditional justice in Uganda will be able to play a major role in dealing with the lower-in-rank perpetrators, even though the crimes to address are of unprecedented nature. These customary mechanisms should however not be radically transformed the way they were in Rwanda. They should keep their soul and aim to achieve peace and closure through ceremonies and rituals involving a measure of accountability, admission of guilt and symbolic power. Only then can forgiveness be expected.

Finally, since truth finding is always a major issue, and courts, even traditional ones, are not the appropriate venues to write history and permit grievance to the victims, a genuine truth commission has to complement mato oput.

\textsuperscript{126} The head of government delegation confirmed in May 2008 that 22 soldiers have been hanged (Source: International Crisis Group, p. 10 FN 70).

\textsuperscript{127} International Crisis Group, p. 10 FN 69

\textsuperscript{128} To remedy regional or ethnical imbalances and disparities, the 1995 constitution has planned an Equal Opportunities Commission. It has yet to be established by parliament. According to International Crisis Group (p. 5) it is one of the elements that cannot miss in the transitional justice package for Uganda.
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