

## CHAPTER SEVEN

### CONDONING IMPUNITY? TRADITIONAL JUSTICE AS AN ACCOUNTABILITY MEASURE FOR INTERNATIONAL CRIMES

#### 7.1 Introduction

The intervention of the ICC in the LRA conflict and the shortcomings it presented, particularly its inability to secure arrests and to end the conflict, led to a keen interest nationally and internationally in domestic solutions including the use of traditional justice as an accountability measure to satisfy the ICC complementarity regime. Victim groups under the leadership of the ARLPI and *Ker Kwaro Acholi* (council of traditional Leaders in Acholi) advocated for the use of *mato oput* (drinking bitterroot), an Acholi traditional justice mechanism, to address atrocities committed in the LRA conflict. These leaders sold *mato oput* as a measure that would ensure accountability for crimes perpetrated during the conflict and would not jeopardise the peace process, as the ICC was bound to.<sup>1</sup>

Donors, NGOs, development agencies and the government of Uganda, eagerly took up traditional justice, as a possible accountability measure<sup>2</sup> but focus remained only on *mato oput*.<sup>3</sup> This however, did not dissuade the ICC from continuing with its investigations, even though in 2005, following a visit of some members of the ARLPI to the Hague, the Chief Prosecutor stated that he was mindful of traditional justice and reconciliation processes in Uganda.<sup>4</sup> Traditional justice then took the centre stage in negotiating accountability and

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<sup>1</sup> L Hovil & JR Quinn 'Peace First, Justice Later: Traditional Justice in Northern Uganda (July 2005) 17 Refugee Law Working Paper 4, 18 – 19; this report suggests that Ugandans can deal with questions of accountability and reconciliation locally and that the ICC process ignores local processes; see also T Allen 'Bitter Roots: the invention of Acholi Traditional Justice' in T Allen & K Vlassenroot (eds) *The Lord's Resistance Army: Myth and Reality* (2010) 242.

<sup>2</sup> T Allen *Trial Justice: The International Criminal Court and the Lord's Resistance Army* (2006) 132 – 138; Allen (n 1 above) 242.

<sup>3</sup> This unfortunately reinforced the sentiment that the LRA conflict is an Acholi conflict requiring an Acholi solution, which is not the case as other ethnic groups in Uganda and a number of others in South Sudan, the DRC and Central African Republic were equally victimised by the LRA and although the LRA leadership remains predominately Acholi, it is composed of persons from several ethnic groups in Uganda, DRC, South Sudan and Central African Republic.

<sup>4</sup> 'Joint Statement by ICC Chief Prosecutor and the Visiting Delegation of Acholi Leaders from Northern Uganda' ICC Press Release 18 March 2005 [http://www.icc-cpi.int/pressrelease\\_details&id=96.html](http://www.icc-cpi.int/pressrelease_details&id=96.html) (accessed 15 Oct 2010).

reconciliation measures in Juba where it was recognised that the Acholi are not the only ethnic group affected by the conflict. Several other ethnic groups with different cultural and traditional processes are equally affected. Therefore, traditional justice processes as applied by the different ethnic groups were considered. The Juba negotiators therefore reached a principle that:

Traditional justice mechanisms, such as *Culo Kwor*, *Mato Oput*, *Kayo Cuk*, *Ailuc* and *Tonu ci Koka* and others as practiced in the communities affected by the conflict, shall be promoted, with necessary modifications as a central part of the framework for accountability and reconciliation.<sup>5</sup>

This is indicative of the strong desire of groups in Uganda to ensure that traditional justice plays a key role in the post conflict search for justice, truth and reparations. A great number of studies have been undertaken on the use of traditional justice and it has become central to the numerous debates and discussion on accountability and reconciliation for crimes perpetrated in Northern Uganda.<sup>6</sup> Unfortunately, most of the studies and debates have focused on the *mato oput* mechanism, and not much focus has gone to the other traditional justice mechanisms practiced in Acholi or by neighbouring ethnic groups that have also been greatly affected by the conflict.<sup>7</sup>

The different ethnic groupings in Uganda have varied traditional justice practices as recognised by the Agreement on Accountability and Reconciliation. These practices have common fundamental features that include, cleansing, truth telling, punishment or atonement through the requirement of compensation, forgiveness, and reconciliation.<sup>8</sup> In addition, the traditional justice practices are based on key principles that include;

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<sup>5</sup> Agreement on Accountability and Reconciliation clause 3. 1.

<sup>6</sup> See literature review contained in chapter one of this thesis.

<sup>7</sup> Unfortunately, my focus in this thesis will be only on *mato oput* with mention of the other Acholi justice and healing mechanisms but I recognise that these mechanisms will not work to the satisfaction of all ethnic groups affected by the LRA conflict. The Judiciary Law and Oder Sector (JLOS) and the Uganda Law Reform Commission have been instructed to carry out field research on the use of other traditional justice measures in Uganda but at the time of writing, had not embarked on this endeavour. The UNICEF branch office in addition commissioned a research on the different traditional justice measures in Uganda in 2009 but at the time of writing, the final report was not available to the public. Interview with Jeroline Akubo, a senior official at the Uganda Law Reform Commission, conducted on 18 March 2011.

<sup>8</sup> L Komakech & A Sheff 'Tradition in Transition: Drawing on the Old to Build New Jurisprudence for Dealing with Uganda's Legacy of Violence' (July 2009) 1 *Beyond Juba Project* 16.

voluntariness, trust, truth telling, compensation, and restoration of broken relationships.<sup>9</sup> There is evidence that traditional practices enjoy significant local support and correspond to accountability requirements that include truth, justice and reparations.<sup>10</sup> However, it remains unclear to what extent these practices could address the systematic and widespread abuses perpetrated in the LRA conflict and whether the practices meet or can be modified to meet Uganda's international obligations including procedural guarantees for the accused and the right of participation for all, including women and children.

Nonetheless, the Agreement on Accountability and Reconciliation requires the government to ensure that 'serious crimes' committed during the conflict are addressed through the traditional justice structures among other national arrangements including prosecutions.<sup>11</sup> The Agreement further provides that the legislation establishing the Special Division to try international crimes may provide for the recognition of traditional justice processes in its proceedings.<sup>12</sup> These provisions are open to interpretation and no doubt need further elaboration, particularly with respect to the relationship between traditional justice and criminal prosecutions. As a result, the government of Uganda assigned JLOS to carry out consultations on the use of traditional justice in Uganda. JLOS in turn is undertaking a countrywide study on the use of traditional justice measures aimed at examining the practicalities, applicability and admissibility of these measures as a tool to promote accountability and reconciliation in Uganda.<sup>13</sup>

Despite the numerous studies and debates, there remains a general lack of understanding and appreciation of the concept and practice of these rituals. Many people, even ardent traditional justice supporters are unable to differentiate healing rituals from justice measures. There is a further lack of understanding on when/how these rituals can be

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<sup>9</sup> OL Ogora 'Acholi Traditional Justice' presentation at a Workshop on Accountability and Reconciliation in Uganda: Juba Peace Talks (6 – 7 May 2008) *Final Workshop Report* para 4.1.

<sup>10</sup> Between February and July 2008 and in September to October 2010, I conducted a number of interview with the local population in Northern Uganda, though there were a few reservations on how to effectively apply traditional justice, there seems to be much enthusiasm for it.

<sup>11</sup> Annexure clause 23.

<sup>12</sup> Annexure clause 9(e).

<sup>13</sup> JLOS consultations has started a process of consultation in the different regions of Uganda but a report is not yet available to the public. Interview with Rachel Odoi-Musoke conducted on 18 March 2011 in Kampala. In addition, the Refugee Law Project, 'Beyond Juba' is undertaking further consultations and research to complement the efforts of JLOS; see Komakech & Sheff (n 8 above) 9.

undertaken and when/how, they can lead to accountability and foster reconciliation.<sup>14</sup> For purposes of clarity, this chapter provides a brief description of some of the Acholi rituals, when/how, they are performed and what they are expected to achieve. It is important to point out from the onset that the discussion in this chapter is only based on Acholi justice mechanisms although the Acholi are not the only ethnic group affected by the LRA conflict, this is due to lack of literature on the other available mechanism and limitation on time and resources for research.

The chapter also investigates the application of *mato oput* to the crimes committed in the LRA conflict examining specific challenges. The challenges examined include modification of traditional justice and what it entails, nature and magnitude of offences, legitimacy of the processes and traditional institutions. The chapter concludes that traditional justice should play a role in accountability process for the LRA conflict for both LRA and UPDF perpetrators but should be applied as a complementarity process not an alternative to formal prosecutions and a truth telling process.

## 7.2 Acholi traditional justice

The Acholi, like many other ethnic groupings in Uganda and Africa at large, greatly rely on traditional ways to resolve disputes between and among people to uphold social harmony. During the conflict, despite the attendant displacement, diminished status of cultural leaders, and poverty that greatly curtailed the practice of cultural rituals, many people continued to rely on them. Healing rituals and justice ceremonies were performed as relatives returned from the ‘bush’ with some beneficial results.<sup>15</sup> These rituals are grounded on a spiritual belief of ancestors and involvement of the dead in the living world. *Cen* or bad spirits that is central to this belief is expected to haunt the living, causing sufferings and destruction including, death, disease and famine on clans and family members, unless

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<sup>14</sup> During informal discussions I had in July 2009 with some staff of the Law Reform Commission, many could not distinguish healing rituals from justice mechanism and every traditional ritual taking place in Acholiland is referred to as *mato oput*. This misunderstanding goes way back and in 2004, where nearly ceremony taking place in Acholi was generically referred to as *mato oput*; T Harlacher et al., *Traditional Ways of Coping in Acholi: Cultural Provisions for Reconciliation and Healing from War* (2006) 100.

<sup>15</sup> P Acirokop ‘The Potential and Limits of Mato Oput as a Tool for Reconciliation and Justice’ in S Parmar, et al., (eds) *Children and Transitional Justice: Truth-Telling, Accountability and Reconciliation* (2010) 276 – 277.

appeased.<sup>16</sup> Therefore, for these rituals to be effective, the perpetrators, the victims and their families must believe in the concept of *cen* and the social consequences attached to it or at least have the desire to reconcile with family, clan and the community at large.

***Nyono tonggweno*** is one of the most basic traditional rituals performed in Acholi. It literally means, stepping on an egg. It is a welcome ceremony and used to welcome family members who have been away for a long period. There is a perceived need to receive such a person home in order to reconcile any problems or feeling of alienation that may have resulted from their extended absence and to ensure that the person feels like a full member of the family again. It is a sign of commitment on both the 'returnee' and the family to live together in harmony.<sup>17</sup>

The ritual involves stepping on an egg (*tonggweno*) placed on a slippery branch (*pobo* - a common plant in Acholi) and a stick with a fork (*layebi*), traditionally used to open granaries. The egg symbolises purity and stepping on it suggests a restoration of innocence. The *pobo*, being slippery and soapy is said to cleanse the returnee from any external influences he or she might have encountered while away. The *layebi* is a symbol of welcoming a person back into the home, where the family will once again share food and drinks.

This ceremony was traditionally carried out at the entrance of a homestead or of a clan settlement but since 2003, the paramount chief; *Rwot* Achana initiated communal stepping on the egg ceremony for large numbers of returnees living in the IDP camps.<sup>18</sup> This ceremony has been most utilised in recent times since the items required (an egg, *pobo* and *Layebi*) are cheap or easily available and the ritual process is brief. The ceremony however, is basic and is not expected to cleanse *cen* that one may have met during the journey effectively. This would require a more elaborate ceremony.<sup>19</sup>

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<sup>16</sup> This sentiment was also echoed by numerous elders in Gulu and Amuru that I interviewed in between Feb and April 2008 including *Rwot* Otinga Atuka Otto Yayi of Lamogi; Opoka Vanango of Paicho; Mzee Banya of Lacor and Ladit Omong of Obiya among others; see also E Baines et al., *The Cooling of Hearts: Community Truth-telling in Acholi-land* (July 2007) 7.

<sup>17</sup> E Baines *Roco Wat I Acoli/Restoring Relationships in Acholiland: Approaches to Justice and Reintegration* (2005) 26.

<sup>18</sup> Baines (n 17 above) 27.

<sup>19</sup> Interview with *Rwot* Otinga Atuka Otto Yayi of Lamogi conducted in Lacor IDP camp on 12 February 2008.

**Lwoko pig wang** is a ritual performed when a person thought dead returns to the family alive. *Lwoko pig wang* literally refers to washing away tears that a family shed in mourning. Symbolically, it is to wash away the thought of death, which may manifest in a bad omen or attract *cen* to the family after the return. This is because, the Acholi, believe that when you mourn the living, the dead may assert their rights over him/her and call him/her to join their world.<sup>20</sup> This ritual is very popular in the current conflict setting when a formerly abducted person, thought dead and was mourned, returns to the family.<sup>21</sup>

**Moyo Kom** literally translates into cleansing the body. This ritual involves a combination of the two ceremonies of *nyono tonggweno* and *lwoko pig wang*.<sup>22</sup> The ritual is performed to denote cleansing the body from negative influence of *cen* to prevent misfortune and ill health.<sup>23</sup> The ceremony begins with elders invoking the ancestors to come to their aid, after which, a goat is slaughtered and cut open. The urine of the goat is removed and placed on the chest of the person to be cleansed, while elders make pleas to the ancestors to give blessings to the person. The Acholi elders interviewed all emphasised that this is a very important ritual for 'returnees' and that they should all be cleansed in the ritual to rid them of bad omen that they may have contracted while in the 'bush'.<sup>24</sup>

**Tumu kir** is a sacrifice to appease (*tumu*) the ancestors for an abomination (*kir*) that has been committed. Behaviours that constitute *kir* across clans in Acholi are those that might kindle or accompany already existing conflicts usually committed in anger and/or hatred to the displeasure of the ancestors.<sup>25</sup> In order to avoid misfortune, such as diseases, famine, or accidents that may strike the offender and the entire clan, a sacrifice (usually a goat) is offered to appease the ancestors for the abomination and to ask for future protection.<sup>26</sup>

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<sup>20</sup> Baines (n 17 above) 28.

<sup>21</sup> Interview with Rwot Otinga Atuka Otto Yayi of Lamogi, conducted on 12 February 2008 in Lacor IDP Camp.

<sup>22</sup> Harlacher et al., (n 14 above) 71.

<sup>23</sup> Interview with Rwot Otinga Atuka Otto Yayi of Lamogi conducted in Lacor IDP camp on 12 Feb 2008.

<sup>24</sup> The elders interviewed include Rwot Otinga Atuka Otto Yayi of Lamogi; Rwot Apige of Paicho, Ladit Oweka Layii of Lacor IDP camp; and Mzee Obama Adam of Lacor.

<sup>25</sup> Interview with Mzee Obama Adam of Lacor conducted on 13 Feb 2008 in Lacor, Amuru district.

<sup>26</sup> Interview with Mzee Obama Adam of Lacor conducted on 13 Feb 2008 in Lacor, Amuru district; see also Harlacher et al., (n 14 above) 75.

*Kwero merok* is a cleansing ceremony for warriors returning from war and is one of the most elaborate rituals in Acholi culture. It lasts three days if a person who killed during war is male and four days if female.<sup>27</sup> Traditionally, this ceremony was not performed for someone who kills members of his or her family or clan but currently, it is being performed on returnees who have done so and suffer from extreme psychological distress.<sup>28</sup> As described by Rwot Apige of Paicho, when a warrior kills an enemy in war, he is considered impure and is required to go through an elaborate ritual with the purpose of cleansing him from the *cen* of the slain enemy. Inclusive in the ritual is the cleansing of the ancestral shrine (*abila*)<sup>29</sup> done to secure the assistance and guidance of the ancestors who together with clan members and elders support the warrior during the ceremony.

*Kwero merok* has been performed on returnees with beneficial results on both the individuals and the community.<sup>30</sup> In the context of the LRA conflict, returnees are expected to tell their families what happened in the 'bush', especially killings they may have committed. Family members report the matter to elders and based on the information obtained, the elders may decide if *kwero merok* is the appropriate ritual to be performed. The aim of these rituals is to heal persons who may have committed an abomination or contracted/come into contact with bad spirits by appeasing the spirits and or ancestors.<sup>31</sup> *Kwero merok* continues to be performed in Acholiland in varying degrees. As much as some rituals like *kwero merok* involve a degree of truth telling, this truth is only disclosed to family members and elders and not necessarily the entire community or the victim's family.<sup>32</sup> They therefore, do not necessarily involve accountability. *Mato oput* and *gomo tong* discussed below are the rituals used for this purpose.

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<sup>27</sup> This is a gendered distinction in Acholi but its origins remain unclear. The most the author got from elders and other persons interviewed is that, the ancestors decided it that way.

<sup>28</sup> Harlacher et al., (n 14 above) 100.

<sup>29</sup> Traditionally, every homestead had a shrine for the ancestors but because of displacement, people usually make temporary shrines for the purpose of the ceremony; interview with Mzee Obama Adam conducted on 13 Feb 2008 in Lacor, Amuru district.

<sup>30</sup> Harlacher et al., (n 14 above) 100. The authors indicate that they observed and documented *kwero merok* rituals over a period and that it showed high positive effects in reducing psychological distress and fostering social reintegration.

<sup>31</sup> Interview with Rwot Apige of Paicho conducted on 12 February 2008 in Paicho, Amuru district.

<sup>32</sup> Harlacher et al., (n 14 above) 102.

***Mato oput*** literally means, 'drinking *oput*'. *Oput* is a tree common in Acholi. Its bitter root is ground and used to prepare a drink that is shared at the peak of the ceremony. *Mato oput* aims at re-establishing relationship that break down between two clans as a response to a killing, deliberate or accidental.<sup>33</sup> Traditionally, the ritual was not applied to killings that happened in a war but rather those occurring between clans that had friendly relationships with each other. The process only starts when a perpetrator comes forward and confesses to a killing(s) to his/her family. The family may reach a decision to inform the elders who then initiate meetings with the offended clan. The actual ritual takes place at the end of a long process of confession, mediation and payment of compensation (*culo kwor*) to reconcile the clans.<sup>34</sup>

Common characteristics of the ceremony include the slaughter of two sheep. The sheep are cut in half and exchanged by the parties. Members of the clans then drink the prepared drink of *oput* to wash away bitterness. The willingness of the offender's clan (not the offender as a single person) to assume responsibility for the act committed, as well as readiness and ability to pay compensation are necessary precursors for a successful process leading to the ceremony. Until the ceremony is concluded, *cen* would be expected to haunt the killer and his/her entire clan, a strong motivation to successful conclusion of the ceremony.<sup>35</sup> In the past, a young girl from the offender's clan would be given as compensation for deliberately committed murder as a form of compensation; this has been replaced by a system where cattle or money may be used as forms of compensation. *Mato oput* involves confession, show of remorse, forgiveness, and compensation that leads to reconciliation and healing after a killing. This ritual has an important component to fostering justice, truth and compensation in Acholiland.<sup>36</sup>

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<sup>33</sup> Harlacher et al., (n 14 above) 78.

<sup>34</sup> According to the elders interviewed *mato oput* is not a one day affair, it involves a long process of negotiations and mediation, even up to 5 years until both clans agree to a compensation and are ready to forgive and reconcile, this fact seems to be ignored by advocates for *mato oput*, and there seems to be this general feeling that *mato oput* is just about the ritual and payment of compensation, so finalised as soon as it begins.

<sup>35</sup> Acirokop (n 15 above) 277.

<sup>36</sup> Several people interviewed in February 2008 in Pabbo, Lacor and Acholi bur(Pader district) IDP camps in Northern Uganda felt that *mato oput*, would ensure justice in Northern Uganda. Several returnees felt that a ceremony like *mato oput* if performed would ensure that they gain acceptance back to the community. See also D Pain, *The Bending of Spears: Producing Consensus for Peace and Development in Northern Uganda* (1997) 58; where the author argues that the ritual is important in for fostering justice and peace in Acholiland.



**Gomo tong** - translated as bending spears was performed as a symbolic ceremony to mark the end of a war or a bloody conflict between different Acholi clans, chiefdoms, or neighbouring ethnic groups. The ritual is a vow between clans or ethnic groups engaged in a violent conflict to end hostilities. At times, it is done in conjunction with *mato oput*. Elders from conflicting clans get together to discuss the source of conflict, develop prevention strategies and warn people to discontinue fighting. At the end of discussions, the mediator bends a spear. In the act of bending the spear, the elders evoke the ancestors and promise that the killings would stop. The act of bending the spear is very significant and if, without due cause, conflict starts again; it is believed that the tip of the spear would turn against the aggressor.<sup>37</sup>

### 7.3 Traditional justice and the LRA conflict

Recent studies agree on the general strengths of traditional justice mechanism that includes; accessibility both in terms of proximity and language of operation; the processes are said to be speedy unlike their formal counterpart; highly participatory; and cheaper to administer.<sup>38</sup> There have also been strong suggestions that these systems are more appropriate to African communities where people live in close-knit groups and must continue to rely on social and economic cooperation with their neighbours.<sup>39</sup> Further, the UN has recognised the importance of traditional justice. In 2004, Kofi Annan, the then UN Secretary General, stated that due regard must be given to informal traditions for administration of justice or settlement of disputes, to help them to continue with their often vital role and to do so in conformity with both international standards and local tradition.<sup>40</sup>

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Several researchers have attended and documented ceremonies of *mato oput* being performed in Northern Uganda, see for instance S Finnström *Living with Bad Surrounding: War and Existential Uncertainty in Acholiland, Northern Uganda* (2003) chap 3; T Allen (n 2 above) 165.

<sup>37</sup> Baines (n 17 above) 30; this ritual was last performed in 1984 between the Acholi and Madi neighbours to address and stop the cycle of violence resulting after the fall of Idi Amin Dada in 1979 between the 2 groups.

<sup>38</sup> See for instance L Huyse & M Salter 'Introduction' in L Huyse & M Salter (eds) *Traditional Justice and Reconciliation after Violent Conflict: Learning from African Experiences* (2007) 5.

<sup>39</sup> As above.

<sup>40</sup> Report of the Secretary General *The Rule of Law and Transitional Justice in Conflict and Post Conflict Societies* (3 Aug 2004) S/2004/616 12.

Research has found that Acholi traditional practices appear to meet both the procedural and the accountability standards, such as those of the Rome Statute and the ICCPR, for instance, the presumption of innocence; no compulsion to confess guilt; trial in the presence of the accused and the desirability for promoting rehabilitation, among others. The research concluded that Acholi traditional system combines elements of both retributive and restorative justice therefore appropriate as an accountability measure for crimes committed in the LRA conflict.<sup>41</sup> Likewise, the author has argued elsewhere that *mato oput* as practised largely meets international standards for a non-judicial intervention in juvenile justice such as informed consent and assistance for children; protection from discrimination; best interest of the child and participation of children in the processes.<sup>42</sup>

*Mato oput* has a core principle of truth telling, show of remorse, atonement through the payment of compensation, forgiveness and healing that are necessary ingredients for reconciliation and accountability. The process also ceases to be about an individual victim or perpetrator but involves the entire community. This is in consonant with Desmond Tutu's view that African justice aims at the healing of breaches, the redressing of imbalances, the restoration of broken relationships seeking to rehabilitate both the victim and the perpetrator.<sup>43</sup> This is not to suggest that there are no challenges to the use of traditional justice generally and *mato oput* in particular as an accountability measure for crimes committed in the LRA conflict. The challenge is in fact enormous and already highlighted by many studies in the case of the LRA conflict. Drawing lessons from other states in the aftermath of mass atrocities, the following are some of the main challenges to the use of traditional justice.

#### **7.4 Modification of traditional justice**

The Agreement on Accountability and Reconciliation provides for the promotion of traditional justice, with necessary modifications as a central part of the framework for

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<sup>41</sup> EK Baines, 'The Haunting of Alice: Local Approaches to Justice and Reconciliation in Northern Uganda' (2007) 1 *International Journal for Transitional Justice* 102.

<sup>42</sup> Acirokop (n 15 above) 281 - 288.

<sup>43</sup> D Tutu *No Future without Forgiveness* (1991) 51.

accountability and reconciliation in Northern Uganda.<sup>44</sup> It is not clear what modifications are envisaged but this could well mean that the government intends to take control and inject a degree of formality in the process to work alongside the ICD. The most ambitious project of this nature has been the Rwandan *Gacaca*.

After the government of Rwanda failed to make substantial progress in clearing genocide cases still awaiting trial, it turned to community justice system to deal with persons who allegedly committed genocide. The government of Rwanda, on 26 January 2002, passed an Organic Law, creating *Gacaca* jurisdictions to deal with middle-ranging genocide crimes, which occurred between October 1990 and December 1994.<sup>45</sup> *Gacaca*, the Kinyarwanda word for justice on the grass used to be presided over by the *inyangamugayo*, meaning respected community members and its role traditionally was to resolve community disputes over land, marriage, inheritance, livestock, property damage and other minor offences. The procedure was completely informal, voluntary, and highly participatory and involved the entire community in resolving the dispute and achieving a settlement to the satisfaction of all.<sup>46</sup>

*Gacaca* as practiced today is very different from the traditional counterpart; it presides over genocide cases; the government appoints persons presiding; it has been formalised and completely legalistic; attendance is compulsory and in recent years has been under state coercion.<sup>47</sup> According to some commentators, the formalisation had a positive impact on the acceptance of the *Gacaca* and its legitimacy, internationally, nationally and locally.<sup>48</sup> Others also state that the formalisation of the *Gacaca* enabled it to be an accountable, formal and an alternative to local prosecutions that ensured accountability and helped to reduce the culture of impunity in Rwanda.<sup>49</sup> Yet others say that the *Gacaca* is viewed by the

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<sup>44</sup> Agreement on Accountability and Reconciliation clause 3.1.

<sup>45</sup> R Vogler *A World View of Criminal Justice* (2005) 259.

<sup>46</sup> Vogler (n 45 above) 260.

<sup>47</sup> Vogler (n 45 above) 260; S Vandeginste *Justice, Reconciliation and Reparations after Genocide and Crimes against Humanity: The Proposed Establishment of Popular Gacaca Tribunals in Rwanda* (1999) 26; A Megwalu & N Loizides *Dilemmas of Justice and Reconciliation: Rwandans and the Gacaca Courts* (2010) 4.

<sup>48</sup> T Lambert 'Legitimising Traditional Justice Mechanisms in the Transition from Conflict: A Comparison between Rwanda and Uganda' (2010) *University of Calgary: ECPR Graduate Conference 2*.

<sup>49</sup> S Wolters 'The Gacaca Process: Eradicating the Culture of Impunity in Rwanda? (August 2005) *Institute for Security Studies: situation Report* <http://www.issafrika.org/AF/current/2005/050805rwanda.pdf> (accessed 10 July 2009).

people of Rwanda as a state imposed mechanism designed to expand the state's reach into local communities and that the system has lost credibility, has created divisions and suspicion among people, undermining its reconciliation value.<sup>50</sup>

It must therefore be recognised that the formalisation of traditional justice institutions legally does not guarantee their legitimate operation and that the state taking control of traditional institutions could have a negative impact. Lars Waldorf provides several examples of states attempting to take control of traditional processes and failing in the process.<sup>51</sup> For example in India, the state tried to replace traditional *panchayats* - village or caste councils with *nyaya panchayats* - people's courts with the justifiable aim of expanding access to justice for the poor, promoting speedy conciliation and extending central control. The new institutions tried to blend formal and the informal systems, but they became unpopular and only survived for 10 years.<sup>52</sup> State control of traditional processes potentially compromises its positive attributes; therefore, its credibility as the process is no longer voluntary and ceases to rely on social sanctions and popular participation. The government of Uganda therefore needs to refrain from 'modifying' or formalising traditional processes as this may lead to these negative repercussions.

## 7.5 Nature and magnitude of crimes

Traditional justice mechanisms practised by most communities in Northern Uganda were conceptualised to deal with only a few cases of homicide that happened on a small scale. Understandably, the means and methods of warfare at the time were such that there was

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<sup>50</sup> Vogler (n 45 above) 260; B Ingelaere 'Does Truth Pass Across the Fire Without Burning? Locating the Circuit in Rwanda Gacaca Courts' (2009) 47 *The Journal of Modern African Studies* 507-528; the author who after twenty months of field work in Rwandan villages found that the Gacaca as practiced ran contrary to the core values of the customary institution and established societal practices. The author concludes that the Gacaca practice in Rwanda serves the interest of power holders (national and local) and not the interest of truth telling and justice.

<sup>51</sup> L Waldorf 'Mass Justice for Mass Atrocity: Rethinking Local Justice as Transitional Justice' (2006) 79 (1) *Temple Law Review* 35.

<sup>52</sup> Waldorf (n 51 above) making reference to SL Whitson 'Neither Fish, Nor Flesh, Nor Good Red Herring, Lok Adalats: An Experiment in Informal Dispute Resolution in India', (1992) 15 *Hasting International & Comparative Law Review* 342.

no great destruction to property and life.<sup>53</sup> In the same vein, *mato oput* was never conceptualised as a process to address systematic cases of murder, rape, kidnappings, mutilation, pillage, destruction of property among others as the crimes committed by the LRA and UPDF in the conflict and it will be a great challenge for the mechanism to serve that purpose.<sup>54</sup> ‘There are so many deaths that cannot be accounted for, so many children and relatives missing, so much property destroyed, looted, burned and it is almost impossible to pinpoint the exact perpetrator.’<sup>55</sup> Unlike in formal prosecutions of international crimes, where persons could be prosecuted on command or superior responsibility<sup>56</sup> for failure to prevent or punish, in the *mato oput* process, the exact perpetrator must account for the crimes.

Also central to *mato oput* process is that the perpetrator must be able to identify the victim to be able to initiate the process of reconciling with the victim and/or his/her family and clan. The UPDF has fought the LRA in several places in Uganda, South Sudan, Central African Republic and the DRC and committed crimes in several of those places. This leaves a huge and undefined pool of victims. It will therefore be difficult for even the most remorseful perpetrator to identify every victim and his or her families to initiate the process of *mato oput*.

In addition, elders are moved to begin the process of *mato oput* only when a confession has been made. Without a confession, the mechanism is of no use. Sometimes families may implore a suspected perpetrator who shows signs of being possessed by *cen*<sup>57</sup> to confess but the final decision to commence the process lie with that person.<sup>58</sup> This is related to the practice in central Mozambique where *magamba* spirits are believed to possess the living causing misfortune to the individual until they are allowed to air out their grievances (truth)

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<sup>53</sup> RA Gabriel & KS Metz ‘A short History of War: Evolution of Warfare and Weapons, Strategic Studies Institute U.S Army War College’ <http://www.au.af.mil/au/awc/awcgate/gabrmetz/gabr0001.htm> (accessed 15 Jan 2010).

<sup>54</sup> Acirokop (n 15 above) 289.

<sup>55</sup> Interview with Ochora Walter, Resident District Commander of Gulu conducted on 10 Feb 2008 in Gulu.

<sup>56</sup> Rome Statute art 28.

<sup>57</sup> This includes nightmares, hallucinations, diseases and other general misfortune.

<sup>58</sup> Interview with Ochora Walter conducted on 10 Feb 2008; interview with Rwot Otinga Otto Yayi of Lamogi conducted 12 Feb 2008 in Lacor IDP camp; Rwot Otinga especially emphasised the voluntary nature of *mato oput* process and insisted that the ceremony is not useful if one is forced to it.

and are appeased by the perpetrator, for the victim to find rest. The person must be willing to visit the elders and ask for assistance and members of the person's family must be willing to take part in the ritual for it to proceed, without which, the ritual does not proceed.<sup>59</sup> Likewise, *mato oput* cannot proceed without a confession. There is no indication that LRA and UPDF perpetrators will make the necessary confession for the process of *mato oput* to commence.

In addition, the Acholi cosmology does not define some of the most rampant crimes perpetrated in the LRA conflict, like use of child soldiers, sexual slavery and abductions, so the justice system does not have the competence to deal with them.<sup>60</sup> There is always a danger in radically changing a system to cope with something that it has not done before within a short period time as the case of Rwanda *Gacaca*. The government of Rwanda modified the *Gacaca* to address cases of genocide but the persons dispensing justice are lay people, who did not get much training before they were required to deal with international crimes, not familiar to them.<sup>61</sup> The now formalised process under which the *Gacaca* operates does not respect procedural guarantees that are accorded in criminal justice systems to the detriment of the accused persons. The accused persons hardly have a right to defend themselves, they do not have a right to counsel, and evidence brought against them are not always substantiated, yet the mechanism is empowered to impose prison sentences, even up to life sentences.<sup>62</sup>

## 7.6 Legitimacy of the process and traditional institutions

Traditional processes in Acholi are presided over by council of elders and/or *Rwodi* (chiefs) and/or clan leaders. The legitimacy of these leaders has been greatly harmed due to the

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<sup>59</sup> V Igreja & B Dias-Lambranca, 'Restorative Justice and the Roles of Magamba Spirits in Post Civil War Gorongosa, Central Mozambique' in L Huysse & M Salter (eds) *Traditional Justice and Reconciliation after Violent Conflict: Learning from African Experiences* (2009) 70; the authors further use 2 case studies to elaborate on the rituals, one case did not proceed because a member of the family, who is Christian was unwilling to appear before the elders to enable them perform the ritual.

<sup>60</sup> Interview with Rwot Otinga Otto Yayi of Lamogi conducted 12 Feb 2008 in Lacor IDP camp.

<sup>61</sup> M Goldstein-Bolocan 'Rwandan Gacaca: An Experiment in Transitional Justice' (2005) *Journal of Dispute Resolution* 376 – 377; WA Schabas 'Genocide, Trials and Gacaca Courts' (2005) 3 *Journal of International Criminal Justice* 891.

<sup>62</sup> Ingelaere (n 50 above) 38 – 39.

conflict. Many of the elders, like the rest of the population, live in extreme poverty. Some have even turned to alcohol and have lost respect among the people.<sup>63</sup> In Acholi, there is the general fear that these leaders will not be able to lead an independent and neutral justice process and that the process they undertake will be riddled with corruption.<sup>64</sup> This fear may be genuine and with donor and NGO involvement, the elders now see getting involved in accountability processes as a way of making money.<sup>65</sup>

In addition, the crowning of some of the traditional leaders has also been contested; this affects the legitimacy of the institution. For instance, *Rwot Achana* was crowned the paramount or overall chief in Acholi, a position that did not exist in the past. This has created some tension and resentment among the different clans.<sup>66</sup> In addition, the appointment of traditional chiefs are now said to be based on political connections rather than heritage or community recognition, as was the case in the past.<sup>67</sup> There is a general fear that such persons do not have the cultural understanding and knowledge and cannot perform the role of dispensing traditional justice.<sup>68</sup> This no doubt will affect the legitimacy and popularity of the traditional process as is the case in Rwanda.

In Rwanda, the *inyangamugayo*, in the true sense of the word – respected community leaders, have been replaced by political appointees, creating legitimacy issues. On the other hand, in Burundi, the selection criteria used for the *bashingantahe* - traditional councillors, if maintained, will be the main strength of the process. Members of the community identify and select the *bashingantahe*. The criteria used for selection are personal qualities that

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<sup>63</sup> Acirokop (n 15 above) 291; M Bradbury *An Overview of Initiatives for Peace in Acholi, Northern Uganda* (1999) 17 – 20; Allen (n 1 above) 247 - 248

<sup>64</sup> Interview with a group of 8 youths in Gulu town conducted on 11 Aug 2010.

<sup>65</sup> It is essential to emphasise that traditionally, elders who undertook this role were not remunerated, in fact, in the election of leaders by the community, material wealth was a consideration, so that such persons have no need to try and make money from such processes – payment was the respect and the task accorded to them by the community. This with the current degree of poverty in Northern Uganda will be difficult to achieve, the traditional leaders expect payment just to give information even for purposes of scholarly research; this is because, most NGOs and aid workers carrying out research in the region, pay some compensation for time and information. See also C Dolan 'Inventing Traditional Leadership? A Critical Assessment of Dennis Pain's *The Bending of the Spears*' (2000) 31 *COPE working paper*; Accord 'Background Papers Presented to the Conference on Peace Research and Reconciliation Agenda, Gulu Northern Uganda' (1999) 32 *COPE Working Paper*.

<sup>66</sup> As above.

<sup>67</sup> As above.

<sup>68</sup> Allen (n 2 above) 149.

include, experience, wisdom, love for truth and a highly developed sense of justice among others. The selected candidates go through an initiation process and take an oath of loyalty.<sup>69</sup> Adhering to such selection procedure is what gives traditional justice processes credibility and legitimacy. The politicisation of the traditional leadership considerably reduces the potential of these institutions, since their success rests on the credibility of its leadership.<sup>70</sup> The political independence of traditional leaders gives them enhanced credibility in playing their role. The government of Uganda will therefore have to refrain from politicising traditional institutions and allow the community their traditional role to make such decisions to avoid inefficiency and corruption that will make the mechanism unpopular.

In addition, traditional justice as applied in Uganda and elsewhere in Africa is usually a cultural specific mechanism for different ethnic groups. It is therefore impractical for people who do not belong to a certain ethnic group or do not subscribe to a certain culture to respond to it positively.<sup>71</sup> For instance, *mato oput* as applied by the Acholi could not be practically used as an accountability and reconciliation measure for crimes committed by members of the LRA who are Acholi against the Langi or Iteso neighbours. It cannot be used as an accountability mechanism for crimes committed by a Muyankole UPDF official against an Acholi, or a Langi LRA member against an Iteso victim and so on. In addition, crimes connected to the LRA conflict have also been perpetrated in the DRC, South Sudan and Central African Republic – these crimes need to be accounted for and traditional justice is not the appropriate mechanism for this undertaking.<sup>72</sup>

As discussed, the thesis maintains that it is impractical to formalise traditional processes to create a uniform mechanism to be applied across the board. The Uganda situation is unlike the case of Rwanda *Gacaca* and Burundi *Ubushingantahe*, where the entire nation adheres to the same tradition. In addition, the tradition has received a degree of codification, and

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<sup>69</sup> AN Kaburahe 'The Institution of Bashingantahe in Burundi' in L Huyse and M Salter (eds) *Traditional Justice and Reconciliation after Violent Conflict: Learning from African Experiences* (2007) 154 – 155.

<sup>70</sup> As above.

<sup>71</sup> JO Latigo 'Northern Uganda: Traditional Based Practices in Acholi Region' in L Huyse and M Salter (eds) *Traditional Justice and Reconciliation after Violent Conflict: Learning from African Experiences* (2007) 113.

<sup>72</sup> Allen (n 1 above) 249; indicating that his non Acholi informants were outright dismissive of reliance of *mato oput*.



one mechanism adopted can be applied to the entire nation removing complexities involved in having multiple traditional systems dealing with the same groups of perpetrators who may have committed similar crimes.<sup>73</sup> Varying traditional practices may have to be applied in Uganda and the neighbouring countries to satisfy all victims of the conflict and bring about meaningful reconciliation.

Payment of compensation by the perpetrator's family and/or clan and procuring items like goats, sheep or cows is central to the success of most traditional justice processes. This will no doubt create immense financial constraints on the poverty-stricken communities that have relied or are relying on aid for survival for more than two decades. There have been suggestions that the government and donors should support such processes by providing items needed and putting aside funds for compensation to benefit persons who have undergone traditional justice processes.<sup>74</sup>

Payment of compensation by government and/or donors of behalf of perpetrators that undergo the process will inevitably cast doubt on the legitimacy of processes. This might lead to resentment as the issue with the amnesty package as shown, with victims feeling that perpetrators are being rewarded.<sup>75</sup> Struggling to provide items needed for the ceremony and payment of compensation is seen as a sign of atonement and the punishment for the wrongdoing.<sup>76</sup> Traditional leaders should therefore be encouraged to engage community members to come up with novel ways of payment of compensation and atoning for crimes that does not require immediate exchange of money or property. One of these ways could be requiring the perpetrator (and his/her clan) to farm or herd animals for the offended clan for a certain number of years.<sup>77</sup>

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<sup>73</sup> Allen (n 1 above) 255.

<sup>74</sup> Baines (n 41 above) 124.

<sup>75</sup> Refer to the discussion in part one of chapter four of this thesis.

<sup>76</sup> Informal discussion with Christine Akumu Okot and Mwa Chris, officers of local government of Gulu and Pader respectively conducted on 10 Aug 2011 in Gulu town.

<sup>77</sup> This is not to suggest that the government should not create a reparations scheme to benefit victims of the conflict in Northern Uganda, such a scheme is absolutely necessary but property or monies from this scheme should not be availed to LRA or other individual perpetrators and this may encourage corruption and create resentment and misunderstanding among the victim population.

Also very important is that with the advent of the ICD, the ICC and a possible Truth Commission, space must be created for the use of traditional justice.<sup>78</sup> The Agreement on Accountability and Reconciliation provides for traditional justice as an alternative to prosecutions and the principle of double jeopardy potentially applies to bar criminal prosecutions of those who have undergone it.<sup>79</sup> Traditional justice measures lack the rigors of prosecution. They, therefore, should not be an alternative to prosecution of international crimes. Traditional justice should be a complementary mechanism, dealing with less serious crimes and available to all who desire it, including those who may undergo prosecutions and those who have received amnesty. In addition, use of traditional justice processes should be limited to the community level and not used as a national tool for accountability.

This is not to suggest that the author is opposed to the use of traditional justice as an accountability measure, quite the contrary, traditional justice and other rituals are very essential in post conflict societies. Indeed, they have been used throughout Africa to serve important elements of accountability during and after conflict.<sup>80</sup> Some examples include Angola, where the traditional ceremony of *conselho* based on the general encouragement given to people to abandon the thoughts and memories of war and losses was used as a healing process. In addition, in both Angola and Mozambique, cleansing rituals attended by the family and entire communities were carried out when welcoming ex-combatant child soldiers back into the community.<sup>81</sup> In Mozambique, despite government's policy of 'forgive and forget', survivors living in the former epicentres of the civil war in Gorongosa, inspired by their own cultural wisdom, developed their own socio-cultural mechanisms to create healing and attain justice and reconciliation in the aftermath of the civil war.<sup>82</sup> In Sierra Leone, healing ceremonies aimed to 'cool the hearts' of former child combatants and

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<sup>78</sup> Agreement on Accountability and Reconciliation clause 3.10 provides that where a person has been subjected to an accountability or reconciliation mechanism in respect for any conduct during the conflict, that person shall not be subject to any other proceedings that in affect means that when one goes through *mato oput* or any other traditional justice measure, he/she will not be subject to any other measure.

<sup>79</sup> Agreement on Accountability and Reconciliation clause 3.1 & Annexure clause 19.

<sup>80</sup> JR Quinn 'What of Reconciliation? Traditional Mechanism of Acknowledgment in Uganda' in JR Quinn (ed) *Reconciliation(s)* (2008) 397 – 398; gives various accounts on the use of traditional justice in Africa.

<sup>81</sup> Quinn (n 80 above) referring to A Honwana 'Children of War: Understanding War and War Cleansing in Mozambique and Angola' in S Chesterman (ed) *Civilians in War* (2001) 1137 – 1140.

<sup>82</sup> Igreja & Dias-Lambranca (n 59 above) 66 – 67.

encourage their reintegration in the community has been used.<sup>83</sup> Traditional justice has also served a critical accountability role in Rwanda and Burundi.

This clearly shows the important role that traditional justice plays in healing and reconciliation after conflict. In Northern Uganda, traditional rituals and justice ceremonies were performed way before the government and the international community took up the issue, even in the midst of the conflict. The rituals continue to be practiced today and will be practised at an even larger scale when circumstances permit, with or without the involvement of government and/or donors. Indeed, traditional justice should not be overlooked and there is a need to explore the potential of the system as practised by the different communities in the LRA affected areas, further, to enhance access to justice, truth and reparations.<sup>84</sup>

The author however, argues that traditional justice is more likely to play a positive role if its application is at the individual and community level and if its participation is voluntary and complementary to other accountability mechanisms. This inevitably requires an investment by the government to take initiatives to enhance the capacity of traditional leaders but also preserve the autonomy of and non-political character of the traditional institution.<sup>85</sup> The government will need to accord respect to these leaders and give them space to exercise visible influence within the communities,<sup>86</sup> but to make traditional justice an alternative mechanism is tantamount to condoning impunity for the grave crimes perpetrated in the LRA conflict.

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<sup>83</sup> Quinn (n 80 above) referring to R Shaw 'Rethinking Truth and Reconciliation Commissions: Lessons from Sierra Leone' (2005) 130 *United States Institute of Peace, Special Report* 9.

<sup>84</sup> Annexure to the Agreement on Accountability and Reconciliation clause 20 calls on the government and other stakeholders to examine these practices to explore the appropriate role of the mechanisms.

<sup>85</sup> The non-political nature and autonomy of traditional leaders and institutions is provided for in art 246 of the Constitution of Uganda.

<sup>86</sup> Authority of traditional has for long been challenged by the creation of local councillors who have taken on roles such as mediation, arbitration and conciliation, roles that were in the past undertaken by traditional leaders, this has greatly reduced the influence of traditional leadership.

## 7.7 Conclusion

The level of support that traditional justice has received shows the recognition of the complexities of the conflict by the affected population in the country. There is deep-rooted knowledge that embracing formal justice means a continuation of a military pursuit, therefore more atrocities on civilians.<sup>87</sup> The most popular saying among locals in Northern Uganda is that, ‘today I live in my own home, I farm my own field, and so I am in support of anything that retains this status quo.’ This is an indication that even today, the people are aware that the peace that prevails is fragile, the LRA are still a threat, contrary to government suggestions. Therefore, traditional justice remains a popular accountability venue that is most likely to maintain the status quo.

Traditional justice and healing ceremonies therefore have a significant role to play in Uganda’s accountability pursuits. The processes offer an accountability platform by allowing perpetrators to account for their crimes, show remorse, apologise and compensate victims, encompassing the goals of justice, truth and reparations. In addition, the processes provide a broad platform for victims and it delivers the greatest impact to local communities that must continue to live together. However, the numerous weaknesses of mechanisms such as cultural specificity and its inability to respond to the gravity and scale of crimes perpetrated, makes it an inappropriate tool, especially so, if it is used as an alternative mechanism to prosecutions. The use of traditional justice therefore should be complementary and voluntary and it should remain at the community level.

The Agreement on Accountability and Reconciliation acknowledge the need for dialogue to promote justice, truth, reparations for victims and to ensure reconciliation. This is also the expressed desire of the affected communities in Uganda.<sup>88</sup> Suffice to say that traditional justice will not adequately play this role; neither will formal prosecutions adequately accomplish this. Instituting a truth commission would therefore be in keeping with the

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<sup>87</sup> This was clearly demonstrated when the LRA refused to sign a peace deal in 2008 insisting that the ICC first drops its arrest warrants and Joseph Kony’s assertion that he had been misled on the true nature of the agreement on accountability and reconciliation that the LRA and government’s peace teams reached.

<sup>88</sup> This was the finding of JLOS during the consultations conducted in eight sub-regions including Buganda, Teso, Bugisu, Bugwere, Busoga, Karamajo, Kapchorwa, Acholi, Ankole, Toro, Bunyoro, Lango and West Nile of Uganda. Interview with Rachel Odoi-Musoke conducted on 18 March 2011 in Kampala.

language of the Agreement on Accountability and Reconciliation and the desire of the people of Uganda. This is discussed in the next chapter.