

THE COMPLEMENTARITY OF ICC AND OTHER INSTRUMENTS IN TRANSITIONAL JUSTICE –THE CASE OF NORTHERN UGANDA

By GJERMUND SÆTHER*

Abstract: *The article presents three arguments. The role of the International Criminal Court in the conflict in northern Uganda cannot be made into an argument against ICC's involvement in ongoing conflicts. Second, while many have seen ICC and ICC's philosophy as completely opposed to traditional mechanisms in northern Uganda, this article argues that these two instruments can in fact complement each other. Within the framework of the agreements reached in Juba, a whole range of transitional justice mechanisms has been merged. Finally, the case of northern Uganda demonstrates that although traditional mechanisms can be an important part of transitional justice, such mechanisms also bring along a number of major challenges.*

Keywords: *Transitional justice, International Criminal Court, Northern Uganda, Lord's Resistance Army, Juba peace agreement, Agreement on Accountability and Reconciliation, traditional justice.*

A. INTRODUCTION

When the National Resistance Army (NRA) and general (later president) Museveni took power in January 1986, it marked the end of many years of civil war which also saw the overthrow of Idi Amin in 1979. It was a new start for Uganda. However, as the former government army retreated northwards to escape the NRA, the seeds of a new civil war in northern Uganda were sown. Later, in 1986, some of these soldiers, many of them from the north themselves, continued to resent the outcome and joined the "Holy Spirit Mobile Forces" of Alice Lakwena to wage war on NRA.¹ They were defeated by NRA in 1987, and Alice Lakwena fled to Kenya. But some of the Holy Spirit fighters continued to fight under the leadership of Joseph Kony. Kony named his group first Uganda Peoples' Democratic Christian Army and later Lord's Resistance Army. LRA's war and terror in northern Uganda continued with varying degrees of intensity up to 2005. The peace agreement signed by the warring parties in Sudan (CPA) in

* Gjermund Sæther is a political scientist and a career diplomat with the Norwegian Ministry of Foreign Affairs. He has been posted in Kampala since 2006. He was co-editor of *Ethnicity Kills? The Politics of Peace, War and Ethnicity in SubSaharan Africa* with Morten Bøas and Einar Braathen (London: Macmillan 2000). This article expresses the views and assessments of the author, and does not reflect the opinions of the Norwegian Ministry of Foreign Affairs. The article has benefited from comments by Dr Pål Wrange, consultant on international law. I would also like to thank two anonymous academic colleagues for very useful feedback and comments.

¹ See Heike Behrend: *Alice Lakwena & the Holy Spirits* (Oxford James Curry 1999).

2005 severely restricted Kony's ability to operate since Khartoum reduced support to LRA and South Sudan came under the control of the South Sudanese government. The new regime in Juba had close ties to Kampala. After the end of the peace talks, and after Kony failed to sign the peace agreement negotiated in Juba in Southern Sudan, hostilities resumed in December 2008. LRA has again gone on the rampage killing hundreds of civilians and creating hundreds of thousands of IDPs in the Democratic Republic of Congo, Sudan and the Central African Republic.

The International Criminal Court (ICC) has been a key component in the debate about the conflict in northern Uganda and the peace negotiations in Juba. ICC's arrest warrants on five leaders from Lord's Resistance Army (LRA), after the Government of Uganda (GoU) referred the case to ICC in 2004, led to an intense debate about ICC inside and outside Uganda. Some even blame the ICC for the resumption of hostilities and LRA's recent killing spree.

Key topics in the debate have been the peace vs. justice dilemma,² as well as the national political debate and practical peacemaking effort in Uganda. The idea that peace and justice are "two sides of the coin", and that there are no difficult trade offs to be made between peace and justice, have been proven wrong in Uganda as elsewhere. But the ICC, and the key philosophy behind the ICC, have shown themselves to be an integrated part of transitional justice in northern Uganda. The peace vs. justice dilemma comes particularly to the forefront when ICC gets involved in ongoing conflicts. But this article maintains that citing northern Uganda as an argument against ICC's involvement in ongoing conflicts, as some have done,³ is untenable. Furthermore, given that ICC represents the global expression of the fight against impunity in Africa, those who argue against ICC and ICC's philosophy in the context of the LRA conflict argue in favour of impunity for the most serious crimes committed by LRA.

A broader understanding of the role of transitional justice is also becoming a central element in the conceptual and practical development of transitional justice.⁴ In the Great Lakes, both Rwanda and Burundi are interesting instances of how transitional justice can function. But it is the unsigned Final Peace Agreement (FPA) for northern Uganda that represents some of the latest innovations when it comes to transitional justice in Africa today, and FPA has ICC's philosophy as one of its bases. The second argument in this article is that ICC and the philoso-

² The dilemma was presented in a straightforward manner by the former Secretary-General of the UN in 2003. "There cannot be real peace without justice. Yet, the relentless pursuit of justice may sometimes be an obstacle to peace. If we insist, at all times, and in all places, on punishing those who are guilty of extreme violations of human rights, it may be difficult, or even impossible, to stop the bloodshed and save innocent civilians. If we always and everywhere insist on uncompromising standards of justice, a delicate peace may not survive.... But equally, if we ignore the demands of justice simply to secure agreement, the foundations of that agreement will be fragile, and we will set bad precedents." UN Press Release dated 25 September 2003.

³ Adam Branch: "Uganda's civil war and the politics of ICC intervention" (2007) Volume 21.2 *Ethics & International Affairs* 179–198.

⁴ See Naomi Roht-Arriaza and Javier Mariezcurrena (eds): *Transitional Justice in the Twenty-First Century* (Cambridge: Cambridge University Press, 2006) and Nicholas Waddel and Phil Clark (eds): *Courting Conflict? Justice, Peace and the ICC in Africa* (London: The Royal African Society 2008).

phy of ICC can operate in tandem with a range of other mechanisms, including traditional ones. While many have seen ICC and traditional mechanisms as completely opposed to each other in northern Uganda, this article argues that the two instruments can in fact complement each other. The FPA, and the process leading up to FPA, are the proof of this. The third argument that will be made is that the role of traditional mechanisms can play an important role in transitional justice, but that such traditional mechanisms also bring along a number of major challenges. First and foremost among them are issues of local politics and formalization (or not). The contention in this article is that traditional mechanisms can supplement other transitional justice mechanisms, but cannot in themselves be the main tool of peace building.

1. A MULTIDIMENSIONAL APPROACH TO PEACE, RECONCILIATION, JUSTICE AND PUNISHMENT

The case of Uganda is also an illustration of the benefits of a judiciary with a wider approach than the traditional legal approach.⁵ The definition of transitional justice offered by Teitel is too narrow.

Transitional Justice can be defined as the conception of justice associated with periods of political change, characterized by legal responses to confront the wrongdoings of repressive predecessor regimes.⁶

In this regard, I agree with Clark and Kaufman in that transitional justice must encompass a much wider framework than judicial responses.⁷ Transitional justice as a process is marked by flexibility and ability to adjust to the context of the particular conflict. Transitional justice includes a number of measures and tools of which societies can make use to come to terms with a past of massive human rights violations as they move away from violent conflict to peace, reconciliation and respect for individual and collective rights. Transitional justice includes both judicial and non-judicial approaches, and the tools might be local, national, regional, international or any form of combination of these. Some of the more common tools are prosecution, truth telling, reconciliation, reparations for victims, socio-economic development, and institutional reform of the judiciary/police/military. Transitional justice in this article is thus seen a multidimensional process that is adjusted to the political and social context of peace building.

⁵ Inger Österdahl: "Justice for Peace in Africa" (2007) Nr. 03 in *Nordic Journal of Human Rights*, 259–281.

⁶ Ruti G. Teitel: "Transitional Justice Genealogy" (2003) Vol. 16, *Harvard Human Rights Journal*, 69.

⁷ Phil Clark and Zachary D. Kaufman: "Introduction and Background", in Phil Clark and Zachary D. Kaufman (eds): *After Genocide, Transitional Justice, Post-Conflict Reconstruction and Reconciliation in Rwanda and Beyond* (London: Hurst & Company 2008) 3.

B. UGANDA – A NEW STANDARD FOR TRANSITIONAL JUSTICE?

After decades of internal conflict in northern Uganda, the most comprehensive attempt to reach a peace agreement started in Juba in 2006, facilitated by the then newly created Government of South Sudan. Despite many complications, the process soon yielded results across many of the five agenda items: cessation of hostilities; comprehensive solution to the northern Uganda conflict; accountability and reconciliation; disarmament/demobilisation and reintegration; as well as ceasefire negotiations. The agreement on item number 3 “Accountability and Reconciliation”⁸ (AAR) was signed by the negotiation teams of LRA and Government of Uganda (GoU), as well as the facilitator (Vice-president Riak Machar of the Government of South-Sudan), 29 June 2007. The Annexure to AAR was signed in February 2008, after country-wide consultations had been conducted by both GoU and LRA. The consultation was an important process, and gave in principle at least the victims an opportunity to influence the outcome of the Juba talks. But even the Annexure leaves many questions unanswered when it comes to the operationalization of AAR. Transitional justice in Uganda will therefore be a process that will take time, similar to other processes in other countries coming out of violent conflict.

AAR provides for several transitional justice components/mechanisms: formal prosecution for the most serious crimes; reconciliation; truth-seeking; consultations with the victims; compensation; and a particular focus on women and children. As regards the ICC warrants, it is stated that GoU shall “address conscientiously the question of the ICC warrants”. In the Annexure it is stated that GoU shall “establish a body” that will, *inter alia*, look into the history of the conflict, gather information about missing persons, inquire into HR violations, conduct truth-telling, provide for witness protection and look into modalities for reparations. This organ will possibly be an extended form of a truth and reconciliation commission. Traditional justice “shall form a central part of the alternative justice and reconciliation framework” and it is left to the GoU to identify the “most appropriate roles” for traditional justice. The Annexure to the AAR also made provisions to establish a special division of the High Court of Uganda for those who have committed “serious crimes”.

The negotiations in Juba were based on experiences of two decades of post-conflict accountability and transitional justice in Africa. The idea to have a special division of the Ugandan high court to look into war crimes is reminiscent of the set-up proposed in Burundi and the Gacaca courts of Rwanda might have given inspiration to use traditional mechanisms. However, the negotiations in Juba were also an attempt to find a conflict-specific response to how best to promote reconciliation and accountability in Uganda. The Agreement on Reconciliation and Accountability from Juba is a comprehensive framework for transitional justice meant to respond to the various needs in the post-war setting. It is also an effort to see how transitional justice can respond to both domestic and international demands and obligations.

⁸ The agreements from Juba, including annexures, can be found at www.beyondjuba.org/peace_agreements visited September 15 2009.

[R]egardless of the ultimate fate of the talks, the early treatment of accountability and reconciliation dilemmas at Juba has set new standards in terms of efforts to meld local demands and international legal obligations.⁹

One key aspect of transitional justice is to avoid impunity for war crimes, crimes against humanity and genocide. ICC and ICC's basic principles are therefore part of a larger and wider approach for peace building in the AAR.

1. IMPLEMENTATION OF THE JUBA ACCORDS WITHOUT LRA SIGNATURE AND DILEMMAS IN THE PEACE-BUILDING PROCESS.

The agreements on different agenda items will be formally implemented after the Final Peace Agreement (FPA) is signed,¹⁰ something that Kony refuses to do. Since FPA is not signed, the follow-up of the Juba agreements is left to one of the parties, namely GoU. The schedule for implementation and mechanisms for monitoring of implementation will only be activated after both parties sign FPA. This will unavoidably affect implementation. However, GoU has started the implementation of relevant parts of the Juba agreements despite lacking LRA's signature. They include economic re-construction and some elements from AAR. The international community and donor countries in Uganda have encouraged this, but it is only Uganda that can take a lead in the process.

The judiciary in Uganda has taken on a big and important responsibility in following up the Juba agreements. There is no doubt that key actors within the judiciary see the many aspects of transitional justice as a useful and important framework for Uganda.¹¹ Some of the same actors also point to the Juba framework's merging of different aspects of justice such as retributive ("western") and restorative ("African") justice (see below).

In August 2008 Ugandan authorities established a working group for transitional justice. The working group and its subgroups will look into diverse aspects of transitional justice such as war crimes, role of traditional mechanisms, reconciliation, accountability and truth telling. It is significant that the working group will also consider how to integrate formal and alternative mechanisms for dealing with war crimes. Thus, both the FPA itself, as well as efforts by both authorities and civil society points to the fact that a holistic approach to peace-building and transitional justice is necessary, possible and desirable. Different aspects of transitional

⁹ Michael Otim and Marieke Wierda; "Justice at Juba; International Obligations and Local Demands in northern Uganda", in Nicholas Waddel and Phil Clark (eds) *Courting Conflict? Justice, Peace and the ICC in Africa* (London: The Royal African Society 2008) 21.

¹⁰ One legal interpretation is that the AAR is in force, but that formal implementation depends on the signing of the FPA, see Pål Wrange "The Agreement and the Annexure on the Accountability and Reconciliation between the Government of Uganda and the Lord's Resistance Army/Movement – a Legal and Pragmatic Commentary", *Uganda Living Law Journal*, (Kampala: 2009, Vol. 6 nr. 2) (forthcoming).

¹¹ "The Honourable Chief Justice of Uganda Benjamin Odoki, Keynote Address at the Third National Justice, Law and Order Sector Forum, July 31, 2008", *Report on the Third National JLOS Forum* (Kampala: Ministry of Justice 2009) 10–11.

justice such as the fight against impunity and use of traditional mechanisms do not contradict each other. A single strategy of transitional justice is rarely sufficient,¹² although in the Ugandan context, some have tried to polarise the debate as the “ICC approach” vs. the “African approach”. The scope of the work is national. Thus the Juba process can act as a catalyst for wider efforts for national reconciliation and accountability that deal with the many violent conflicts in Uganda since independence. Uganda as a whole can potentially benefit from this process, not least by passing new national legislation for transitional justice.¹³

The working group have so far mostly dealt with the issues of formal prosecution of war crimes and the establishment of the war crimes court. This work is linked to preparations for passing a bill on international crimes/ICC bill by the Ugandan parliament in 2009/2010. This bill will also domesticate the Rome statute. It is illustrative that the first draft of a national bill on reconciliation was made by a group of researchers (Refugee Law Project at Makerere University), rather than GoU. Nationwide consultations on the draft legislation for national reconciliations are planned for later in 2009.

However, there is some hesitation, in particular at the political level, to proceed with a national reconciliation process. Given that FPA has not been signed, GoU might not be under any formal obligation to start this process. Besides, the work on the reconciliation bill is very complex, and it will take a lot of work to iron out the relationship between alternative mechanisms and formal systems.¹⁴ There is also a risk for GoU that consultations on reconciliation and truth-telling mechanisms will entail more attention to the human rights violations committed by the UPDF (Ugandan People’s Defence Forces) in northern Uganda. But this debate has already started. The former army chief of Uganda, now a leading member of the opposition, has argued for a commission of inquiry regarding the accusations against UPDF for past crimes committed in the north.¹⁵

However, even if many local politicians in northern Uganda want to draw attention to abuses committed by the UPDF during the war, it might also be that national reconciliation that includes truth telling could go against their interests since some of these politicians have been supportive of armed rebellion earlier. There might also be a legitimate fear that a new national process could open up old wounds from as far back as 1962. Uganda as a whole needs a lot of political will to make such a process a success. The recent debate in Uganda about UPDF atrocities in the north can also be taken as an illustration of the need for a comprehensive process of national reconciliation that includes truth telling. Another important aspect of transitional justice will be the need to have systems of reparation. For the victims in northern Uganda reparations, or the lack of them, can be seen as an indicator of Kampala’s will to pur-

¹² Siri Gloppen: “Reconciliation and Democratisation: Outlining the Research Field” *CMI Working Paper* 2002:5 (www.cmi.no, last visited 26 October 2009).

¹³ The Juba process can thus become instrumental in addressing important challenges. See Makau Mutua: “Beyond Juba: Does Uganda Need a National Truth and Reconciliation Process?” (2007) *East African Journal of Peace and Human Rights* (Vol. 13:1) 142–155.

¹⁴ Pål Wrange: “The Agreement and the Annexure on the Accountability and Reconciliation between the Government of Uganda and the Lord’s Resistance Army/Movement – a Legal and Pragmatic Commentary” (2009) *Uganda Living Law Journal*, (Kampala:, Vol. 6 nr. 2) (forthcoming).

¹⁵ “Killings: Government fears the truth says Muntu” *Daily Monitor*, September 1, 2009.

sue reconciliation. The government's plan for reconstruction in northern Uganda (Peace, Recovery and Development Plan for northern Uganda, PRDP) cannot be seen as fulfilling the need for individual reparations. At the same time, a system for reparations in northern Uganda will enable a new debate about reparations in other parts of the country for the many gross human rights abuses committed after independence.

Commissions of reconciliation and truth are often seen as integral to transitional justice. But such a mechanism must have a conflict-specific framework. A process that aims at truth telling should be appropriately phased in relation to other mechanisms, such as prosecutions. If the revelation of the truth happens too early in the process perpetrators might be loath to tell the truth for fear of prosecution.¹⁶ This, in combination with the political hesitation and controversy surrounding the issue, indicates that Uganda needs time to appropriately prepare a possible truth-telling process or commission of inquiry. Civil society can also be a key in pushing for such a commission, but this pressure must be done with *fingerspitzengefühl*.

The Agreement on Accountability and Reconciliation was negotiated after intense debate inside and outside Uganda about the ICC, the role for traditional mechanisms, the issue of truth seeking and the need for national reconciliation. But the debate has continued after the Juba peace process was concluded. Part of the discussion is also ongoing within the framework for following up of the various aspects of transitional justice by the government. The four issues at the centre of the discussion are ICC and the issue of impunity; a stated contradiction between "African" and "western" justice; the role of traditional mechanisms; and the views of the victims.

ICC AND THE ISSUE OF IMPUNITY

When ICC issued arrest warrants on Joseph Kony and four other LRA leaders in the autumn of 2005, it kicked off a huge debate in Uganda and globally. Many observers doubted the usefulness of the warrants and claimed that the warrants would make it impossible to reach a peace agreement because Kony would not surrender under such circumstances. In other words, an instance of the peace vs. justice dilemma at work.¹⁷ It was argued that the ICC was ignoring national efforts geared at peace and reconciliation and undermining the views of the victims and the population in the north. The idea that traditional mechanisms could handle issues of accountability and reconciliation, was stressed by many. Finally, it was emphasised that the ICC process was one-sided since it was only LRA, and not UPDF, that was under investigation and that UPDF had also been guilty of many grave human rights violations.¹⁸

Many civil society groups in northern Uganda (for example the northern Uganda Peace Initiative), parliamentarians and faith based organizations, have been proponents of these arguments. LRA's negotiating team used the same arguments when they asked for the removal

¹⁶ In Liberia, the Truth and Reconciliation Commission started work before it was decided to establish a special court.

¹⁷ See "Peace First, Justice Later; Traditional Justice in Northern Uganda", Working Paper No 17. Kampala July 2005, *Refugee Law Project* and "ICC indictments not needed here says Bishop Ochora" *Daily Monitor*, March 10, 2008.

¹⁸ Patrick Hoenig: "The Dilemma of Peace and Justice in Northern Uganda" (2008) Vol. 14, No 2. *East African Journal of Peace & Human Rights* 333–349.

of the ICC warrants.¹⁹ Some of the international critics claimed that the ICC warrants would prolong the conflict and they saw northern Uganda as an example of why ICC should not intervene in ongoing conflicts.²⁰ Some politicians, local leaders and academicians still maintain their criticism of ICC. Few of these however, have openly admitted that they have in fact argued for impunity for the LRA leadership.

In the debate on ICC, other observers put more emphasis on ICC's preventive role and the role of the ICC warrants in bringing LRA to the negotiating table. It was argued that the limitations that the ICC warrants entailed for the peace negotiations were a necessary part of a framework against impunity for war crimes in Uganda and globally.²¹

If we make a distinction between the institution of ICC and its philosophical and judicial base, it becomes even clearer that the fight against impunity for the most serious crimes gains ground in Africa as elsewhere. In the debate about ICC, one is sometimes given the impression that the main aim of ICC is to get as many perpetrators as possible behind bars in The Hague. According to the Chief Prosecutor of the ICC, the role of the court as a global norm against impunity is the key objective.

The most important impact of this court is that it provides incentives to the national authorities to behave better. That is the beauty of this global court: It's setting a limit in international relations – no more war crimes, no more crimes against humanity, no more genocide. That is what we are doing.²²

It seems that another reason for the rather one-sided criticism of the ICC by some in northern Uganda is related to the fact that ICC never investigated UPDF crimes. The chief prosecutor at ICC has on occasion held joint press briefings with president Museveni. Some took this as proof of ICC's lack of neutrality. There is no doubt that UPDF did commit many human rights violations and atrocities in the north. But few would argue that those acts constituted genocide, war crimes or crimes against humanity. In any case, the ICC has never excluded the possibility of investigating the UPDF, neither have the judges in the war crimes court. Soldiers who committed atrocities in the north, and who have not been punished for them by the army already, might be subject to the war crimes court. It should be an aim of the national reconciliation process to facilitate an open debate on UPDF's conduct in the north, and, as we have seen, this process has already started.

The debate on ICC in Uganda has only to a limited degree taken into account the developments in Juba and the region since the negotiations ended.²³ That is unfortunate because

¹⁹ "LRA completes consultations on reconciliation" *Daily Monitor*, December 10, 2007.

²⁰ Adam Branch: "Uganda's civil war and the politics of ICC intervention" (2007) Volume 21.2 *Ethics & International Affairs* 179–198.

²¹ Tim Allen: *Trial Justice, The International Criminal Court and the Lord's Resistance Army* (London Zed books 2006).

²² Luis Moreno-Ocampo, *Newsweek*, March 20, 2009.

²³ The criticism of ICC has continued, see for example "The Juba Peace Process, An Analysis of Emerging Issues and Key Lessons Learned", *Institute of Peace and Strategic Studies*, Gulu University, Proceedings from a workshop at Gulu 23–24 April 2009.

those developments can illuminate the debate on the peace vs. justice dilemma in the case of the LRA conflict. The ICC warrants did not make it impossible to conclude an agreement. After long-lasting and difficult negotiations were concluded in Juba, the two negotiation teams agreed on a text that combined different forms of transitional justice early in 2008.

The Juba agreements made room for traditional mechanisms and the AAR put a lot of emphasis on reconciliation. In the interest of peace it was clear that many serious HR violations and atrocities would not be subject to prosecution. Given the limited size of the LRA, it was not a capacity problem that made it difficult to prosecute all those who had participated in atrocities. It was the need to put an end to the conflict that made the GoU delegation to agree to this. Besides, prosecution of many ordinary LRA soldiers would be complicated since many of these soldiers were themselves victims of kidnapping and abuse as children in the captivity of LRA. They were subsequently forced to take part in atrocities under the threat of being executed.

However, in the AAR the parties also agreed that for individuals who committed the most serious crimes “formal criminal and civil justice measures shall be applied” through the new war crime tribunal in Uganda. The threshold for what defines war crimes was not spelled out in the AAR, but it is clear that formal justice would include more than the five LRA leaders that ICC investigated. However, it would not be likely that the war crimes court would process more than 10–15 cases. During the negotiations doubt persisted for a long time as to how closely the LRA delegation in Juba coordinated their positions with Kony. On some occasions the LRA team signalled Kony’s readiness to sign. But after several failed attempts to get his signature on the FPA in 2008, it became increasingly clear that he would not put his name to the Juba agreements.

The ICC warrants were, according to many, one key reason for Kony not to sign FPA. Kony demanded that GoU should get ICC’s warrants “removed” *before* he signed FPA. GoU was all the time of the opinion that Kony needed to sign FPA and only *afterwards* would GoU look into the question of the ICC warrants and a possible process to have them lifted. Any other position would also been very difficult for GoU given that they had asked for ICC’s investigation into the LRA conflict and that Uganda is a party to the Rome statute. For the GoU, and for many observers as well, it was clear that the ICC was not so much a barrier to peace. Quite the contrary, the ICC warrants were one of three important factors in getting LRA to the negotiating table (military marginalisation and lack of support from Khartoum were two other reasons), and to keep them there until an agreement was signed.

The contention that it was ICC’s arrest warrants that in the end stopped Kony from signing the FPA is highly questionable. Even if the FPA clearly rules out impunity for the most serious crimes, the criticism against the war crimes court in Uganda has been muted. The principles underpinning the war crimes court are, however, the same as the ICC’s. But the ICC seems to be a preferred target for criticism compared to the Ugandan war crimes court. The reason for this contradiction might be found in northern Uganda politics and/or academic circles eager to criticize efforts to make global norms. Was Kony more afraid of ICC than the Ugandan war crimes court? Maybe, but there was no indication in the agreement that Kony would be treated milder in Uganda than in ICC. Some would actually argue that he would be safer, and receive better treatment, in The Hague than in Kampala. He was also very afraid of revenge attacks on himself if he should return to Uganda. In some of Kony’s last communica-

tions during 2008, he was very concerned about his own future and welfare if he signed the agreement.

From the agreement on Accountability and Reconciliation it was evident that GoU and LRA's negotiators had never agreed to an amnesty for Kony. Kony would face the war crimes court and GoU was not at all ready to consider Kony's request for housing and a driver in Kampala. In addition, many observers have pointed out that spoilers in the diasporas, driven by hate of the NRM regime, convinced Kony not to sign. Thus, the contention that it was the ICC warrants that prevented a successful conclusion of the peace talks is highly doubtful. It is likely that Kony did not agree to any prosecution in Uganda or elsewhere, and that was one reason for him not signing.

Furthermore, while GoU kept on negotiating with LRA in Juba, LRA and Kony engaged in bloody attacks on civilians in 2007 and 2008. This, combined with Kony's build up of his base in Garamba in DRC, puts Kony's motivation for the negotiations in Juba in doubt. Maybe Kony most of all used the negotiations to build up LRA's military capacity? When Kony killed his deputy, Vincent Otti, in October 2007 it was a worrisome sign. Otti had been the key link between LRA's military wing and the negotiators in Juba. His death was another indication that Kony's interest in the peace process might have been limited. Thus, there are many factors that indicate that Kony was not ready to enter into compromises in order to achieve peace. But given the weakened military capability of LRA after 2005, it was obvious LRA needed to give serious concessions at the negotiating table.

Many commentators have claimed that peace must have priority before prosecution in northern Uganda, but they seem to have forgotten that the commitment to peace must come from both parties. Given all the reasons for why Kony did not sign the FPA, and given the fact that LRA had long been showing hesitation towards peace, one can hardly claim that the experience from northern Uganda would lend credit to the view that ICC should not get involved ongoing conflicts. Those who still argue that the ICC has derailed the Juba process, and that the ICC warrants should be removed right away, have limited credibility after LRA's violent attacks in the region in 2007 and 2008. ICC critics do, in fact, argue for impunity for Kony. They are willing to risk impunity for Kony without any guarantee that Kony would have signed the FPA, and without any assurance of LRA's implementation of such an agreement.

Kony signing the FPA is not the same as LRA implementing FPA. Just as Kony's forces were killing civilians during the negotiations, they could have continued to do so after a signature. Secondly, a peace agreement without prosecution for the top leaders of LRA, in combination with traditional reconciliations mechanisms, would have had several negative repercussions. It would go against the global trend, and recent developments in many post-conflict African countries, of avoiding impunity. It would also have been a big domestic political challenge for Uganda given the scale of LRA atrocities. Victims of LRA would have felt duped if Kony did not face prosecutions, and in particular so if Kony had been given housing and other material privileges that he asked for.

By insisting that Kony had to sign the agreement first before the GoU would discuss what could be done with the ICC warrants, the Ugandan delegation introduced a sensible sequenc-

²⁴ Moses Chrispus Okello; *The False Polarisation of Peace and Justice in Uganda*, Presentation in Nuremberg, Germany, June 2007. Refugee Law Project.

ing in the talks. Some of the criticisms against the ICC warrants have been based on the idea that they disrupted the natural order of things, i.e. first peace then justice.²⁴ The Ugandan delegation did, however, re-establish this sequencing in the negotiations, and GoU did this without putting the philosophy of ICC on the sideline given that the war crimes court in Uganda would ensure there was no impunity for the most serious war crimes and crimes against humanity. This was also in line with the views of many of the victims (see below).

If Kony suddenly were to sign the FPA, and if the proposed international crimes bill were adopted by parliament, then a possible lifting of the ICC warrants would become a key issue. Based on articles 1, 17 and 19 of the Rome statute, it is clear that ICC should be a supplement to national courts (principle of complementarity). The fact that the victims are in Uganda and neighbouring countries is an argument in favour of letting the Ugandan judiciary handle the cases, possibly with a regional mandate. As of today there are no indications that leading war criminals would be treated so leniently at the war crimes court in Uganda that the ICC could not leave the cases to Uganda. Leading Ugandan judges are also very much aware that it would be up to them to convince ICC that the warrants for the LRA leadership can be left to Uganda. They also need to convince ICC that judges, investigators, the prosecutions, lawyers, witness protections and prisons are of high enough standards.

In the set-up of the war crimes court, the Uganda judiciary has been inspired by parts of the ICC structure, e.g. when it comes to having a panel of judges. But it is also clear that the war crimes court in Uganda will not be a copy of the ICC. It is a home-grown institution, and an important element of the Juba negotiations. At the same time it is based on the same key principle as ICC, namely no impunity for war crimes, crimes against humanity and genocide. The war crimes court in Uganda is both western and African. It was born out of a peace agreement that was led by Africans such as the facilitator from South Sudan, the UN special envoy to Uganda and the military and civilian observers from the region.

2. IS THERE AN ANTAGONISM BETWEEN “WESTERN” AND “AFRICAN” JUSTICE, AND DOES THIS APPEAR IN NORTHERN UGANDA?

One of the most innovative aspects of the Juba agreements is the significant role given to traditional mechanisms²⁵ and how these mechanisms are combined with formal prosecution. In the debate about the role of the ICC in northern Uganda it has often been claimed that there are intrinsic contradictions between “western” justice with emphasis on “retribution” and the “African” tradition of forgiveness and the re-establishment of harmonious relations with “restorative” justice. The background for some of this argument has been made with reference to the South African experience of the Truth and Reconciliation Commission. There were many good reasons why the Nuremberg trial paradigm was not suitable for South Africa.²⁶ Politicians and community leaders in the north of Uganda have put great emphasis on these

²⁵ In the annexure to the Agreement on Accountability and Reconciliation it is stated in §19; “Traditional justice shall form a central part of the alternative justice and reconciliation framework identified in the Principal Agreement.”

²⁶ Desmond Tutu: *No Future Without Forgiveness* (New York: Random House 1999) 19–20.

types of arguments when they have promoted the idea about an accountability and reconciliation process based on traditional institutions.²⁷

The first observation that should be noted is that during decades of civil strife after independence, the civil wars in Uganda were marked by violence and counter violence. Violent retribution had been the norm rather than any type of restorative justice in the war, and this was well before the ICC was created. Furthermore, it is hard to see how generalizations based on different models in the western world and Africa make much sense.²⁸ Retribution has also been a part of justice in Uganda (and the rest of the continent) for a long time. Moreover, it is not hard to find “western” conflicts that have used other mechanisms than just prosecution in a post-conflict phase, e.g. in Northern Ireland, or for that matter the lenience shown to many former STASI agents in unified Germany. Teitel argues that the “restorative model” was the main ingredient in transitional justice after the Cold War.²⁹ In Scandinavia, criminal justice has also been heavily influenced by restorative justice, inter alia through the emphasis on re-training and re-integration of criminal offenders into society. There is no inherent antagonism between the “west” and “Africa” when it comes to accountability and reconciliation. Some have argued for the importance of “survivor’s justice” as opposed to “victor’s justice” based on the Nuremberg paradigm in the context of the Darfur conflict,³⁰ but it is hard to see whether the concept of “survivor’s justice” brings anything new to the debate. The arguments brought forward by Mamdani in the context of the Darfur crisis has been part of the transitional justice debate for some time.

The historical context of the war, how the war ended and the specific political and economic framework for war and peace will have a much more decisive influence than general observations about “African justice” on how issues around justice, accountability and reconciliation are handled. In this sense, the experience from South Africa and Nuremberg should not be seen as opposing models, but cases that can provide us with useful and distinct lessons on how issues of accountability can be handled in different contexts.

The communities in northern Uganda had, as in all other societies, various mechanisms at their disposal to regulate behaviour and solve conflicts. But it is challenging to describe those mechanisms without distorting actual practice. It is true that many of them underlined the need to re-establish harmony between individuals and family groups in the community. But this is not the whole story. In the Ugandan context it is normal to distinguish between three such mechanisms for three different communities in northern Uganda: *mato oput* in Acho-

²⁷ “The ICC is of no value to wronged African communities; Traditional Courts can handle crime against humanity” (Michael Baingana), *The New Vision*, 7 July 2009; *Faculty of Law Makerere University*: “Stakeholders Dialogue; Beyond Juba”. Proceedings from a workshop, December 1–3, 2006.

²⁸ See also Luc Huyse: “Introduction: tradition-based approaches in peacemaking, transitional justice and reconciliation policies”, in Luc Huyse and Mark Salter (eds) *Traditional Justice and Reconciliation after Violent Conflict* (Stockholm: IDEA, 2008) 5–6.

²⁹ Ruti G. Teitel: “Transitional Justice Genealogy” (2003) Vol. 16, *Harvard Human Rights Journal*, 77.

³⁰ Mahmood Mamdani: *Saviours and Survivors: Darfur, Politics and the War on Terror* (New York: Pantheon Books 2009).

liland, *kayo-cuk* in Lango and *ailuc* in Teso. These three mechanisms are quite distinct, but a new study has identified the following five principles that look to be common:³¹

- Cleansing, cooling and welcoming for the ones that “return” to the community
- Punishment and retributive aspects
- Truth telling, dialogue and responsibility
- Material compensation as reparations
- Reconciliation and forgiveness

It is again of particular interest to note that traditional justice also includes retribution in different forms. The same study from the Beyond Juba Project also found that many in northern Uganda were not entirely opposed to the use of imprisonment as punishment and as an element of traditional justice.

The mechanisms have flexibility and can be used for everything from compensation for theft of chickens to cleansing of “lost sons”. But the traditional mechanisms for reconciliation have not been meant to deal with atrocities of the scale witnessed in northern Uganda. Another key challenge of trying to apply traditional justice mechanism is that they have not been used to dealing with inter-communal conflicts such as that between Acholi and Lango.

The debate about peace, reconciliation, justice and accountability in northern Uganda must also be seen in a local political context. In the discussions about the use of traditional mechanisms in northern Uganda there has been a particular focus on *mato oput* in Acholiland, and those elements of *mato oput* that emphasize reconciliation. Some of the reasons for the willingness to focus on reconciliation are linked to the fact that many of the LRA perpetrators were also victims of LRA given that they were kidnapped as children. However, there are also some local politicians that, at least in the 90s, had sympathy with LRA and its predecessors.

Those who have argued against the role of the ICC in the conflict because ICC is “political” seem to have forgotten that any framework for the regulation of behaviour will have to be “political”. Seen from this aspect, there is very little difference between western and African justice. Traditional leaders in northern Uganda, who in many cases are more a reflection of the “re-invention” of tradition than age-old customs,³² will take on a more important political role if they end up being masters of ceremony for reconciliation and truth telling. The formal administrative structures of the state, and locally elected leaders, might become less influential. The use of traditional mechanism in the framework of the Juba agreements will also be part of a wider political debate in Uganda as the role of “traditional” leaders and re-invented institutions is becoming increasingly contentious. But even if there is no inherent conflict between traditional mechanisms in northern Uganda and the philosophy of ICC, could it still be that traditional mechanism systematically could handle issues of accountability and reconciliation on its own?

³¹ “Tradition in Transition; Drawing on the old to develop a new jurisprudence for dealing with Uganda’s legacy of violence”, *Beyond Juba Project* (Kampala, Working Paper No. 1, July 2009) 16–30. The paper can be found at www.beyondjuba.org/working_papers, visited September 17 2009.

³² Tim Allen: *Trial Justice, The International Criminal Court and the Lord’s Resistance Army* (London: Zed books 2006) 151–152.

3. CAN THE ROLE OF TRADITION IN RECONCILIATION BE FORMALISED?

Traditional mechanisms were given an important role in the Juba agreements when it came to reconciliation, accountability, compensation and truth seeking. The traditional mechanisms are seen as relevant and important by many inhabitants in northern Uganda, and by key actors in the Ugandan judicial system. But practices such as *mato oput* raise several questions about a more systematic use of the mechanisms. The traditional mechanisms might not enjoy legitimacy in all areas. There are different views among the population, politicians and observers about how traditional mechanisms for reconciliation can be adjusted and be of use in northern Uganda. The Beyond Juba Project³³ identified five challenges for the use of traditional mechanisms in transitional justice in northern Uganda.

- The role and status of traditional and clan leaders
- The relationship between religion and traditional justice
- The involvement, or lack of involvement, of women and youth
- The connections between formal justice and traditional justice at local level
- Traditional justice and the extra-ordinary challenges of mass conflict

In other words, before one can really make use of traditional mechanisms, there are many clarifications, and possibly modifications, that need to be done. The issue of regional variations within northern Uganda remains a key challenge, and is an illustration of the shortcomings of any uncritical embrace of traditional mechanism. Victims in Teso do not necessarily see the relevance of *mato oput* for them. Another illustration is the traditional practice (not seen as relevant by most local leaders today) of giving away a woman as part of “packages of reconciliation”. Traditional mechanisms cannot be a panacea, only one element within a broader process of transitional justice. Traditional mechanisms are rarely equipped to deal with modern day peacemaking without modifications.

There are obvious pitfalls in trying to formalise and codify traditional mechanisms. An additional argument against such attempts is also that flexibility and local attachment that traditional mechanisms can bring to a transitional justice process might be lost if it is formalised too much. It should not be an objective of traditional mechanism to create parallel structures of law and order in addition to the formal judicial system. The inclusion of traditional mechanisms in the Juba agreements has been criticized.³⁴ Traditional mechanisms were included because the parties saw them as useful to promote accountability and reconciliation, and this was a creative way of getting to terms with some of the difficult part of peace building in northern Uganda, in particular in the context of the peace vs. justice dilemma. However, more

³³ “Tradition in Transition; Drawing on the old to develop a new jurisprudence for dealing with Uganda’s legacy of violence”, *Beyond Juba Project* (Kampala, Working Paper No. 1, July 2009) 30–40. The paper can be found at www.beyondjuba.org/working_papers, visited September 17 2009.

³⁴ Tim Allen: “Ritual (Ab)use? Problems with Traditional Justice in Northern Uganda”, in Nicholas Waddel and Phil Clark (eds): *Courting Conflict? Justice, Peace and the ICC in Africa* (London: The Royal African Society 2008).

work remains to be done on how the use of traditional mechanisms can practically facilitate accountability, truth telling, reconciliation and compensation.

Despite the many relevant aspects of traditional mechanisms, they cannot fulfil several aspects of a transitional justice process in northern Uganda. In addition to the conceptual challenges facing use of traditional mechanisms, it should also be stressed that northern Uganda is not “traditional”. Social, political and economic changes in society have made it impossible for traditional mechanisms to handle all aspects of the peace-building process. The negotiators who made the AAR in Juba were well informed about the opportunities and limitations that traditional mechanisms offer. That is the key reason why the Juba process ended up merging aspects of tradition with other national tools for accountability and reconciliation, as well as the philosophy of ICC. Some have claimed that the importance given to the fight against impunity in Juba goes against the interest and wishes of the population and the victims in the north. Is this true?

4. THE VIEWS OF THE VICTIMS

The framework from Juba gives a lot of attention to the victims, and the victims’ need for reconciliation, truth, accountability and justice. The AAR highlights reconciliation for regular LRA soldiers, while those who have committed the most serious crimes should be prosecuted. But what is it that the victims of the war and the population in the north want most, prosecutions or reconciliation, peace or justice? As a point of departure most of the people want both prosecution and reconciliation, both peace and justice, and they want UPDF atrocities to be investigated closely, but by others than the army. But it is evident that it might be hard to achieve both peace and justice, particularly at the same time. So what is most important, peace or justice?

Quite a few observers have concluded that the victims of the war want peace at any price and as fast as possible,³⁵ and that peace must be given priority over prosecution.³⁶ During the 2007 national consultations about justice and accountability conducted by both LRA and GoU before the finalisation of the Juba agreements it appeared that many, but far from all, were mostly concerned about securing the peace. Different forms of punishment and accountability were discussed at a local level, including formal prosecution and the use of traditional mechanisms. The outcome of the consultations was to some degree reflected in the FPA. During the consultations regional differences emerged since the Acholi in general were more inclined to declare peace as priority number one, and more negative to ICC and formal prosecution than people in other regions. In other parts of northern Uganda accountability and punishment were given more importance.

³⁵ Sverker Finnström. *Living with Bad Surroundings; War, history and Everyday Moments in Northern Uganda* (Durham and London: Duke University Press 2008) 228.

³⁶ Mareike Schomerus: *The Lord’s Resistance Army in Sudan: A History and Overview*, The Small Arms Survey. Geneva 2007.

Two other comprehensive studies showed that the victim's wish for accountability and punishment was more prevalent than what many thought.³⁷ Many of the local political and religious elite in the north had argued against formal prosecutions and against ICC claiming they were talking on behalf of the population in the north. It was not hard to find victims who supported ICC's arrest warrants for the LRA leadership, partly because they were afraid that Kony would get too mild a punishment in Uganda. The wish for retribution for the perpetrators was in general most pre-eminent in qualitative studies based on personal interviews.³⁸ There are thus more nuances to the peace vs. justice dilemma than what have emerged in the northern Ugandan political discourse. Those who have claimed that all the victims are ready to forgive the perpetrators, and that the victims want ICC and formal prosecution out of the picture, have oversimplified victims' attitudes. As peace gets hold in the region, the desire for retribution might grow stronger given that it will not threaten peace. On the other hand, time may have the opposite effect, and the importance of prosecution diminish as the war becomes a memory.³⁹

The fact that many victims do want to see accountability and prosecution, not only traditional mechanisms of reconciliation, can also be explained by the fact that LRA's atrocities cannot be understood and accounted for only within a traditional and local context. The LRA leadership have put themselves outside the traditional mechanisms that have been practised to regulate individual and group behaviour in northern Uganda. The Juba agreements were a compromise between peace and justice. Many of the LRA perpetrators would not be prosecuted under this framework. On the other hand, the LRA leadership would be prosecuted for war crimes and crimes against humanity. There is no impunity for Joseph Kony and his leading accomplices.

The compromise from Juba was probably much more adjusted to the wishes of the victims when it comes to the peace vs. justice dilemma than many statements given by the local elite in the north. The philosophy of ICC has not been imposed on the population in the north, as some have argued.⁴⁰ However, given that many HR violations and crimes will not be pros-

³⁷ *When the War Ends; A Population-Based Survey on Attitudes about Peace, Justice and Social Reconstruction in Northern Uganda*. Human Rights Center, University of California Berkley, Payson-Center, Tulane University and International Center for Transitional Justice. December 2007. *Making Peace Our Own; Victims' Perceptions of Accountability Reconciliation and Transitional Justice in Northern Uganda*, Office of the High Commissioner for Human Rights, United Nations 2007.

³⁸ Tim Allen: *Trial Justice, The International Criminal Court and the Lord's Resistance Army* (London: Zed books 2006) 181.

³⁹ For some, including those maimed by LRA, it is impossible to forget: "I want Justice: For some victims of the LRA, forgiving is too much to ask of them", *Sunday Vision*, 18 November 2007.

⁴⁰ Chris Dolan: "Imposed Justice and the need for Sustainable Peace in Uganda", Presentation to the AMANI Forum training in Transitional Justice for Parliamentarians, Entebbe 18 July 2008. Refugee Law Project.

See also James Ojera Latigo: "Northern Uganda: Tradition based practices in the Acholi Region", in *Traditional Justice and Reconciliation after Violent Conflict; Learning from African Experiences* (Stockholm: IDEA, 2008).

ecuted, it is very important that some kind of mechanism is established to promote accountability and to tell the history of the war as seen from the standpoint of the victims. Some form of truth-telling mechanism would go some way to acknowledge the many atrocities committed against the population by LRA and UPDF.

C. FROM THE ICC TO CLEANSING RITUALS –THE NECESSITY OF A WIDE FRAMEWORK TO MANAGE DILEMMAS IN PEACE BUILDING

There are many peace accords that have been signed but never implemented. Even without the final signature, the Juba FPA can become more important than many of these agreements due to the innovations and compromises that were made in Juba. Even if GoU might not go ahead with full implementation of all parts of AAR, the Juba process has given new insights into transitional justice issues.

In this article we have seen that the claim that the conflict in northern Uganda can be used as a case for arguing against the involvement of the ICC in ongoing conflicts is not supported by the evidence. The true intentions of Kony are not known. At the same time, the LRA negotiators did agree to formal prosecution for war crimes and crimes against humanity in Juba. The ICC warrants were one of the factors bringing LRA to the negotiating table. The ICC's warrants and the negotiations in Juba have been catalytic for the establishment of the war crimes court in Uganda. Furthermore, the whole idea that ICC could not intervene in ongoing conflicts would de facto give support to impunity for individuals like Kony who have masterminded atrocities for more than 20 years.

The dispute about ICC and ICC's role in Africa is more intense than ever. But the developments in Uganda are an example of how the ICC can play a constructive role in several phases of a peace process, in addition to supporting the fight against impunity in an ongoing conflict. Some of the motives and views that have been ascribed to the ICC in the debate about LRA are not correct. This is partly because ICC has been dragged into Ugandan politics. Teitel reminds us that there will always be a "close relationship between the type of justice pursued and the relevant limiting political conditions".⁴¹ ICC must always operate within a political context. ICC, just as the international war crime tribunals for ex-Yugoslavia and Rwanda,⁴² will not be able to stay aloof from domestic political issues in the countries they work; neither can such tribunals avoid the forces of international relations.

The issue is therefore not whether ICC can avoid politics or not, neither is it possible or desirable that ICC should avoid handling cases in ongoing conflicts. Based on ICC's role and mandate, one must try to manage the political setting for ICC in each conflict. It should be managed such that it promotes the fundamental norms of the court, but at the same time this should be done in a manner that makes it less of a hindrance to the search for peaceful solu-

⁴¹ Ruti G. Teitel: "Transitional Justice Genealogy" (2003) Vol. 16, *Harvard Human Rights Journal*, 69.

⁴² Victor A. Peskin: *International Justice in Rwanda and the Balkans, Virtual Trials and the Struggle for State Cooperation* (Cambridge: Cambridge University Press, 2009).

tions. As long as the key principles of the ICC are secured, local, national and regional solutions and institutions could do the job. In concrete cases, this will entail difficult dilemmas and a good balancing act. The experience from Uganda illustrates first of all that it is possible to do it, and secondly that these considerations can best be met within a wider framework of transitional justice that includes a variety of tools and mechanisms.

During the last decade practitioners and academicians have looked into the possibility of having a convergence between the different elements (e.g. justice, accountability, reconciliation, reparations, truth telling) and the multiple layers (local, national and regional) in processes of peace building. It is within a wider framework for transitional justice that one can find a potential for advancing peace building through combining these elements.⁴³ This approach is salient in AAR. In the classification of transitional justice provided by Teitel,⁴⁴ the AAR would be a combination of phase II (Post-Cold War Transitional Justice) and phase III (Steady-State Transitional Justice). The experiences from countries such as Sierra Leone, Argentina, Peru, Chile, and East Timor have been important in this regard. Such a wider framework can also accommodate notions of not only negative, but also positive peace, including issues around economic rights (not only issues related to compensation).

It is in the combination of the many different elements of transitional justice, including the use of traditional mechanisms and the role of the ICC, that we witness the innovative element of the Juba framework. As we have seen in this article, the fight against impunity has been complemented by traditional mechanisms in the peace process in northern Uganda. The creativity of the two negotiation teams at Juba led to a merger between concepts of home-grown justice and the ICC. The Ugandan judiciary, and leading judges in Uganda, have also been at the forefront of this merger between the philosophy of ICC and traditional justice. The merger seems to be the best compromise seen from the viewpoint of the victims as well. The actual process has thus been the opposite of what some have claimed, namely that ICC and traditional mechanism have clashed over how to promote peace, reconciliation and accountability in northern Uganda.

The third finding of this article is that the use of traditional mechanisms, as is agreed in the AAR, raises new questions that need to be addressed. Any uncritical support to the use of "local tradition" in peacemaking should be avoided.⁴⁵ Rwanda might be a case to learn from. The Gacaca process seen as an effort to bring justice and reconciliation to the grassroots mer-

⁴³ Naomi Roht-Arriaza and Javier Mariezcurrena (eds): *Transitional Justice in the Twenty-First Century* (Cambridge: Cambridge University Press, 2006); Graeme Simpson: "One among Many: The ICC as a Tool of Justice during Transition", in Nicholas Waddel and Phil Clark (eds) *Courting Conflict? Justice, Peace and the ICC in Africa* (London: The Royal African Society 2008).

Louise Mallinder: "Can Amnesties and International Justice be Reconciled?" *The International Journal of Transitional Justice*, Vol. 1 No 2, 2007.

⁴⁴ Ruti G. Teitel: "Transitional Justice Genealogy" (2003) Vol. 16, *Harvard Human Rights Journal*, 69–94.

⁴⁵ For a discussion of the role of traditional mechanisms in transitional justice, see Luc Huyse: "Conclusions and Recommendations" in Luc Huyse and Mark Salter (eds) *Traditional Justice and Reconciliation after Violent Conflict; Learning from African Experiences*, (Stockholm IDEA 2008).

its considerable respect.⁴⁶ But there have also been many logistical and legal challenges with Gacaca, and there are many lessons to be learnt.⁴⁷ The use of traditional mechanisms does not by itself solve the dilemma of peace vs. justice, but these mechanisms can give more and better tools in a peace and reconciliation process. The use of tradition cannot be a substitute to solicit the views of the victims. It must also be stressed that traditional mechanisms must be seen in their proper political, economic and social context.

The debate in Uganda about ICC can also provide new impulses to the global discussion, inter alia on the peace vs. justice dilemma. While some seem to insist that ICC in northern Uganda is only about “imposed” justice from the west, and that ICC stands in the way of political compromises that can result in “survivor’s justice”,⁴⁸ the FPA does in many ways prove their assertions wrong (the AAR explicitly states that the goal is “lasting peace with justice”). ICC can be part of a wider solution within a framework of transitional justice, a framework that combines the philosophy of ICC with traditional mechanism. The arguments put forward in this article have illustrated that the debate about the role of ICC and the struggle against impunity are not about the west vs. Africa and not about the example of Nuremberg against the example of South Africa. The global norm of impunity for war crimes, crimes against humanity and genocide does not have to yield to “survivor’s justice”. It is possible to have a framework for peace building that is politically sensitive, while at the same time giving the opportunity to balance different dilemmas.

ICC’s fundamental philosophy, namely the struggle against impunity for war crimes, crimes against humanity and genocide, has been a significant element in peace building and transitional justice in Burundi and Rwanda as well as in Uganda. The Arusha Agreement of 2000 excluded impunity for war crimes, crimes against humanity and genocide in Burundi. In Rwanda, one key motivation for the Gacaca courts was to fight impunity. In Sudan the stormy debate around the ICC indictments against president Bashir has by some been portrayed as another example of “imposed justice” on Africa. But in the newly released report by the African Union’s High Level Panel on Darfur, the struggle against impunity and the establishment of a new “hybrid” war crimes court in Sudan that includes expatriate judges, are another sign of how entrenched the struggle against impunity is becoming in Africa.

To try to move beyond the peace vs. justice dilemma, it would be useful to look at the relationship between the two as a continuum in which different mechanisms within transitional justice at different times contribute to accountability, justice and peace building.⁴⁹ The tim-

⁴⁶ Timothy Longmann “Justice at the Grassroots? Gacaca Trials in Rwanda” in Naomi Roht-Arriaza and Javier Mariezcurrena (eds): *Transitional Justice in the Twenty-First Century* (Cambridge Cambridge University Press, 2006) 223–224.

⁴⁷ Bert Ingelaere: “The Gacaca courts in Rwanda”, in Luc Huyse and Mark Salter (eds) *Traditional Justice and Reconciliation after Violent Conflict* (Stockholm IDEA 2008) 25–60.

⁴⁸ Mahmood Mamdani: *Saviours and Survivors: Darfur, Politics and the War on Terror* (New York Pantheon Books 2009) 284–286.

⁴⁹ Graeme Simpson: “One among Many: The ICC as a Tool of Justice during Transition” in Nicholas Waddel and Phil Clark (eds): *Courting Conflict? Justice, Peace and the ICC in Africa* (London: The Royal African Society, 2008).

ing, and the shifts in the political context, will be some of the factors that can determine which transitional justice tools one should use at any given time. It might, for example, be that a future mechanism for truth telling will reveal war crimes that will be brought before a war crimes court. The sequential use of the tools for transitional justice should not be seen as a list of priorities in this context.

But in all post-conflict countries, it has proven necessary to enter into compromises to manage these difficult situations. In Burundi one still has to make difficult decisions when it comes to “temporary immunity” against prosecution. In Uganda prosecutions were planned for the most serious crimes at the war crimes court, but many HR violations will not be subject to formal prosecution. Rwanda has done impressive work to avoid impunity, but even there it has proven necessary to introduce levels of punishment that entail mild sanctions for crimes. In Sudan, it is still unclear if the authorities will approve of the proposed hybrid war crimes courts. Thus, the practical politics as well as the academic debate will have to continue to focus on these dilemmas.