REACHING OUT FOR JUSTICE AND RECONCILIATION IN NORTHERN UGANDA: THE PROPOSED WAR CRIMES COURT AND TRADITIONAL JUSTICE

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1.0 Introduction

The conflict in northern Uganda between the LRA and the government forces has gone on for over twenty years, during which egregious violations of human rights have been perpetrated against civilians.[1] At the hands of the warring parties, to a great extent the Lord's Resistance Army (LRA) rebels, civilians have been subjected to displacement, mutilation/maiming, killings, etc.[2] Uganda is a party to a number of international human rights instruments that include the: International Covenant on Civil and Political Rights,[3] International Covenant on Economic Social

[1] International Crisis Group [hereinafter ICG], *Northern Uganda: Understanding and Solving the Conflict*, Africa Report No. 77, April 14, I (2004), accessible at, http://www.crisisgroup.org/library/documents/africa/central_africa/077_uganda_conflict.pdf (Last visited Dec. 14, 2008).

[2] Human Rights Watch [hereinafter HRW], *Uprooted and Forgotten: Impunity and Human Rights Abuses in Northern Uganda*, Vol. 17, No.12 (A) pp. 14-24 (2005). This report details the human rights violations committed against civilians, accessible at, http://www.hrw.org/sites/default/files/reports/uganda0905.pdf (Last visited Dec.12, 2008).

[3] Dec. 16, 1966, 999 U.N.T.S. 171 entered into force Mar. 23, 1976, [hereinafter ICCPR]. Ratified by Uganda on Sept. 21, 1995. *See*, http://www.unhchr.ch/pdf/report.pdf.

and Cultural Rights,[4] African Charter of Human and Peoples Rights.[5] Under these instruments, Uganda is enjoined to avail the rights enshrined therein to all its people. Fulfilling the above obligation has been such a daunting task for the government of Uganda amidst the conflagration of internal conflicts from time to time.[6]

The involvement of the International Criminal Court (ICC) in the current conflict between the Ugandan Government and the LRA led to the Juba peace process according to some commentators[7] and the silencing of the guns.[8] With the ICC warrants of arrest still hovering over the heads of the LRA top brass,[9] Uganda is grappling with issues of accountability for the human rights violations committed in the north; justice and reconciliation. Indeed, she has an obligation to respect and ensure respect for international human rights law;[10] including investigating violations and providing effective remedies to victims, among others.[11] Not much of this was done during the

[4] Dec. 16 1966, 27 [hereinafter ICESCR] Uganda ratified it on April 21, 1998.

[5] June 27, 1981, OAU Doc. entered into force Oct. 21, 1986: [hereinafter ACHPR]. Ratified by Uganda on

[6] Since independence, the country has had various out breaks of civil strife/conflicts; the Holy Spirit Movement of Alice Lakwana, Allied Defense Forces, Lord's Resistance Army [hereinafter LRA] all of which were accused of attacks on civilians of Uganda.

[7] TIM ALLEN, TRIAL JUSTICE: THE INTERNATIONAL CRIMINAL COURT AND THE LORD'S RESISTANCE ARMY 116 (2006). The ICC got involved in 2003 on referral by the government, and the Juba Peace Process began in the summer of 2006. The process has 5 agenda items ;(1) Cessation of hostilities, (2) Comprehensive solutions to the war, (3) Accountability and reconciliation, (4) Disarmament, demobilization and reintegration and (5) A permanent cease fire.

[8] Agenda Item No 1 on cessation of hostilities was signed on August 26th 2008. Text available at, http://northernuganda.usvpp.gov/uploads/images/hUgm3ncZ_oIetYG7u_CjFQ/agreement.pdf, accessed on December 9th 2008.

[9] *See* http://www.icc-cpi.int/cases.html, (Last visited Dec. 16,2008). The indicted whose arrest is sought are Joseph Kony, Vincent Otti, Okot Odhiambo, and Dominic Ongwen. Vincent Otti is feared dead, but the Court is yet to prove.

[10] These obligations are contained in International human rights instruments she is a party to. *See supra* note 3, 4 and 5.

[11] *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, United Nations G A Res. A/RES/60/147, adopted 16 December 2005, Principle (s) I. 1 and II 3 (b) & (d) available at, http://www2.ohchr.org/english/law/remedy.htm.

active combat days.[12] Currently, it is not clear whether a national or international mechanism will be used to reach out for justice and reconciliation. According to Louis Moreno-Ocampo,

> International justice, national justice, the search for truth and peace negotiations can and must work together…; they are not alternative ways to achieve a goal; they can be integrated into one comprehensive solution….The Court…was created to investigate and punish the worst perpetrators, the organizers, the planners and commanders-; national proceedings and other accountability mechanisms remain essential for the purpose of achieving comprehensive solutions;…[13]

Whether or not the ICC indictments are suspended, there is a greater need for national accountability and reconciliation mechanisms in Uganda. It has been noted that any outcome for northern Uganda must include both a peace agreement and fair and credible prosecutions of those responsible for the most serious crimes committed during the conflict, together with accountability measures for lesser offenses.[14] If the indictments are suspended, both 'greater' and 'lesser' offenders would be dealt with under national justice and reconciliation mechanisms.[15] If no suspension is secured, national mechanisms would be used for the 'lesser' offenders, not subjected to ICC jurisdiction.

In the Ugandan context, pure retributivism would typically require the prosecution of all those culpable for international crimes during the more than twenty -year conflict.[16] Restorative justice on the other hand would focus on victim's needs, and reintegration of the

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[12] *See* Human Rights Watch, *Supra*, note pp 37-42.

[13] Prosecutor, International Criminal Court, Address at Nuremberg: *Building a Future on Peace and Justice*, June 24/25, 2007, accessible at http://www.icc-cpi.int/library/organs/otp/speeches/LMO_nuremberg_20070625_English.pdf, (last visited December 8, 2008).

[14] *See* Human Rights Watch, *Bench Marks for Assessing Possible National Alternatives to International Criminal Court Cases Against LRA Leaders*, May 2007, at 2. Accessible at http://www.iccnow.org/documents/icc0507web%5B1%5D.pdf (last visited on Dec. 16, 2008).

[15] *Id.* That the ICC does not deal with all offenders, but only those that bear the greatest responsibilities.

[16] Linda M. Keller, *Achieving Peace with Justice: The International Criminal Court and Uganda Alternative Justice Mechanisms*, *Connecticut* Journal of Int'l Law Vol. 23 209-278, at 210.

rebels into Ugandan society among others.[17] In order to reach out for both justice and reconciliation in northern Uganda, the War Crimes Court (WCC) and traditional justice mechanisms (*Mato Oput)* are suggested and provided for in the Annexure to Agenda Item no 3 on Accountability and Reconciliation of the Juba Peace Agreements.[18]

This paper explores the issue whether or not the WCC and traditional mechanisms like *Mato Oput* can deliver justice and reconciliation to Northern Uganda, respectively. It delves into the strengths and weaknesses of both the WCC and *Mato Oput*, in as far as justice and reconciliation is concerned. It sets out to recommend how best the above mechanisms can be applied to the conflict in question, the categories of people to be dealt with by each, and how their relationship *inter se* can be streamlined in the interest of justice and reconciliation.

1.1 The WCC: A Background Note

Establishment of the WCC will introduce the notion of prosecutorial justice for international crimes in Uganda. The WCC is a brain child of the negotiating team in Juba.[19]The team, representing both the government of Uganda and the LRA, recognized the importance of justice and reconciliation in ending the conflict and signed an Agreement on Accountability and Reconciliation.[20] The details of how to achieve the foregoing were then

[17] *Id.* at 210.
[18]ALLEN, s*upra* note 7.
[19] *See* ALLEN, *supra* note 7. The negotiations are between the Government of Uganda and the Lord's Resistance Army, and are aimed and resolving the decade long conflict in northern Uganda between the parties to the negotiations.
[20] *See* ALLEN, *supra* note 7. Signed June 13, 2007. This agreement indicates that the government and the LRA prefer formal domestic civil or criminal proceedings against perpetrators of crimes/human rights violations in the north during the war.

spelt out in the Annexure to the agreement on accountability and reconciliation.[21] The institutional framework set out in the Annexure includes the WCC, which is a Special Division of the High Court of Uganda.[22] The WCC is not yet functional, but its judicial officers have been appointed.[23]

The hurried creation (at least on paper and the appointments that followed suit) of the WCC can best be understood against the whole gamut of issues at the Juba peace talks. The LRA's adamant position that they could only sign the peace deal if the ICC indictments are withdrawn is important in this case.[24] Having submitted the case to the ICC, the Ugandan government's hands are tied – the government has no exclusive right to withdrawal the matter save through procedures set down in the Rome Statute.[25] The government therefore found establishment of a WCC as a panacea to prove to the ICC that it was now "able and willing" to try the crimes committed by the LRA at home.[26]This raises a number of key questions. Why

[21] Signed between the parties on February 19, 2008.

[22] Others include a body to inquire into the past and related matters, and traditional justice as part of the alternative justice and reconciliation mechanisms.

[23] Hillary Nsamba, *Ogoola Names Judges on Anti- Corruption, War Crimes Court*, THE NEW VISION, October 1, 2008, accessible at http://www.newvision.co.ug/D/8/12/629897/war%20crimes%20court%20Akiiki-%20kiiza (Last visited Sept. 30, 2008). The Judicial officers include Justices: Dan Akiiki-Kiiza, Eldad Mwangusya and Ibanda Nahamya.

[24] *See* ICG, *Northern Uganda: The Road to Peace, With or Without Kony*, Africa Report No.146-Dec. 10 2008 at ii, accessed at http://www.crisisgroup.org/library/documents/africa/central_africa/146_northern_uganda__the_road_to_peace__with_or_without_kony.pdf. (Last visited Dec 16, 2008).

[25] ICC Statute, A/CONF.183/9 of July 17, 1998, entered into force July 1, 2002. *See* Articles 16, under which the Security Council would have to defer investigation and prosecution for 12 months, if Uganda, pursuant to Article 17, can prove ability and willingness to deal with the LRA within her domestic jurisdiction.

[26] Article 17 of the Rome Stature provides:

1. Having regard to paragraph 10 of the Preamble and Article 1, the Court shall determine that a case is inadmissible where:
   (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
   (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;…
   (c) The case is not of sufficient gravity to justify further action by the Court.

now? Why not earlier? The conflict in northern Uganda has been raging for over 20 years, and there has been a paucity of judicial initiatives to get involved in finding a solution.[27] Shouldn't one then presume that the current efforts are tokenism intended to give the LRA a soft landing, and exonerate them from liability? On the other hand, the LRA has repeatedly rejected criminal prosecutions[28] and pushed for traditional justice mechanisms.[29] Creation of the WCC to some extent depends on signing of the final peace accord at Juba, which the LRA have from time to time avoided.[30] One thus wonders why a country would rush to create a judicial institution based on an agreement with rebels even before the agreement is signed by appointing judges without the requisite logistical support or legislation. This section of the paper seeks to address the factors that have to be borne in mind in the assessment of whether or not the WCC will deliver justice as promised.

1.1.0 Mandate of the WCC

Currently, the mandate of the WCC is not clear. There is no legislative enactment stipulating it, and neither can it be ascertained from the Agreement on Accountability and Reconciliation signed in Juba.

1.1.1 Who to Try and for What?

The principle agreements seem to limit the persons that will be tried by the WCC to those that were indicted by the ICC in the first place, leaving UPDF soldiers to courts martial.[31] The loop side of this is that the public will be denied an opportunity to know what the UPDF did.

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[27] *See*, HRW, *supra* note 2, at 37- 42. Many perpetrators of crimes in Northern Uganda have not been brought to justice.
[28] Keller, *supra* note 16, at 217.
[29] IRIN, *Living with the LRA: The Juba Peace Initiative, Uganda- Sudan, a*ccessible at http://74.125.95.132/search?q=cache:XM8AFkrylakJ:www.irinnews.org/InDepthMain.aspx%3FInDepthId%3D58%26ReportId%3D72447+LRA+want+Traditional+justice&hl=en&ct=clnk&cd=1&gl=us, (last visited Dec. 16, 2008).
[30] ICG, *supra* note 24, at 1.
[31] *See* Annexure to the Agreement on Accountability and Reconciliation Clause 4.

The Annexure to this agreement indicates that the Court shall try all individuals alleged to have committed ***serious crimes*** (emphasis added) during the conflict,[32] and that recourse shall not be had to military courts.[33] What constitutes ***serious crimes*** is not stated in the annexure. This confusion is exacerbated by further assertions that the WCC will not try UPDF soldiers because they have been cleared by the ICC[34] and that the WCC will only deal with non state actors, but will not be a bar to investigation of crimes committed by state actors.[35] Though this might be defensible, it will definitely not be appreciated by some victims of atrocities committed by the UPDF,[36] and thus may affect the victims' perspective of the WCC's credibility. Note however that the government vehemently denies any atrocities committed by the UPDF, and believes that the Human Rights Watch Report published some atrocities perpetrated by the UPDF should be ignored.[37]

Worse still, the annexure to the agreement seems to introduce an 'either' –'or' situation in the choice of mechanisms between the WCC and Traditional Justice.[38] According to Keller, this implies that those accused of the most serious crimes, like Kony indicted by the ICC might

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[32] *Id.* Clause 7.
[33] *Id.* Clause 23.
[34] Ann Mugisha *et al, ICC clears UPDF in the North,* http://www.newvision.co.ug/D/8/13/646975/war%20crimes%20court. *(Accessed Oct 2, 2008)*
[35] James Ogoola, *The Special Division of the High Court and other Accountability Institutions*, Presentation, at the Workshop on Accountability and Reconciliation in Uganda: Juba Peace Talks, May 6-7 2008 Fairway Hotel, Workshop Report, at 17. This workshop was intended to clarify to the rebel leader issues pertaining to the Agreement on Accountability and Reconciliation, say how *Mato Oput* and the suggested WCC will operate.
[36] The atrocities committed by the UPDF have been documented by Organizations including HRW. *See supra* note 2, 24-35. These include indiscriminate shooting or killings, rape, torture, etc.
[37] Chris Magezi, *Ignore Human Rights Watch Report on UPDF,* http://www.newvision.co.ug/D/8/459/641593/war%20crimes%20court. *(accessed Oct.1, 2008)*

[38] Clause 23 of the annexure provides "…the Government shall ensure that serious crimes committed during the conflict are addressed by the Special Division of the High Court; Traditional Justice Mechanisms ;and Alternative justice mechanisms…."

face traditional justice than criminal prosecutions.[39] A robust legislation clearly spelling out the mandate of the WCC is long over due.

1.1.2 The International Criminal Court Bill, 2006

The ICC Bill, 2006 is an updated version of the ICC Bill No. 10/2004. The Bill is intended to domesticate the Rome Statute of the International Criminal Court,[40]make it part of the laws of Uganda, and also enable Uganda to prosecute perpetrators of the proscribed crimes in the Statute in Uganda. Remarkable from the bill is the retention of the ICC cutoff date of July 2, 2002; the WCC will not be in a position to try offences committed prior to this date. This provision raises a number of concerns, especially in light of the fact that the conflict in Northern Uganda has been ongoing since 1986.[41] By maintaining this date, a greater number of atrocities committed prior it might go unpunished. The reason advanced for maintaining this date both at the ICC[42] and in Uganda[43] is the legal rule against retroactive legislation or punishment. The drafters of the ICC Bill ignored the fact that international crimes (like crimes against humanity) are not unique or a creature of the Rome Statute, and their prosecution shouldn't entirely be tied to the date the Rome Statue came into force; July 1, 2002. Richard Overy, argues that the Nuremberg trials after world war II are remarkable for attempting to define international crimes, and that they achieved the objective of building the foundation for contemporary international law on war crimes and contemporary conventions on human

[39] Linda M. Keller, *supra* note 16, at 219.
[40] *See supra* note 25.
[41] Refugee Law Project [herein after RLP], *Behind the Violence: Causes, Consequences and the Search for Solutions to the War in Northern Uganda*, Working Paper No 11, and Feb.2004 at 1.
[42] *See Supra* note 25.
[43] Article 28 (7) of the 1995 Constitution of Uganda provides that, 'No person shall be charged with or convicted of a criminal offence which is founded on an act or omission that did not at the time it took place constitute a criminal offence.'

rights.[44] Since the Nuremberg trials of 1945, the prohibition of crimes like those against humanity is recognized by the international community as *jus cogens*.[45] These crimes shock the conscience of the international community and therefore Uganda ought to be in position to punish them no matter when they were committed, for they are so grave to go unpunished.[46]

Lending more support to the above discussion is the ICCPR, to which Uganda is a party.[47] Article 15 thereof provides:

> "1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed.
> 2. Nothing in this article shall prejudice the trial and punishment of any person **for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations."(**Emphasis added)

No doubt that under the above provision, and by virtue of the fact that they commit crimes against the community of nations, the LRA are outside the category of people protected by the rule against retroactive criminality stipulated in 15 (1) above.

Notwithstanding this wealth of jurisprudence, it is not possible to seize the courts of Uganda with a matter that is not based on municipal legislative enactments, even if it is based on international customary law.[48] Crimes that were committed prior to July 2, 2002 will most certainly go unpunished. The perpetrators of such crimes might be dealt with under other post conflict reconciliation mechanisms, of a traditional nature, say *Mato Oput*.

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[44] *The Nuremberg Trials: international law in the making* , in FROM NUREMBERG TO THE HAGUE: THE FUTURE OF INTERNATIONAL CRIMINAL JUSTICE ,2 (Phillip Sands 2003)

[45] M. Cherif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, 42:1 Va. J. Int'l L.81, 119 (2000-2001).

[46] Stefan Kadelbach, *International Law and the Incorporation of Treaties into Domestic Law,* German Year Book of international Law 42, 69(1999). Discusses some objections that might be raised against *jus cogens* obligations, which include their abstract nature.

[47] *See supra* note 3.

[48] Article 123 (2) of the Constitution of Uganda requires procedural steps by a law of ratification passed by parliament to incorporate international treaties in domestic law. International law (treaties) is not self executing.

1.2 WCC's Position as a Division of the High Court: Prospect and Challenge

There are prospects and challenges that arise from having such a unique court as part of an already established judicial institution in Uganda, the High Court. This joinder presents opportunities in the sense that considering the limited time within which the WCC had to be set up, appending it to an already existing institution would not only be practical but tactful as well.[49] Aside from that, the High Court of Uganda has a proven record of performance, despite the unfriendly political and economic environment in which it operates.[50] It would most probably offer the new WCC a strong backbone with which to execute its mandate.

However, there are challenges too posed by such a joinder considering that the WCC is a very specialized court, intended to have very specific mandate, geared towards availing justice for some horrendous atrocities committed during the over 20 year carnage in northern Uganda.[51] Such challenges include executive meddling into the Judiciary - there have been instances in Uganda where the executive has impeded the good work of the Judiciary.[52] It is not uncommon for the executive to disrespect decisions of the Judiciary, especially if they are not in favor of the former.[53] Arguably, chances are high that the executive's ghost of interference into the affairs of judicial bodies might still hover the new WCC, and thereby rendering it incapable to produce.

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[49] It is a lawful by-pass of the would-be long procedure of establishing such an institution that would require the involvement of parliament, to approve the establishment.

[50] *See* http://www.judicature.go.ug/high.php, about the High Court as the third superior court of record in Uganda.

[51] Justice James Ogoola, *supra* note 35.

[52] Anne Mugisa, *et al*, *PRA Suspects Get Bail*, THE NEW VISION, November 17th, 2005, accessible at http://www.newvision.co.ug/D/8/12/466356/black%20mamba. (Last visited Oct. 2, 2008).

[53] Marc Lacey, *Lawyers Protest Soldiers at High Court in Uganda*, N.Y. Times, Nov.25,2005, accessible at http://www.nytimes.com/2005/11/29/international/africa/29brief-uganda.html, (Last visited Dec.16, 2008) Where the High Court granted bail to persons suspected to belong to a rebel group, one of whom was a presidential candidate contesting for the presidency with the incumbent, Museveni. In response, armed men clad in black – 'the black mambas' besiege the High Court to prevent release of the suspects, who were immediately re arrested.

The past record of the Judiciary invoking its mandate to salvage the situation in northern Uganda during the conflict is not clean. Human Rights Watch reported for example, that the High Court in the north does not sit all through the year.[54] One is therefore poised to ask- if the High Court could not intervene at the time it ought to have, why now? Specifically, the 1995 Constitution of Uganda gives the High Court unlimited original jurisdiction in all matters.[55] Despite that, the operation of the Court in the war affected North is wanting now, like it was during active combat in the region. Understaffing and backlogs are some of the features of the judicial system in Northern Uganda.[56] With such a tainted past to build upon by the WCC, much effort will be needed for it to prove ability to deal with the perpetrators of grave crimes now. If the High court could not deal with simple felonies and misdemeanors during conflict how can its division deal with crimes of an international character like crimes against humanity? Probably such questions would not arise if, instead of establishing a WCC as a division of the High Court, it was set up as a fully fledged stand-alone court.

1.2.1. The WCC Delivering Justice? Possible Challenges

Justice can be retributive or restorative.[57] This section deals with the WCC and retributive justice, which focuses on accountability for crimes committed and punishment for them.[58]The ability of Uganda to establish a WCC to dispense justice for international crimes is questionable in absence of implementing legislation of the Rome Statute.[59] The Juba Peace agreements cannot, legally, be a basis for establishment of the WCC. They are signed by a

[54] HRW, *supra* note 2, at 50-51.
[55] Article 139 (1).
[56] HRW *supra* note 2, at 50-51.
[57] Charles Villa-Vicencio, *infra* note 66, at 215. Restorative Justice prepares a way for victims, their respective families, their communities and the nation as a whole to learn to live together.
[58] *Id.* at 215. Retribution denotes an "*eye for an eye"* kind of justice.
[59] Amnesty International, *Uganda: Agreement and Annex on Accountability and Reconciliation Falls Short of a Comprehensive Plan to end Impunity*, 1 March 2008. AFR 59/001/2008. UNHCR Refworld, accessible at: http://www.unhcr.org/refworld/docid/4847a4872.html [Last visited 17 December 2008].

recognized government and an insurrectionist party – the LRA with no status of statehood in international law.[60] It does not therefore bestow any rights and obligations on the parties in international law. Within the domestic jurisdiction, the agreements have no force of law, until the Parliament of Uganda ratifies them into law.[61] Ratification can only take place after the Final Peace Agreement (FPA) is signed. At the time of writing, the FPA wasn't signed.[62]

The above notwithstanding, according to Human Rights Watch, the benchmarks that would need to be satisfied before any national alternative to the trial by the ICC of the cases of the LRA leaders would be adequate are: credible, independent and impartial investigation and prosecution; rigorous implementation of internationally recognized standards of fair trial; and penalties on conviction that are appropriate and reflect the gravity of the crimes committed.[63] It is highly questionable that national trials of the LRA by the NRM government with whom they have fought for over two decades would have a semblance of fairness. It has also been argued that in light of the mistrust between Uganda's north and south, credible international trials could function as a depoliticized avenue for justice.[64] The NRM government has been rejected by the

[60] *See* Prosecutor V. Morris Kallon (Case No. SCSL-2004-15-AR72 (E)) and Brima Bazzy Kamra (Case No.SCSK-2004-16-AR72 (E)), Decision on Challenge to jurisdiction: Lome Accord Amnesty. The court found that since the Lome Agreement was ratified by Parliament under 40 (4) of the Constitution of Sierra Leone, it was recognized in Municipal Law, but couldn't be characterized as an international instrument.

[61] Article 123(1) of the 1995 Constitution, the president has power on behalf of Uganda to enter into any such agreements, treaties or convention with another country or international body or organization. According to clause (2) Parliament has to make a law governing their ratification- which has to be domestication.

[62] Norbert Mao, *Kony's failure to sign pact raises questions* THE NEW VISION, Dec. 3, 2008 at 1, accessed at http://www.newvision.co.ug/D/8/20/662534/LRA%20Sign%20peace%20deal, (Last visited Dec. 16, 2008).

[63] HRW, *Supra* note 14, at 3.

[64] ICG, *Northern Uganda: Understanding and Solving the Conflict*, (2004) at 2, accessible at, http://www.up.ligi.ubc.ca/ICGreport.pdf (Last visited Nov. 15, 2008).

Acholi people and the north generally, and it would have to win their trust to dispense justice in the LRA cases.[65]

The other factor is whether it will be possible to avoid use of law and in fact the WCC for political purposes by conducting perfunctory trials and not necessarily the dispensation of justice. It is not uncommon for political imperatives to drive leaders into the desire to establish sham institutions, to make political statements to the world, especially in cases where there is no victor and vanquished, like it is in the LRA case. This is especially so where the atrocities supposed to be punished were committed under the same regime that purports to punish them, just like the case with Uganda. Villa Vicencio argues that in addition to the rule of law making it difficult to obtain a guilty verdict against many perpetrators, the fact that courts remain largely under the control of the old regime is key.[66] Although Villa Vicencio looks at this in the context of transitions from undemocratic rule, it holds true for post conflict situations. Commenting on the inefficiencies reported in the Human Rights Watch Report about the Judicial system in northern Uganda,[67]Cecily Rose says the capacity to guarantee fair trials is very limited and the resources necessary to rebuild the judiciary and support mass justice in the Acholi region could perhaps be better spent on other initiatives geared more directly towards reconciliation.[68]

[65] *Id.* at 10. The Acholi's rejection of the NRM government was evident in the 1996 and 2006 presidential and Parliamentary elections, during which they expressed a desire for political change in the hope that the new government (opposed to the NRM) would address the war and their concerns.
[66] *Why Perpetrators should not Always be Prosecuted: Where the International Criminal Court and Truth Commissions Meet*, 49 Emory L.J. Winter, (2000).
[66] *Id.*
[67] HRW, *supra* note 2, at 50.
[68] *Looking Beyond Amnesty and Traditional Justice and Reconciliation Mechanisms in Northern Uganda: A proposal for Truth Telling and Reparations*, 28 B.C. Third World L.J 345,357(2008).

Further, it has been argued that criminal justice in northern Uganda is inappropriate, given the identity of the perpetrators and the circumstances surrounding their crimes.[69] Children were abducted from their communities, and forced to commit atrocities against their communities under duress. [70] They are perpetrators, and at the same time victims. This among other factors justifies the argument that trial justice is unsuitable for northern Uganda.

There hasn't been a demonstrated political will on the part of successive governments of Uganda, including the NRM government to deal with impunity. This leaves us with no precedent on the basis of which the NRM government can be trusted to deal with the LRA. Beginning with 1974, Idi Amin's Commission into the Disappearance of People in Uganda produced a report and recommendations[71] which were never published, nor its recommendations implemented.[72] The NRM government made an attempt to fight impunity when it established the Commission of Inquiry into Violations of Human Rights in 1986.[73] This Commission produced no positive results. Judging by history, the existing dearth of hope for the WCC to deliver is justified, especially if it lacks the backing of government's genuine political will.

As earlier mentioned, the penalty for international crimes tried by a domestic institution must be appropriate.[74] International standards and practice indicate that a term of

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[69] Refugee Law Project, *Whose Justice? Perceptions of Uganda's Amnesty Act 2000: The Potential for Conflict Resolution and Long –Term Reconciliation, Working* paper No. 15, at 12, accessible at http://www.refugeelawproject.org/resources/papers/workingpapers/RLP.WP15.pdf (Last visited November 19, 2008).

[70] *Id.*

[71] Priscilla Hayner, *Unspeakable Truths: Facing the Challenge of Truth Commissions*, 23 (2003) (234-234) check..

[72] *Id.*

[73] *See*, The Commissions of Inquiry Act Legal Notice No. 5 (May 16, 1986) (Cap. 56), accessible at http://www.usip.org/library/tc/doc/charters/tc_uganda.html.(Last visited Dec 15, 2008). The Commission found wide spread arbitrary arrests, and detentions, but the final report (Oct. 1994), but was not widely distributed, and nothing was done.

[74] *See* HRW, *supra* note 14.

imprisonment reflecting the gravity of the crime is the appropriate penalty for the most serious crime.[75] Article 77 of the Rome Statute lists the applicable penalties as: (a) Imprisonment for a specified number of years, which may not exceed a maximum of 30 years; (b) A term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person, etc. Imprisonment is seen as the ordinary penalty for crimes under ICC regime.[76] For a punishment by the WCC to be internationally credible, the convicted LRA fighters must be sentenced to terms of imprisonment rather than death. However, the International Criminal Court Bill 2006 Sections 7 (3) (a), 8 (3) (a) and 9 (3) (a) provide for a death penalty for persons convicted under that law. The death penalty is not in tandem with the ICC. At the same time, sentencing the LRA to a term of imprisonment in lieu of death will present a situation of dual punishment in Uganda; since Penal Laws of Uganda maintain the death penalty.[77] This might call for an overhaul of the criminal laws/justice system to abolish the death penalty, which is unlikely in the circumstances.[78]

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[75] HRW, *The June 29 Agreement on Accountability and Reconciliation and the Need For adequate Penalties for the Most Serious Crimes* Second Memorandum on Justice Issues and the Juba Talks, (JULY 2007) at 16 , accessible at http://www.hrw.org/en/news/2007/07/30/june-29-agreement-accountability-and-reconciliation-and-need-adequate-penalties-most (Last visited November 16, 2008).

[76] OTTO TRIFFTERER, COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS'NOTES, ARTICLES BY ARTICLE, 1420 (2nd Edition 2008).

[77] *See* the Penal Code Act, Cap 120, sections 188 and 189 where the death penalty is applied in cases of, e.g., murder, accessible at http://www.ugandaonlinelawlibrary.com/files/free/The_Penal_Code_Act.pdf.

[78] The recent case of Susan Kigula and 416 others V. The Director of Public Prosecutions, Constitutional Petition No.6/2003, was an attempt to move court to hold that the death penalty is unconstitutional. The Constitutional Court held that the mandatory death penalty for murder and aggravated robbery is unconstitutional. This judgment was appealed by the government and the Supreme Court is yet to pronounce itself on this matter. The case was filed by a number of inmates on death row. It is highly likely that the Supreme Court will confirm the Constitutional Court's ruling. For example, Susan Kigula was sentenced to death for a single murder of her husband, in the Case of Susan Kigula Seremba and another V Uganda. Criminal Appeal No 167 of 2002, accessible at, http://www.eastafricapricedirectory.com/lawlib/judgment_display.asp?Key=63, (Last visited November 17, 2008).

Besides the above controversy that might arise from the law, the annexure on the Agreement on Accountability and Reconciliation is silent on punishment for offenders.[79] This indicates that even if there may be criminal prosecutions, criminal punishment might be lacking.[80]

More so, securing the arrest of the LRA will present a challenge, in the event that they do not surrender. The LRA do not have a fixed place of abode or operation. They are always on the move traversing areas of northern Uganda, southern Sudan and the Garamba forest in the Democratic Republic of Congo.[81] The elusive nature of the LRA coupled with the seeming unwillingness on the part of the countries in which LRA operates to arrest the rebels (for logistical or other reasons) explains why Kony *et al* is still at large.[82] To date, the ICC arrest warrants against the top bras of the LRA haven't been executed. In the same vein, the success of the WCC hinges on either procuring the arrest of the perpetrators, or their surrender. It is highly unlikely that the Uganda Police will be well positioned (than at any earlier time) to arrest Kony and others at large for trial by the WCC. This therefore presents a further challenge to the prospect of holding the LRA accountable for the horrendous violations of human rights in Northern Uganda during the conflict.

Finally, passing legislation and establishing a WCC will be an indication of a commitment by Uganda to prevent impunity, reflected in the performance of an obligation to prosecute and punish perpetrators of crimes in northern Uganda. Delivery of justice for the victims of the northern Uganda conflict is caught between the ICC and national trials, and the

[79] *See* Clauses 7-9, about the Court, 16-17 on reparations, but no provision for punishment.
[80] Linda M. Keller, *supra* note 16 at 220.
[81] *See* Henry Mukasa, *UPDF planes attack Kony's Congo base*, THE NEW VISION, Dec. 14, 2008 at 1, accessible at, http://www.newvision.co.ug/. UPDF, southern Sudan and Democratic Republic of Congo waged an attack on Kony's Garamba forest base.
[82] *See Id.* It's only recently that other countries have joined Uganda to fight the LRA.

WCC may help the Ugandan government to secure a suspension of the indictments issued by the ICC against the LRA. Aside from the WCC, traditional justice has been put across as an alternative mechanism for justice and reconciliation in Northern Uganda.

1.3 Is Traditional Justice an Alternative for Northern Uganda?

Traditional justice (*Mato Oput*) is of a restorative nature. It is a process of active participation in which the community deliberates over past crimes, giving centre stage to both victim and perpetrator in a process which seeks to bestow dignity and empowerment upon the victim with special emphasis placed upon contextual factors.[83] It has been cited as one of the available options for northern Uganda to achieve justice and reconciliation. The ICC's 'complementarity of jurisdiction' requires the court to make more efforts to adapt to national priorities and process.[84] At the same time, in making a decision whether or not to investigate and prosecute, the prosecutor has to take into account a number of factors that include the gravity of the crime and the interests of victims.[85] The prosecutor may give up prosecution if the gravity of the offence and the interest of the victim give him a substantial reason to believe that an investigation would not serve the interest of justice.[86] In the Uganda situation that is before the ICC, traditional Acholi leaders have strongly advocated for the use of traditional justice and reconciliation ceremonies as mechanisms for reintegration in the post conflict context.[87] The fact that Acholi leaders and not the government put forward the proposal for traditional mechanisms makes the choice more legitimate. [88]

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[83] *See*, Sinclair Dinnen, Restorative *justice in Papua New Guinea*, International Journal of Sociology of Law 25 (1997) 245-262.
[84] TIM ALLEN, *supra* note 7, at 128.
[85] Rome Statute of the International Criminal Court, Article 53 (1) (c).
[86] *Id.*
[87] Rose, *supra* note 68 at, 357.
[88] Keller, *supra* note 16 at 263.

The debate on traditional justice mechanism has greatly tilted towards the Acholi mechanisms, despite the existence of similar mechanisms in other affected regions. There has been no suggestion to impose Acholi Mechanisms on other communities, but to apply them to the Acholi community to reconcile them with the perpetrators majority of who are Acholi.[89] For purposes of this paper, traditional justice is used to refer to the Acholi rituals of *Mato Oput.* In sum, traditional justice has been accepted as complimentary to other judicial mechanism like the ICC or WCC, but not a choice that can trump them.

1.3.1 Traditional Justice: A description

Practices of traditional justice in Acholi ethnic group differ across clans, although there are common aspects that are shared across the clans.[90] These include: the voluntary nature of the process; mediation of truth; acknowledgement of wrong doing; and reconciliation through symbolic acts and spiritual appeasement.[91] Elders play an important role as arbiters in the reconciliation mechanism. The mechanisms also differ from tribe to tribe, across the: Acholi, Langi, Madi, Itestots, etc. Some of the basic traditional mechanisms:

1.3.2 *Nyono tong gweno* 'stepping on the egg' and *Mato Oput* 'drinking of the bitter Root'

The ceremony of 'stepping on the egg' is generally intended to welcome home family members who have been away from the homestead for an extended period of time, and is at

[89] Liu Institute & Gulu District NGO Forum, *Accountability, Reconciliation and the Juba Peace Talks: Beyond the Impasse*, The Justice and Reconciliation Project Field Notes, No3, October 2006 at 2,accessible at http://www.internal-displacement.org/8025708F004CE90B/(httpDocuments)/379B02BBA761C733C1257210002A45B2/$file/LiuFN3-pdf.pdf (Last visited November 17, 2008).

[90] *Id.*

[91] *Id.* at 3.

times a precursor to the eventual *Mato Oput* rite where applicable.[92] It is a gesture of welcome by the family or clan to the returnee and a commitment that both are ready to begin life together in harmony.[93] This ritual cleanses foreign elements to prevent them from entering the community and bringing it misfortune.[94] Traditionally, this ritual was performed particularly when someone had done something immoral or amoral, such as having a child while living away from the ancestral home.[95] It has been adapted in this new context as a ceremony to 'forgive' the LRA.[96] Over 12000 LRA returnees have under gone the ceremony of 'steeping on the egg'[97] and about 54 ceremonies of *Mato Oput* have been conducted between 2004 and 2006.[98]

Killing without just cause invokes the anger of ancestors and deities and creates a barrier between the family of the clan of the killer and that of the killed.[99] The *Mato Oput* ritual of reconciliation was therefore intended to bridge the gap between these two clans by reconciling them, and relieving the killer of the evil spirits that make him an evil person.[100] The killer's clan pays blood money that the victim's family can use to marry another woman to produce children to replace the deceased.[101] This is followed by the real ceremony of *Mato Oput.*

The *Mato Oput* ceremony involves slaughtering animals (goat and a ram), and the killer admitting wrong doing, accepting responsibility (repenting) and seeking forgiveness.[102] This is

[92] James Ojera Latigo, *Northern Uganda: Traditional-based Practices in the Acholi Region*, *in* TRADITIIONAL JUSTICE AND RECONCILIATION AFTER VIOLENT CONFLICT: LEARNING FROM AFRICAN EXPERIENCES, (International Institute for Democracy and Electoral Assistance 2008) at 106.
[93] *Id.*
[94] Cecily Rose, *Supra* note 68 at 7.
[95] TIM ALLEN, *supra* note7, at 166.
[96] *Id.*
[97] Latigo, *supra* note 93, at 106.
[98] *Id.* at 105.
[99] *Id.* at 103.
[100] *Id.* at 104.
[101] *Id.*
[102] *Id.* at 108.

followed by the killer and the next of keen of the deceased drinking an alcoholic drink mixed with the bitter powder of the roots of the *oput* tree.[103]Members of both families too join in and drink from the same calabash. A bull that is brought by the killer is speared, cooked and shared by the two families.[104]Other communities victimized by the conflict in northern Uganda have similar rituals of reconciliation: the Lango – *Kayo cuk* (biting of charcoal), Madi, *tonu ci koka*, and *ailuc* for the Itesots.

1.4 Reconciliation through *Mato Oput*

Reconciliation is the coming together again (or re coming together) of things that should be together but had been separated.[105] It connotes the coming together of things that once were united but have been torn asunder, a return to or recreation of the status quo ante, whether real or imagined.[106] Latigo argues that Northern Uganda has a traditional system of law and justice that reflects principles of conflict management with both retributive and restorative elements where the objective is to reintegrate the perpetrators into their communities and reconcile them with the victims, through a process of establishing the truth, confession, reparation, repentance and forgiveness.[107] The Acholi culture used the *Mato Oput* ritual to achieve reconciliation between enemies.[108]By requiring compensation on the part of the offender, acknowledgment and compensation on the part of the perpetrator, and participation of the victim, *Mato Oput* brings about reconciliation between the two, and restoration of bonds between clans of the perpetrator and the victim.[109]The intended reconciliation is at various levels, for instance, if it

[103] *Id.*
[104] *Id.* at 105.
[105] Jeremy Sarkin, *et al*, *Too Many Questions, Too Few Answers: Reconciliation in Transitional Societies*, 35 Colum. Hum. L. Rev. 661 2003-2004, 665.
[106] *Id.*
[107] Latigo, *supra*, note 93, at 108.
[108] Timothy Murithi, *rebuilding Social Trust in Northern Uganda*, 14 Peace Rev.291, 292-95 (2002)
[109] Keller, *supra* note 16, at 277.

is a murder; between the offender and the family of the deceased; deceased's family and that of the offender, deceased's clan or community and that of the offender. Keller says *Mato Oput* would address local or tribal reconciliation.[110] They are therefore intra-community processes intended to foster communities' co- existence in harmony.

Evidently, with *Mato Oput* the victim can be accepted back to the community.[111]This aspect of *Mato Oput* is key, especially in light of the fact that most if not all LRA fighters are abducted members of the local communities affected by the conflict, and need to be reintegrated into the community[112] Failure to accept them back would definitely be an impetus for them to remain in the jungle and continue waging war against their people. On the other hand, trying them through the formal justice systems and incarcerating them might widen the gap between the offenders on the one hand, and their victims and families on the other. It should also be borne in mind that approximately 80% of the LRA ranks are children, coerced to commit heinous crimes.[113]

In sum, naming the perpetrators through *Mato Oput* and having the victim's family and clan/community participate in the ritual would foster reconciliation in some cases. One has to note however that reconciliation is not an event but a process that might take some time.

1.5 Viability of *Mato Oput*

Mato Oput is a very small component of a bigger process of reconciliation.[114]

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[110] *Id.*
[111] *Id.*
[112] Linda M. Killer, *supra* note 16 at 276.
[113] World Vision, *Pawns of Politic: Children, Conflict and peace in Northern Uganda,* (2nd Edition),at 16, accessible at http://www.worldvision.org/resources.nsf/main/PPA_Pawns2nd_final.pdf/$file/PPA_Pawns2nd_final.pdf (Last visited Dec. 16, 2008).
[114] Justice and Reconciliation Project [hereinafter JRP] *et al, , Acholi Elder perspectives,* Presentation by Otto James at the Workshop on Accountability and Reconciliation in Uganda: Juba Peace Talks , Work shop Report , Workshop held 6-7 May 2008, Fairway hotel , Kampala ,at 15, accessible at, http://www.humansecuritygateway.info/documents/LIGI_JRP_Uganda_workshopaccountabilityreconciliation.pdf

As mentioned earlier, it was most of the times put forward by the elders, or people in positions of responsibility as a solution to the conflict.[115] Tim Allen in his research found no widespread enthusiasm for *Mato Oput* or other ceremonies performed by the paramount chief.[116] In fact, some Acholi people he spoke to were adamant that such public rituals are useless, or make things worse by concentrating in urban centers.[117] Some people do not hold the position that accountability for crimes has been set aside by the community as a whole in favour of *Mato Oput*.[118] He further argues that there are problems associated with equating rituals of social healing with 'justice', as well as questions to ask about who has the right and authority to speak for the Acholi people as a whole and claim that they do not want or that they reject the ICC for *Mato Oput*.[119] His research further revealed that the Langi, Madi, and Itesots were dismissive of these rituals.[120]

The conflict has led to the displacement of over 1.8 million of people from their communities into internally displaced peoples' camps.[121] This has eroded the hitherto solid and rich Acholi social fabric which was the foundation upon which traditional norms, belief systems and practices were meaningfully and effectively regulated.[122] Beside, the traditional mechanisms have a very close link to traditional religious beliefs and the powers of the spirit world, and over the years, a great majority of the Acholi's are not staunch believers in the spirit

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(Last visited November 28, 2008).
[115] *See infra* note 128.
[116] *Supra* note 7, at 167.
[117] TIM ALLEN, *supra* note 7, at 167.
[118] ALLEN, *supra* note 7, at 167.
[119] *Id*. at 131.
[120] *Id.* at 167.
[121] World Vision, *Pawns of Politics: Children, Conflict and Peace in Northern Uganda* (Kampala: World Vision, 2004) at 4.
[122] James Ojera Latigo, *supra*, note 93, at 109.

world.[123] They embraced religion and many are Catholics, Pentecostals, Muslims, etc.[124] There are various forms of social healing that play a part in northern Uganda.[125]For Catholics, for example, individual confession and collective celebration of mass are claimed to have therapeutic effects on those who are disturbed or traumatized.[126] There has been great lobbying against the ICC and for local modes of reconciliation by the traditional and religious leaders.[127] This calls for modification of the traditional norms and rituals to make them acceptable to the entire community, if they are to be viable to bringing about reconciliation in the community, part of which is religious.

In addition, the Acholi had an indigenous system of governance under which these mechanisms were operated.[128] This system has progressively been hampered by a number of events including colonialism, independence, conflict and displacement.[129] In a way, this eroded the respect and belief in the cultural institutions and leaders, the custodian and performers of traditional rituals respectively. This has been exacerbated by the fact that majority of the LRA fighters are abducted minors, who were born during the conflict. Very few if at all, of the above minors and those that were lucky not to be abducted know something about the rituals or have experienced them.[130] Furthermore, those who are unfamiliar with the rituals generally

[123] *Supra note* 93.
[124] See, Robert Lukwiya- Ochola, *The Acholi Religious Leaders' peace Initiative in the Battle of Northern Uganda: An Example of an Integral , inculturated and Ecumenical Approach to Pastoral Work in a War Situation*,Insbruck, June 2006, accessible at http://www.comboni.de/literatur/ochola_diplomarbeit.pdf (Last visited Dec. 16 2008). It is reported that Uganda is a highly Christian or religious country.
[125] TIM ALLEN, *supra* note 7, at 164.
[126] *Id.*
[127] *Id.* at 132. These include the Acholi Religious Leaders' Initiatives (ARLI) established as a peace initiative in 1998. It comprises of Catholic, Anglican and Moslem religious leaders, though the first two dominate it. The Christians in the group discuss Mato Oput in a different way, to suit the Christian concept of forgiveness and reconciliation. One of the reasons they advance for this is that the children in the LRA are victims, in addition to being perpetrators.
[128]James ojera Latigo, *supra* note 93, at 102.
[129] *Id.*
[130] James Ojera Latigo, *supra* note 93 at 109.

do not gain exposure to them because they are typically held at reception centers in district centers where only small audiences bear witness.[131] These raise a question whether there will be genuine reconciliation if the former abductees are subjected to a ritual they don't know, or at the worst believe in.

Besides that, non Acholis in northern Uganda and southern Sudan have also been greatly affected by the LRA conflict since 2002, but have relatively little knowledge of Acholi traditional practices and may question their relevance to them.[132] Most recently, the LRA has had incursions into the Chad and the DRC, where it killed people and abducted children.[133] Victims in these affected areas are not Acholi and have no knowledge of traditional rituals of the Acholi. Worse still, there has been no systematic documentation of *Mato Oput*, and thereby no document to be referred to for consistency.[134] To this end, *Mato Oput* or Acholi rituals lacks legitimacy among non Acholi and might not be used to reconcile them.

The traditional mechanisms are sanctioned by the community, and tend to be more intra – community than individual. It is doubted whether community reconciliation definitely trickles down to that between and among individuals. They also take for granted the individual's willingness to forgive. The Acholi's capacity to forgive may have been inflated or overestimated by researchers, journalists , humanitarian aid organizations, Acholi elders and

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[131] ICG, *Building a Comprehensive Peace Strategy for Northern Uganda*, Africa Briefing Paper No. 27 (2005), at 8, accessible at, http://www.crisisgroup.org/library/documents/africa/central_africa/b027_building_a_comprehensive_peace_strategy.pdf, (Last visited Dec. 2, 2008).

[132] HRW, *supra* note 2, at 56.

[133] Codjo Houegniglo, *LRA Elements Commit Grave Human Rights Violations*, Accessible at, *http://www.monuc.org/News.aspx?newsId=18389*, (Last visited Nov. 10, 2008).

[134] Liu Institute for Global Issues *et al*, *Roco Wati Acoli: Restoring Relations in Acholi-land: Traditional Approaches to Reintegration and Justice* (Sept. 2005), at 65-66, accessible at, http://www.ligi.ubc.ca/sites/liu/files/Publications/JRP/15Sept2005_Roco_Wat_I_Acoli.pdf , (Last visited Nov. 13, 2008).

catholic leaders in the region.[135] In Gulu town in particular, it is presented as a kind of 'received wisdom' that the Acholi people have a special capacity to forgive, and that local understandings of justice are based upon reintegration of offending people into society.[136] This overlooks the nature of forgiveness as a personal choice. Indeed, a study carried out by Human Rights Watch reveals that although the community has accepted perpetrators back into the community, individual victims may not want to forgive the perpetrators of serious crimes.[137] The report further shows that not all victims are agreed on the concept of forgiveness; some want retributive justice.[138] There can be no guarantee that a well organized and attended *Mato Oput* event will instantly result in forgiveness and reconciliation, since these are processes rather than events.

Mato Oput can only occur when a sense of guilt and responsibility are assumed /recognized by the perpetrator.[139]The perpetrator must be present, and able to identify the victim and the victim's clan, for both clans to reconcile, after the perpetrator has asked for forgiveness and paid compensation.[140] Unfortunately, poverty is a stumbling block to peoples' ability to pay compensation. In 1999-2004 poverty went back up in the North while it continued to decline, at a lesser rate, in other regions of Uganda.[141] This is partly attributed to the civil conflict.[142] In order to deal with this, it has been suggested that compensation should

[135] TIM ALLEN, *supra* note 7, at 129- 133.
[136] TIM ALLEN, *supra* note 7, at 129.
[137] S*upra* note 2, at 55- 56.
[138] HRW, *supra* note 2, at 40.
[139] Liu Institute for Global Issues, *et al*, *supra* note 135, *at 67.*
[140] *Id.* at 66.
[141] Stephen Younger, *Understanding Poverty in Northern Uganda*, SAGA Cooperative Agreement Sponsored by USAID Office of Poverty Reduction/PASSN, May 16, 2007 accessible at, http://www.povertyfrontiers.org/ev_en.php?ID=1964_201&ID2=DO_TOPIC (Last visited Nov. 15, 2008).
[142] *Id.*

be symbolic.[143] The clans should assist perpetrators in paying compensations.[144]If this cannot work, alternatives like sourcing for money from the reparations fund (to be set up by government) or community work should be viable options.[145]

Perpetrators are usually unaware of the victim's identity;[146]they commit atrocities in villages other than their own. The above presents a number of challenges on the viability *Mato Oput*. First, most of the individuals committing the crimes did so on orders from high ranking LRA commanders or institutions like the UPDF, who have to own up to them rather than the individual.[147] Note however that the UPDF and the victims are from a diversity of ethnicities, and might not subscribe to *Mato Oput*.[148]Besides, under the Uganda Peoples' Defense Forces Act, 2005, government forces are subject to military law and Courts Martial, for the offences they commit while on duty.[149] This means *Mato Oput* cannot trump the written law, but written law can trump it. Second, *Mato Oput* can only take place when the rebels return home. A significant number of them are still in the 'bush'.[150]

It is also questionable whether *Mato Oput* as perceived in its original sense is capable of dealing with the current conflict because it does not readily apply to the mass atrocities committed by the LRA.[151]*Mato Oput* only applied to less serious offences like manslaughter and not to the kind of heinous crimes committed by the LRA; mutilations, wanton killings,

[143] Ogola, *Traditional Justice*, *supra* note 115, at 14.
[144] *Id.*
[145] *Id.*
[146] Liu Institute for Global Issues, *et al*, *supra* note 135, at 66.
[147] Id, at 67. Interview of Rwot Arop Poppy Paul.
[148] *Id.* at 67.
[149] The UPDF Act is an Act to provide for the regulation of Uganda Peoples' Defense Forces in Accordance with Article 210 of the 1995 Constitution of Uganda.
[150] Liu Institute for Global Issues, *et al supra* note 135, at 67.
[151] *Id.* at 66.

during a war.[152] However, the restorative value in *Mato Oput* lies in educating, and rebuilding an offender than in simply incarcerating him and forgetting about him.[153] Through the traditional justice mechanisms, there is a greater search for restoration of relations in the community than punishment. Catholic leaders in northern Uganda have very successfully promoted the idea of forgiveness through NGOS and the local council system and have thereby played a significant role in pressuring the Uganda government to, for example pass and implement the Amnesty Act.[154] They are not opposed to some mechanisms like *Mato Oput* that might have an end result of reconciliation and harmony in the community. The Amnesty Act and the 'policy of forgiveness' thereunder need to be complimented by further processes to promote intergration and restoration of social relations.[155]

The process of *Mato Oput* is viewed as the most relevant instrument by its advocates.[156] *Mato Oput and Nyono tong gweno* help facilitate reintegration, and stimulate the process towards reconciliation.[157] The preceding should be considered a first step only, and not sufficient for reconciliation in the community.[158]No doubt, if the shortcomings are addressed, traditional justice mechanisms can foster reconciliation at a later stage. They should be seen as one ring on the chain towards reconciliation. It is however important not only to emphasize the Acholi rituals, but carry out a thorough investigation into the practices in the neighboring affected communities, to bring them on board.

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[152] *Id.*
[153] RLP, Peace *First, Justice Later: Traditional Justice in Northern Uganda*, 2005, Working paper No.17 at 14, accessible at http://www.refugeelawproject.org/resources/papers/workingpapers/RLP.WP17.pdf (Last visited Nov. 13, 2008).
[154] TIM ALLEN, *supra* note 7, at 137.
[155] RLP, *supra* note 154, at 14.
[156] *Id.*
[157] Liu Institute for Global Issues, *et al*, *supra* note 135at 69.
[158] *Id.*

1.6 **Synchronizing Justice and Reconciliation: The WCC and *Mato Oput***

The annexure to the agreement on accountability and reconciliation does not specify the order in which the WCC and Traditional Justice Mechanisms *(Mato Oput)* will be applied.[159] At the same time, it is not clear which offenses will be dealt with by the WCC on the one hand, and *Mato Oput* on the other.[160] A myriad of questions arise and they include; would the WCC deal with a case that has already been subjected to *Mato Oput* without double jeopardy claims? Would it use incriminating evidence gathered during *Mato Oput* ritual ceremonies without jeopardizing reconciliation? Would the fact that one has gone through the *Mato Oput* ritual be considered as a mitigating factor at sentencing? Would *Mato Oput* be conducted for one who has been tried, convicted by the WCC and served sentence? To avoid tension between the WCC and *Mato Oput* in the interest of justice and reconciliation, it is important to synchronize the work of the two institutions.

It has been suggested that the two systems; formal justice by WCC and traditional justice by *Mato Oput* should coexist alongside each other.[161]Care should be taken not to bring about friction between them. All ex- combatants who return from the bush are expected to under go *nyonno tongwenno* (stepping on the egg), and all that committed murder *Mato Oput*, on top of the former.[162] Undergoing the traditional ceremonies should not be a bar to prosecution by the WCC, if one committed crimes within its jurisdiction.[163] At the same time, serving sentence following a conviction by the WCC ought not to be a bar to undergoing *Mato Oput* ritual of reconciliation.[164]

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[159] In fact, Clause 23 thereof seems to suggest that they are alternatives.
[160] Clause 23, 'serious crimes' committed during the conflict can be dealt with by both.
[161] JRP, *et al*, *supra* note 115 at 16.
[162] *Id.* at 11.
[163] *Id.* at 16.
[164] *Supra* note 115, at 16-17.

Note that if undergoing *Mato Oput* does not immunize one from trial by the WCC, it is highly plausible that there will be no incentive for ex-combatants to undergo *Mato Oput*; yet no one can be compelled to.[165] Reconciliation might suffer a challenge presented by the WCC.[166] Similarly, very few if at all might be willing to go for *Mato Oput* after serving sentence. In the process of synchronizing the two systems, one might suffer. There seems to be bias in favor of reconciliation than justice. According to Justice James Ogoola,[167]

> "… We are dealing with a situation which is special and it needs everything special… The issue of reconciliation, restoration and healing should be seen as one of the governing doctrines in the accountability and justice debates, and especially in the proposed Special Court as recognized by the agreement and most importantly the Ugandan Constitution. Accountability proceedings (even the special court and other formal processes) are to promote reconciliation…"

It is likely that the WCC which is a judicial body might be used to promote reconciliation, which is said to be much needed than justice. Diane Orentlicher argues that international law does not, necessarily, require states to take actions which pose a threat to vital national interests.[168]All the same, Uganda ought to take care not to evade its duty to punish. Without legislation the question on how to synchronize justice and reconciliation and achieve both in the end is still moot. From all efforts to end the conflict, it seems clear that reconciliation is preferred to justice; to an extent that justice mechanisms are considered a tool for reconciliation.

[165] Clause 22 Annexure to the agreement on accountability and reconciliation.
[166] ICG, *supra* note 64, at 10.
[167] JRP, *supra* note 115, at 17. Principle Judge, presentation on, *Special Division of the High Court*.
[168] Diane F. Orentlicher, *The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 Yale L.J. 2595 (1991).

1.7 Conclusion

This paper has attempted to show how daunting a task it is for Uganda to come up with credible and effective alternatives to ICC prosecutions.[169] A number of mechanisms have been proposed as seen in the Annexure on accountability and reconciliation.[170] National alternative hinge on the signing of the Final Peace Agreement which, at the time of writing, is yet to be signed.[171] The WCC and *Moto Oput* have been suggested as conduits to reach out for justice and reconciliation respectively. Although both are mired with a number of short falls, there seems to be greater genuine political will for reconciliation than for justice.[172] No doubt, the WCC might have been suggested since it is the only way through which ICC warrants would be suspended, and not necessarily to deliver justice.[173] Currently in Uganda, peace and reconciliation seem more urgent than justice.

On the other hand, *Mato Oput* is a very small component of a bigger process of reconciliation in the northern Uganda society.[174]However, *Mato Oput* cannot be fostered until the conflict ends, and it does not immediately translate to the scope and scale of the present conflict.[175] All the same, in order to reach out and achieve justice and reconciliation in northern Uganda, the shortfalls of the two systems highlighted in this chapter have to be addressed.

Legislation should be passed to make provision for the relationship between the WCC and the traditional mechanisms like *Mato Oput*, stipulating the crimes that will be dealt with by either system, among others. Ultimately the issue of sequencing –that is resolving the conflict before

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[169] *See* ICG, *Northern Uganda: The Road to Peace, with or without Kony*, Africa Report No. 146 –Dec.10, 2008 at 9, accessible at http://www.crisisgroup.org/library/documents/africa/central_africa/146_northern_uganda___the_road_to_peace__with_or_without_kony.pdf (Last visited Dec.16 2008).
[170] They include; Cl.4, Commission of Inquiry, Cl.7 Special Division of the High Court, Cl.19 Traditional justice.
[171] ICG, *supra* note 170, at 1.
[172] *See supra* note 168.
[173] *See* ICG, *supra* note 70, at ii.
[174] JRP, *supra* note 115, at 15. Presentation by Otto James, *Acholi Elder perspective*.
[175] Liu Institute for Global Issues, *et al*, *supra* note 135, at 66.

beginning to deal with perpetrators of crime is very important.[176]In the end, through the courts and traditional mechanisms, Uganda should strive to reach out for both justice and reconciliation.

[176] RLP, *supra* note154, at 22.