

# Alternative Justice for Victims in Uganda: Learning from the Impact of COVID-19 on the Court System

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The notion of a more “victim-centred” approach to peacebuilding and Transitional Justice (TJ), is increasingly emphasized in academic, legal and policy discourse. Unfortunately, this element is mostly lacking within the context of Uganda’s post war recovery and transition. This article attempts to strike a balance between retributive justice and reconciliation. Considering the challenges of achieving justice through the courts, including the COVID-19 disruptions, the article argues that by directly engaging survivors in alternative dispute resolution as a process embedded in plea-bargaining, the Courts can make accountability for atrocity crimes more “victim-centred”. This recommendation is radical, from an International Criminal Justice (ICJ) perspective, because redress through the courts is primarily about retribution or punishment of guilty parties, which a survivor-centred approach to plea bargaining might not always produce. The argument, however, is not to turn away from retributive justice. Rather, the claim is that it is ineffective for mass atrocities within specific contexts, on its own. Ultimately, a more radical approach is for criminal accountability mechanisms to preserve spaces that allow for reconciliation, through Alternative Dispute Resolution (ADR) and Plea Bargaining. This proposed approach is meant to specifically address atrocity violence during periods of transition, which would be interpreted as radical in the context of ICJ.

## BACKGROUND

Thirty-five years ago, Northern Uganda plunged into a two decade-long civil war. The Lord’s Resistance Army (LRA), a rebel group, were implicated in enormous acts of gross human rights violations. To some scholars, the war, which predominantly affected the Acholi people, was partially a result of the politicization of ethnic identities in post-colonial Uganda.<sup>1</sup> The LRA atrocities, together with the government military campaigns, led to massive displacement of people in Northern Uganda which lasted until 2006 when the rebels were driven out of the region.<sup>2</sup> In light of recent reports about the continued economic and psychological impacts of the conflict on the victims and communities,<sup>3</sup> it is important to

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Adam Branch, ‘Exploring the Root of LRA Violence: Political Crisis and Ethnic Politics in Acholiland’, in *The Lord’s Resistance Army: Myth and Reality*, ed. Tim Allen and Koen Vlassenroot, 1st ed. (London: Zed Books, 2010)26.

2 Artur Bogner and Gabriele Rosenthal, “Rebels in Northern Uganda after Their Return to Civilian Life: Between a Strong We-Image and Experiences of Isolation and Discrimination,” *Canadian Journal of African Studies / Revue Canadienne Des Études Africaines* 51, no. 2 (2017).

3 Sarah Kasande Kihika and Eva Kallweit, ‘Building Blocks for Reparations: Providing Interim Relief to Victims Through Targeted Development Assistance’, Research Report (Kampala: International

evaluate the existing framework of international criminal justice (ICJ).

While ICJ is primarily associated with international criminal prosecutions as a response to mass atrocities and impunity, it also envisions incidental outcomes like peace and reconciliation of communities.<sup>4</sup> Ugandan scholar Lubaale develops a legal pluralist account for ICJ, challenging dominant assumptions that undermine the role of local

need for a seemingly radical solution: Reconciliation as a complementary goal of ICJ to be pursued through its constituent processes in a more than incidental manner. Based on my work as a legal practitioner and socio-legal researcher in Uganda, I argue that the radical solution of embedding reconciliation within formal court processes has the potential to make the trials more participatory and legitimate before the affected communities. Besides my work, the way that COVID-19 related disruptions in

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approaches in formal conflict resolution.<sup>5</sup> Crucially, there are calls for creative confrontation of the challenges facing ICJ within specific contexts<sup>6</sup>. It is here where this paper intervenes.

At the domestic level, the COVID-19 pandemic has had an enormous impact on the Ugandan criminal justice system and courts, namely through suspension of post-atrocity trials at the International Crimes Division (ICD).<sup>7</sup> In addition, the justice system faces enormous challenges like limited financial resources, leading to frustration among litigants, including victims.<sup>8</sup> These complexities beg the

the trials threatened such an outsized impact the overall process of doing justice provided the impetus for thinking about solutions for the post-war affected communities and victims.

### RECONCILIATION AS A FORM OF TRANSITIONAL JUSTICE IN UGANDA

Transitional Justice (TJ) relates to the different process of addressing past systematic abuses during post-conflict or democratic transitions,<sup>9</sup> and its goals include truth-seeking, justice, peace, democracy and reconciliation.<sup>10</sup> The post-war accountability mechanisms of contemporary TJ in Uganda include reparations, reconciliation and criminal prosecutions at domestic and international levels through bodies like the International Criminal Court (ICC).<sup>11</sup>

Contemporary TJ scholarship suggests a need to create a balance between the competing interests of retribution

Center for Transitional Justice, September 2020<sup>35</sup>, [https://www.ictj.org/sites/default/files/ICTJ\\_Report\\_Uganda\\_InterimRelief\\_Web.pdf](https://www.ictj.org/sites/default/files/ICTJ_Report_Uganda_InterimRelief_Web.pdf).

4 Payam Akhavan, "The Rise, and Fall, and Rise, of International Criminal Justice," *Journal of International Criminal Justice* 11, no. 3 (July 2013): 532; Frederic Megret, "International Criminal Justice as a Peace Project," *European Journal of International Law* 29, no. 3 (2018): 835–858.

5 Emma Charlene Lubaale, "Legal Pluralism as a Lens through Which to Appreciate the Role and Place of Traditional Justice in International Criminal Justice," *Journal of Legal Pluralism and Unofficial Law* 52, no. 2 (2020): 180–202.

6 Payam Akhavan, "The Rise, and Fall, and Rise, of International Criminal Justice"; Frederic Megret, "The Anxieties of International Criminal Justice," *Leiden Journal of International Law* 21, no. 1 (2016): 197–221.

7 Lino Owor Ogora, "Kwoyelo Trial Suspended Due to COVID-19," *International Justice Monitor*, March 26, 2020, <https://www.ijmonitor.org/2020/03/kwoyelo-trial-suspended-due-to-covid-19/>.

8 "Victims in the Thomas Kwoyelo Case Forced to Wait Longer for Justice," *International Center for Transitional Justice*, July 25, 2018, <https://www.ictj.org/news/victims-thomas-kwoyelo-case-forced-wait-longer-justice>; Andante Okanya, "World Bank Commits More Sh500m

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9 Joanna R. Quinn, "The Development of Transitional Justice," in *Research Handbook on Transitional Justice*, ed. Cheryl Lawther, Luke Moffett, and Dov Jacobs, *Research Handbooks in International Law Series* (Cheltenham: Edward Elgar Publishing, 2017), 11–33.

10 Paul Gready and Simon Robins, "Transitional Justice and Theories of Change: Towards Evaluation as Understanding," *International Journal of Transitional Justice* 14, no. 2 (2020): 226.

11 Frédéric Mégret, "The Strange Case of the Victim Who Did Not Want Justice," *International Journal of Transitional Justice* 12, no. 3 (November 2018): 444–63.

## Alternative Justice for Victims in Uganda

and reconciliation,<sup>12</sup> while making TJ more creative through sensitivity to the particular contexts in which the mechanisms are deployed.<sup>13</sup> Within the context of TJ, reconciliation refers to the process of rebuilding relationships at individual, societal and institutional levels.<sup>14</sup> Besides the truth-seeking mechanisms, acts of memory or remembrance, and acknowledgement of past violations by the perpetrators, including state agents, contribute to reconciliation.<sup>15</sup>

In Northern Uganda, reconciliation is synonymous with peacebuilding and community building through the use of customary practices of justice—*mato opu* or “bitter roots” among the Acholi people.<sup>16</sup> The ultimate goal of such rituals is to restore relations between the perpetrators, offended individuals and communities, through their clan representatives.<sup>17</sup>

On the other hand, retributive justice is objectively compelling in the case of atrocities as it offers a chance for nominal punishment. Yet, retribution is not necessarily beneficial to the practice of TJ. One can thus argue that reconciliation is a better option, since it allows the participation of multiple victims and affected communities. However, we should not think of them as mutually exclusive.

The next section will illustrate how customary rituals and

practices could help facilitate a more effective form of ICJ, using the court procedures of Alternative Dispute Resolution (ADR) in the tangible case of Thomas Kwoyelo.

### COURTS AS INTERMEDIARIES OF RECONCILIATION

The COVID-19 pandemic led to the halt of the trial of Thomas Kwoyelo, a former LRA commander, in the first domestic war crimes case, regarded as a test case for post-conflict justice in Uganda.<sup>18</sup> Kwoyelo was charged with 93 counts of war crimes and crimes against humanity, allegedly committed during the conflict. This case illustrates the complexity and limitations of criminal prosecution of LRA atrocities from a TJ perspective. The attitudes of affected communities towards the LRA crimes are diverse. Critics of the Kwoyelo trial view his prosecution as politicized justice, arguing that legal accountability is not appropriate within the cultural and political contexts.<sup>19</sup> In light of these arguments, it is important to also think of ways that criminal courts could act as intermediaries of reconciliation.

Alternative dispute resolution (ADR) refers to means of solving disputes outside of simple litigation in the court system, and often involves things like mediation or arbitration, but can take many forms. The range of outcomes of ADR processes might not be predetermined in the way that litigation is, and inputs from all parties involved can be taken into account. The adoption of a radical ADR within ICJ processes has the opportunity to bring community and traditional practice together with existing justice system and legal rigour. From legal pluralist point of view, Lubaale argues that traditional practices and criminal trials have the potential to complement each other.<sup>20</sup>

Whilst acknowledging their importance in TJ, interdisciplinary scholarship also suggests that criminal trials are not truly victim-centred due to their narrow focus on individual perpetrators,<sup>21</sup> and due to procedural limitations in victim participation and influence on the verdict.<sup>22</sup> On the other hand, more victim-oriented scholars are sceptical about the value of traditional reconciliation ceremonies of *mato opu*, since they can also imply a lack of protection for victims

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12 Dustin N. Sharp, *Rethinking Transitional Justice for the Twenty-First Century Beyond the End of History* (Cambridge: Cambridge University Press, 2018); Anna Macdonald, “In the Interests of Justice?” *The International Criminal Court, Peace Talks and the Failed Quest for War Crimes Accountability in Northern Uganda*, *Journal of Eastern African Studies* 11, no. 4 (2017).

13 Kirsten J. Fisher, ‘Defining a Relationship between Transitional Justice and Jus Post Bellum: A Call and an Opportunity for Post-Conflict Justice’, *Journal of International Political Theory* 16, no. 3 (2020):300; Hugo van der Merwe, ‘Transitions in the Middle East and North Africa: New Trajectories and Challenges for Transitional Justice?’, in *Transitional Justice and the Arab Spring*, ed. Kirsten J. Fisher and Robert Stewart (London: Routledge, 2014), 234.

14 Paul Seils, “The Place of Reconciliation in Transitional Justice: Conceptions and Misconceptions,” *ICTJ Briefing* (New York, NY: International Center for Transitional Justice, June 2017), <https://www.ictj.org/sites/default/files/ICTJ-Briefing-Paper-Reconciliation-TJ-2017.pdf>.

15 Pablo de Greiff, “Unacknowledged Past Breeds Manipulation and Fear,” *International Center for Transitional Justice*, May 4, 2016, <https://www.ictj.org/debate/article/unacknowledged-past-manipulation-fear>.

16 Marisa O. Ensor, “Drinking the Bitter Roots: Gendered Youth, Transitional Justice, and Reconciliation across the South Sudan-Uganda Border,” *African Conflict and Peacebuilding Review*, Special Issue on Peace Education, Memory, and Reconciliation in Africa, 3, no. 2 (2013); Janet McKnight, “Accountability in Northern Uganda: Understanding the Conflict, the Parties and the False Dichotomies in International Criminal Law and Transitional Justice,” *Journal of African Law* 59, no. 2 (2015): 193-219.

17 Ketty Anyeko et al., “‘The Cooling of Hearts’: Community Truth-Telling in Northern Uganda,” *Human Rights Review* 13 (2012): 107-124.

18 Oryem Nyeko, “A Test Case for Justice in Uganda: Government Should Signal More Commitment to Uganda’s International Crimes Division,” *Human Rights Watch*, November 15, 2018, <https://www.hrw.org/news/2018/11/15/test-case-justice-uganda>.

19 Anna Macdonald and Holly Porter, “The Trial of Thomas Kwoyelo: Opportunity of Spectre? Reflections from the Ground on the First LRA Prosecution,” *Africa* 86, no. 4 (2016): 698-722.

20 Emma Charlene Lubaale, “Legal Pluralism as a Lens through Which to Appreciate the Role and Place of Traditional Justice in International Criminal Justice.”

21 Makau Mutua, “What Is the Future of Transitional Justice?,” *International Journal of Transitional Justice* 9, no. 1 (2015): 1-9.

22 Luke Moffett, ‘Complementarity’s Monopoly on Justice in Uganda: The International Criminal Court, Victims and Thomas Kwoyelo’, *International Criminal Law Review* 16, no. 3 (2016):518.

and other vulnerable people.<sup>23</sup>

As observed by TJ scholars, the relationship between the elements of criminal trials, retribution and reconciliation is still unsettled.<sup>24</sup> This can make it useful to adopt a radical approach to criminal accountability processes, by including non-legal aspects like negotiation, apology, forgiveness and communal compensation in the process. One way of doing this would be through the use of ADR and its incorporation into court procedures. The end result could be a more participatory and culturally inclusive form of post-war justice.

The potentially successful collaboration between the criminal justice system and traditional reconciliation rituals and systems is illustrated through the use of plea bargaining. The context of Northern Uganda provides a practical case study to examine whether ADR could influence sentencing decisions by criminal courts, by bringing victims more directly into the criminal justice process.<sup>25</sup> Through a legal procedure termed "Plea Bargaining", the state prosecutors negotiate a compromise with the accused persons. Within the context of TJ, this would be more effective if the victims were allowed to be part of this process. In this way, the radical solution could be achieved by expanding the plea-bargaining process to include a wide range of actors, like village elders and affected communities, that are pivotal in the customary rituals.

## CONCLUSION

The COVID-19 trial disruptions demonstrate to some extent the problem of relying on retributive justice done in the courts as a sine qua non for community reconciliation. More ongoing victim involvement in the form of ADR could have lessened the impact of such disruptions as delayed justice. This and other criticisms levelled against such trials reminds us of the need for legal pluralism and radical solutions. In order for this to happen, the article has suggested the incorporation of ADR embedded in plea bargaining, into the post-atrocity criminal accountability procedures. The courts, in collaboration with government and development partners need to draw appropriate legal and policy strategies aimed at making this solution a reality.

23 Luke Moffett 516.

24 Makau Mutua, "What Is the Future of Transitional Justice?"; Anna Macdonald and Holly Porter, "The Trial of Thomas Kwoyelo: Opportunity of Spectre? Reflections from the Ground on the First LRA Prosecution."

25 Patience Aber, Farooq Kasule, and Lamony Wilfred Jwee, "Kanyamunyu Opts for Acholi Justice System," *New Vision*, September 15, 2020, <https://www.newvision.co.ug/news/1527000/kanyamunyu-opts-acholi-justice>; URN, "Akena Murder: Kanyamunyu Sentenced to 6 Years as Girlfriend Walks Free," *The Observer*, November 12, 2020, <https://observer.ug/news/headlines/67358-akena-murder-kanyamunyu-sentenced-to-5-years-as-girlfriend-walks-free>.

This seemingly radical solution would be effective in countries like Uganda, where TJ processes remain contested<sup>26</sup>. As has been highlighted, there are critical concerns about punitive justice, and suggestions have been put forward for restorative approaches that centralize the affected communities and victims. The case of Thomas Kwoyelo has been used as a prism through which to demonstrate the practicality of the radical solution.

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## Alternative Justice for Victims in Uganda

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