REVISITING *THE PROSECUTOR V DOMINIC ONGWEN*: TOWARDS A POSSIBLE COMPLEMENTARITY BETWEEN TRADITIONAL JUSTICE AND THE INTERNATIONAL CRIMINAL COURT?

Submitted in partial fulfilment of the requirements of the master's degree

Human Rights and Democratisation in Africa

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23 October 2023

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DEDICATION

To the victims of the Lord's Resistance Army (LRA) conflict in northern Uganda.

ACKNOWLEDGEMENTS

My sincere gratitude to Prof Magnus Killander and Prof Atangcho Akonumbo, for offering their expertise, time, and guidance throughout this process. Special thanks to the Centre for Human Rights for this lifetime opportunity, my academic tutor Mr Clement Agyemang and Dr Patricia Atim for always encouraging me to dream big.

To my parents Lucy and Michael Can, and my brother Jerome Olara, I am immensely grateful for your unconditional love, prayers, sacrifices and support throughout my life. I am also grateful to Daniel Lubanga, and Geraldine Kauma for consistently encouraging and motivating me through this journey. Last but not least, I thank my HRDA tribe, Nadine Yango and Kafula Kasonde for the psychosocial support during my stay in Cameroon.

Above all, it has been God since day one. Ebenezer, thus far He has helped me! (1 Samuel 7 :12)

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ACRONYMS AND ABBREVIATIONS

ACHPR	African Charter on Human and Peoples' Rights
AERL	Acholi Elders and Religious Leaders
AU	African Union
CCFU	Cross-Cultural Foundation of Uganda
CSOPNU	Civil Society Organisations for Peace in Northern Uganda
HRC	Human Rights Committee
IAHPCR	International Association for Humanitarian Policy and Conflict Research
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICD	International Crimes Division of the High Court of Uganda
ICJ	International Criminal Justice
ICTR	International Criminal Tribunal for Rwanda
LIGI	Liu Institute for Global Issues
LRA	Lord's Resistance Army
NTJP	National Transitional Justice Policy
OHCHR	Office of the High Commissioner for Human Rights
OSJI	Open Society Justice Initiative
OTP	Office of the Prosecutor
RLP	Refugee Law Project
RUF	Revolutionary United Front
SCSL	Special Court for Sierra Leone
TJA	Transitional Justice Act
TJC	Transitional Justice Commission
TRA	Truth and Reconciliation Act
TRC	Truth and Reconciliation Commission
TFV	Trust Fund for Victims
UCDA	Uganda Christian Democratic Army
ULS	Uganda Law Society
UN	United Nations
UNLA	Uganda National Liberation Army soldiers
UNSC	United Nations Security Council

UPDA	Uganda People's Democratic Army
UPDF	Uganda Peoples' Defence Forces

CHAPTER 1

INTRODUCTION

1.1 Background

The northern Uganda conflict began in 1986 and underwent various transformations as different groups emerged through the years to fight against the Ugandan Government.[1] These groups include the former Uganda National Liberation Army (UNLA), the Uganda People's Democratic Army (UPDA) headed by Brigadier Odong Latek, the Holy Spirit Mobile Forces headed by Alice Auma Lakwena, the Holy Spirit Movement II headed by Severino Lukoya and the Uganda Christian Democratic Army (UCDA) headed by Joseph Kony. The UCDA later transformed into the Lord's Resistance Army (LRA) in 1991.[2] The genesis of this conflict can be traced to a revolt by the UPDA after President Yoweri Kaguta Museveni (Museveni) from western Uganda captured power from General Tito Okello Lutwa, an Acholi from northern Uganda in 1986.[3] The UPDA which comprised of Acholi ex-army officers (ex UNLA soldiers) who had just lost power started as a rebel group against Museveni and joined the LRA group whose strength was boosted.[4]

The conflict that lasted for 20 years brought untold suffering and loss of lives to many people in the region as the LRA systematically started directing violence towards the civilians.[5] This comprised of abduction of civilians including women and children, killings, torture, rape and cutting off of body parts such as hands, ears, breasts and lips.[6] Boys who were abducted were recruited to battle whereas the girls were forced into sex slavery or married off to the LRA commanders.[7] The unforgettable attacks include the heinous massacre in Atyak where the LRA rebels shot dead over 200 people on a riverbank in July 1996 and over 300 people were burnt to death in Barlonyo in February 2004 among others.[8]

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[1] JO Latigo 'Northern Uganda: Tradition based Pratices in the Acholi Region' in L Hyse & M Salter (eds) *Traditional Justice and Reconciliation after Violent Conflict: Learning from African Experiences* (2008) 88.
[2] As above.
[3] Refugee Law Project 'Behind the Violence: Causes, Consequences and the Search for Solutions to the War in Northern Uganda' *Working Paper No. 11* February 2004 4 https://www.refugeelawproject.org/files/working_papers/RLP.WP11.pdf accessed 20 July 2023.
[4] KC Dunn 'Uganda: The Lord's Resistance Army' (2004) 31 *JSTOR Review of African Political Economy* 140 http://www.jstor.org/stable/4006946 accessed 25 July 2023.
[5] Civil Society Organisations for Peace in Northern Uganda (CSOPNU) 'Counting the Cost: Twenty Years of War in Northern Uganda' (2006) 9 https://reliefweb.int/report/uganda/counting-cost-twenty-years-war-northern-uganda accessed 28 May 2023.
[6] As above.
[7] Open Society Justice Initiative (OSJI) 'The Trial of Dominic Ongwen at the International Criminal Court' (2016) 3 https://www.justiceinitiative.org/uploads/17e6ecf3-3473-46eb-a91b-af2ffd5df915/briefing-ongwen-20161129%20(2)_1.pdf accessed 28 May 2023.
[8] P Acirokop 'Accountability for Mass Atrocities: The LRA Conflict in Uganda' unpublished PhD thesis, University of Pretoria, (2012) 6.

The numerous gruesome attacks prompted the Ugandan Government to enact the Amnesty Act in 2000 as part of the various efforts towards ending the conflict.[9] Noticeably, the Act pardons those engaged in rebellion acts against the Government since 26 January 1986.[10] However, the Amnesty Act failed in ending the conflict and suffered numerous setbacks despite the support it received from the people of northern Uganda.[11] In a bid to advance its efforts towards ending the conflict, Uganda ratified the Rome Statute in 2002[12] and on 16 December 2003, the Ugandan Government referred the conflict to the International Criminal Court (ICC).[13] The referral which was the first referral by a state to the ICC was formerly accepted by the Prosecutor in January 2004 and in August that very year, investigations into the whole situation in northern Uganda began.[14]

The referral of the conflict to the ICC is credited for triggering peace negotiations that started in 2006 between the Ugandan Government and the LRA.[15] However, Joseph Kony the LRA leader did not show up to sign the final peace agreement on 10 April 2008 citing the ICC indictment as a reason for this.[16] Despite this, the 2007 Agreement on Accountability and Reconciliation between the Government of the Republic of Uganda and the LRA (Juba Agreement) was signed and this led to the creation of the International Crimes Division of the High Court of Uganda (ICD).[17] Remarkably, the Juba Agreement prescribed that traditional justice mechanisms were to be promoted with necessary modifications.[18] It was further agreed that there were institutions, mechanisms, customs and usages in Uganda sufficient to address crimes committed during the conflict although modifications would be essential to ensure a better accountability response.[19]

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[9] B Olugbuo 'Positive complementarity and the fight against impunity in Africa' in C Murungu & J Biegon (eds) *Prosecuting International Crimes in Africa* (2011) 271.
[10] As above.
[11] Refugee Law Project (RLP) 'Whose Justice? Perceptions of Uganda's Amnesty Act 2000: The Potential for Conflict Resolution and Long-Term Reconciliation' *Working Paper No. 15* (2005) 9 https://refugeelawproject.org/files/working_papers/RLP. accessed 22 August 2023.
[12] Uganda International Criminal Court Project https://www.aba-icc.org/country/uganda/#:~:text=To%20date%2C%20however%2C%20the%20alleged,Statute%20on%20June%2014%2C%202002. accessed 20 July 2023.
[13] CSOPNU (n 5) 5.
[14] C Mbazira 'Prosecuting International Crimes Committed by the Lord's Resistance Army in Uganda' in C Murungu & J Biegon (eds) *Prosecuting International Crimes in Africa* (2011) 204.
[15] Olugbuo (n 9) 271-272.
[16] As above.
[17] Agreement on Accountability and Reconciliation between the Government of the Republic of Uganda and the Lord Resistance Army/Movement https://peacemaker.un.org/sites/peacemaker.un.org/files/UG_070629_AgreementonAccountabilityReconcilition.pdf accessed 27 July 2023 See also The International Crimes Division, The Judiciary of the Republic of Uganda https://judiciary.go.ug/data/smenu/18/International%20Crimes%20Division.html accessed 20 July 2023 and Rule 3 of the High Court (International Crimes Division) Practice Direction 2011 https://www.legal-tools.org/doc/d5a66e/pdf/ accessed 7 August 2023.
[18] Clause 3.1 of the Juba Agreement.
[19] Clause 5.1 of the Juba Agreement.

The need for a holistic justice model requiring the implementation of formal criminal system alongside traditional justice was also acknowledged.[20]

Conversely, the Juba Agreement attracted criticism for example from Amnesty International which argued that Uganda had an obligation under article 59 of the Rome Statute to arrest the LRA leaders who were subject of the arrest warrant[21] as the obligation to arrest is absolute regardless of whether there were ongoing negotiations.[22] Amnesty International also argued that the ICD did not have the capacity to try international crimes[23] and this may be justified by the ICD's delay in concluding the *Uganda v Thomas Kwoyelo* case as it is perhaps one of the longest trials in the history of international criminal justice (ICJ).[24] The proceedings against Kwoyelo, a LRA commander commenced in July 2011 as the first war crime trial in the ICD[25] and as of July 2023 has not yet been concluded.

Suffice to say, Uganda domesticated the Rome Statute in 2010 through the enactment of the International Criminal Court Act[26] and the ICD was only created in 2008, about 5 years after the referral of the conflict to the ICC. The principle of complementarity enshrined under article 1 of the Rome Statute mandates the ICC to exercise its jurisdiction where the national jurisdiction is not able to as this was the case with Uganda prior to the establishment of the ICD.[27] Conspicuously, the referral of the conflict to the ICC was opposed by some people from northern Uganda who asserted that it was better to handle the situation domestically rather than refer it to the ICC.[28] It was also argued that the ICC was imposing western values of justice[29] and an impediment to peace and reconciliation that traditional justice offered.[30]

Despite the opposition, on 14 October 2005, the Chief Prosecutor of the ICC, Luis Moreno-Ocampo, issued a statement announcing that ICC Pre-Trial Chamber II had unsealed five warrants of arrest in the Uganda situation as the judges of Pre-Trial Chamber II were convinced that the evidence presented offered sufficient grounds to show that crimes against humanity and war crimes were committed by the five people whom

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[20] Clauses 5.2 & 5.3 of the Juba Agreement.
[21] Amnesty International 'Uganda: Agreement and Annex on Accountability and Reconciliation falls short of a comprehensive plan to end impunity' 7 https://www.amnesty.org/en/documents/afr59/001/2008/en/ accessed 21 July 2023.
[22] As above.
[23] As above 15.
[24] Avocats Sans Frontieres 'Thomas Kwoyelo Trial: Prosecution moves close to wind—up presenting its witness' 25 April 2023 https://asf.be/thomas-kwoyelo-trial-prosecution-moves-close-to-wind-up-presenting-its-witness/ accessed 22 July 2023.
[25] KS Kihika & M 'Regue Pursuing Accountability for Serious Crimes in Uganda's Courts: Reflections on the Thomas Kwoyelo Case' *International Center for Transitional Justice Briefing* https://www.ictj.org/sites/default/files/ICTJ-Briefing-Uganda-Kwoyelo-2015.pdf accessed 18 July 2023.
[26] Olugbuo (n 9) 273.
[27] K Urbanova 'The Principle of Complementarity in Practice' in P Sturma (ed) *The Rome Statute of the ICC at its Twentieth Anniversary: Achievements and Perspectives* (2019) 3.
[28] Mbazira (n 14) 205.
[29] As above.
[30] Olugbuo (n 9) 271, See also Paragraphs 3 and 4 of Defence Submissions in the case of *The Prosecutor v Dominic Ongwen* 13 July 2025 https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2015_12896.PDF accessed 6 August 2023.

the arrest warrants sought.[31] The arrest warrants were against Joseph Kony (the LRA leader), Vincent Otti (Second-in-Command) and three other commander namely; Raska Lukwiya, Okot Odhiambo and Dominic Ongwen (Ongwen).[32] In furtherance of the ICC referral by the Ugandan Government, Ongwen who surrendered in January 2015 was transferred to the ICC where he was tried and convicted for 25 years.[33] Ongwen's fellow indictee, Joseph Kony, is still at large while proceedings against Vincent Otti, Raska Lukwiya and Okot Odhiambo were terminated because of their passing.[34]

1.2 Problem Statement

The conviction of Ongwen by the ICC aroused mixed feelings among the people of northern Uganda. While some think that Ongwen's prosecution at the ICC was justice for the Government of Uganda and not for the victims,[35]others view the trial as foreign and confusing since it was not within their territory.[36] Furthermore, justice to the victims meant peace and not incarceration of Ongwen because they view him as a victim of the war and prefer to rely on customs and traditions rather than the ICC to obtain justice.[37] The foregoing shows divergence in opinion on the use of traditional justice or the ICC to address international crimes.

However, the request by the counsel for the defence to adopt traditional justice during the sentencing was denied by the Trial Chamber IX of the ICC which noted that integrating traditional justice into sentence under article 76 of the Rome Statute was precluded by the principle of legality enshrined under article 23 of the said Statute.[38] Consequently, the rejection by Trial Chamber IX to consider the use of traditional justice mechanisms in northern Uganda to complement its processes in the case of *the Prosecutor v Dominic Ongwen* (*Ongwen* case) raises questions of whether there was justice for the victims. It was also a missed opportunity to show the extent to which the complementarity between the ICC and traditional justice mechanisms in northern Uganda would have ensured a smooth and effective trial. This study therefore seeks to show the extent to which such a complementarity could have made a difference and how it could have been done.

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[31] Statement by Chief Prosecutor Luis Moreno-Ocampo 14 October 2005 https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/2919856F-03E0-403F-A1A8-D61D4F350A20/277305/Uganda_LMO_Speech_141020091.pdf 28 May 2023.

[32] As above.

[33] OSJI (n 7) 2, see also paragraph 374 of Judgment on the appeal of Mr Dominic Ongwen against the decision of Trial Chamber IX of 6 May 2021 entitled 'Sentence' https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2022_07148.PDF accessed 8 August 2023.

[34] International Criminal Court 'Situation in Uganda' ICC-02/04 https://www.icc-cpi.int/uganda accessed 8 August 2023.

[35] Ugandan human rights lawyer Nicholas Opiyo in 'J Hatcher- Moore 'Is the World's Highest Court Fit for Purpose?' *The Guardian Weekly* 5 April 2017 https://www.theguardian.com/global-development-professionals-network/2017/apr/05/international-criminal-court-fit-purpose accessed 17 May 2023.

[36] As above.

[37] A Arinaitwe and E Mwine-Mugaju 'The dichotomy of Dominic Ongwen' *Mail & Guardian* 15 February 2021 https://mg.co.za/africa/2021-02-15-the-dichotomy-of-dominic-ongwen/ accessed 17 May 2023.

[38] *The Prosecutor v Dominic Ongwen*, ICC-02/04-01/15, Trial Chamber IX, 6 May 2021 Paragraph 43 https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2021_04230.PDF accessed 7 July 2023.

1.3 Research Questions

The central question this study seeks to answer is:

To what extent can traditional justice mechanisms be applied to complement the ICC?

In answering this research question, the study addresses the following sub-questions:

1. What is traditional justice?
2. What is the relationship between traditional justice and international criminal justice?
3. What are the strengths and shortcomings of traditional justice approaches in northern Uganda in addressing international crimes?
4. How can the identified shortcomings be addressed?
5. How could have traditional justice mechanisms in northern Uganda been used to complement the ICC's jurisdiction from the standpoint of the *Ongwen* case?

1.4 Research Objectives

This study seeks to mainly examine the extent of complementarity between traditional justice mechanisms and the ICC.

The main objective is guided by the following specific objectives:

1. To explain the concept of traditional justice.
2. To assess the strengths and weaknesses of traditional justice mechanisms in addressing international crimes.
3. To propose measures to address the deficiencies of traditional justice mechanisms in addressing international crimes.
4. To evaluate the effectiveness of traditional justice mechanisms in complementing the ICC in the adjudication of international crimes.

1.5 Definition of Terms

The principle of complementarity as used in this dissertation is based on articles 1, 17 and 19 of the Rome Statute. According to the principle, the ICC should be a supplement to the national courts.[39]

Interest of Justice as used in this dissertation is enshrined under article 53 of the Rome Statute. According to the Policy Paper on the Interests of Justice, the exercise of the OTP's discretion under article 53(1)(c) and 53(2)(c) is exceptional in nature and there is a presumption in favour of investigation or prosecution

[39] G Saether 'The Complementarity of ICC and other Instruments in Transitional Justice- The Case of Northern Uganda' (2009) 27(4) *Nordisk Tidsskrift for Menneskerettigheter* 477.

wherever the criteria established in article 53(1) and (b) or article 53(2)(a) and (b) have been met. Secondly, the criterion for its exercise is directed by the objects and purposes of the Statute which includes the prevention of serious crimes of concern to the international community through ending impunity. Thirdly, that there is a difference between the concepts of the interests of justice and the interests of peace and that the latter falls within the mandate of institutions other than the OTP. Lastly, it should be noted that the OTP is obliged to inform the Pre-Trial Chamber of any decision not to investigate or not to prosecute based solely on Articles 53(1)(c) or 53(2)(c). The Pre-Trial Chamber may review such a decision which will then only be effective if confirmed by the Chamber.[40]

1.6 Literature Review

The complementarity of the ICC and traditional justice mechanisms in northern Uganda has been discussed by some scholars prior to the conviction of Ongwen. However, the measures to be adopted to achieve the complementarity have not been deeply explored. This research therefore acknowledges the existing literature and seeks to contribute to the academic discourse on the possibility of an effective complementarity between traditional justice and the ICC.

Lajul describes the meaning of justice in a post conflict situation as a 'process of healing and peaceful restoration of harmonious co-existence among individuals and within communities'.[41] He further posits that traditional justice is the only source of true healing for the victims in northern Uganda. The ICC as Lajul states, thinks justice for the people of northern Uganda is the appropriate punishments of the perpetrators whereas the Acholi Elders and Religious Leaders (AERL) think justice is more than just appropriate punishments of the perpetrators but 'peaceful restoration of harmony within the community' through traditional justice.[42] Lajul proposes the need to investigate how the ICC and traditional justice can supplement each other for justice to be obtained. According to Lajul, the ICC's understanding of justice is based on the notion that justice means prosecution and then seclusion of the convict which differs from traditional justice where the notion is that peace and fairness are accomplished when the offender and offended face the crimes committed in 'truth, contrition, reparation, forgiveness and reconciliation'.[43] Although Lajul postulates the meaning of justice in the context of the Acholi, he does not propose measures on how traditional justice and the ICC could complement each other to address international crimes.

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[40] International Criminal Court 'Policy Paper on the Interests of Justice' (2007) 1 https://www.icc-cpi.int/sites/default/files/ICCOTPInterestsOfJustice.pdf accessed 1 October 2023.
[41] W Lajul 'Justice and Post LRA War in Northern Uganda: ICC Versus Acholi Traditional Justice System' (2017) 3 *IAFOR Journal of Ethics, Religion & Philosophy* 22.
[42] As above.
[43] As above, 26.

Ogora is of the view that traditional justice is a potential conflict resolution mechanism in many African societies, yet it is portrayed as archaic and many traditional justice mechanisms have not been adapted to meet the needs of contemporary times.[44] According to Ogora, unlike the formal justice system such as the ICC, most traditional justice mechanisms have not been fully defined and documented. This may create inconsistencies in its implementation especially with regard to international crimes.[45] Ogora contends that traditional justice mechanisms should be modified to suit recent times and be adopted to complement the formal justice mechanisms such as the ICC.[46] Ogora postulates that most traditional justice mechanisms except for a few such as *gacaca*[47] in Rwanda have not been modified to suit current times and address gross human rights violations or international crimes.[48] Ogora therefore proposes that traditional justice mechanisms should evolve to handle current crimes and transitional justice needs through modifying its practices and the codification of all cultural practices to enable a uniform traditional reconciliation and accountability framework.[49] While Ogora rightly points out that traditional justice should be modified to handle international crimes, he does not suggest ways through which traditional justice mechanisms could complement the ICC.

Remarkably, the International Association for Humanitarian Policy and Conflict (IAHPCR) states that the application of traditional justice could be difficult as it may not be uniformly accepted by all in a given society.[50] However, IAHPCR does not propose any procedures that could be adopted to address such difficulties. Moreover, Acirokop argues that the administration of traditional justice is usually patriarchal and biased against prioritising the rights of children yet many women are victims of sexual and gender based violence.[51] All these arguments are supported by Baderin who asserts that traditional justice does not fully meet ICJ standards and as such does not serve justice.[52] Both Acirokop and Baderin do not address how traditional justice mechanisms could be modified to fully meet ICJ standards in order to be able to complement the ICC.

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[44] LO Ogora 'Moving Forward: Traditional Justice and Victim Participation in Northern Uganda' (2009) *Institute for Justice and Reconciliation* 9.
[45] As above.
[46] As above, 10.
[47] System of community justice in Rwanda following the 1994 genocide.
[48] Ogora (n 44) 9.
[49] As above, 10.
[50] International Association for Humanitarian Policy and Conflict Research (IAHPCR) 'Traditional & Informal Justice Systems: Definitions & Conceptual Issues' 20 http://www.peacebuildinginitiative.org/index526d.html?pageId=1694 accessed 11 July 2023.
[51] P Acirokop 'The Potentials and Limits of Mato Oput as a Tool for Reconciliation and Justice' in S Parmar et al (eds) *Children and Transitional Justice* (2010) 253 https://www.unicef-irc.org/publications/pdf/tj_publication_eng.pdf accessed 1 June 2023.
[52] MA Baderin 'International Criminal Justice and Accountability in Africa: Balancing Legal Idealism and Legal Realism' in R Manjoo et al (eds) *Criminal Justice and Accountability in Africa: Regional and National Developments* (2022) 29.

Furthermore, Acirokop expresses the concerns of those she interviewed who are doubtful on the capacity of traditional justice mechanisms to adequately provide justice for all the atrocities committed.[53] Their reason for the concerns is that traditional justice processes were never meant to address gross human rights violations. This means that the traditional justice mechanisms alone may also not offer justice unless used alongside judicial mechanisms.[54] Each mechanism used in isolation may not offer absolute justice as Acirokop argues that excessive reliance on traditional justice mechanisms could lead to devastating results but nonetheless it is prudent to admit the potential of traditional justice mechanisms and religious approaches and to acknowledge that they complement the formal judicial mechanisms.[55] Acirokop's assertion shows the potential that traditional justice mechanisms have in addressing international crimes if explored alongside the formal justice systems such as the ICC.

Ruhweza further proposes that the ICC should adopt a purposive interpretation of the concept of complementarity so that the Court is able to consider non-prosecutorial interventions.[56] This could have made it possible for the OTP to find Uganda willing and able to address the situation as enshrined under article 17 of the Rome Statute. Additionally, Lubaale states that initially, it could be assumed that the principle of complementarity under the ICC context envisions traditional justice mechanisms. However, on closer analysis, complementarity has been interpreted to operate only if the locality is investigating with an eye towards criminal prosecutions and not traditional justice mechanisms.[57] Therefore traditional justice mechanisms at the national level can only stop the ICC from prosecuting if they constitute criminal prosecutions.

Even though scholars believe in the complementarity between traditional justice and the ICC, they have not examined how traditional justice should be applied alongside the ICC especially in the context of the *Ongwen* case which remains the focal point of this study.

1.7 Methodology

The study is based on desk research and is qualitative in nature. It relies on information from both primary and secondary data sources. The primary data sources include the proceedings and rulings of the *Ongwen* case and secondary data sources include books, journal articles and reports among others. Data obtained

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[53] Acirokop (n 51) 288-289.
[54] As above.
[55] As above, 292.
[56] DR Ruhweza 'Situating the Place for Traditional Justice Mechanisms in International Criminal Justice: A Critical Analysis of the implications of the Juba Peace Agreement on Reconciliation and Accountability' PhD thesis, University of Kent, 2016 21. https://kar.kent.ac.uk/56646/1/172Situating%20the%20Place%20for%20Traditional%20Justice%20Mechanisms%20in%20International%20Crimi.pdf accessed 13 November 2023.
[57] EC 'Lubale Legal Pluralism as a Lens Through Which to understand the Role and Place of Traditional Justice Mechanisms in International Criminal Justice' (2020) *The Journal of Legal Pluralism and Unofficial Law* 2 https://doi.org/10.1080/07329113.2020.1780387 accessed 15 November 2023.

from these sources are examined through a structured analytical approach which involves the analysis of traditional justice mechanisms and the *Ongwen* case to determine the extent of the complementarity between traditional justice and the ICC towards the delivery of a holistic form of justice.

1.8 Scope of the Study

The study explores the complementarity of the ICC and traditional justice mechanisms of the Acholi tribe in northern Uganda to which Ongwen belongs. The study however acknowledges that there are several traditional justice mechanisms among different tribes in northern Uganda.

1.9 Limitation of the Study

The use of interviews in this research would have immensely contributed to the findings. Regrettably, the researcher lacks the logistics and financial resources to achieve that. Moreover, the possibility to conduct interviews virtually is not feasible due to the lack of internet accessibility in the community where the respondents live. Data from sources indicated in the research methodology have therefore been critically analysed to achieve the objectives of the study.

1.10 Significance of the Study

The study contributes to the discourse on how traditional justice mechanisms can be implemented alongside the ICC. It further seeks to addresses the concerns of some of the victims who are not content with the decision of the ICC not to apply traditional justice mechanisms in the *Ongwen* case. The study further provides additional grounds to reduce the scepticism around complementarity of ICJ and traditional justice systems.

1.11 Structure (Overview of Chapters)

The research comprises 5 Chapters as described below:

Chapter one gives a general introduction.

Chapter two examines the scope of traditional justice as practised in northern Uganda, its strengths and shortcomings and its nexus with ICJ in the context of the LRA conflict.

Chapter three evaluates the possibility of addressing international crimes through traditional justice.

Chapter four analyses the *Ongwen* case through a traditional justice lens.

Chapter five provides the general conclusion and recommendations.

CHAPTER 2

THE NEXUS BETWEEN TRADITIONAL JUSTICE AND INTERNATIONAL CRIMINAL JUSTICE

2.1 Introduction

This chapter aims to show the relationship between traditional justice and international criminal justice (ICJ). Firstly, it defines traditional justice and discusses its nature to give a proper understanding of traditional justice mechanisms. The chapter then explores the Acholi historical approach to justice to put the Acholi traditional justice mechanisms into context. The Acholi traditional justice mechanisms are then explained with a focus on their relevance in providing justice. The pros and cons of traditional justice are further examined to offer an informed discussion on whether traditional justice mechanisms can meet the ICJ standards. The primary focus of all the above discussions is to analyse the link between traditional justice mechanisms and ICJ to effectively interrogate if traditional justice could be used to complement the ICC or address international crimes such as those committed during the LRA conflict. The chapter acknowledges the role of ICJ in prosecuting international crimes and revisits the Juba Agreement which prescribed the use of traditional justice mechanisms to address crimes committed during the LRA conflict as discussed in chapter 1. Finally, the chapter analyses the threshold that traditional justice mechanisms must satisfy to meet the ICJ standards.

2.2 Understanding Traditional Justice

Traditional justice is a type of justice system that exists at the community level but that has not been set up by the state.[58] It includes local mechanisms used by communities for adjudication of disputes and restoration of loss caused by violence.[59] Traditional justice mechanisms are dependent on customs, traditions, values, norms, and rules of a given community that have been practised over time and deemed customary law.[60] Some customary laws that govern traditional justice mechanisms are oral while others have been written and codified. Traditional justice mechanisms which rely on oral customary law may be referred to as 'living customary law'.[61] However, both the oral and codified customary law have been critiqued in that although

[58] United Nations Human Rights Office of the High Commissioner (OHCHR) *Human Rights and Traditional Justice Systems in Africa* (2016) 6 https://www.ohchr.org/sites/default/files/Documents/Publications/HR_PUB_16_2_HR_and_Traditional_Justice_Systems_in_Africa.pdf accessed 28 July 2023.
[59] African Union Transitional Justice Policy (AU TJ Policy) para 18 https://au.int/sites/default/files/documents/36541-doc-au_tj_policy_eng_web.pdf accessed 16 September 2023.
[60] OHCHR (n 58) 1.
[61] As above.

living customary law is flexible and keeps evolving, it is not predictable unlike the codified customary law which is predictable but also not flexible.[62]

Customary law has been recognised by the Human Rights Committee (HRC) in General Comment 32[63] as one of the two other legal systems besides the formal legal system.[64] The HRC places an obligation on states that recognise courts based on customary law to ensure that such courts do not deliver binding judgments unless:

> Proceedings before such courts are limited to minor civil and criminal matters, meet the basic requirements of fair trial and other relevant guarantees of the International Covenant on Civil and Political Rights (ICCPR), and their judgments are validated by State courts considering the guarantees set out in the Covenant and can be challenged by the parties concerned in a procedure meeting the requirements of article 14 of the ICCPR.[65]

In Uganda for instance, traditional justice mechanisms are regulated by customary law which includes rules of conduct with force of law, not part of common law nor legislation but established by customs and usage over a period.[66] However, customary laws that are inconsistent with the Constitution of the Republic of Uganda are null and void.[67] This means that traditional justice systems which are regulated by customary law must respect human rights including the right to a fair trial and non-discrimination.

Traditional justice mechanisms are a vital system through which transitional justice can take place[68] and should be used to complement formal mechanisms in accordance with the African Charter on Human and Peoples' Rights (ACHPR) and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) to achieve justice, healing and reconciliation that post-conflict communities need.[69] This places an emphasis that in the use of traditional justice mechanism, human rights standards should always be respected and processes that are not in accordance with human rights instruments such as the ACHPR and the Maputo Protocol should be discouraged.

Generally, transitional justice as stated above include formal and traditional measures that societies adopt after inclusive consultations to overcome violations, divisions, and inequalities they faced in the past and These measures also lead to the creation of favourable conditions for transformation in post conflict societies.[70] Transitional justice is commonly used by countries when transitioning from violent conflicts

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[62] As above.
[63] United Nations Human Rights Committee (HRC), General Comment 32, Article 14 on Right to equality before courts and tribunals and to fair trial 23 August 2007 CCPR/C/GC/32 https://www.refworld.org/docid/478b2b2f2.html accessed 28 July 2023.
[64] OHCHR (n 58) 6.
[65] HRC (n 63) paragraph 24.
[66] Section 2 of the Local Councils Courts Act 13 of 2006.
[67] Article 2(2) of the Constitution of the Republic of Uganda.
[68] A Tripoel & S Pearson 'What Do You Think Should Happen? Public Participation in Transitional Justice' (2010) 22 *Pace International Law Review* 123 https://digitalcommons.pace.edu/pilr/vol22/iss1/3/ accessed 6 August 2023.
[69] AU TJ Policy (n 59) para 18.
[70] As above, para 19.

and in the quest to address gross human rights violations. Transitional justice encompasses the total scope of processes such as traditional justice mechanisms related with a society's endeavours to come to terms with a legacy of massive abuses, in order to guarantee accountability, justice and reconciliation.[71] Just like all transitional justice processes, traditional justice seeks to recognise the victims, achieve reconciliation and prevent new violations as the processes are context specific and focused on the needs of the victims.[72]

Furthermore, traditional justice mechanisms are quite varied as there are circumstances under which such mechanisms may be accurately distinguished as courts and others where the forum is like structured effort by community leaders to resolve wrongful acts through fair and extensive negotiation.[73] Additionally, traditional justice mechanisms are characterised by community leaders steering the decision-making process through public participation of all members of the affected community with the aim to achieve reconciliation and at the same time maintaining harmony.[74] The reason behind this is that crimes or wrongs are a community affair and cannot be resolved as a bilateral affair.[75] The understanding is that a crime affects the entire community and not just the victim and perpetrator.

Traditional justice mechanisms may be governed by the state and recognised as part of the legal order and as such the decisions made are legally binding.[76] In such instances, the practice of traditional justice is regulated through limits on jurisdiction such as subject matter or personal. States such as Malawi, Namibia and Zambia follow a vertical structure whereby traditional justice systems form the lowest level of their court system whereas Uganda follows a parallel structure in that traditional justice systems and the formal system serve alongside each other and provide interested parties with a choice of forum.[77] This means that in a parallel structure like Uganda, victims have a choice to identify which mode of justice they prefer when they are offended.

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[71] United Nations Security Council 'The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies' 23 August 2004 4 https://documents-dds-ny.un.org/doc/UNDOC/GEN/N04/395/29/PDF/N0439529.pdf?OpenElement accessed 6 August 2023.

[72] United Nations Human Rights Office of the High Commissioner 'Transitional Justice and Human Rights' https://www.ohchr.org/en/transitional-justice#:~:text=Transitional%20justice%20aims%20to%20provide,the%20prevention%20of%20new%20violations. Accessed 10 August 2023.

[73] OHCHR (n 58) 14.

[74] As above 17.

[75] A Szpak 'Indigenous and Tribal Mechanisms of Transitional Justice: Filling the Gaps in Formal Justice Systems' in R Manjoo et al (eds) *Criminal Justice and Accountability in Africa: Regional and National Developments* (2022) 44.

[76] OHCHR (n 58) 2.

[77] As above 13.

Some traditional justice mechanisms have been modified to handle international crimes such as genocide.[78] An example was the *gacaca*[79] as used in Rwanda after the genocide. *Gacaca* courts were formalised to try the perpetrators of international crimes such as genocide and crimes against humanity between 1 October 1990 to 31 December 1994.[80] The new *gacaca* was governed by state intervention and institutionalised as it incorporated both customary aspects of handling disputes and the formal justice system.[81] The law that first established the *gacaca* courts was the Organic Law (Establishing the Organisation, Competence and Functioning of *Gacaca* Courts Charged with Prosecuting and Trying the Perpetrators of the Crime of Genocide and other Crimes Against Humanity, committed between 1 October 1990 and 31 December 1994).[82] The nature of the *gacaca* courts and how they operated to address crimes committed during the genocide in Rwanda is further discussed in chapter 3.

Over the years and because of emerging crimes such as international crimes, many traditional justice mechanisms have evolved. Due to such evolvements, some of the mechanisms such as *gacaca* in Rwanda as mentioned above have been in contestation on whether they are still traditional justice mechanisms because of the modification to create the new *gacaca*.[83] This has been justified by the notion that tradition keeps evolving through interactions with other traditions and that practices are influenced by the political, social, economic and cultural environment.[84] The new *gacaca* for example as practised in Rwanda was the old traditional justice mechanism that was remodelled through state intervention and designed to deal with post genocide issues. This was because a need arose to remodel the *gacaca* courts after the genocide since they had originally not been designed to handle gross human rights violations and international crimes. This shows that as societies progress, traditional justice mechanisms can be adapted to the needs of the changing society since many of the traditional practices were inspired by the circumstances at the time they were developed.

It is important to note that most of the traditional justice mechanisms are inspired by spiritual beliefs of a particular community which determine the ceremony and the rituals performed.[85] As discussed below, many of the Acholi traditional justice mechanisms are associated with a spiritual being and the processes usually

[78] C Garuka 'Genocide as Prosecuted by the International Criminal Tribunal for Rwanda and Gacaca Courts in Rwanda' in C Murungu & J Biegon (eds) *Prosecuting International Crimes in Africa* (2011) 223.
[79] *Gacaca* means 'justice on the grass' and was derived from the word *umugaca* referring to a soft plant that people preferred to sit on during gatherings to restore order and harmony.
[80] B Ingelaere 'The Gacaca Courts in Rwanda' in L Hyse & M Salter (eds) *Traditional Justice and Reconciliation after Violent Conflict: Learning from African Experiences* (2008) 38.
[81] Garuka (n 78) 223.
[82] No. 40/2000 of 26 January 2001.
[83] Szpak (n 75) 45.
[84] Ingelaere (n 80) 32.
[85] OHCHR (n 58) 10.

entail appeasing the gods to cancel bad luck that the offence committed may create. Some of the various traditional justice mechanisms as practised by the Acholi of northern Uganda are discussed in this chapter.

2.3 The Acholi Historical Approach to Justice in Uganda

Historically, the Acholi believed in divine spirits *jok* which played a critical role in defining justice.[86] The Acholi believed that the divine spirits would cause misfortune or illness, *cen,* when something wrong is done and no action is taken by the elders plus the offender and their clan. Justice was viewed as a way of restoring social relationships, encouraging forgiveness and discouraging revenge.[87] Justice was actually done for *ber bedo*, which means restoration of harmony and this was the practice within the Acholi community and even extended to conflicts with other tribes.[88] In order to end inter-tribal conflicts, elders from both the Acholi and the opposing tribe such as the Madi or Langi would gather to discuss the cause of the conflict and come up with strategies to end the conflict. After the mediation process, the mediator would then bend the spear, *gomo tong,* to indicate an end to the inter-tribal conflict.[89]

The Acholi culture defined the rights of the Acholi people, *twero,* which were a collection of norms and traditions.[90] The idea of rights placed more emphasis on roles and responsibilities. Therefore, justice was dispensed to ensure compliance with one's roles and responsibilities within the community. Notably, although the Acholi are a patriarchal community, women participated in community matters and were represented in the council of elders by a *rwot mon* or *lawi mon* who spearheaded women issues.[91]

The Acholi justice system encompasses principles and practices that encourage reconciliation and amnesty.[92] The traditional chiefs *rwodi* facilitated mediations amongst parties when offences were reported for example when homicides happened, the *rwodi* would intervene and mediate the matter between the parties.[93] During the British colonial rule in the early 1900s, the British appointed new chiefs called *rwodi kalam*[94] but despite their appointment, the legitimacy of the culturally appointed *rwodi* was maintained.

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[86] P Tom 'The Acholi Traditional Approach to Justice and the War in Northern Uganda' *Beyond Intractability Substack Newsletter* (2006) https://www.beyondintractability.org/casestudy/tom-acholi accessed 7 August 2023.
[87] As above.
[88] Liu Institute for Global Issues (LIGI) et al 'Roco Wat I Acoli, Restoring Relationships in Acholi-land: Traditional Approaches to Justice and Reintegration' (2005) 17 https://sppga.ubc.ca/wp-content/uploads/sites/5/2016/03/15Sept2005_Roco_Wat_I_Acoli.pdf accessed 12 August 2023.
[89] As above.
[90] The Cross-Cultural Foundation of Uganda (CCFU) 'Women, Culture and Rights in Acholi' (2017) 6. https://crossculturalfoundation.or.ug/docs/Women-Culture-and-Rights-in-Acholi-2017.pdf accessed 1 September 2023.
[91] As above, 6.
[92] B Afako 'Reconciliation and Justice: 'Mato oput' and the Amnesty Act' in O Lucima (ed) *Protracted Conflict, Elusive Peace: Initiatives to end the violence in Northern Uganda* 67 https://rc-services-assets.s3.eu-west-1.amazonaws.com/s3fs-public/Protracted_conflict_elusive_peace_Initiatives_to_end_the_violence_in_northern_Uganda_Accord_Issue_11.pdf accessed 6 August 2023.
[93] As above.
[94] S Komujuni 'To be a Chief and to Remain a Chief: The Production of Customary Authority in Post-Conflict Northern Uganda' unpublished phD thesis, Ghent University (2019) 51 https://core.ac.uk/download/pdf/196520307.pdf accessed 28 August 2023.

The 1995 Constitution of the Republic of Uganda[95] which supports traditional leaders has also contributed to the revival of the *rwodi* among the Acholi and given them legitimacy under the law.

2.4 The Acholi Traditional Justice Mechanisms

Justice according to the Acholi traditional justice system means the fair sharing of both the gains and afflictions among the people in the community. This emanates from the social philosophy which looks at crime as a personal and social issue.[96] Both the communal responsibility and individual responsibility principles emerge from this social philosophy. Based on the communal responsibility principle, both social welfare or deprivation and individual welfare or deprivation affect the whole community. Similarly, crimes committed by individual members in the community affect everyone in that community and crimes committed by members of a given community negatively affect everyone who belongs to that community. On the other hand, the Acholi also endorse the individual responsibility principle which provides that an individual or their immediate family should be liable for crimes committed by that individual against the members of the individual's community.[97] It is against this backdrop that the Acholi have a plethora of traditional justice mechanisms and a few of them that are relevant in the context of this research are discussed below.

Mato oput is a traditional justice mechanism practised by the Acholi based on forgiveness and reconciliation.[98] *Mato oput* loosely translated means 'drinking the bitter herb'. The goal of *mato oput* is to restore relationships that have been destroyed between clans because of a killing. The ritual is carried out after a mediation and negotiation process between the parties and thus marks the crowning of a successful reconciliation. The ritual is dependent on the success of the mediation and the readiness of the offender and their clan to accept responsibility for the crime and ability to pay compensation to the victim.[99] Culturally, every family within the clan is required to contribute to the compensation since it is believed that the killing affects everyone within the clan. Once this is concluded, a date is then agreed on for the ceremony. The ceremony of *mato oput* involves the offender acknowledging the wrong committed and taking responsibility for it and in the end the parties drink the bitter herb to symbolise a bitter past and the start of peace between the offender and the victim.[100] The actual ritual involves confession, mediation, and compensation of the victim *culo kwor* which is important in achieving peace and justice.[101] From the foregoing, *mato oput* can

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[95] Article 246 (1) provides that the institution of traditional leader or cultural leader may exist in any area of Uganda in accordance with the culture, customs and traditions or wishes and aspirations of the people to whom it applies subject to the provisions of the Constitution.
[96] Lajul (n 41) 28.
[97] As above, 29.
[98] Szpak (n 75) 50.
[99] T Harlacher et al *Traditional Ways of Coping in Acholi: Cultural Provisions and Healing from War* (2006) 80.
[100] Szpak (n 75) 50-51.
[101] D Pain *The Bending of Spears: Producing Consensus for Peace and Development in Northern Uganda* (1997) 58.

only be performed when there is a known offender and a known victim which may be difficult with the LRA since many returnees (offenders) may not know the exact victims. Since it is clan based, it may also be hard to perform it in situations where the offender and the victim are within the same clan as was the case with the LRA conflict.

Nyono tonggweno which loosely translated means 'stepping of the egg' is a ceremony conducted to welcome a family member who has been away for a long time.[102] The purpose of this is to receive the family member, ensure reconciliation and inclusivity. This ceremony has been performed to welcome returnees from the LRA such as brigadiers Banya and Sam Kolo.[103] The practice is that the returnee steps on the egg *tonggweno* placed on a slippery branch *opobo* and a forked shaped stick used to open granaries *layebi*. The egg symbolises purity, the *opobo* which is a soapy and slippery branch cleanses the returnee and the *layebi* symbolises sharing food together again as a family.[104] Although this traditional justice mechanism ensures reconciliation, it is not sufficient and so a more effective ceremony like *mato oput* is required later.[105]

One of the most elaborate traditional justice mechanisms among the Acholi is *kwero merok*.[106] It is a cleansing ritual for warriors returning from war and lasts three days if the warrior is male and four days if the warrior is female.[107] The Acholi believe that a warrior who has murdered people or passed next to the dead should undergo this ceremony to cleanse them from evil spirits which could bring bad omen to the warrior and their family.[108] This ritual was traditionally not performed for a warrior who kills members of their family or clan. However, with the LRA, an exception was made, and the ceremony was performed on returnees who had done so and suffered from extreme psychological distress.[109] Firstly, the returnees narrate to their families what transpired while they were with the LRA including the murders they may have executed. The family members then report the matter to the elders who then review the information and decide if the ceremony of *kwero merok* is necessary. [110] However, the truth telling process is limited to the family members and elders only. This marginalises the general community that may have an interest in the matter and may compromise peaceful coexistence.

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[102] Latigo (n 1)105, see also LIGI (n 88) 26.
[103] Harlacher (n 99) 65.
[104] LIGI (n 88) 26.
[105] Latigo (n 1) 106.
[106] Acirokop PhD Thesis (n 8) 204.
[107] As above.
[108] W Khamalwa & E Ndossi 'Why Acholi Traditional War rituals Cannot Reintegrate Female Lord's Resistance Army Combatants: A Case Study of Kwero Merok War Ritual' (2021) 4 *East African Journal of Traditions, Culture and Religion* 72 https://www.researchgate.net/publication/356122729_Why_Acholi_Traditional_War_Rituals_Cannot_Reintegrate_Female_Lord's_Resistance_Army_Combatants_A_Case_Study_of_Kwero_Merok_War_Ritua accessed 2 September 2023.
[109] As above.
[110] As above.

2.5 Pros and Cons of Traditional Justice Mechanisms

Traditional justice mechanisms as described above have both strengths and weaknesses. The proponents of traditional justice often advance the following reasons in support of their arguments.

Traditional justice mechanisms foster dialogue and inclusivity which are essential for conflict resolution and peace.[111] They also promote unity through permitting public community participation and providing community focused solutions.[112] Furthermore, traditional justice mechanisms enable the confession of the truth and as such aid the victims to handle their emotions by offering the information that they may need to heal.[113] The practice of traditional justice also strengthens and empowers a community through giving them a sense of belonging and communal ownership.[114] Peace and reconciliation is fostered through traditional justice, and this is the best option for communities as both the victims and perpetrators must continue living in harmony and coexist within the community. Traditional justice mechanisms may also be considered more legitimate as they are influenced by the cultures, norms, and traditions of the affected community. One thing that cuts across is that traditional justice mechanisms are community centred and encourage the sustainability of a community as they minimise retribution.

However, traditional justice mechanisms also have some shortcomings that are usually advanced by the opponents of the practices.

The opponents contend that the mechanisms are specific to a given culture and tribal group and as such it is not possible for people who belong to a different tribal group to acknowledge it.[115] The processes also depend on elders who are the custodians, and the traditional practices vary among the different clans even within the same tribal group.[116] The lack of a codified law in place to govern the procedures of the various traditional justice mechanisms may lead to inconsistency and non-uniformity in its practice. Traditional justice mechanisms may also violate human rights such as the right to a fair trial as there is usually no legal representation.[117] Additionally, in most communities, traditional justice processes are patriarchal and discriminatory against women and children.[118] In an attempt to achieve peace and reconciliation, the punishments meted out during traditional justice processes may be weak and this could lead to recidivism especially with processes that hold the entire clan responsible such as *mato oput* as seen above. This promotes community criminal responsibility rather than individual criminal responsibility and is also

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[111] Latigo (n 1) 112.
[112] As above.
[113] Szpak (n 75) 53.
[114] As above 54.
[115] Latigo (n 1) 113, see also Trial Chamber IX (n 38) Paragraph 30.
[116] Latigo (n 1) 113.
[117] Szpak (n 75) 56.
[118] K Carlson & D Mazurana 'Accountability for Sexual and Gender-based Crimes by the Lord's Resistance Army' in S Parmar et al (eds) *Children and Transitional Justice* 253.

contrary to article 25 of the Rome Statute that provides for individual criminal responsibility rather than community criminal responsibility.

2.6 Exploring the Nexus between Traditional Justice and International Criminal Justice in the Context of the LRA Conflict

In order to draw the complementarity between traditional justice and the ICJ, it is critical that the nexus between the two is established. Briefly, ICJ may be described as the international community and other communities' response to mass atrocity.[119] ICJ focuses on prosecuting international crimes and gross human rights abuses such as those that were committed during the LRA conflict.[120] The debate on the relationship between ICJ in the context of the ICC and traditional justice emanates from the Rome Statute's requirement that the ICC should act in the 'interest of justice' and in the 'interest of the victims'.[121] The phrase 'interest of justice' as used in the Rome Statute seems to raise two questions; whether interest of justice means retributive justice or whether a wider meaning of justice can be considered.[122] In transitional societies, the phrase 'interest of justice' could be incorporated to include truth commissions[123] and other forms of justice such as traditional justice.

As elaborated above, the Acholi have several traditional justice mechanisms that have been practised since time immemorial and the efforts to codify these and explore their position in relation to ICC were awakened following the LRA conflict.[124] These efforts were formalised in the 2007 Agreement on Accountability and Reconciliation[125] between the Government of the Republic of Uganda and the LRA (Juba Agreement). The Juba Agreement laid a basis for finding a compromise between the victim's traditional justice needs and ICJ standards. The parties to the Juba Agreement agreed that reconciliation and accountability would be pursued locally through the formal and informal legal structures.[126] The Ugandan Government as a party was further obliged to establish the ICD which could be complemented by traditional justice mechanisms that would be legally recognised.[127]

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[119] G Boas & P Chifflet *What is International Criminal Justice?* (2017) 1 https://www.elgaronline.com/display/9781785360626/08_chapter1.xhtml accessed 26 August 2023.
[120] University of Lincoln 'What is the Role of International Criminal Justice Systems' (2022) https://online.lincoln.ac.uk/what-is-the-role-of-international-criminal-justice-systems/ accessed 26 August 2023.
[121] See Articles 53, 54, 55, 61, 65, 67 and 68 of the Rome Statute.
[122] D Đukic 'Transitional Justice and the International Criminal Court- in the interests of justice'?' (2007)89 *International Review of the Red Cross* 696.
[123] As above, 697.
[124] T Allen 'Post- Conflict Traditional Justice: A Critical Overview' *The Justice and Security Research Programme (JSRP)* Paper 3 18.
[125] Clause 3.1 of the agreement provides 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.
[126] K Peschkle 'The ICC Investigation into the Conflict in Northern Uganda: beyond the dichotomy of peace versus justice' in BS Brown (ed) Research Handbook on International Criminal Law (2011) 187.
[127] As above.

An annex to the Juba Agreement (the annex) was signed on 19 February 2008 between the Ugandan Government and the LRA again to put more emphasis and expound on the clauses in the original agreement.[128] Clause 23 of the annex placed an obligation on the Ugandan Government to ensure that serious crimes committed by the LRA during the conflict are handled by the ICD, traditional justice mechanisms and other alternative mechanisms[129] mentioned in the original Juba Agreement.[130] The annex obligated the Ugandan Government to conduct consultations to determine the most appropriate role for traditional justice mechanisms as well as their effect on both women and children.[131]

Traditional justice presented a better opportunity to achieve justice among the Acholi.[132] This was because unlike other usual conflicts, with the LRA conflict, it was quite hard to distinguish the victims and the perpetrators as most of the Acholi accept that majority of the combatants in the LRA army were civilians who were forcefully abducted and are also victims of the conflict. All the Acholi households had at least a member who had been abducted and unwillingly recruited in the LRA. As a result, most Acholi chose to promote reconciliation instead of retributive justice that they felt ICJ offered.[133]

It is therefore imperative to understand the threshold that traditional justice mechanisms must satisfy in order to meet the ICJ standards.[134] This threshold is dual as proposed by Hovil and Quinn: the procedural standard and accountability standard. [135] The procedural standard focuses on the procedures and protocols in implementing traditional justice mechanisms and the accountability standard focuses on punishing the criminals.[136] In determining the procedural standard, article 14 of the International Covenant on Civil and Political Rights (ICCPR)[137] which provides for the right to equality before courts and tribunals and to a fair trial is a key determinant. This is supplemented by the Rome Statute which forms the basis of procedural and accountability standards to be maintained by the ICC.[138]

Article 14(1) of the ICCPR guarantees the right of all persons to be treated equally before any court in the determination of any criminal charge against them. The hearing must be fair and public in a competent, independent, and impartial court that has been established by law. The accused person shall also be

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[128] As above.
[129] Paragraph 5.3 of the annex provides that Alternative justice mechanisms shall promote reconciliation and shall include traditional justice mechanisms, alternative sentences, reparations, and any other formal institutions or mechanisms.
[130] Amnesty International (n 21) 18.
[131] See Clauses 2.4, 3.1 & 14.1 of the Juba Agreement and Paragraphs 19 and 20 of the annex to the Juba Agreement.
[132] Afako (n 92) 64.
[133] As above.
[134] L Hovil *et al* 'Peace First, Justice Later' *Refugee Law Project Working Paper No. 17* (2005) 40 https://www.refugeelawproject.org/files/working_papers/RLP.WP17.pdf accessed 7 September 2023.
[135] As above.
[136] As above, 40-41.
[137] Ratified by Uganda on 21 June 1995.
[138] Hovil (n 134) 41.

presumed innocent until proved guilty[139] and will be entitled to these minimum guarantees: informed promptly and explicitly of the charge in a language they understand; adequate time and facilities to prepare their defence and communicate with their own counsel; trial without undue delay in their presence and a right to defend themselves in person or through their own chosen legal counsel. During the trial, the accused has a right to examine witnesses, have the free assistance of an interpreter if they do not understand or speak the language used in court and not to be compelled to testify against themselves or to confess guilt.[140] Article 14(4) specifically provides that if the accused is a juvenile, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation. A person who has been convicted has a right to have their conviction and sentence reviewed by a higher court.[141] Moreover, when a conviction is reversed or the convict pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, they shall be compensated unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to them.[142] Finally, a person cannot be tried or punished again for an offence they have already been convicted or acquitted in accordance with the law and penal procedure of each country.[143]

A close assessment of the Acholi traditional justice mechanisms with the tenets of a fair trial outlined in article 14 of the ICCPR could determine whether it satisfies ICJ standards. The Acholi traditional justice system ensures equality and public participation is encouraged throughout the trials. However, the participation of women is minimal given that the society is a patriarchal society. The traditional justice mechanisms seem to guarantee the presumption of innocence as the accused is given a chance to present their case and is informed of the charges in Acholi which is spoken by most of the people. However, this presents a difficulty in diverse or cosmopolitan communities where victims and perpetrators belong to different tribal groups.[144] Additionally, the accused is also given adequate time to prepare their defence, tried without undue delay in their presence and those of the family members, given an opportunity to examine witnesses and not compelled to testify against themselves.[145] However, the fact that the accused does not have legal representation compromises the quality of defence preparation and examination of witnesses which in turn violates article 14 of the ICCPR as seen above. Additionally, the protocols observed in circumstances where the accused is a juvenile are not clear and paths for reviewing or appealing a decision are not established.

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139 Article 14(2).
140 Article 14(3).
141 Article 14(5).
142 Article 14(6).
143 Article 14(7).
144 Hovil (n 134) 42.
145 As above.

An issue that may also arise from the above assessment is that if traditional justice mechanisms satisfy ICJ standards and are implemented, then a case of double jeopardy could be argued under article 14(7) of the ICCPR if the same persons tried under the traditional justice system are tried again at the ICC. Furthermore, article 17(1)(c) of the Rome Statute obliges the ICC to declare a case inadmissible if the accused has already been tried for the same offence.[146] This presents a strong case for the ICC and traditional justice mechanisms to collaborate to protect the rights of the accused. The victims' perceptions that justice has been served and that the perpetrators are being held accountable is very key in such circumstances.[147] Traditional justice mechanisms therefore may meet the procedural and accountability standards with some minimal modifications so that they successfully satisfy all ICJ standards.

2.8 Conclusion

Traditional justice mechanisms have existed since time immemorial among the Acholi and were developed back then to address disputes and conflicts that societies faced. Historically, African societies were organised in tribal groups such as the Acholi and as such it was easy for all members of the group to know and follow the laws governing their society. It was therefore easy for the traditional justice mechanisms to be implemented as it was considered justice by the entire society. Additionally, states and international crimes were not envisaged in the traditional set ups, and this explains why the traditional justice mechanisms were originally not designed to handle such large atrocities and human rights violations. It is thus very key that these traditional justice mechanisms are modified to meet the new challenges that tribal groups within the states are facing under the ICJ regime. In so doing, identified key gaps of traditional justice mechanisms in meeting the ICJ standards especially those set out under article 14 of the ICCPR should be bridged and its strengths appreciated. States can play a key role in revising traditional justice mechanisms to fit within the legal structure since in contemporary times, tribes exist under states unlike the pre-colonial times.

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[146] As above, 45-46.

[147] United Nations Office on Genocide Prevention and the Responsibility to Protect 'Accountability for Atrocity Crime' https://www.un.org/en/genocideprevention/accountability.shtml accessed 5 September 2023.

CHAPTER 3

ADDRESSING INTERNATIONAL CRIMES THROUGH TRADITIONAL JUSTICE

3.1 Introduction

This chapter aims to explore the possibility of addressing international crimes through traditional justice. It starts by discussing the notion of traditional justice and international crimes and lists the international crimes as provided for in the Rome Statute. The chapter acknowledges that the discussion on using traditional justice to address international crimes began way before the establishment of the ICC as will be seen in Rwanda and Sierra Leone. It further discusses challenges that were posed by traditional justice mechanisms in addressing international crimes committed during the LRA conflict. The chapter then seeks to draw lessons from Rwanda by investigating how the traditional justice mechanism of *gacaca* courts were used to address international crimes alongside the International Criminal Tribunal for Rwanda. Similarly, the chapter also draws lessons from the use of traditional justice mechanisms in Sierra Leone alongside the Truth and Reconciliation Commission and the Special Court for Sierra Leone.

3.2 Traditional Justice and International Crimes

The Rome Statute establishes the core international crimes under article 5 and these include the crime of genocide, crimes against humanity, war crimes and the crime of aggression. According to article 5 of the Rome Statute, the listed international crimes are within the jurisdiction of the ICC. International crimes which qualify as *jus cogens*[148] constitute *obligatio erga omnes*[149] and this creates a duty to prosecute or extradite.[150] This obliges the ICC or states to prosecute and address international crimes as they are a concern to the entire international community.

The discussions on traditional justice being used to address international crimes were revitalised by the creation of the ICC.[151] Although traditional justice was applied alongside the International Criminal Tribunal for Rwanda (ICTR) and the Special Court for Sierra Leone (SCSL), as will be seen in this chapter, the ICC invigorates the discussion on the applicability of traditional justice in addressing international crimes. This is buttressed by the wording of the Rome Statute which requires the ICC to act 'in the interests of justice'[152] without explaining what that means.[153] Moreover, the Rome Statute has provided a platform

[148] Peremptory norm of general international law accepted and recognised by states as a norm from which no derogation is allowed.
[149] Obligations that states have towards the international community.
[150] MC Bassiouni 'International Crimes: 'Jus Cogens' and 'Obligatio Erga Omnes' (1996) 59 *Accountability for International Crimes and Serious Violations of Fundamental Human Rights* 63 https://www.jstor.org/stable/1192190 accessed 18 September 2023.
[151] Allen (n 124) 5.
[152] Article 53(1)(c) and (2)(c) of the Rome Statute.
[153] Allen (n 124) 5.

for arguments on traditional justice in relation with the duty of the ICC to act in a way that is complementary to national criminal jurisdictions.[154] This presents a ground for traditional justice and the ICC to complement and supplement each especially if traditional justice mechanisms are part of the national criminal standards.

Traditional justice mechanisms that are performed in accordance with ICJ standards play a key role in responding to international crimes and promoting reconciliation within a community as they encourage truth telling and reintegration.[155] These elements are very key especially in circumstances where the perpetrators and the victims must coexist within the same community. Furthermore, traditional justice may be a preferred option by victims of international crimes within a given community because it is culturally relevant and built on customs of reconciliation in close community setups where both the perpetrators and victims live together.[156] These traditional justice mechanisms are very useful in transitional communities as they have been used for several years to promote community sustainability.

Numerous and widespread atrocities make it hard for all perpetrators to be held accountable especially with the ICC for example the arrest warrants in the LRA situation were issued against Joseph Kony (the LRA leader), Vincent Otti (Second-in-Command) and three other commanders namely, Raska Lukwiya, Okot Odhiambo and Ongwen only.[157] Many of the perpetrators have not been tried even in the formal national courts with the exception of Thomas Kwoyelo who is still under trial as discussed in chapter 1. Traditional justice mechanisms therefore are vital in supplementing the formal courts in such instances for example the gacaca courts in Rwanda supported the formal courts and the ICTR with the overwhelming cases as is later discussed in this chapter.

Notably both the ICC and traditional justice seek to uphold peace and ensure some form of justice. In both systems, no impunity is allowed as those who commit crimes are found guilty and punished or pardoned accordingly.[158] Remarkably, traditional justice mechanisms include mediation which enable individuals to solve problems and ensure that a wider societal balance is accomplished.[159] Apart from mediation, compensation is also another central part of traditional justice processes among the Acholi and is a precondition for reconciliation.[160] For example for the *mato oput* ceremony to be performed, the perpetrator must have agreed to pay compensation to the victim. This means that although the traditional justice

[154] Article 1 of the Rome Statute.
[155] Amnesty (n 21) 18.
[156] Allen (n 124) 6.
[157] Statement by Chief Prosecutor Luis Moreno-Ocampo (n 31).
[158] Uganda Law Society (ULS) & Friedrich Ebert Stiftung 'International Justice Systems & The International Criminal Court: Opportunities and Challenges for Uganda' 5 https://library.fes.de/pdf-files/bueros/uganda/05917.pdf accessed 10 August 2023.
[159] Hovil (n 134) 39.
[160] As above.

mechanisms among the Acholi are predominantly restorative, they also have a small component of retribution. However, while the ICC is majorly retributive and punitive, traditional justice is more restorative and allied to peace and social cohesion than to punishment of the perpetrators.

Traditional justice mechanisms such as *mato oput* were not originally used to resolve international crimes and as such pose a challenge if their scope is expounded to address international crimes.[161] Furthermore, traditional justice mechanisms in their original forms may not adequately address international crimes and this justifies the need to expand on its scope to benefit victims who are not comfortable with justice from the ICC only. With the LRA conflict, it was contended that the ICC alone could not offer a holistic form of justice to the victims and therefore discussions geared towards traditional justice as a complement to the ICC.[162]

The idea of advancing how traditional justice mechanisms would complement the ICC in the LRA situation was overshadowed by discussions on how the High Court War crimes division (now International Crimes Division) Uganda could complement the ICC.[163] The discussions on complementarity between the ICC and traditional justice were thus not advanced further. Nevertheless, the Ugandan Government approved the National Transitional Justice Policy (NTJP) in 2019. The NTJP focuses on the legal and institutional structure for investigations, prosecutions, trials within the formal system, reparations and alternative justice approaches which are divided into 5 categories including traditional justice. It is on this background that the Transitional Justice Bill of 2019 was drafted and clause 25 of the Bill provides for the creation of traditional justice courts to the extent that they promote healing, reintegration, and reconciliation. Suffice to say, the Bill has not yet been passed by the Parliament of Uganda.

Accountability and reconciliation could be encouraged through various harmonised and complementary initiatives such as traditional justice mechanisms, formal court structures and the ICC system in accordance with ICJ standards.[164] It is thus important that both traditional justice and the ICC complement each other. For instance among many of the Acholi, the ICC and even the ICD processes embody mainly punishment for the offenders such as imprisonment while *mato oput* embodies majorly peace and reconciliation which the Acholi were interested in.[165] This conception undermines the ICC's ability to deliver peace and yet it is important that both the ICC and traditional justice are accorded equal importance to close gaps that may be

[161] Szpak (n 75) 51.
[162] Clauses 5.2 & 5.3 of the Juba Agreement.
[163] Allen (n 124) 16.
[164] United Nations Human Rights Council (UN HRC) 'Implementation of General Assembly Resolution 60/251 of 15 March 2006 entitled 'Human Rights Council': Report of the High Commissioner for Human Rights and follow-up to the World Conference on Human Rights Addendum Report on the work of the High Commissioner for Human Rights in Uganda' (2007) 19.
[165] ULS (n 158) 4.

created by the weaknesses of each form of justice.[166] Traditional justice mechanisms had actually for over 20 years during the LRA conflict not been able to achieve peace nor justice on their own. The Office of the High Commissioner for Human Rights (OHCHR) in Uganda also raised concerns that relying on traditional justice mechanisms only to address international crimes may set a dangerous precedent for impunity.[167] The ICC on the other hand can also only meaningfully achieve justice if its processes are understood and appreciated by the victims. A combination of the two forms of justice in a complementary way would therefore be best suited for all the victims.

The above discussion pushed for the debate on the establishment of a culturally appropriate hybrid model comprising of traditional and formal justice mechanisms for the Acholi.[168] A tailormade special court created to deal with the situation and considering the interests of the victims in the application of traditional justice mechanisms could have been explored. Nevertheless, traditional justice mechanisms could still be used to complement the ICC especially in situations where it is in the 'interest of justice' for the victims.

3.3 Challenges Posed by Traditional Justice Mechanisms in Addressing International Crimes Committed During the LRA Conflict

The opportunity that was presented as discussed above definitely created a platform for the nexus between traditional justice mechanisms and international criminal justice to be assessed. There were arguments that traditional justice mechanisms fell short of ICJ standards. One of the arguments fronted was that the Acholi chieftaincy that was supposed to implement the traditional justice mechanisms to address international crimes committed during the LRA conflict had limited capacity and that majority of the elders did not know how to perform the traditional processes.[169] This is because most of the traditional justice mechanisms are not codified and mainly rely on the knowledge of the elders who guide the processes.

The LRA conflict also eroded the Acholi culture upon which the traditional justice mechanisms were based. Besides, the LRA conflict made it very difficult and impossible for some cultural practices to be performed because of the insecurity at the time and utmost poverty.[170] Furthermore, the conflict influenced the cultural identity of many Acholi who now associate with religious beliefs and 'modernity' yet many of the traditional justice mechanisms are based on Acholi spiritual beliefs. Equally important to consider was that the youth and children who were born during the conflict did not get to appreciate the traditional justice mechanisms and as such found little or no meaning in them.[171] Besides, it was argued that the Acholi

[166] As above.
[167] UN HRC (n 164) 19.
[168] As above.
[169] Allen (n 124) 18.
[170] Latigo (n 1) 109.
[171] As above.

traditional justice mechanisms could not address issues of reconciliation among the non-Acholi victims of the LRA conflict since they also have their own traditional justice mechanisms.[172]Additionally, traditional justice mechanisms were hard to implement since some of the perpetrators were still out of reach from the clans as they had not yet surrendered from the LRA.

Although the Acholi culture prohibits all forms of violence against women and sexual crimes such as rape or defilement which were heavily punished through penalties including caning and cleansing by slaughtering a goat or sheep, it was rare and the practice has never been done for mass sexual violations as those committed by the LRA.[173] Gender-based and sexual crimes could not also be adequately addressed as *mato oput* for example does not apply to crimes such as rape, sexual violence, forced marriage and slavery.[174] From the foregoing, lessons could be drawn from other countries like Rwanda and Sierra Leone that used traditional justice alongside other formal justice mechanisms to address international crimes.

3.4 Lessons from Rwanda

About 85% of the Rwandan population are Hutu and the others Tutsi with a small number of Twa.[175] The genocide in Rwanda occurred in 1994 during which the Hutu ethnic majority murdered about 800,000 mainly Tutsi minority.[176] In the aftermath of the Rwanda genocide, the ICTR was established by the United Nations Security Council to 'prosecute persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda between 1 January 1994 and 31 December 1994'.[177] The ICTR and national courts in Rwanda had concurrent jurisdiction to prosecute persons for international crimes.[178] Due to the many trials related to the genocide, the ICTR and national courts in Rwanda were overwhelmed and the Rwandan Government decided to transform the traditional *gacaca* courts and make them fit to effectively complement the formal system.[179] The *gacaca* courts had to deal with the problem of numerous and widespread atrocities as at least 800,000 people had been killed during the genocide and the state prisons were overly crowded with 120,000 alleged perpetrators with only 15 judges assigned to all the cases.[180]

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[172] Carlson (n 118) 252.
[173] CCFU (n 90) 17.
[174] Carlson (n 118) 256.
[175] History.com Editors 'The Rwandan Genocide' 19 May 2023 https://www.history.com/topics/africa/rwandan-genocide accessed 8 September 2023.
[176] As above.
[177] United Nations International Residual Mechanism for Criminal Tribunals 'The ICTR in Brief' https://unictr.irmct.org/en/tribunal accessed 5 September 2023, see also Article 1 of the Statute of the International Tribunal for Rwanda https://legal.un.org/avl/pdf/ha/ictr_EF.pdf accessed 5 September 2023.
[178] Article 7(1) of the Statute of the International Tribunal for Rwanda.
[179] Garuka (n 78) 223.
[180] Allen (n 124) 6-7.

Originally, *gacaca* courts handled minor disputes such as petty offences, marital disputes, and property matters.[181] After the genocide, the *gacaca* was modified and a *new gacaca* was created to deal with international crimes. The modified *gacaca* courts had jurisdiction over genocide and crimes against humanity that were committed in Rwanda by both citizens and foreigners[182] and pursued both retributive and restorative justice. The modifications created the *new gacaca* which was more of a hybrid of the original *gacaca* and the formal justice system.[183] The judges *inyangamugayo* were elected from amongst the people and 11,000 *gacaca* courts were established all over Rwanda.[184] The judges would then be oriented for a six-day period[185] to clearly define their roles and expectations.

The law governing the *gacaca* courts was amended by the Organic Law[186] after a two-year pilot stage and the amendment streamlined the *gacaca* system. The amendment also created a *gacaca* hierarchical system in Rwanda's two lowest administrative units, that is the cell and the sector, and introduced a *gacaca* court of appeal.[187] The Organic Law created three categories of offences and punishments; category one carried the death penalty for those who engineered the genocide and committed heinous acts like sexual crimes and torture, offences classified under category two included accomplices of homicides, attempted murder and assault and category three included those accused of offences against property.[188]

Suspects accused of offences under category one would only be tried by the formal courts as the *gacaca* courts could sentence convicts to imprisonment for category two offences while category three convicts would be sentenced to pay a compensation for damages caused to the property of the victim.[189] The *gacaca* court offered sentence reductions to promote confession and the option of mitigating the convicted person's sentence into community service. The *gacaca* system also provided for three modes of appeal which included opposition, appeal, and review of judgments. Opposition was a remedy for those convicted in their absentia while appeal was only available for category 2 offences.[190] Remarkably, women played a central role in the *new gacaca* courts though it could not adequately address sexual crimes since the embedding of the courts in an open community setting made it hard to address sexual crimes.[191]

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[181] JT Lar 'Post-Conflict justice in Rwanda: A Comparative Analysis of the International Criminal Tribunal for Rwanda and Gacaca Courts' 54.
[182] Garuka (n 78) 225.
[183] Ingelaere (n 80) 52.
[184] Lar (n 181) 54.
[185] MG Bolocan 'Rwandan Gacaca: An Experiment in Transitional Justice' (2004) *Journal of Dispute Resolution* 386.
[186] No 16 of 19/6/2004.
[187] Bolocan (n 185) 386.
[188] As above, 379.
[189] As above.
[190] As above.
[191] Ingelaere (n 80) 52.

Notably, the ICTR was geographically located in Arusha, Tanzania and this made it difficult for witnesses to appear in the court. The victims felt detached as it was hard to meet their hopes and expectations without them experiencing the process within their country.[192] They were also frustrated with the Court and found the processes slow, very expensive and far from Rwanda yet both countries (Tanzania and Rwanda) are within the East African region. *Gacaca* courts therefore offered an added advantage to the victims as they were within their communities and the victims could effectively engage in the hearings. *Gacaca* courts in a cell would categorise individuals who lived in that community during the genocide; try accused persons of the least serious offences under category 3 suspects; and forward files of accused persons within categories 1 and 2 offences to the public prosecutor and the gacaca courts at the sector level respectively.[193] This expedited justice and ensured the broader goal of creating social cohesion.

Notwithstanding, there were also several challenges in the implementation of the *gacaca* courts. The *gacaca* which was principally used to handle minor disputes had been adopted to deal with international crimes and complex issues. The fact that untrained judges were elected locally from amongst the people meant that the local balance of power could influence the proceedings.[194] The accuser had the mandate to prosecute the accused, and this was inconsistent with conventional formal court practices.[195] Furthermore, the accused also had no right to legal counsel.[196] This compromised the tenets of a fair trial as enshrined under article 14 of the ICCPR as in some instances the presumption of innocence was also compromised.

Drawing lessons from Rwanda, one system of justice alone may not fully address the aspirations of the victims and reconciliation. It was therefore necessary and important that the *gacaca* courts complement the formal courts to achieve a holistic form of justice for the victims. Since both retributive and restorative justice were required in the case of Rwanda, the ICTR focused more on retributive justice and the *gacaca* courts focused on mainly restorative justice and retributive justice also. Moreover, traditional justice mechanisms could be used to avoid undue delays in trials and reduce case backlog especially when the formal courts are overwhelmed as was the case with Rwanda. However, a coherent and organised structure that connects both the ICTR and the *gacaca* courts was not developed.[197]

[192] Lar (n 181) 54.
[193] Bolocan (n 185) 380.
[194] Lar (n 181) 54.
[195] As above.
[196] Garuka (n 78) 224.
[197] Lar (n 181) 55.

3.5 Lessons from Sierra Leone

Sierra Leone was faced with a conflict in March 1991 after it was invaded by the Revolutionary United Front (RUF).[198] In February and March 1996, democratic elections were held, and a peace agreement was signed with RUF on 30 November 1996. However, a military coup on 25 May 1997 disrupted peace again.[199] After the civil war, the Government of Sierra Leone and the RUF signed the Lomé Peace Agreement in July 1999.[200] The Lomé Peace Agreement granted blanket amnesty to the RUF but this raised concerns on whether blanket amnesties could apply to international crimes as the civil war was characterised by gross human rights violations from both the RUF and the Government.

The Lomé Peace Agreement had envisaged the use of transitional justice mechanisms such as the Truth and Reconciliation Commission (TRC) to reconstruct post conflict Sierra Leone and the need to establish the Special Court for Sierra Leone (SCSL) during the reconstruction emerged.[201] The SCSL was established by the United Nations and the Government of Sierra Leone in 2002 under Security Council Resolution 1315 to prosecute those responsible for serious violations of international humanitarian law.[202] It was referred to as the Special Court because it was the first international criminal tribunal to be established within the country where the crimes prosecuted were committed and it applied both national and international laws though the international laws took precedent in cases of inconsistencies.[203] The TRC therefore worked side by side with the SCSL which adopted a locally relevant justice approach to effectively administer justice to the victims.[204]

Traditional justice mechanisms were formally recognised in Sierra Leone and the Truth and Reconciliation Act (TRA) of 2000 mandated the TRC to consult traditional and religious leaders during their hearings and in resolving local conflicts.[205] Traditional justice mechanisms in Sierra Leone were predominantly patriarchal but provision was made for female representation. However young people could not participate in the process as they were considered immature.[206] The key actors were chiefs, local courts, community and religious leaders and tribal headmen. The 1963 Local Court Act established local courts headed by

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[198] JAD Alie 'Reconciliation and traditional justice: tradition-based practices of the kpaa mende in Sierra Leone' in L Hyse & M Salter (eds) *Traditional Justice and Reconciliation after Violent Conflict: Learning from African Experiences* (2008) 123.
[199] As above, 125.
[200] African Union Panel of the Wise 'The African Union Series Peace, Justice and Reconciliation in Africa: Opportunities and Challenges in the Fight against Impunity' *International Peace Institute* (2013) 36 https://www.ipinst.org/wp-content/uploads/publications/ipi_epub_peace_justiceafrica2.pdf accessed 8 September 2023.
[201] Sierra Leone TRC Reports Volume Three B 'Chapter 6: The TRC and the Special Court for Sierra Leone' (2004) paragraphs 1 & 2 https://www.sierraleonetrc.org/index.php/view-the-final-report/download-table-of-contents accessed 17 September 2023.
[202] See Statute of the Special Court for Sierra Leone.
[203] I Bangura 'Leaving Behind the Worst of the Past Transitional Justice and Prevention in Sierra Leone' International centre for Transitional Justice Report (2021) 15 https://www.ictj.org/sites/default/files/ICTJ_Report_Prevention_SierraLeone.pdf accessed 18 September 2023.
[204] AU Panel of the Wise (n 200) 38.
[205] Allen (n 124) 8, see also Article 7(2) of the TRA.
[206] Alie (n 198) 133.

court chairmen and these courts were a formalised version of the traditional justice system. The court chairmen were appointed initially for 3 years and could be removed by the Minister of Local Government. There was no legal representation in the local courts, but the courts were overseen by a customary law officer who was a lawyer. The emergence of paralegals also enabled the dispensation of justice as they helped communities through engagements with the relevant actors.[207] However, the 1963 Local Court Act has since been repealed in its entirety by the Local Court Act of 2011 which transferred the local courts from Ministry of Local Government to the Judiciary.[208]

Unlike Rwanda, Sierra Leone has diverse ethnic groups which means that there are several traditional justice mechanisms. The *Kpaa Mende* for example have strong cultural and religious beliefs and have developed their traditional justice mechanisms which are mainly restorative in nature as the main goal is to determine reconciliation although some punishments could also be handed down to the convicted.[209] Chiefs and elders adjudicate civil cases such as land matters and criminal cases such as theft which were punishable by public reproach, cleansing ceremonies or payment of compensation.[210] Just like the conflict in northern Uganda, the conflict in Sierra Leone brought untold suffering to the communities, led to the displacement of people and many elders who were critical in the application of the traditional justice mechanisms were targeted and killed during the conflict. This however did not prevent the TRC from promoting reconciliation and many aspects of traditional justice mechanisms which were adopted during the TRC hearings.[211]

The traditional justice mechanisms fell short though as they were only applicable to a particular community for example the *Kpaa Mende* traditional justice mechanisms could not be suitable in addressing disputes with other tribes. Furthermore, the traditional practices appeared inflexible in addressing disputes such as international crimes in contemporary times. Some of the traditional justice mechanisms also violated human rights as they encouraged violence for instance persons accused of robbery among the Mende would be dressed in rags, molested, and forced to dance around the village where they are usually beaten.[212]

Unfortunately, the SCSL did not seek to explore the use of traditional justice mechanisms while addressing international crimes as this was left to the TRC alone.[213] Although traditional justice mechanisms

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[207] As above.
[208] S Mohamed 'Informal Institutional Change and the Place of Traditional Justice in Sierra Leone's Post-War reconstruction' (2019) 118 *African Affairs* 13.
[209] NM Mpaka 'Traditional Transitional Justice Mechanisms- Lessons from Africa' Centre for the Study of Violence and Reconciliation (2020) 7 https://www.csvr.org.za/wp-content/uploads/2020/01/Traditional-Transitional-Justice-Mechanisms-Policy-Brief-2020.pdf accessed 17 September 2023.
[210] Alie (n 198) 133.
[211] Sierra Leone TRC Reports Volume Three B 'Chapter 7: Reconciliation' (2004) paragraph 36 https://www.sierraleonetrc.org/index.php/view-the-final-report/download-table-of-contents accessed 17 September 2023.
[212] As above, para 34.
[213] Allen (n 124) 4, This shortcoming had been acknowledged a year earlier by the UN Secretary General, Kofi Annan in a report to the Security Council entitled "The rule of law and transitional justice in conflict and post-conflict societies", in which he observed that: "due regard must be given to indigenous and informal traditions for administering justice or settling disputes.

complemented the formal transitional systems in Sierra Leone, it is only in Rwanda where traditional justice mechanisms were adopted and made part of the formal post- genocide justice policy.[214] One outstanding lesson that can be drawn from the Sierra Leone experience is the appointment of a lawyer to oversee the local courts and the engagement of paralegals to support the dispensation of traditional justice.

3.6 Conclusion

Going forward, traditional justice mechanisms are beneficial in addressing international crimes and restoring social relations adequately if implemented as they encourage reconciliation, forgiveness, and harmony after a conflict as seen with the experience in Rwanda and Sierra Leone. Despite their significance, traditional justice mechanisms alone are not best suited to address the gross violations and atrocities amounting to international crimes. As such it is prudent to rethink the various traditional justice mechanisms and apply them with necessary modifications to the emerging crimes and evolving communities. This would enable the effective complementarity between traditional justice systems and formal courts such as the ICC.

[214] As above, 8.

CHAPTER 4

VIEWING THE *ONGWEN* CASE FROM A TRADITIONAL JUSTICE LENS

4.1 Introduction

This chapter provides a background and summary of the *Ongwen* case. It critically assesses the proceedings and judgment of the ICC in the case from a traditional justice point of view. The chapter weighs in on the possibility of the ICC withdrawing the arrest warrants in favour of traditional justice and if the application of traditional justice by Uganda to address the situation before the ICC would render the case inadmissible before the Court. Additionally, the chapter considers the dual personality of Ongwen as a victim and a perpetrator and whether traditional justice could have been the best resort in such circumstances. Furthermore, the chapter assesses the likelihood of the Trial Chamber applying traditional justice at the sentencing stage. Generally, the chapter identifies stages during the initiation and proceedings where and how traditional justice mechanisms could have been explored in the *Ongwen* case.

4.2 Background of the *Ongwen* Case

The LRA situation in northern Uganda was referred to the ICC by the Ugandan Government on 16 December 2003 and on 29 July 2004, the OTP determined a reasonable ground to start an investigation into the LRA situation in northern Uganda.[215] The OTP then submitted the request for the arrest warrants of the 5 LRA top commanders namely; Joseph Kony (the LRA leader), Vincent Otti (Second-in-Command) and three other commanders namely; Raska Lukwiya, Okot Odhiambo and Ongwen on 6 May 2005.[216] Pre-Trial Chamber II went ahead to issue warrants of arrest under seal against all the 5 aforementioned persons on 8 July 2005 and requested the Ugandan Government to search for, arrest, detain and surrender them to the ICC. The OTP additionally submitted an 'Application for Unsealing of Warrants of Arrest Issued on 8 July 2005' to Pre- Trial Chamber II on 9 September 2005 and on 13 October 2005 Pre- Trial Chamber II unsealed the warrants of arrest for all the 5 persons, including Ongwen.[217]

Ongwen surrendered to the custody of the ICC on 16 January 2015. He was then transferred to the ICC detention centre on 21 January 2015 and made his first court appearance on 26 January 2015. The proceedings against Ongwen were severed from the case of the *Prosecutor v Joseph Kony, Vincent Otti, Okot Odhiambo and Ongwen* on 6 February 2015 by Single Judge Ekaterina Trendafilova on behalf of Pre-

[215] International Criminal Court (ICC) 'The Prosecutor v Dominic Ongwen Case Information Sheet' https://www.icc-cpi.int/sites/default/files/CaseInformationSheets/OngwenEng.pdf accessed 15 August 2023.
[216] As above.
[217] As above.

Trial Chamber II of the ICC to allow the trial to proceed against Ongwen only.[218] Pre-Trial Chamber II confirmed the charges against Ongwen on 23 March 2016 and committed him on trial and on 2 May 2016 Trial Chamber IX was constituted to hear the case.[219] Ongwen was subsequently charged with 70 counts of acts amounting to war crimes and crimes against humanity.

4.3 Possibility of Withdrawing the Case

Notably, after the arrest warrants were issued, there were peace talks between the LRA and the Ugandan Government. Six agreements were concluded between August 2006 and February 2008.[220] Key among these agreements was the 2007 Agreement on Accountability and Reconciliation between the Government of the Republic of Uganda and the LRA (Juba Agreement) which proposed the use of traditional justice to handle crimes committed by the LRA.[221] President Museveni announced that all the 5 LRA leaders whom the ICC had issued arrest warrants against including Ongwen would be left unpunished if they abandoned terrorism and signed the peace agreement.[222] The President inferred that if the peace agreement was signed, the Ugandan Government would use traditional justice to ensure the persons whom the ICC arrest warrants had been issued against such as Ongwen sought forgiveness from the victims. This meant that Uganda wanted to withdraw the ICC arrest warrants in favour of traditional justice.[223] However, the Rome Statute, and its *travaux préparatoires*, is silent on whether a state may withdraw a matter once the ICC's jurisdiction has been activated.[224]

Nevertheless, the Rome Statute gives the UNSC the mandate to stop investigations or prosecutions for a period of twelve months and this could be renewed by the UNSC.[225] The possibility of the UNSC invoking this provision was mooted in the peace versus justice debate in the situation in northern Uganda.[226] In a situation where the peace in a region is dependent on the deferral of the ICC investigation then the UNSC could do so to enable the Ugandan Government fulfil some of the obligations that were created during the Juba Agreement such as the use of traditional justice to foster peace within the region and the signing of all peace agreements.

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[218] International Criminal Court 'ICC Pre-Trial Chamber II separates Dominic Ongwen case from Kony et al.case' 6 February 2015 https://www.icc-cpi.int/news/icc-pre-trial-chamber-ii-separates-dominic-ongwen-case-kony-et-al-case accessed 25 September 2023.
[219] ICC Case Information sheet (n 215).
[220] KP Apuuli 'The Government of Uganda, The ICC Arrest Warrants for the LRA Leaders and the Juba Peace Talks: 2006-2008' (2013) 2 *European Society of International Law Conference Paper Series* 3.
[221] Clause 3.1
[222] Peschkle (n 126) 196.
[223] Amnesty International 'Uganda: Government cannot prevent the International Criminal Court from Investigating Crimes' 16 November 2014.
[224] Peschkle (n 126) 196.
[225] Article 16 of the Rome Statute.
[226] Peschkle (n 126) 196.

Additionally, for the ICC arrest warrants issued against Ongwen and the other LRA leaders to be withdrawn, the Ugandan Government or LRA could challenge it on grounds of admissibility if traditional justice mechanisms are enough to ensure justice and accountability. It is the defendant (Ongwen in this case) and the state party (Uganda) that have the responsibility to challenge, and the ICC judges can decide on whether the case is admissible or not.[227] For a case to be admissible before the ICC, the person concerned ought not to have been tried for similar conduct which is the subject of trial before the ICC.[228] This means that if the traditional justice mechanisms meet international criminal justice standards, then they could be utilised to prosecute Ongwen, and the case would not be admissible before the ICC.

Moreover article 17(1)(a) of the Rome Statute provides that a case becomes inadmissible before the ICC if it is already being investigated or prosecuted by the state that has jurisdiction over the matter unless that state is unwilling or unable to investigate or prosecute the matter. Traditional justice mechanisms if properly regulated by the state could fit within the national judicial system and the case could be declared inadmissible by the Pre-Trial Chamber to satisfy the principle of complementarity.[229] The charges and sentences should be comparable to those under the Rome statute for the ICC to rule that the case is inadmissible. Traditional justice mechanisms as they are could not trigger complementarity[230] under the Rome Statute because of the weaknesses and challenges in its implementation that were identified under the previous chapters.

According to article 53(1)(c) of the Rome Statute, the OTP must consider the gravity of the crime and interests of the victims and the investigation should serve the interests of justice. In the *Ongwen case*, there were two categories of victims; those who supported the ICC and those who were in support of traditional justice. Serving the interests of all victims would in this instance mean combining the ICC and traditional justice to achieve a holistic form of justice and balance the interests of all victims. The OTP suggests that the interests of victims include the victims' interest in seeing justice being served and essential interests such as their protection.[231] In ascertaining the interests of the victims, the OTP ought to organise dialogues with the victims and seek views of relevant actors.[232] Indeed, the OTP in the situation in northern Uganda conducted more than 25 missions to have dialogues and meet relevant stakeholders within the

[227] AKA Greenawalt 'Complementarity in Crisis: Uganda, Alternative Justice, and the International Criminal Court' (2009) *Pace Law Faculty Publications* 152 https://digitalcommons.pace.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1624&context=lawfaculty accessed 1 October 2023.
[228] Article 17(1)(c) and Article 20(3) of the Rome Statute.
[229] T Allen 'Ritual Abuse? Problems with Traditional Justice in Northern Uganda' in N Waddell & P Clarks (eds) *Courting Conflict? Justice, Peace, and the ICC in Africa* (2008) 51.
[230] Peschkle (n 122) 201.
[231] International Criminal Court 'Policy Paper on the Interests of Justice' (n 40) 5.
[232] As above.

community.[233] The views gathered by the OTP in these dialogues on the role of traditional justice could be a ground for the OTP to reconsider the decision to initiate prosecution based on new facts or information as mandated by article 53(4) of the Rome Statute.

Remarkably, although article 53(1)(c) of the Rome Statute does not specifically mention traditional justice, it gives the OTP flexibility in this regard to apply the concept of interest of justice. To interpret this concept, reference could be made to article 31 of the Vienna Convention on the Law of Treaties which provides for the interpretation of treaties in good faith in line with the ordinary meaning of the terms used and in consideration of the treaty's object and purpose. Accordingly, the ordinary meaning of the concept of interests of justice revolves around whether it implies a retributive perception of justice or whether other perceptions of justice such as traditional justice may be inclusive.[234]

In relation to traditional justice mechanisms, the OTP restates the need to integrate diverse approaches which can all be complementary. The quest for international criminal justice provides one part of the required reaction to international crimes which by itself may prove to be insufficient as the OTP is conducting focused investigations and prosecutions. Therefore, the OTP entirely validates the complementary role that can be done by national courts, truth seeking, reparations programs and traditional justice in the quest for a holistic justice.[235]Additionally, the OTP underscores the important role played by measures such as traditional justice mechanisms in dealing with a big number of perpetrators and addressing the impunity gap. The OTP therefore seeks to carry on its work side by side with those engaged in other forms of justice such as traditional justice to ensure that all efforts are complementary to develop an inclusive approach.[236]

4.4 Pre-Trial Engagement in the Case

The pre-trial stage presents the best opportunity for victims to influence proceedings.[237] Article 68(3) of the Rome Statute obliges the ICC to permit the views and concerns of victims where their personal interests are affected to be presented and considered at stages of the proceedings in a way that is not prejudicial or inconsistent with the rights of the accused including the right to a fair and impartial trial. The pre-trial stage could have been the best stage for the victims in support of traditional justice with support from the Ugandan Government to lay their grounds and strategies on how it could be implemented to achieve justice.

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[233] As above.
[234] Đukic (n 122) 696.
[235] International Criminal Court 'Policy Paper on the Interests of Justice' (n 40) 8.
[236] As above.
[237] J Elone 'Improving Victim Participation in the Ongwen Case: Lessons from Lubanga' (2015) *Coalition for the International Criminal Court* https://www.coalitionfortheicc.org/news/20150917/improving-victim-participation-ongwen-case-lessons-lubanga accessed 26 September 2023.

There were also discussions that the trial should take place in Uganda so that it is closer to the victims. The defence submitted that the hearing of the case should be held in Gulu within northern Uganda or at the Supreme Court of Uganda.[238] This request was pursuant to article 3(3) of the Rome Statute which permits the ICC to sit elsewhere besides the Hague where it is desirable. The defence submitted that the ICC ought to reconnect with the Acholi to show that they care, and the victims ought to own the Court process and contribute to its success by physically attending the Court proceedings to encourage reconciliation and reintegration.[239] However in its response, Trial Chamber IX took cognisance of the importance of bringing justice to the victims but ruled that the trial would take place at the Hague unless the Court considers it desirable to sit elsewhere.[240] Suffice to say, holding an *in situ* trial would have enabled more victim participation, consultation, legitimised the court processes and enabled justice to be seen to be done. *In situ* proceedings fulfil a fundamental promise of the ICC that was created through the efforts of civil society groups representing victim's aspirations and this who have presented a better opportunity for the ICC to explore traditional justice mechanism in northern Uganda.[241]

Conspicuously, the LRA abducted young boys and forced them to become child soldiers. The LRA top command would take advantage of the innocence and vulnerability of the child soldiers and transform them into submissive and brutal killers.[242] It is vital to consider the dual personality of many of the perpetrators in the northern Uganda conflict. Many of the perpetrators including Ongwen were abducted as children and thus considered both victims and perpetrators.[243] The children would be forced to commit atrocities to prevent them from returning to their communities and as such many families had children in the LRA. This explains why the desire to forgive and reconcile through traditional justice was greater than the desire to prosecute the perpetrators.[244] During the hearing for the confirmation of the charges, the defence submitted that Ongwen could benefit from legal protection afforded to child soldiers given that he was both a victim and perpetrator. However, Pre-Trial Chamber II did not accept this argument and went ahead to confirm the charges against Ongwen.[245]

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[238] Defence Submissions Pursuant to Pre-Trial Chamber II's Order for Observations on the Location of the Confirmation of Charges Hearing in the case of *the Prosecutor v Dominic Ongwen* Paragraphs 1 & 17 13 July 2015 https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2015_12896.PDF accessed 29 September 2023.
[239] As above, paragraphs 6 & 7.
[240] Trial Chamber IX in the case of *the Prosecutor v Dominic Ongwen* Decision Concerning the Requests to Recommend Holding Proceedings In Situ and to Conduct a Judicial Site Visit in Northern Uganda Paragraph 1 https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2016_05118.PDF accessed 11 October 2023.
[241] Elone (n 237).
[242] FS Hassellind 'The International Criminal Trial as a Site for Contesting Historical and Political Narratives: The Case of Dominic Ongwen' (2021) 30(5) *Social & Legal Studies* 793 https://journals.sagepub.com/doi/epub/10.1177/0964663920971836 accessed 27 September 2023.
[243] S Worden 'The Justice Dilemma in Uganda' (2008) *United States Institute of Peace Briefing* 6.
[244] As above, 7.
[245] *The Prosecutor v. Dominic Ongwen* Decision on the Confirmation of Charges 23 March 2016 paragraph 150.

4.5 Application of Traditional Justice at the Sentencing of Ongwen

The trial commenced in December 2016 and the charges against Ongwen were read to which he pleaded not guilty. After close to six years of trial, Trial Chamber IX found Ongwen guilty of 61 crimes characterised as crimes against humanity and war crimes committed between 1 July 2002 and 31 December 2005.[246] Trial Chamber IX then held a hearing on 4 February 2021 under article 76(2) of the Rome Statute to hear further submissions and any additional evidence that could be relevant for the sentencing.[247]Additional evidence was only presented by the defence which emphasised the consideration of traditional justice mechanisms by the Court while sentencing.

An issue that arose was whether the ICC could replace the penalty of imprisonment listed under article 77(1) of the Rome Statute for alternative penalties not enshrined under the Rome Statute or impose such alternative penalties alongside imprisonment. In its submissions on the matter, the defence contended that, considering Ongwen's personal background, and the appropriate mitigating factors, Trial Chamber IX ought to pronounce a sentence of time served bearing in mind that he would undergo the Acholi traditional justice mechanisms. Alternatively, the defence submitted that Ongwen could be sentenced to a maximum of ten years and the sentence supplemented with the Acholi traditional justice mechanisms.[248]

In its closing statements, the defence submitted that if Ongwen is found guilty, Trial Chamber IX could suspend the sentencing and order Ongwen to undergo the Acholi traditional justice mechanism of *mato oput* as the final sentence for the crimes for which he was convicted and that the grant of this remedy would be dependent on the Acholi through their cultural institution accepting and signing an undertaking that it would comply with the order of Court.[249] The defence further submitted that the recognition of the Acholi traditional justice mechanisms would prevent Ongwen from being punished twice for the same offences and break the cycle of hatred that had been caused by the LRA conflict.[250]

The prosecution in response to the defence's submissions stated that article 77(1) of the Rome Statute lists possible sentences that the ICC could impose, and traditional justice is not included as one of the sentences.[251] Besides, article 23 of the Rome Statute provides for the principle of *nulla poena sine lege*, a person convicted by the ICC can only be punished according to the Rome Statute. The Trial Chamber is obliged by article 76(1) of the Rome Statute to consider the appropriate sentence to be imposed considering the evidence presented and submissions made during the trial that may be relevant to the sentence. However,

[246] ICC Case information sheet (n 215).
[247] As above.
[248] Trial Chamber IX (n 38) Paragraph 10.
[249] As above, paragraph 17.
[250] As above, paragraph 18.
[251] As above paragraph 19.

incorporating traditional justice mechanisms into the sentence imposed under article 76(1) fails under the principle of *nulla poena sine lege*. The Trial Chamber can only impose a sentence listed under article 77 and therefore precluded from introducing new sentences not envisaged by the Rome Statute such as those enshrined under traditional justice.[252] Trial Chamber IX noted that the Acholi traditional justice mechanisms were not widely used in northern Uganda to the extent of being able to replace formal justice. Additionally, it did not find the defence's assertion that traditional justice mechanisms are readily available and acceptable by all the victims relevant.[253]

The ICC as a court dealing with international crimes should be able to exercise judicial discretion even at the sentencing stage. Although the Rome Statute expressly provides for the sentences that the court can met out, the judges can consider other factors such as traditional justice to mitigate sentences. Suffice to say, the most important aspects of traditional justice are trust, establishment of truth, voluntary nature of the process, compensation, and restoration of social relations.[254] Some of these elements are closely embedded in the ICC trial process which requires the accused to plead guilty or not guilty to the charges to ascertain the truth. The victims are also compensated based on the article 75 of the Rome Statute. Article 75(1) of the Rome Statute mandates the ICC to establish principles in respect of victims' reparations such as restitution, compensation, and rehabilitation. The victims' assistance and reparation mechanism created by the ICC enables the Court to engage communities such as northern Uganda affected by the LRA conflict. It was submitted that community-based reconciliation activities such as traditional justice mechanism that had played a key role in reconciliation and healing should be explored through the Trust Fund for the victims.[255]

A Trust Fund was established in September 2002 pursuant to article 79 of the Rome Statute for the benefit of victims. Regulation 50(a) of the Regulations of the Trust Fund for Victims (TFV) mandates the TFV Board of Directors to decide whether to use its other resources for the benefit of victims of crimes that fall under the Rome Statute. On this backdrop, the TFV Uganda programme was created, and it has offered psychosocial support and livelihood services to victims affected by the crimes Ongwen was convicted for.[256] The current cycle of programming runs from 4 April 2019 to 3 April 2024.

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[252] As above, paragraph 26.
[253] As above paragraph 34 and 35.
[254] LIGI (n 88) 14.
[255] Amicus Curiae observations by the International Center for Transitional Justice and the Uganda Victims Foundation, pursuant to article 75 of the Rome Statute and Rule 103 of the ICC Rules of Procedure and Evidence in the case of *the Prosecutor v Dominic Ongwen* before the Trial Chamber IX 7 February 2022.
[256] Trust Fund for Victims' Observations pursuant to Trial Chamber II's order of 25 August 2023 before Trial Chamber IX in the case of *the Prosecutor v Dominic Ongwen* Paragraph 11.

Remorse is also a key component of traditional justice as alluded to by Trial Chamber IX. Indeed, genuine remorse by a perpetrator could be considered as a mitigating factor in the determination of a sentence under rule 145(2)(a)(ii) of the ICC Rules of Procedure and Evidence.[257] However, Ongwen had not shown any remorse even during his personal statement at the hearing.[258] The defence submissions were therefore rejected and it was ruled that traditional justice would not be considered.[259] Ongwen was then sentenced to 25 years of imprisonment by Trial Chamber IX.[260] The verdict in the case was received with mixed feelings and there were concerns that there had been a miscarriage of justice.[261] Many victims also thought that the judgement favoured Ongwen as he could be happier with the guilty verdict that would give him a long-term sentence out of northern Uganda but this would affect his reintegration within his community which is a key component of traditional justice.[262]

Ongwen appealed the decision of Trial Chamber IX and submitted in the third ground of appeal that the Trial Chamber IX erred when it did not objectively consider the application of the Acholi traditional justice mechanisms in this case.[263] The Appeals Chamber upheld the decision and noted that Trial Chamber IX was correct in holding that it was precluded from incorporating a sentence not foreseen in the Rome Statute and found no merit in the submissions of the defence.[264] The Appeals Chamber found that the defence submission to apply traditional justice into the sentence imposed on the convicted person fails because of the principle of *nulla poena sine lege*.[265] Although, the Appeals Chamber invited nineteen *amici curiae* to participate in the hearing of the appeal which raised many novel issues,[266] traditional justice mechanisms were not explored adequately and none of the *amici curiae* presented on the possibility of the application of traditional justice at that stage of the proceedings.

4.6 Conclusion

There were several stages in the trial as seen above where traditional justice mechanisms could have been considered. However, the opportunity was missed, and this could be attributed to the challenges that the application of traditional justice mechanisms presented. For instance, for the admissibility argument to be

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257 https://www.icc-cpi.int/sites/default/files/Publications/Rules-of-Procedure-and-Evidence.pdf accessed 28 September 2023.
258 As above, paragraph 42.
259 As above, Paragraph 43.
260 ICC Case information sheet (n 215).
261 Amani Institute Uganda ‘‘Insensitive’ Justice! Perceptions of Trial Justice in the case of the Prosecutor v Dominic Ongwen’ (2021) 7 https://thegenderhub.com/wp-content/uploads/2021/04/Trial-Justice-Survey-Amani-Report-Final-Feb-2021.pdf accessed 1 October 2023.
262 As above, 14.
263 Summary Judgment of the Appeals Chamber in *the Prosecutor v Dominic Ongwen* Read by Judge Luz del Carmen Ibanez Carranza 15 December 2022 Paragraph 88 https://www.icc-cpi.int/sites/default/files/2022-12/2022-12-15-ongwen-judgment-summary-eng.pdf accessed 30 September 2023.
264 As above, paragraph 90 and 92.
265 As above, paragraph 89.
266 As above, paragraph 11.

viable, traditional justice mechanisms should have been capable of prosecuting Ongwen according to the ICJ standards. Interestingly, although the ICC disregarded the argument on the use of traditional justice, it is important to note that some of the elements of traditional justice such as truth telling, and compensation are embedded in the ICC system. The Court should have taken note of this fact that the ICC considers some traditional justice elements to cushion victims who were in support of traditional justice. Trial Chamber IX can exercise its judicial discretion and integrate traditional justice as a mitigating factor during the sentencing stage.

CHAPTER 5

CONCLUSION AND RECOMMENDATIONS

5.1 Conclusion

This research explored the possibility of complementarity between traditional justice and the ICC. The *Ongwen* case was analysed from a traditional justice perspective and the stages where traditional justice could have complemented the ICC were identified. The main objective of the research was to examine the extent of complementarity between traditional justice mechanisms and the ICC and the core research question that was advanced to attain this objective was to what extent can traditional justice mechanisms be applied to complement the ICC.

Throughout the research, it is apparent that traditional justice and the ICC can complement each other to achieve a holistic form of justice for post conflict societies. This is because the best form of justice in a post conflict society is on a case-by-case basis as what may be very helpful in one community may not be in another. Traditional justice presents a context specific form of justice for victims within well organised communities with traditional justice mechanisms practised over time. The Acholi from northern Uganda have a significant historical approach to justice which many of them still believe in up to today. Accordingly, justice to them means reconciliation and because of this many Acholi chose peace over justice as understood by the ICC. Although there is need for peace to prevail, there is also a need to strike a balance with justice so that the victims are reasonably compensated. Additionally, part of creating a sustainable peaceful community is holding the offenders accountable through the formal courts such as the ICC. From the analysis it is also evident that traditional justice is not only restorative but also has some elements of retribution for example the victim must be compensated by the perpetrator for the ceremony of *mato oput* to be performed.

Traditional justice mechanisms as discussed under chapter 2 may fall short of ICJ standards to some extent. However, this does not mean that the traditional justice mechanisms are useless. On the contrary, they offer reconciliation and sustainability of the community as both the victims and perpetrators can continue coexisting within the same community after the conflict. The importance of traditional justice mechanisms in reducing case backlog or prosecuting perpetrators in situations where they are so many and cannot all be prosecuted through the formal courts such as the ICC cannot be underestimated. In the case of northern Uganda, majority of the perpetrators underwent traditional justice processes and not the formal justice process. Only *Ongwen*'s case has been pursued till the end at the ICC.

Notably, a factor that favourably enabled the implementation of the *gacaca* courts in Rwanda was the fact that Rwanda is not ethnically diverse. However, in an ethnically diverse country like Uganda with many tribes who were affected by the LRA conflict besides the Acholi, it was difficult to agree on which traditional justice mechanisms to follow given that all the ethnic groups have different mechanisms. Fortunately, though the practices may have different names, they are similar and have key elements that are the same such as truth telling, remorse, compensation among others. A common ground can be reached to explore all the traditional justice mechanisms together and this would be simplified if they are codified.

Remarkably, during the Ongwen trial, there were several opportunities for the ICC to explore the complementarity of traditional justice, but the ICC declined on various accounts. There was an opportunity for traditional justice mechanism to be modified to meet the ICJ standards and as such Uganda would have been prepared to prosecute international crimes using traditional justice. This would have supported the argument on the principle of complementarity and rendered the case inadmissible before the ICC. If this argument did not work, the ICC should have considered holding *in situ* proceedings in northern Uganda to bring justice closer to the victims and this would have probably influenced the use of traditional justice.

Regardless, Trial Chamber IX should have explored further on how to use consider the use of traditional justice mechanisms at the sentencing of Ongwen. The ICC should administer substantive justice without due regard to technicalities as the purpose of the ICC is to serve victims of international crimes and not just tick a box of sentencing a perpetrator. Justice should be seen by the victims as done for the ICC to be considered relevant in post conflict societies. Striking a balance between the Rome Statute and traditional justice in organised societies is thus very crucial for the ICC.

Although Ongwen has been sentenced by the ICC, he may have to undergo traditional justice processes after serving his sentence so that he can peacefully coexist and reintegrate within his community. This could amount to double jeopardy which could have been avoided had the ICC considered some elements of traditional justice during the trial. Suffice to say, elements of traditional justice such as establishment of truth, compensation and remorse are also embedded in the ICC justice system. These findings therefore inform the recommendations proposed below.

5.2 Recommendations

5.2.1 Codification and Modification of Traditional Justice Mechanisms

First and foremost, for traditional justice mechanisms to go a long way and get adopted within the formal system, it must be codified. This will create uniformity and consistency in its practice and can be passed on from one generation to another. In a community like the Acholi in northern Uganda, the traditional leaders and all relevant stakeholders including elders, women, youth, and children should be consulted and involved

in drafting the traditional justice laws. Section 38 of the Local Government Act of Uganda empowers the Local Council to pass subsidiary legislation that are binding within the local Government area. A law governing traditional justice within the local Government area can be passed and approved by the Parliament of Uganda if it is consistent with the Constitution of Uganda and ICJ standards. Uganda could benchmark with the *gacaca* courts in Rwanda that were created under the Organic Law.

Modifying traditional justice mechanisms to deal with international crimes would be beneficial for post conflict societies. Arguably modifying the traditional justice mechanisms may change the original context within which they operate but it is important to note that societies change with time and culture is influenced by so many factors. It is therefore imperative for traditional justice to meet the actual needs of the contemporary society. The *gacaca* courts for instance as was used in Rwanda was modified to meet the needs of Rwanda during the aftermath of the genocide. In other words, justice should meet the needs of the people it intends to serve but not the people meeting the needs of justice.

5.2.2 Enacting a Transitional Justice Act in Uganda

Although Uganda passed the Transitional Justice Policy in 2019, the Transitional Justice Act (TJA) is yet to be passed. The TJA would be an enabling law on the application of different traditional justice mechanisms to address international crimes within the Ugandan context. While drafting the TJA, recourse should be made to the ICC Act, AU Transitional Justice Policy, and the Penal Code Act of Uganda to avoid inconsistencies and ambiguities. The TJA should operationalise the Transitional Justice Commission (TJC) which should oversee the implementation of traditional justice within the country. The traditional justice courts would then be supervised by the TJC to ensure compliance with ICJ standards. The TJC should be composed of persons with expertise in prosecuting international crimes so that they can effectively give oversight.

5.2.3 Developing an ICC Transitional Justice Policy

Since international crimes always lead to post-conflict societies, it is prudent that the ICC develops a Transitional Policy to guide complementary of the ICC and other transitional justice mechanisms such as traditional justice mechanism. The ICC policy could elaborate further on how to integrate traditional justice mechanism during the proceeding in the Court. Even though the Rome Statute may bar the Court from meting out sentences not listed under article 77, the policy could emphasise the similarities between some of the elements of the Court and traditional justice such as truth telling, compensation and remorse.

The phrase ‘interest of justice’ under article 53(1)(c) of the Rome Statute should broadly be interpreted to include the use of traditional justice mechanisms for some post conflict societies with organised structures.

The ICC Transitional Justice Policy could be based on this and expounded to include the use of traditional justice during the Court proceedings.

5.2.4 Exploring the Use of Paralegals

To ensure that ICJ standards are complied with even at grassroot level, paralegals could be enrolled to support the traditional justice mechanisms within the local communities. Drawing lessons from the Sierra Leone experience, the use of paralegals to aid the dispensation of justice through participating in traditional justice processes could be explored. Paralegals can offer legal support and ensure that the rights of both the victims and the perpetrators are respected during the traditional justice processes.

5.2.5 Constituting a Specialised Court

The establishment of a specialised court to handle individual situations in a post conflict society. The ICC could be constituted on a case-by-case basis based on expertise and factors relevant in that given conflict. This is because all cases differ for instance in the northern Uganda issue the issue of victim-perpetrator influenced the desire for traditional justice given that many of the perpetrators were abducted and conscripted into the LRA when they were children. When it comes to defining justice, a one size does not fit all because what justice means to the people of northern Uganda may not be the same elsewhere.

Word Count: 19675 words

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