ONE SIZE DOES NOT FIT ALL: A RETHINK OF INTERNATIONAL LAW MECHANISMS IN THE CASE OF THE LORD'S RESISTANCE ARMY IN UGANDA

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1. INTRODUCTION

In order to investigate the horrendous crimes which occur during war, it is important to understand the fundamental aspects of stopping the violence and ensuring peace. The aim is to determine how justice will be obtained for these crimes. How does a society heal after rape, torture, mutilation and death have torn apart the soul and moral fibre of a society? Does a cry for justice mean a prison sentence to satisfy the international and domestic rule of law? Alternatively, does it mean victims' or community justice within the context of indigenous justice systems?

The juridical approach would assume that a trial and conviction would satisfy the ends of justice, but is this assumption relevant in an African context? Although the International Criminal Court (ICC) received a ratified mandate to ensure the execution of global juridical justice, it appears that the signatories did not consider the normative societal frameworks in which this juridical justice is sought.

Allen (2006:4) explains that the complexities and dynamics of traditional justice found on grassroots level is something the ICC did not foresee. The ICC has found its mandate to be embroiled in the controversy of two streams of thought in dealing with past atrocities. The first stream maintains that states should hand over those who committed war crimes to the international justice machinery to ensure that the principle of universal human rights prevails. This approach transcends the sovereignty principles which allow these citizens to be tried in local courts or to remain free in the name of peace (Robertson 2002:389-390).

The second stream favours alternative means of justice and regards the international legal system as "fundamentalist" and detached from the normative societal rules which constitute the very essence of their existence. Cautioning against this dilemma, Allen (2006:24) argues that the:

> "dangers of 'international law fundamentalism' propose that the decision, on the one hand to seek justice through punishment or, on the other, to forgo punishment in favour of justice through reconciliation,

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> is a decision that must be made by the concrete community that is the victim of the crimes and that will have to live with the consequences of the decision. 'Humanity' is too thin a community upon which to base a universal right to punish…If local injustice is the price to be paid for the kind of international justice that results from ICC prosecution, then we must abandon the Court and imagine new modes of building a truly global rule of law."

This article provides a descriptive analysis of the international and alternative justice approaches to war crimes. This also includes an exploratory view of a third option. That is, whether a compromise between the two streams of thought, as mentioned above, is possible. Current initiatives in Uganda bear testimony to the nuances of the dilemma of tribal and retributive justice systems. This dilemma highlights the interesting interplay of peace and justice while addressing war crimes through legal mechanisms.

President Yoweri Museveni of Uganda indicated as recently as 11 March 2008 that the leaders of the Lord's Resistance Army (LRA) would be tried under tribal justice. Museveni also stated that although the fact that the utilisation of a process of tribal justice would seem to be a concession to the LRA, it would also be in the interest of the Ugandan government to try the leadership of the LRA at home. This would give the Museveni Government a certain amount of leverage during the enactment of the law creating a special tribunal for the trials. The role played by the ICC, however, cannot be ignored. The international arrest warrants issued by the ICC have given the Ugandan government greater leverage in negotiations with the LRA - providing more impetus to the peace negotiations than 22 years of military campaigning was able to do (Bisika 2008).

As the case against the LRA will be an important test case for the ICC in terms of the justification of its existence, it will endeavour to implement its mandate in terms of the Rome Statute[2] in the dispensing of retributive justice. It is for this reason that the LRA in Uganda will be used as a case study in order to determine if international retributive justice mechanisms are complementary to or an obstacle in addressing the issue of war crimes in Africa.

2. THE DEVELOPMENT OF TRANSITIONAL JUSTICE IN ADDRESSING HUMAN RIGHTS VIOLATIONS AND WAR CRIMES

A key aspect of political transformation is to facilitate the process of political and legal change from violent conflict to one of peace and democracy. It is important to ensure that this process guarantees a new dispensation that is democratically constituted,

[2] The ICC was given its mandate in terms of the Rome Statute of the International Criminal Court, 1998.

and reflects a common value system which protects the social foundations which contextualise the nature of the conflict and regime change.

It is within the road to peace and democratisation, regardless of the uniqueness of its foundational realities, that the need to address past violations of human rights, where political leaderships viciously turned on some or all of the citizens to whom they are accountable, becomes imperative. Who should be held accountable for these deeds and how they are held accountable, also becomes a matter of concern.

These are pertinent questions which normatively highlight the significance of the principles and values of "justice and reconciliation". These two values may procedurally and inherently be different, but they share a common goal of ending the cyclical occurrence of war, conflict, violence and gross human rights violations within the particular contextual environment while striving for long-lasting peace, healing and social reconstruction (Anderlini *et al*. 2007:1).

Drawing from past incidents or examples (South Africa, Rwanda), it is clear that the political leadership of any newly established regime have a number of options to choose from when dealing with past aggressors. These may range from a variety of political options, national amnesty initiatives and advocacy for future national unity, executions, vetting or tribunals. Often these options are determined by the desired political outcome. An approach which inclusively deals with the aspect of political transformation, justice and law is known as transitional justice (Daniel and Ramdeen 2006:192). Transitional justice, Bickford (2004:2) explains,

> "refers to a range of approaches that societies undertake to reckon with legacies of widespread or systematic human rights abuse as they move from a period of violent conflict or oppression towards peace, democracy, the rule of law, and respect for individual and collective rights".

This definition highlights an interesting and very pertinent debate about the relationship between peace and justice which lies at the heart of this article. At first glance, it appears that peace precedes justice. Peace and justice are often viewed as separate initiatives within the transformation process but are in fact part of a greater process in the pursuit of reconciliation. If creating an environment that is conducive to progressive change is imperative, then one should investigate whether peace should precede justice or if justice should precede peace, given the unique nature of the transitional process in question.

Okello (2007:2) points out that the sequence in which the transition should ideally occur is a decisive factor in this debate and argues that "sequencing should be distinguished from prioritisation. If the preferred sequence is peace followed by justice, this in no way signals that justice is a lower priority than peace".

Teitel (2000:10) continues the debate in terms of sequence to include all the other steps in the transitional justice process. Given that the relationship between politics and law is an important consideration in this context, it is necessary to determine

whether there is a correlation between the transition of one legal order to another as well as a normative legitimate link between the old and the new dispensation. In viewing this linkage, one should seriously consider the following elements which facilitate the political transformation from a political dispensation caught up in violent instability to a peaceful democratic dispensation, i.e. elections, constitutions and trials. The sequence in which these three modalities occur are dependent on the transformation of the "diminished legitimacy" (Teitel 2000:10).

Teitel's view, similar to that of Bickford, also implies peace before justice and this sequential focus assumes peace and highlights elements of the rule of law (elections, constitutions and trials) as important to the transition. Hovil and Quinn (2005:12) emphasise that within African justice, a holistic approach is needed to ensure peace, the rule of law and protection of human rights. The rule of law within African justice models also requires a multilayered legal approach that includes all legal systems as a means towards progressive change. The transitional justice system functions within multiple international legal systems with various jurisdictional characters. Teitel (2000:2) explains that there is "a paradigm of global transitional justice: an increasing juridification among diverse legal systems, international and national, and multiple paradigms of legitimacy in global order". The relationship between traditional African legal systems and international law is of particular interest to the debate in this article.

Transitional justice may be correlated to the aspect of political transformation as there are accompanying implied aspirations such as post-conflict nation-building, judicial reform, political legitimacy, amnesties and tribunals. Daniel and Ramdeen (2006:192) explain that transitional justice

> "is a form of law involving a set of judicial or quasi judicial procedures designed both to deal with the issues of accountability for past wrongs and to ensure the success of the transition. It straddles the middle ground between law and politics, it is a politicised form of the law involving the application of judicial processes in the context of what - and this is the key point - is politically possible in the circumstances of a political transition."

These implied aspirations are domestic state-driven initiatives aimed at addressing the challenges inherited from the previous regime and can be achieved within the jurisdiction of the new regime. However, past transgressions by states may transcend beyond the realm of domestic law into the legal sphere of international law. The question is, if all these changes need to take place on a national or local level, whether domestic or international law becomes applicable? In order to address this question it is important to understand the nature of the rule of law in terms of its normative foundations, be it within an international, domestic, local or indigenous legal framework. Teitel (2000:14) explains that:

"international criminal justice's aims and contributions are mixed, as

> justice-seeking in such new political circumstances inevitably imply diverse understandings of rule of law values. To begin, consider the extent to which international law at The Hague affords the rule of law values of fairness and neutrality, which one might juxtapose to other rule of law dimensions privileging local accountability."

When discussing transitional or restorative justice, an understanding of the nature of the conflict which contextualises the political and legal changes inherent to these processes becomes a prerequisite. Whether apartheid in South Africa, the Revolutionary United Front (RUF) in Sierra Leone or the LRA in Uganda is considered, it is important to determine what role the past conflicting relations play in the peace-building and nation-building initiatives of the future.

Robertson (2002:201) states that countries in the process of transition to new democratic dispensations all face a common challenge of whether to investigate and punish those responsible for atrocities committed in the previous dispensation. Embedded in this reflection is whether it is possible to forgive crimes committed in the pretext of peace-building. Central to the issue is whether forgiveness, instead of vengeance and retributive justice, is possible. This observation is pivotal to the current Ugandan situation.

3. THE NATURE AND EXTENT OF HUMAN RIGHTS VIOLATIONS AND WAR CRIMES DURING UGANDAN CONFLICTS

Uganda has not been a stranger to conflict, war crimes and gross human rights violations. All actors involved in the conflicts made themselves guilty of transgressing the rules of warfare, especially in their treatment of civilians. In this section, the conflict history of Uganda is explored by reviewing the pre- and post-1986 periods. This time-line represents the period from Ugandan independence (1962) to the takeover of Uganda by the current Museveni regime (1986), and the period of rule by Museveni up to 2008.

3.1 Ugandan conflict review: Pre-1986

Uganda's very first post-independence government under Milton Obote soon suspended its constitution and initiated a military campaign against the kingdom of Buganda. This led to the deterioration of the rule of law and the perpetration of gross human rights violations. Ironically, the army commander spearheading the program against the Buganda, Idi Amin, overthrew Obote in 1971, leading to an increase in war crimes and gross violation of human rights. After Amin had been ousted in 1979, Obote returned to power, with armed insurgencies against his rule ruthlessly crushed, leading to the death of tens of thousands and the displacement of many more (Kritz 1995:512-513). Obote was again overthrown in 1985, this time

by Tito Okello, whose own rule was ended a year later (1986) by the forces of the National Resistance Movement (NRM) under the leadership of Yoweri Museveni (Kritz 1995:513).

The NRM undertook to return to the rule of law and the protection of basic human rights. To show its seriousness in addressing the violation of human rights, a Commission of Inquiry into Violations of Human Rights was appointed to investigate

> "all aspects of violation of human rights, breaches of the rule of law and excessive abuses of power committed against persons in Uganda by the regimes in government, their servants, agents or agencies whatsoever called during the period from the 9th day of October 1962 to the 25th day of January 1986 and possible ways of preventing the recurrence of the aforesaid matters…" (Uganda: Legal Notice 1986).

After delays due to inadequate resources, a lack of institutional capacity and ongoing instability in the country, the commission finally rendered a report in 1994. The timing of the commission proved to be problematic as the country was not yet fully at peace. At the same time, many of those affected by the conflict had already died and the necessary political will to drive the process was often lacking (Hovil and Quinn 2005:20). The report did make some recommendations including the incorporation of human rights training and education into the educational curricula of a variety of societal role-players, including the security services, schools and universities. It also recommended the creation of a permanent and independent human rights commission to form part of future Ugandan constitutional dispensations (Human Rights Watch 2001). Notwithstanding its noble intentions, the commission did not leave much of a legacy. Few Ugandans were aware of its work and findings - and those who were, stated that it was biased towards the NRM (Hovil and Quinn 2005:20).

3.2 Ugandan conflict review: Post-1986

The stability brought by the takeover of Museveni's National Resistance Army, that later became the Uganda People's Defence Force (UPDF), was short-lived and within that year various resistance groups sprang up, especially in the northern parts of the country. The reasons for the ongoing instability were myriad, ranging from differences among and the marginalisation of the Acholi that inhabited northern Uganda to the traditional north-south split that had plagued Uganda from independence and the interference of other states, especially Sudan (International Crisis Group 2004).

The resistance group that survived the longest and gained the most notoriety for its methods of warfare, is the LRA. With widespread reports of mutilation, abduction, rape and sexual enslavement of children, the LRA grabbed the headlines as one of the most brutal rebel forces in Africa (Kasaija 2005:42). Akhavan (2005:407) states that the Abducted Children Registration and Information System, a database developed and maintained by the United Nations Children's Fund (UNICEF) and the Ugandan

government recorded the abduction of 26 615 children by the LRA by 2001, with 12 000 more abductions by August 2004. The fact that the LRA has to rely on the abduction and indoctrination of children indicates its complete lack of a popular base, making violent intimidation of communities its only "recruitment" practice (Akhavan 2005:407).

The methods of warfare practised by the LRA are certainly not a reflection of the claimed Christian background of its leader, Joseph Kony. Ironically Kony, a former Catholic alter boy, uses religion as the foundation of his organisational doctrine and bases his rule on the Biblical Ten Commandments - quoting Bible texts to substantiate and explain killings. Kony is convinced that the ethnic cleansing of the Acholi people is his life's work. This spiritual dictum has deepened to a point where he sees himself as a spirit medium and from this platform he formulates his own set of rules. This aura of mysticism instils fear in the ranks of his army and they follow his lead (Anderson, Sewankambo and Vandergrift 2005:12-14).

The struggle between the LRA and the UPDF was not localised within Uganda. Much of the LRA's support came from Sudan in retaliation for Uganda's support for the freedom struggles of the Sudanese Peoples Liberation Army (SPLA). The signing of the Comprehensive Peace Agreement in January 2005 between the government of Sudan and the SPLA caused the diminishing of the operational area of the LRA. The southern Sudan was placed under the administration of the government of South Sudan, led by the SPLA (Kasaija 2007:49). This forced the LRA to abandon the southern parts of Sudan for the jungles of the Garamba National Park in the eastern Democratic Republic of the Congo (DRC) where they are currently based (Nyakairu 2007).

Though support for the LRA rebellion has ebbed and flowed over the years, the LRA remains the only rebel group to elude the UPDF. Various military campaigns against the LRA were unsuccessful in crushing it, forcing the Ugandan government to announce a unilateral cease-fire in November 2004, leading to peace talks with the LRA (Kasaija 2005:35). The peace talks collapsed in December 2004 and resumed later in July 2006. This led to a historic truce in August of 2006. This truce brought a semblance of peace to the north of the country and formal peace talks are ongoing at Juba, South Sudan. The outcome remains on a knife's edge, with the LRA threatening to continue the war if its leadership is not pardoned for the war crimes committed (Apunyo and Okello 2007). This request of the LRA should be seen against the background of the variety of legal mechanisms that were utilised in an effort to bring an end to the conflict.

4. ADDRESSING HUMAN RIGHTS VIOLATIONS AND WAR CRIMES IN UGANDA: LEGAL CONSIDERATIONS

In its attempt to bring the war to an end, the Ugandan government did not only make use of force, but also utilised a variety of legal mechanisms to entice the LRA to give up its armed struggle. The next section highlights some of the more important

legal mechanisms relevant to the current and future situation in Uganda. National, regional and international legal mechanisms are explored as part of the process to bring about a lasting peace in Uganda.

4.1 National legal mechanisms

The utilisation of amnesty to end insurgencies is not new in Uganda, with the Okello government inviting all other groups that opposed Obote to join his government. This implicitly amnestied them for all the crimes they had committed during their insurgencies. Museveni also utilised amnesty to lure his political opponents from exile upon his take-over of the government. In 1987, the parliament of Uganda passed the Amnesty Statute, seeking to entice fighting groups to end their insurgencies. The statute, however, excluded four offences from its amnesty list: genocide, murder, rape and kidnapping (Kasaija 2005:44).

In order to facilitate the ending of the conflict, the Ugandan government promulgated the Amnesty Act of 2000, offering pardons to all Ugandans that had been engaged in acts of rebellion against the government since 26 January 1986 (Hovil and Lomo 2005:4). The Amnesty Act extended amnesty to all Ugandans who were involved in insurgencies in the following manners:

- Actual participation in combat;
- collaboration with insurgents;
- the committing of crimes aimed at supporting insurgencies; and
- any other act assisting or aiding the conduct of armed rebellion.[3]

Renunciation of conflict and the surrendering of weapons to an official of the Amnesty Commission[4] result in the issuing of an Amnesty Certificate and the awarding of remuneration packages to assist soldiers to restart their lives. This compensation is one of the hallmarks of the Amnesty Act. It shows a commitment to reintegrate ex-combatants into civilian life, a clear indication of the recognition of restorative justice, following amnesty as part of a transitional justice approach.

Restorative justice challenges the tendency to equate justice with punishment. Its central focus is the relationship between the perpetrators of crimes and their victims. It offers the victims the centre stage by allowing them to restore the relationship between themselves and the perpetrator in order to fulfil their own healing needs (May 2006:4). By the end of January 2005, 14 695 "reporters" (an official term used for those applying for amnesty) had been received by the Amnesty Committee. This number included some high-ranking LRA members.

Even though the Amnesty Act has been viewed as relatively successful in luring LRA soldiers from the jungles, problems do occur when a national amnesty

[3] Section 3(1) Amnesty Act 2000.

[4] The Amnesty Commission is a body established by parliament under the Amnesty Act 2000 to oversee the implementation of the Act.

process is juxtaposed with the operation of international legal mechanisms, such as the ICC. The Amnesty Act is a massive stumbling block for the ICC prosecutions as the position of international law is that *jus cogens*[5] crimes cannot be amnestied and that amnesty laws that expunge criminal liability for war crimes and crimes against humanity appear to be illegal – both under customary and international law (Kasaija 2005:46-49).

4.2 National prosecution of war crimes and crimes against humanity

Human Rights Watch (2006) maintains that any outcome for northern Uganda should be inclusive of both a peace agreement and fair prosecutions of those responsible for war crimes, including accountability for lesser offences.[6] It argues that impunity will avoid the issue of accountability and that accountability is essential for a durable peace in northern Uganda. Similarly, the 2004 report of the Secretary General of the United Nations on the rule of law and transitional justice in conflict and post-conflict societies states that "the maintenance of peace in the long term cannot be achieved unless the population is confident that redress for grievances can be obtained through legitimate structures for the peaceful settlement of disputes and the fair administration of justice" (UN 2004:3).

Such "legitimate structures" would not only include the ICC, but also national courts within Uganda. Credible prosecutions could take place in national courts if they were found to adhere to a number of benchmarks found satisfactory by the ICC. Section 17 of the Rome Statute permits states to investigate and prosecute persons for whom ICC warrants have been issued and favours domestic prosecution where national alternatives meet benchmarks acceptable to the ICC and international human rights standards.[7] The benchmarks can be summarised as follows (Human Rights Watch 2006): First of all, credible, impartial and independent investigation and prosecution must be guaranteed. Section 17 of the Rome Statute clearly states that a national alternative must include a state genuinely able and willing to conduct investigation and prosecution. Any national prosecution would have to reflect the gravity of war crimes and crimes against humanity in the charges brought against perpetrators. Human Rights Watch (2006) is of the opinion that any traditional justice measures taken against perpetrators would not be sufficient if not accompanied by such credible investigations and persecutions. Secondly, rigorous adherence

5 *Jus cogens* (peremptory norms) indicates a norm accepted and recognised by the international community of states as a whole as a norm from which no derogation is permitted and which can only be modified by a subsequent norm of general international law having the same character (Dugard 2005:40).

6 Accountability could be complemented by a number of other mechanisms such as trials for lesser offences, a truth commission and traditional justice measures (Keppler and Dicker 2007).

7 The ICC attempts to be complimentary to national jurisdictions in terms of paragraph 10 of the preamble of the Rome Statute.

to international fair trial standards is contained in the International Covenant on Civil and Political Rights (ICCPR)[8]. Uganda's judiciary have been lauded for its good record of impartiality in high-profile trials, with Ugandan jurists involved in a number of international criminal tribunals. The danger of political interference in the juridical process always remains, especially in politically charged prosecutions. Lastly, penalties that reflect the gravity of the crime should be imposed. Imprisonment should be the principal penalty for conviction in any trials held on national level as an alternative to the ICC – never the death penalty. A light sentence or the option of a fine following a fair and well-executed trial would make a mockery of the due process of law. This is one of the more important objections that Human Rights Watch, among others, have against the use of traditional justice methods in addressing crimes committed by the LRA – perpetrators should be punished as retribution for deeds committed and as a deterrent against such crimes being perpetrated again.

Section 19 of the Rome Statute states that the ICC would make the decision whether a national prosecution would be a fitting alternative to its jurisdiction, meaning that a country like Uganda would not be allowed to take such a decision unilaterally. Furthermore, a national case tried against a person on whom an ICC warrant had been served that had not met the Rome Statute's benchmarks for national trials would be brought back to the ICC for trials – thus keeping the nations concerned "honest" as far as prosecutions are concerned (Human Rights Watch 2006).

4.3 Regional legal mechanisms

With the establishment of the African Union (AU) new expectations were created regarding many of the continent's human rights and justice problems. The establishment of the African Charter for Human and Peoples' Rights was a major step in focussing the continent on human rights issues which were perennially ignored. In 2003, the establishment and coming into force of the African Court on Human and Peoples' Rights (ACHPR) marked a step forward in implementing the Charter. In 2004, the two judicial branches of the AU, the ACHPR and the African Court of Justice (ACJ) were merged, thus losing much of the focus of the ACHPR (Dugard 2005:568). However, an African "super court" to deal with, amongst other things, human rights abuses, offers the possibility of a continental solution to many of the problems of the continent.

The protocol of the ACJ allows for states who are party to the protocol and members of the AU to bring cases to the court. Importantly, third parties may only bring cases by means of authorisation in the form of special provisions in treaties adopted by the AU Assembly.[9] This means that Non-governmental Organisations

[8] Uganda ratified the ICCPR in 1995 with elements of it contained in the Ugandan constitution.

[9] Protocol to the African Court of Justice, Section 18(1).

(NGOs) and civil society groups cannot bring cases to the court unless authorised to do so. This is further complicated by the fact that under the ACHPR, Section 34(6) states that a declaration by the home state of an NGO is required to allow it to bring cases to the ACHPR. This requirement was extended to the amalgamated court and may be the main reason why an African mechanism may fail to address human rights abuses in regions such as northern Uganda, where NGOs are very active in the conflict area.

The jurisdiction of the ACJ extends to any matters of international law and as such would be ideal to prosecute war crimes and crimes against humanity as they are considered peremptory norms of international law or *jus cogens*. However, whether the ACJ would allow for African solutions for crises in countries such as Uganda, remains for the most part unanswered. The fact that a state has to refer cases to the court is promising in the case of Uganda, as the Ugandan government has shown by its use of the ICC that it is willing to use legal mechanisms. The Ugandan Amnesty Act may prove to be an impediment to any judicial course of action as it currently seems to be the only way in which the LRA will surrender. Any threat of prosecutions is likely to drive the LRA back into the forests of northern Uganda and southern Sudan.

Due to the fact that Uganda has, as a state party, not taken the case of the LRA to the ACJ, leaves it outside of the field of action as far as the current situation in Uganda, and this article, is concerned.

4.4 International legal mechanisms

On 1 July 2002, the Rome Statute of the ICC came into existence, signifying a milestone in the practice of international law. The ICC's guiding principle of complementarity means that it intends to be a complement to national court systems – prosecuting those crimes that have been referred to it and those that countries cannot or will not prosecute themselves (Dembowski 2003:135). The ICC has jurisdiction over persons who commit genocide[10], crimes against humanity[11] and war crimes[12]. An ICC investigation can be initiated in the following ways: [13]

- A referral of a case to the ICC by a state party to the ICC statute;
- the initiation of an investigation by the ICC; and
- the referral of a situation to the ICC by the Security Council of the United Nations (UN).

The ICC became relevant to the Ugandan situation[14] in December 2003 when president Museveni first referred the situation concerning the LRA to the Office of

10 Section 6 Rome Statute.
11 Section 7 Rome Statute.
12 Section 8 Rome Statute.
13 Section 13, 14 and 15 Rome Statute.
14 Uganda ratified the Rome Statute on 14 June 2002.

the Prosecutor of the ICC, with the formal referral agreement announced in January 2004 (Kasaija 2005:35). Opinions differ on the reasons for the unexpected referral, but it seems that at the stage that the Rome Statute was ratified by Uganda, a referral to the ICC was the furthest thing from the minds of the Ugandan government. Some of the factors contributing to the ultimate referral could have been the following:

- The failure of a purely military solution to the problem of the LRA;
- the ongoing support of the LRA (at that time) by the Sudanese government. The referral could be seen as an effort to ratchet up pressure on the Sudanese government to assist in international efforts to end the war and bring the perpetrators of war crimes to justice;
- an attempt to bring the international community on board as far as attempts for ending the war were concerned; and
- an effort to de-politicise legal proceedings that could follow the capture of LRA leaders by ensuring international trials (Akhavan 2005:410-411).

The logic behind some of the measures taken are debatable as the referral currently forms one of the major obstacles in ensuring a lasting peace at the Juba peace talks, but the referral has definitely made the international community aware of the dire situation in Uganda and has led to widespread condemnation of the LRA and its methods. Kasaija (2007:43) argues that the referral and the subsequent warrants put pressure on the LRA to stay in conversation with the government regarding possible peace.

The referral to the ICC was heavily criticised by NGOs for its apparent political selectivity and possible bias. The fact that the referral was announced at a joint press conference by the prosecutor of the ICC and president Museveni created the perception that the prosecutor was being manipulated by the Ugandan government (Seils and Wierda 2005:10). Human Rights Watch commented that while the spotlight fell on abuses committed by the LRA, no mention was made of the abuses committed by the UPDF. Museveni however declared his government's willingness to cooperate in cases where his forces were to be investigated for war crimes, stating that perpetrators would be handed over to the ICC or tried locally (Akhavan 2005:411).

In 2004, the prosecutor of the ICC emphasised that the ICC would investigate all crimes in an impartial manner, inclusive of possible crimes committed by members of the UPDF (Friman 2004:21). The UPDF hopes to signal its seriousness regarding its possible war crimes through trials of 29 soldiers accused of the worst abuses during the recent conflict. The UPDF executed 124 soldiers over the past 20 years for crimes committed against civilians, with officers with the rank of captain and major having received sentences of up to 10 years for abuses committed by subordinates.

Scepticism remains regarding the number of UPDF perpetrators being investigated and the number of convictions attained (McKenna and Egadu 2007).[15]

Investigations by the ICC into war crimes committed by the LRA led to the unsealing of warrants of arrest in October 2005 for the five top leaders of the LRA: Joseph Kony, Vincent Otti[16], Okot Odhiambo, Domonic Ongwen and Raska Lukwiya.[17] The pretrial chamber of the ICC concluded that reasonable grounds existed to believe that the five LRA leaders had ordered the commission of crimes within the jurisdiction of the ICC (ICC 2005). The men are charged with extremely serious crimes - with crimes against humanity including murder, enslavement, sexual enslavement and rape; and with war crimes including murder, intentionally directing attacks against civilian populations, pillaging, inducing rape and the forced enlistment of children[18] (Human Rights Watch 2006). The LRA however sketches the ICC as the biggest stumbling block to peace, undertaking not to end the war if the warrants are not suspended. The intervention by the ICC has thus become a central issue pertaining to the peace talks in Uganda.

5. ADDRESSING HUMAN RIGHTS VIOLATIONS AND WAR CRIMES IN UGANDA: NORMATIVE CONSIDERATIONS

Even though African traditional justice mechanisms requiring retributive aspects for past conflicts alone are not sufficient to address African issues, it is important that the traditional/normative considerations are also included in the process. The next section will briefly look at the normative considerations of traditional African legal mechanisms.

Traditional justice systems certainly have a place within African societies. Unlike other regions in the world, Africa, more than any other continent, has maintained a hold on traditional practices, while accepting modern justice systems. These traditional approaches place a rather large bounty on the essence of community and relations among them. This approach is a holistic one and aspires to a more natural harmony and the restoration of social order going beyond retribution and sentencing (Tsemo 2004).

This directly opposes the so-called "Western" approach which emphasises retribution and justice in terms of punishment through prison sentences and other sanctions. The African approach looks more at the victims and offenders and how

15 This article will concentrate on war crimes committed by the LRA.

16 Vincent Otti is rumoured to have been executed by Kony due to differences on the current peace talks (Kiwawulo 2007).

17 Raska Lukwiya is reported to have been killed by the UPDF in 2006 (*The New Vision*, 12 August 2006).

18 Section 26 of the Rome Statute excludes the jurisdiction of the court over any person under the age of 18, a clause which could have an impact on the Ugandan situation seeing that most LRA soldiers are children or were under 18 at the time that most of the atrocities were committed.

to bring them back into the fold of the community. The traditional approaches are often seen as opportunities for the offender to be transformed and to display moral growth. This approach relies heavily on community involvement in addressing all crimes, and often requires greater attention to the root causes of the behaviour by the offender in order to understand why the conflicts occur and how they can be prevented in future (Naber and Watson 2006:85–87).

This is evident in the traditions of the Acholi people of Uganda. The Acholi region of northern Uganda and the Acholi people have several traditional approaches, specifically aimed at forgiveness and reconciliation, which are already being used for the returning ex-LRA combatants. Concepts such as justice and punishment have different meanings within African traditional systems. The Acholi believe that punishment should involve shaming and compensation (Hovil and Quinn 2005:16-18). This view also adds to the lack of belief in the ICC, as many Acholi would not view the punishment handed down by the ICC as sufficient or appropriate.

Once again the question is raised as to whether the ICC form of justice is appropriate in an African context, particularly where traditional approaches to justice are still strongly recognised and respected? The *mato oput* reconciliation ceremony forms the basis around which the Acholi people deal with the situation. This ceremony is mediated by a traditional chief known as a *Rwot*, whose authority is guarded by the Ugandan constitution, and who would intervene to calm the situation and create the correct climate for reconciliation (Kasajia 2005:50). The *mato oput* ceremony consists of an admission of wrongdoing by the perpetrator, followed by compensation offers and the drinking of a bitter traditional drink by victims together with perpetrators and their families, which is symbolic. This process can take several days and is the result of long-term negotiations and talks between the various parties. Finally, the traditional bending of the spears ceremony or *gomo tong* symbolises a cessation in hostilities (Kasaija 2005:51). These traditional approaches work well in cases of homicide or wrongful death. The problem however lies in how someone like Joseph Kony can account for all the killings he ordered, and whether Acholi traditional justice is capable of dealing with widespread atrocities.

The recent implementation of traditional justice approaches or permutations thereof in high profile cases is not new in Africa. In 1994, the Rwandan genocide, which claimed the lives of over a million of the country's citizens, sent shock waves around the world. Both the people of Rwanda and the global community condemned the crimes against humanity and called for accountability and retributive justice against the perpetrators. Arrests were duly made but a serious problem complicated the process. Out of Rwanda's population of 7,5 million there are 135 000 people awaiting trial on suspicion of participating in the genocide. Such a case load could take 150 to 200 years to be concluded at the current rate (Cobban 2007:ix). The situation was exacerbated by further problems such as investigative bias, corrupt

judges, intimidation of witnesses and weak or absent defence councils. It became clear that the utilisation of an alternative form of justice was crucial to expedite accountability for crimes perpetrated during the genocide and to involve communities in establishing the truth and through that reconciliation (Uvin 2003:116).

A conventional European-style justice system was clearly not the only solution to the legal problems facing Rwanda. It began searching for alternatives, leading to the proposal of an alternative justice system, namely the Gacaca jurisdictions. This was a new system of participatory justice that grew from the reworking of a traditional Rwandan community conflict resolution system. The "Gacaca Law" was adopted in March 2001.

In short the Gacaca tribunals are made up of persons of integrity from the community (where the crimes were committed) who are given the right to hear cases related to the genocide. Communities are involved in the process as a "general assembly", providing testimony and discussing the facts of the case (Uvin 2003:117). An elaborate confession and reparation procedure forms part of the Gacaca process, all aimed at speeding up the process of reconciliation and the reintegration of perpetrators of crimes into their communities. Even though the Gacaca system is criticised as compromising the principles of justice as defined in international legal mechanisms, it currently seems to be the best alternative to the "real-world" situation in Rwanda, with the categories of persons most affected being the perpetrators, the survivors and the larger Rwandan community, largely in favour of the Gacaca process (Uvin 2003:118-119).

It is thus clear that any approach followed in Uganda will be able to reflect on the "good practice" of what happened in Rwanda – contributing to the creation of a possible alternative option to the current legal alternatives on the table.

The question which needs to be raised concerns the victim's justice. Though the focus above has been on how traditional systems view the offenders, it is actually the victims who take centre stage in African traditional justice. The belief amongst Africans is that recognition of the victim's pain and suffering is a necessity and that the dignity and status stolen by the actions of the offender need to be restored (Saleh-Hannah 2002). This approach takes into account the processes which the victim needs to go through, something which Western justice seems to view as being completed once the offender has been sentenced and punished. The importance of the societal aspect as factor in judicial outcomes is stronger in traditional African justice systems than in so-called Western justice systems and therefore makes a strong case for the use of traditions/ normative considerations in an African context. It stands to reason that ensuring the successful reinsertion of the victim into society will increase the ability to recover from the traumatic side effects associated with conflict situations.

It is therefore necessary to consider a balance between the Western and African traditional justice approaches and turn to the African Court of Justice, in the hope that an African solution and approach will be more effective than the two extremes identified above. This approach would have to recognise the elements of traditional justice, such as forgiveness, responsibility, acknowledgment and most importantly rituals and ceremonies alongside the rule of law.

6. EVALUATION

The debate has highlighted that there are different approaches to achieving justice with the two main streams of thought focusing on retribution on the one hand and restoration on the other. In this regard Anderlini *et al*. (2007:1) explains that "justice can be based on retribution (punishment and corrective actions of wrongdoings) or on restoration (emphasising the construction of relationships between individuals and communities)". A brief outline of the limitations of each view will now be discussed.

The important role that the international legal system plays in restoring international justice and the protection of human rights cannot be disputed. There are however certain limitations posed by retributive justice within the context of post-conflict transformation. These include the following (Daniel 2001:13-19): Firstly, the state's legal responsibility to prosecute perpetrators could clash with the state's political agenda of using leaders of the previous regime to facilitate a process of national unity and political transformation. Secondly, prosecutions do not necessarily end the conflict and abuses nor go out to promote reconciliation. Thirdly, the process of retributive justice within a new political regime, does not always consider that the past human rights violations may have been mandated and authorised by the previous legal order. The individual's societal status has thus normatively changed from hero and role model (albeit superficial) to perpetrator showered with societal blame and shame. Fourthly, during a trial the perpetrator will be reluctant to share the truth out of fear that this information will be held in evidence against him. Revelations about past atrocities are therefore based on considerations of punitive sanctions and with the victims' healing process in mind. Lastly, using state resources to fund a trial may satisfy political and civil rights, but these resources are usually limited resulting in overfull prisons, trial dates pending for years and sidestepping state responsibility towards socio-economic rights which could once again fuel the already doused fire of past conflicts.

The African traditional justice mechanisms offer an alternative way of approaching perpetrators to the Western models which simply focus on the retributive elements of justice. African justice models follow an encompassing approach which includes the aspects of reconstruction, healing and reconciliation (Hovil and Quinn 2005:12). Upon reflection, a word of caution with this approach

is not to lean too heavily towards the African traditional justice mechanisms away from the judicial processes. Anderlini *et al*. (2007:7) explains that while traditional systems contribute greatly towards nation-building and reconciliation there are some key challenges to take cognisance of, namely the standardising of values, norms and processes throughout a country; ensuring that victims do not feel that justice has been compromised; and avoiding the overburdening of the community with the large and difficult task of administering justice.

Henham (2004:32) proposes a third option or alternative to purely retributive or transitional/restorative models of justice. This alternative model is known as a relational model of justice. Relational justice is defined by Henham (2004:32) as:

> "[recognising] the relational quality of rights norms; one which appreciates the fact that process rights must relate to the legal and moral contexts of criminal action and punishment… (and that) …rights conceived in these terms imply sharing of the justice process; namely, that rights should no longer be conceived as a distinct set of normative constraints on process, but rather as an integral and inseparable component of relational justice".

Section 53 of the Rome Statute[19] does make provision for restorative justice, thus making allowance to bridge the gap between international and local justice systems (Hovil and Quinn 2005:46). A correlation between normative and legal frameworks therefore gains precedence within the relational justice model. An example of this occurred in March 2005 when the chief prosecutor of the ICC invited traditional Acholi leaders to The Hague as he has a duty to take their interest and traditions into account. After a fruitful meeting the ICC prosecutor agreed to take their traditional justice mechanisms and processes into account. This meant also considering peace initiatives and dialogues and to reprieve those that have already been reintegrated into society after having received amnesty and who would then not be subjected to the ICC retributive processes. The Acholi chief Acana II also explained the *mato oput* (reconciliation ceremony) to the ICC (Allen 2006:130-136; 177-178).

These normative aspects have an impact on the way states view their responsibility in terms of the manner in which war crimes need to be addressed. When determining if states have a duty to prosecute perpetrators for war crimes and crimes against humanity the issue of individual rights, cultural and ethnic rights, the sovereignty principle and legality becomes relevant to the discussion. The rights of the individual and the enforcement of the rights depend on the inherent value system within which these individuals find themselves (Walzer 1999:262). The legal and normative considerations in dealing with international crimes are therefore of particular importance to states and communities in Africa.

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[19] Section 53(1)(a-c) juxtaposes the traditional criminal justice considerations (e.g. the seriousness of the crimes) with the notion of "interests of justice" – also indicating that the latter might be found to be more important than the former.