

# **The application of traditional justice mechanisms to the atrocities committed by child soldiers in Uganda: A practical restorative justice approach**

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## **Summary**

*Some communities affected by the conflict in Uganda have selectively adopted traditional cleansing rituals to reintegrate former child soldiers. Furthermore, there appears to be support amongst communities for the holistic adoption of traditional justice mechanisms for the atrocities committed by child soldiers. However, these processes need to be modified prior to their adoption in order to address various practicality dilemmas such as the nature and extent of atrocities committed, the proportionality of punishments to the crimes committed, and the identification of parties. This article therefore proposes that such modifications should primarily be drawn from practical restorative approaches embodied within the criminal justice system, and relevant examples from selected countries. This could enhance the application of traditional justice mechanisms to the crimes committed by child soldiers. The article is timely considering that Uganda is currently developing a comprehensive national policy on transitional justice, which will entail a policy on traditional justice mechanisms.*

## **1 Introduction**

The child justice system in Uganda recognises the application of traditional justice processes to child offenders. For instance, section 92 of the Children's Act and section 6 of the Executive Committees (Judicial Powers) Act give village courts original jurisdiction over civil

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matters and criminal offences,<sup>1</sup> and award them the discretion to make informal orders of reconciliation, compensation, restitution, apology and caution, notwithstanding the penalties prescribed in the Penal Code Act 1950 (chapter 120) regarding criminal offences.<sup>2</sup>

It is important to note that these provisions are silent as to whether such processes can be used for crimes under international law, committed by child soldiers. Nonetheless, the current discourse on Uganda's draft national transitional policy indicates a widespread acknowledgment for the holistic adoption of traditional justice processes for the atrocities committed by child soldiers.<sup>3</sup> This is in the midst of uncertainties as to the possible prosecution of some crimes committed by former child soldiers, within Uganda's International Crimes Division.<sup>4</sup>

The adoption of traditional justice mechanisms for atrocities committed by child soldiers is reinforced in paragraph 3.1 of the Agreement on Accountability and Reconciliation (Agreement) between the government of Uganda and the Lord's Resistance Army (LRA).<sup>5</sup> Such processes include *cula kwor* (practised among Acholi and Langi for homicide);<sup>6</sup> *kayo cuk* (among the Langi); and *mato oput*

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1 Such as actual bodily harm and malicious damage to property. Sec 92 Children's Act; sec 6 Executive Committees (Judicial Powers) Act; sec 2 Executive Committees (Judicial Powers) Act Cap 8, 1964. Village courts are the lowest ranking, followed by Parish courts, the sub-county courts.

2 Secs 6 & 28 Executive Committees (Judicial Powers) Act. See also sec 92(4) of the Children's Act.

3 Justice, Law and Order Sector *Key note address to stakeholder consensus on building workshop on the Draft National Transitional Justice Policy* (2013); Chief Justice of Uganda, Steven BK Kavuma, 21 May 2013, Imperial Royale Hotel, Kampala, Uganda, <http://www.jlos.go.ug/index.php/component/k2/item/288-transitional-justice-policy-reviewed> (accessed 3 June 2013).

4 Sec 19(1)(a)(v) of the International Criminal Court Act 2010 limits its jurisdiction to crimes committed by perpetrators aged 18 and above. For more discussion on the possible prosecution of some crimes committed by child soldiers, see H Among 'Challenges in prosecuting former child soldiers in Uganda's International Crimes Division' (2012) 18 *East African Journal of Peace and Human Rights* 336. On amnesty, see Amnesty Act 2000 and sec 2 of the Amnesty Act (Extension of Expiry Period) Instrument 2010, 21. See also K Agger & S Lezhnev 'Policy alert: Uganda reinstates key tool to boost defections from the Lord's Resistance Army' 5 June 2013 <http://www.enoughproject.org/blogs/policy-alert-uganda-reinstates-key-tool -boost-defections-lords-resistance-army> (accessed 29 June 2013).

5 Para 3.1 Agreement on Accountability and Reconciliation between the Government of the Republic of Uganda and the Lord's Resistance Army/Movement, Juba, Sudan (Agreement on Accountability and Reconciliation) [http://www.beyondjuba.org/BJP1/peace\\_agreements/Agreement\\_on\\_Accountability\\_An\\_d\\_Reconciliation.pdf](http://www.beyondjuba.org/BJP1/peace_agreements/Agreement_on_Accountability_An_d_Reconciliation.pdf) (accessed 27 March 2012). This agreement was never signed by the LRA but is highly recognised and persuasive in Uganda's transitional justice framework. High Court Division 'Establishment of International Crimes Division of the High Court in Uganda' [http://www.judicature.go.ug/index.php?option=com\\_content&task=view&id=117&Itemid=154](http://www.judicature.go.ug/index.php?option=com_content&task=view&id=117&Itemid=154) (accessed 22 March 2013).

6 Concerned Parents Association & Lango Cultural Foundation *Lango traditional mechanisms and its application to the current war situation* (2008) 1.

(among the Acholi).<sup>7</sup> Moreover, paragraph 12(IV) of the Agreement provides that children shall be exempted from criminal justice processes, but may participate as appropriate in reconciliation processes.<sup>8</sup> The majority of affected communities also maintain that traditional justice processes should be modified and adopted for the crimes committed by child soldiers.<sup>9</sup> This position is informed by the peculiar experiences of these children, such as forced recruitment at a young age and indoctrination, which significantly influenced their participation in the commission of atrocities.<sup>10</sup>

The discourse on traditional justice processes indicates that the processes used among communities in Uganda entail some variations in content, but they embody comparable restorative processes that aim at realising justice through compensation and reconciliation.<sup>11</sup> While these restorative processes have the potential to contribute towards accountability for atrocities committed by child soldiers, the actual application of traditional justice processes in their entirety will be limited by factors such as the nature and scale of atrocities committed, and the devastated economic structures, as discussed later.

Uganda is currently drafting a national transitional justice policy which will entail a policy on traditional justice processes within Uganda.<sup>12</sup> This creates an opportunity for this article to propose practical restorative approaches that have the potential to advance the application of traditional justice processes to the crimes committed by child soldiers. These restorative approaches are drawn from selected restorative processes incorporated within criminal justice systems, such as those in the United States of America and Canada, and transitional justice mechanisms in countries like Sierra Leone, Rwanda and South Africa.

The term ‘traditional justice mechanisms’ in this article refers to customary law processes used to resolve disputes. This term encompasses processes that were used prior to the conflict, and those that have been modified to deal with atrocities committed during the conflict. The words ‘mechanisms’ and ‘processes’ are used interchangeably.

7 Mato Oput Project *Community perspectives on the Mato Oput process: A research study by the Mato Oput Project* (2009) 10; See Beyond Juba Project *Conflict justice and reconciliation in Teso* (2008) 7.

8 The Agreement on Accountability and Reconciliation (n 5 above).

9 P Pham et al *When the war ends: A population-based survey on attitudes about peace, justice, and social reconstruction in Northern Uganda* (2007) 43.

10 See Among (n 4 above).

11 Mato Oput Project (n 7 above) 7.

12 Justice, Law and Order Sector ‘Opening remarks by Hon Eng Hillary Onek, Minister for Internal Affairs at a stakeholder concensus building workshop on the Draft National Transitional Justice Policy’ 21 May 2013, Kampala, Uganda.

## 2 Restorative justice within the criminal justice system and transitional justice

Restorative justice is an umbrella term referring to processes that bring together all the parties affected by a crime to actively participate in the resolution of matters arising from this crime.<sup>13</sup> This term is not restricted to already-existing processes, but also embraces future processes that might develop.<sup>14</sup> Restorative justice processes focus on repairing the harm rather than punishment and attend to the needs of victims, which range from emotional, financial, material and social. These processes also aim to avert recurrence by reintegrating offenders, to provide opportunities for active responsibility, and to foster a community environment that supports victims and promotes the rehabilitation of offenders.<sup>15</sup>

### 2.1 Criminal justice system

The use of restorative justice within the criminal justice system has been recognised through resolutions and principles within the international legal framework.<sup>16</sup> For instance, the Development and Implementation of Mediation and Restorative Justice Measures in Criminal Justice recommends the adoption of mediation and restorative justice measures for minor disputes.<sup>17</sup> Moreover, the Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters<sup>18</sup> emphasises the development and incorporation of restorative justice mechanisms in all stages of the criminal justice process.<sup>19</sup> Participation in such processes and their outcomes or agreements should be voluntary,<sup>20</sup> and states should formulate guidelines and procedural safeguards for restorative processes. The

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13 Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters, ECOSOC Res 2000/14, UN Doc E/2000/INF/2/Add.2 35 (2000); H Zehr *The little book of restorative justice* (2002) 32.

14 D van Ness 'Proposed basic principles on the use of restorative justice: Recognising the aims and limits of restorative justice' in A van Hirsh *et al* (eds) *Restorative justice and criminal justice: Competing or reconcilable paradigms?* (2003) 166.

15 T Marshall *Restorative justice* (1999) 6.

16 The recognition of restorative processes and remedies was informed by a number of factors such as the inadequate recognition of victims' rights to a remedy within the justice system. C Nils 'Conflict as property' (1977) 17 *British Journal of Criminology* 1.

17 Principles 2 & 5 Development and Implementation of Mediation and Restorative Justice Measures in Criminal Justice 1999/26, adopted by the Economic and Social Council on 28 July 1999.

18 Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters.

19 Principle 6 Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters.

20 Principle 7 Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters.

Declaration also recognises that judicial discharges arising out of restorative agreements are binding, just like judicial decisions.<sup>21</sup>

Restorative justice processes have been comprehensively developed and used within the criminal justice process or as a diversion option, especially within the child justice system in Africa and on other continents.<sup>22</sup> Some of the most common restorative justice processes within criminal justice systems are victim-offender mediation, family group conferencing and sentencing/peace-making circles. These processes are briefly explained below.

Victim-Offender Mediation (VOM) involves face-to-face or indirect discussions between victims and offenders, facilitated by trained mediators in secure settings.<sup>23</sup> VOM aims to foster healing and reconciliation, to enable face-to-face interaction, to give offenders an opportunity to take responsibility, and to give victims closure.<sup>24</sup> During this process, the needs of both parties are identified and outcomes are tailored to suit such needs.<sup>25</sup> This process has been used successfully<sup>26</sup> mainly to complement the criminal justice process and not as a substitute.<sup>27</sup> The application of VOM in the transitional context of Uganda will be limited, considering that parties to the atrocities can rarely identify each other,<sup>28</sup> and the face-to-face interactions may be traumatic for former child soldiers and victims of atrocities as well. This process could, however, be used for the

21 Principles 11-12 Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters.

22 In South Africa, restorative justice processes of victim offender mediation and family group conferencing have been incorporated in secs 61, 62 and 73 of the Child Justice Act 75 of 2008. For a detailed discussion of restorative programmes in South Africa, see A Skelton & M Batley *Mapping progress, charting the future: Restorative justice in South Africa* (2006). Restorative processes have been used in schools and workplaces. B Morrison 'Restorative justice in schools' in C Hoyle (ed) *Restorative justice: Critical concepts in criminology* (2010) 416. For a summary of restorative justice developments worldwide, see D van Ness & HK Strong *Restoring justice: An introduction to restorative justice* (2010) 33.

23 G Bazemore & M Umbreit 'A comparison of four restorative conferencing models' (2001) *Juvenile Justice Bulletin* 2; K Edgar & T Newell *Restorative justice in prisons: A guide to making it happen* (2006) 11; Legal systems in Europe have developed practices of indirect mediation where professional mediators act as go-betweens for the parties. I Aertsen 'Restorative justice through networking: A report from Europe' in E van der Spuy *et al* (eds) *Restorative justice: Politics, policies and prospects* (2007) 95.

24 Bazemore & Umbreit. (n 23 above) 2-3.

25 Marshall (n 15 above) 11.

26 Research shows that VOM has successfully been used in countries like the United States of America, Canada and New Zealand. See W Nugent *et al* (eds) 'Participation in victim-offender mediation and re-offence: Successful replications' (2001) 11 *Research on Social Work Practice* 5; D Miers 'An international review of restorative justice' (2001) *Crime Reduction Research Series Paper* 10. However, there are concerns regarding the unregulated power of mediators which consequently diminishes parties' ownership of the process and outcomes. R Declan *Accountability in restorative justice* (2004) 36.

27 Marshall (n 15 above) 8-9 21.

28 Perpetrators committed atrocities in numerous villages. Mato Oput Project (n 7 above) 18.

resolution of subsequent civil and criminal disputes. This argument is later elaborated upon.

Family group conferencing (FGC) was drawn from the traditional *whanau* conference process of dispute resolution among the Maori in New Zealand,<sup>29</sup> primarily to address the high rates at which courts transferred young persons from Maori families into state facilities.<sup>30</sup> The FGC embodies face-to-face meetings, the offenders' active responsibility for their actions, the identification of needs, and mutual outcomes.<sup>31</sup> VOM and FGC are strikingly similar, but the major difference is that FGC encourages the attendance of the victims' and offenders' support systems such as family, relatives, psychologists, probation officers and social workers.<sup>32</sup>

In the transitional context, FGC could be used in redressing atrocities committed by child soldiers, and any other offences or disputes subsequent to their return into communities. However, the application of FGC will be limited by the face-to-face meetings which may traumatisise former child soldiers and victims of atrocities. Therefore, FGC should be modified to suit the peculiar needs of child soldiers and their communities, taking into consideration that the conflict diminished social cohesion and devastated cultural structures which were the bedrock of traditional justice processes.<sup>33</sup> This could therefore necessitate an adjustment towards a holistic approach of community conferencing or discussions.

Sentencing circles have been used for serious crimes such as robbery and criminal negligence causing death, with a primary focus on responsibility, reparation, rehabilitation, empathy, healing, dialogue and transformation.<sup>34</sup> These circles have been used in the

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- 29 C Love 'Family group conferencing: Cultural origins, sharing and appropriation: A Maori reflection' in G Burford & J Hudson (eds) *Family group conferencing: New directions in community-centred child and family practice* (2000) 15; Van Ness & Strong (n 22 above) 28–68. The FGC was first created by the Children, Young Persons and Their Families Act 1989 24 (as at 23 July 2011), Public Act, to deal with young offenders in New Zealand.
- 30 This process later involved adult offenders; Van Ness & Strong (n 22 above) 28–29. This was later developed in the United States, Canada, England and Australia to address issues of family violence. For the development of restorative justice process from 1970 to 2004, see P McCold 'The recent history of restorative justice: Mediation, circles and conferencing' in Hoyle (n 22 above) 137–142.
- 31 Outcomes ranged from financial support to counselling. Offenders may need employment and moral support. Van Ness & Strong (n 22 above) 99.
- 32 Edgar & Newell (n 23 above) 12.
- 33 L Hovil & J Quinn 'Peace first, justice later: Traditional justice in Northern Uganda' Working Paper 17 (2005) 3 8–9. See also C Blattman & J Annan 'Child combatants in Northern Uganda: Reintegration myths and realities' in R Muggah (ed) *Security and post-conflict reconstruction: Dealing with fighters in the aftermath of war* (2008) 103.
- 34 B Hculak *et al* 'Restorative justice innovations in Canada' (2002) 20 *Behavioral Sciences and the Law* 363. These circles were developed by judges in Yukon, Canada between the 1980s and early 1990s to solve the high incarceration rates within communities. J Rudin 'Aboriginal justice and restorative justice' in E Elliott & RM Gordon (eds) *New directions in restorative justice: Issues, practice, evaluation* (2005) 97–99.

pre-charge and post-charge stage as a diversion for youth straight into community circles.<sup>35</sup> Circles have also been used during the pre-sentencing stage to attain detailed information from the offender, the victim and their families, which could inform an alternative sentence to incarceration.<sup>36</sup> The participation in these circles is completely voluntary.<sup>37</sup> In the context of atrocities committed by child soldiers, it is more appropriate to adopt community or healing circles than sentencing circles, considering that child soldiers have been excluded from prosecution, as earlier discussed. Nonetheless, these circles could be developed within the child justice system and used for offences under penal law.

Last but not least, peace-making circles, which already form part of traditional justice mechanisms among native communities in Europe, Asia, and Africa,<sup>38</sup> have been developed to deal with offences within the criminal justice system. One good example is the Navajo nation<sup>39</sup> which has successfully developed peace-making circles as a diversion from the criminal justice system.<sup>40</sup> The Navajo Peace-Making Division combines substantive and procedural rules of Navajo common law with Anglo-American methods.<sup>41</sup> Peace-making circles complement the formal justice system, but are mainly conducted in an informal manner with the participation of all parties and the entire community. These circles focus on communal rather than individual healing, and are guided by peace-makers who draw knowledge from traditional narratives, customs and norms.<sup>42</sup>

35 Huculak *et al* (n 34 above) 367.

36 Rudin (n 34 above) 97.

37 Huculak *et al* (n 34 above) 367.

38 K Pranis 'Peace-making circles: Restorative justice in practice allows victims and offenders to begin repairing the harm' (1997) 59 *Corrections Today* 73.

39 The Navajo nation is considered a sovereign Indian state. H Brown 'The Navajo nation's peacemaker division: An integrated, community-based dispute resolution forum' (1999-2000) 24 *American Indian Law Review* 297-298. This nation covers North Eastern Arizona, South Eastern Utah and North Western New Mexico. RD Austin *Navajo courts and Navajo common law: A tradition of tribal self-governance* (2009) 1-2.

40 For the development of peace-making circles, see J Zion & R Yazzie 'Navajo peace-making: Original dispute resolution and a life way' in D Sullivan & L Tiffet (eds) *Handbook of restorative justice: A global perspective* (2006) 157; see also R Yazzie *History of the courts of the Navajo nation* (2003), prepared for the Orientation of the Judiciary Committee of the Navajo Nation 11 February 2003 Navajo Nation Museum, Library and Visitor Centre <http://www.navajocourts.org/history.htm> (accessed 10 February 2012). Circles have also been used in work places, child welfare cases, schools, and families. B Stuart & K Pranis 'Peace-making circles: Reflections on principal features and primary outcome' in Sullivan & Tiffet (n 40 above) 125-126.

41 Rule 90. J Zion 'The Navajo Peace-Maker Court: Deference to the old and accommodation to the new' (1983) 11 *American Indian Law Review* 89. This Division was developed by James Zion and Phil Bluehouse in partnership with the criminal justice system. EK Gross *Evaluation/assessment of Navajo peace-making* 2001 NCJRS Document 187675 US Department of Justice Research Report <https://www.ncjrs.gov/pdffiles1/nij/grants/187675.pdf> (accessed 24 September 2012) 4-5.

42 Gross (n 41 above) 5.

It is significant that peace-making circles may generally entail healing circles for victims and circles with offenders to appreciate the causes of their criminal behaviour.<sup>43</sup> A typical circle is guided by key values such as respectful listening; voluntary and objective participation,<sup>44</sup> regardless of one's qualifications and expertise; honesty when sharing one's experience; the focus on the community rather than individuals; and mutual outcomes.<sup>45</sup> Peace-making circles share similar values and goals but may be conducted differently based on the nature of the case, traditions or religion and the needs of participants.<sup>46</sup>

Peace-making circles have remarkably similar attributes to some traditional justice processes within communities in Uganda. Such attributes include the emphasis on communal healing, the application of traditional norms and customs, and the use of traditional leaders or elders to conduct the process. Such similarities could make it easier for child soldiers and communities to embrace attributes of peace-making circles which could enhance the practicability of traditional justice mechanisms in dealing with the atrocities committed by child soldiers.

The restorative justice processes of VOM, FGC, sentencing circles and peace-making circles have been successfully used within the criminal justice system, especially for child offenders.<sup>47</sup> I will now consider restorative justice processes within a transitional justice framework.

## 2.2 Transitional justice framework

Restorative justice is not a new concept within transitional justice and has been associated primarily with truth and reconciliation commissions which embody restorative aspects of truth telling, and the bringing together of victims and perpetrators.<sup>48</sup> Although truth commissions are primarily created to complement rather than substitute prosecution,<sup>49</sup> their work generally has been commended

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43 Stuart & Pranis (n 40 above) 125.

44 M Umbreit *et al* 'Restorative justice circles: An exploratory study' (2003) 6 *Contemporary Justice Review* 268.

45 Umbreit *et al* (n 44 above) 268.

46 J Zion 'The dynamics of Navajo peace-making' (1998) 14 *Journal of Contemporary Criminal Justice* 58.

47 For an evaluation as to the effectiveness of peace-making circles, see Gross (n 41 above) 32; Judicial Branch of the Navajo Nation *Fiscal Year 2010 Fourth Quarter Report* (1 July 2010-30 September 2010) released 15 October 2010, <http://www.navajocourts.org/Reports/FY2010%204th%20Qtr%20Report.pdf> (accessed 30 November 2011) 38-56.

48 Detailed discussion of truth commissions established between 1974 and 2010, Amnesty International *Commissioning justice: Truth commissions and criminal justice* (2010).

49 C Stahn 'Accommodating individual criminal responsibility and national reconciliation: The UN Truth Commission for East Timor' (2001) 95 *American Journal of International Law* 652 954.

to realise far-reaching closure and accountability for atrocities committed.<sup>50</sup> The truth commissions in Sierra Leone<sup>51</sup> and Liberia<sup>52</sup> are commended for the innovative participation of children, especially former child soldiers, within their processes.<sup>53</sup> With the assistance of child protection agencies,<sup>54</sup> these commissions put in place special child-friendly procedures to ensure the participation and protection of children from re-victimisation. These include statement taking *in camera*; prior consent from parents or guardians; confidentiality concerning the names of children, their relatives and particular locations; and participation based on the maturity of the child.<sup>55</sup>

On the contrary, these commissions are generally criticised for providing limited avenues that specifically advance the active participation of all parties, an appreciation of the needs of parties, and mutual outcomes that are designed to suit such needs. Moreover, the 'tell-it-all' approach of the commissions undermines some traditional practices that require the parties to forgive each other and never to reminisce about the past.<sup>56</sup> Nonetheless, the restorative justice aspects and the child-friendly participation measures in these commissions could be instructive to the provisions on the creation of a truth commission, and the application of traditional justice processes, which are intended to form part of the national transitional justice policy in Uganda.

Besides truth commissions, aspects of restorative justice have also been used among civil society groups to deal with human rights

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- 50 R Teitel 'From dictatorship to democracy: The role of transitional justice' in H Koh & R Slye (eds) *Deliberative democracy and human rights* (1999) 278. For the different commissions, see PB Hayner 'Fifteen truth commissions - 1974 to 1994: A comparative study' (1994) 16 *Human Rights Quarterly* 611.
- 51 Secs 2-6 Truth and Reconciliation Commission Act 2000, Supplement to the Sierra Leone Gazette CXXXI (9), 10 February 2000 <http://www.unhcr.org/refworld/pdfid/3fbcee4d4.pdf> (accessed 3 October 2012). See also T Ekiyor 'Reflecting on the Sierra Leone Truth and Reconciliation Commission: A peace-building perspective' in CL Sriram & P Suren (eds) *Peace versus justice? The dilemma of transitional justice in Africa* (2009) 157.
- 52 See art 3 of the Act to Establish the Truth and Reconciliation Commission (TRC) of Liberia of 12 May 2005 <http://www.trcofliberia.org/about/trc-mandate> (accessed 14 January 2012).
- 53 The participation of children within the South African Truth and Reconciliation Commission was instructive to the Commission in Sierra Leone and Liberia. UNICEF Innocenti Research Centre and the International Centre for Transitional Justice *Children and truth commissions* (2010) 41. On participatory rights of children, see art 12 of the Convention of the Rights of the Child, adopted and opened for signature, ratification and accession by General Assembly Resolution 44/25 of 20 November 1989; G Lansdown 'Children's participation: A decade of change' in I Byrne & L MacMillan (eds) *Participation: The forgotten 'P' in the Convention on the Rights of the Child* (2003) 48-51.
- 54 These agencies provided guidance and psychological support for children and statement takers. P Cook & C Heykoop 'Child participation in the Sierra Leonean Truth and Reconciliation Commission' in S Parmar *et al* (eds) *Children and transitional justice: Truth-telling, accountability and reconciliation* (2010) 171.
- 55 Cook & Heykoop (n 54 above) 158.
- 56 R Shaw *Rethinking truth and reconciliation commissions: Lessons from Sierra Leone* (2005) 9.

violations. For instance, the Community Restorative Justice Ireland and Northern Ireland Alternatives were created as part of the wider peace-making plan in Northern Ireland to convince the Republican and Loyalist paramilitaries against the use of violent punishments such as shooting and beatings. These groups, especially the Irish Republican Army (IRA) and Ulster Volunteer Force (UVF), adopted community-based systems of restorative justice.<sup>57</sup> In South Africa, the Ex-Combatants Reintegration and Restorative Justice Project was created to facilitate restorative justice dialogue or mediation between ex-combatants and survivors. This project was developed to include victim/victim discourses, ex-combatant discourses, and dialogues involving intergenerational conflicts and disappearance cases.<sup>58</sup>

### 2.3 Restorative justice and child soldiers

There is an emerging interest in the adoption of restorative justice processes for the atrocities committed by child soldiers. For example, the Paris Principles and Guidelines on Children Associated with Armed Forces or Armed Groups recommend that the crimes committed by child soldiers should 'be treated in accordance with international law in a framework of restorative justice and social rehabilitation'.<sup>59</sup> This proposition is supported by several scholars, like Masila, who recommend that restorative justice elements must be emphasised in any accountability approach adopted for child soldiers.<sup>60</sup> Stovel and Valiñas also propose restorative justice as the most appropriate approach to realise the healing needs and reintegration measures of former child soldiers with the support of community and family members. However, the study cautions against drawing conclusions from restorative justice as used for youth in peace time and translating them to contexts of war. This is because of the peculiar circumstances faced by child soldiers, such as differences in the social construction of childhood and complexities of atrocities.<sup>61</sup>

The adoption of restorative justice processes for atrocities committed by child soldiers was to a limited extent observed in some modifications to the *Gacaca* courts which were adopted to end

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57 K McEvoy & A Eriksson 'Restorative justice in transition: Ownership, leadership and "bottom-up" human rights' in D Sullivan & L Tiffet (eds) *Handbook of restorative justice: A global perspective* (2006) 321-332.

58 These dialogues have contributed towards peace building and reconciliation. B Greenbaum *Evaluation of the 2005 Ex-Combatants' Dialogues* (2006) 3.

59 Paris Principles and Guidelines on Children Associated with Armed Forces or Armed Groups 3.6.

60 GM Masila 'Challenges in establishing the accountability of child soldiers for human rights violations: Restorative justice as an option' (2005) 5 *African Human Rights Law Journal* 321.

61 L Stovel & M Valiñas *Restorative justice after mass violence: Opportunities and risks for children and youth* (2010).

impunity in Rwanda after the 1994 genocide.<sup>62</sup> The *Gacaca* courts passed orders of community service which were intended to provide perpetrators with opportunities to take active responsibility for the crimes they committed.<sup>63</sup> Unfortunately, it was overshadowed by concerns about proportionality of punishments to the crimes committed, and fears of reprisal.<sup>64</sup> Moreover, the *Gacaca* courts were primarily modified with punitive measures and punishments, the application of which was limited by arbitrary arrests, the rejection of evidence or witnesses for the accused, partiality of judges towards victims, and false testimonies, among others.<sup>65</sup> The *Gacaca* model presents an example as to how traditional justice processes could be modified with punitive measures, and the limitations of such modifications in establishing accountability.

So far, Sierra Leone is the first documented transitional society to primarily modify traditional justice processes with restorative justice measures in order to deal with the atrocities committed by both adult and child soldiers. Communities in Sierra Leone are currently using the community-based traditional justice mechanism of *Fambul Tok* (family talk) process. Previously, the communities in Sierra Leone primarily relied on the Truth and Reconciliation Commission to establish accountability for atrocities committed by child soldiers.<sup>66</sup> Notwithstanding the success of these processes,<sup>67</sup> some communities still struggled to come to terms with the atrocities committed against them.<sup>68</sup> Many victims and offenders had not participated in these processes.<sup>69</sup> Even after participation, the offenders were still resented by some community members, and victims expressed fear for and hatred towards their aggressors.<sup>70</sup> This informed the adoption of *Fambul Tok*.

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- 62 Organic Law 40/2000 of 26 January 2001 setting up *Gacaca* Jurisdictions and Organising Prosecutions for Offences Constituting the Crime of Genocide or Crimes against Humanity Committed between 1 October 1990 and 31 December 1994; L Waldorf 'Rwanda's failing experiment in restorative justice' in Sullivan & Tiffet (n 57 above) 422-425.
- 63 See art 14 of Organic Law 10/2007 of 1 March 2007, which complemented Organic Law 16/2004 of 19 June 2004. By May 2010, more than 106 918 had been sentenced to community service. Penal Reform International *Eight years on: A record of Gacaca monitoring in Rwanda* (2010) 47.
- 64 Penal Reform International (n 63 above) 13.
- 65 Rwandan League for the Promotion and Defence of Human Rights *Situation of human rights in Rwanda: 2007-2008* (2010) 2.1.1.12.
- 66 A Tejan-Cole 'Sierra Leone's "not-so" Special Court' in CL Sriram & P Suren (eds) *Peace versus justice? The dilemma of transitional justice in Africa* (2009); Child soldiers were exempted from prosecution. Special Court for Sierra Leone Public Affairs Office 'Special Court prosecutor says he will not prosecute children' Press Release 2 November 2002 1.
- 67 UNICEF *Truth and Reconciliation Commission: Report for the children of Sierra Leone* (2004) 30-32.
- 68 E Hoffman 'Reconciliation in Sierra Leone' (2008) 32 *The Fletcher Forum of World Affairs* 131.
- 69 Hoffman (n 68 above).
- 70 L Fofana 'Sierra Leone: No easy road to reconciliation' *Inter Press Service News* 25 March 2010 1.

The *Fambul Tok* process was modified with inclusive restorative justice attributes that bring together all parties to deal with the effects of the crimes, to focus on repairing the harm, and to provide perpetrators with opportunities for active responsibility. These attributes also aim at identifying and addressing the needs of the parties, realising mutual outcomes, supporting victims, and fostering rehabilitation and reintegration.<sup>71</sup> During *Fambul Tok*, the participants sit in a circle around a bonfire and openly share their experiences with the entire community. The circle reinforces equal participation, provides a platform for dialogue, understanding and mutual outcomes that address their needs. This process is usually guided by positive traditional values and rituals,<sup>72</sup> and is being used for both minor and brutal atrocities with a focus on accountability, reconciliation and reintegration.<sup>73</sup>

The modifications to the *Fambul Tok* process could provide practical insights into the application of traditional justice processes in Uganda, considering the striking similarities between transitional communities in these countries. For example, both communities experienced intra-communal conflicts,<sup>74</sup> which were notorious for recruiting and using child soldiers who notably participated in the commission of atrocities.<sup>75</sup> Moreover, some community members selectively used traditional cleansing rituals to welcome and heal perpetrators, and overlooked other important aspects of traditional justice processes such as confession from the perpetrators to the victims, individual responsibility, remorse, forgiveness from the victim, and compensation were excluded.<sup>76</sup>

It is evident from the above discussion that restorative justice processes have been developed and used within the criminal justice system, and in some transitional justice approaches adopted by communities in dealing with atrocities committed by child soldiers. The next part of this article therefore proposes the modification of traditional justice processes with primarily restorative attributes or processes embodied within the criminal justice system and various transitional justice processes earlier discussed. This broad approach provides far-reaching recommendations that could enhance the

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71 Fambul Tok International Community healing in Sierra Leone: Our second year (2010) 26.

72 Fambul Tok International (n 71 above) 17.

73 Fambul Tok International (n 71 above) 5.

74 Intra-communal conflicts are conducted among groups within a community. Stovel & Valiñas (n 61 above) 27.

75 Coalition to Stop the Use of Child Soldiers *Child soldiers: Global report 2008* (2008) 341-350.

76 Such as *nyono tong gweno* which are primarily considered preconditions for the commencement and conclusion of justice processes like *mato oput*. Lui Institute for Global Issues & Gulu District NGO Forum *Roco Wat I Acoli: Restoring relationships in Acholi-Land: Traditional approaches to justice and reintegration* (2005) 27; ASJ Park 'Community-based restorative transitional justice in Sierra Leone' (2010) 13 *Contemporary Justice Review: Issues in Criminal, Social, and Restorative Justice* 95.

practicability of traditional justice processes to the atrocities committed by child soldiers.

These proposals are discussed based on the restorative justice attributes of repairing the harm caused; participation; truth telling; ownership; catering for the needs of all stakeholders; active responsibility; reparations or compensation; and follow-up. The article also proposes the harmonisation of traditional justice processes with fundamental human rights.

### 3 Proposals based on restorative justice processes

#### 3.1 Repairing the harm caused

It is important for the modifications to traditional justice processes to focus on the harm suffered rather than the punitive distinction of offenders based on the nature of the offence, and criminal responsibility which is typically found in the formal justice system. This distinction was adopted within the *Gacaca* courts to determine the jurisdiction of courts and the penalties.<sup>77</sup> Whereas this fostered the systematic prosecution of perpetrators, the focus on punitive consequences resulted in serious fair trial violations such as delayed trials, arbitrary arrests, disregard for evidence or witnesses led in favour of the accused, and partiality of judges towards victims.<sup>78</sup> Although the adoption of some restorative justice processes like victim offender mediation necessitates the identification of victims and offenders,<sup>79</sup> any modifications to traditional justice processes should focus primarily on repairing the harm suffered and the reintegration of child soldiers.

The focus on the dichotomy of parties could be a major setback. The identification of parties is complicated by the blurred distinction by the overlap of victim and perpetrator, considering that child soldiers were recruited at a young age, manipulated, and forced to commit atrocities against their own communities.<sup>80</sup> This was witnessed in the case of Odong, a former child soldier whose failure to identify his victims and their clans hindered the commencement of *mato oput* in Uganda.<sup>81</sup> This dichotomy could undermine the

77 Organic Law 40/2000 of 26 January 2001.

78 Rwandan League for the Promotion and Defence of Human Rights (n 65 above) 2.1.1.12.

79 Bazemore & Umbreit (n 23 above) 2-3.

80 Refugee Law Project (n 7 above) 32.

81 Odong's case was dismissed by the elders of the Acholi Cultural Authority in 2010. Odong justified his inability to identify his victims: 'When I am abducting you, do I know your place?' 'If I kill you in the road, I cannot know where you come from.' The elders also believed that the Acholi community was not prepared for detailed accountability of the conflict. Integrated Regional Information Networks 'Uganda: Former LRA combatants struggle for forgiveness' *Humanitarian News and Analysis* (2010) <http://www.irinnews.org/InDepthMain.aspx?indepthid=87&reportid=91019> (accessed 28 March 2013) 1.

recognition of the harm suffered by the majority of affected individuals who cannot identify their victims or perpetrators.<sup>82</sup> Besides, the restorative justice processes, as mentioned earlier, primarily focus on the recognition of the harm suffered and the way forward in attaining reconciliation and reintegration rather than the distinction of victim from perpetrator.

Therefore, the traditional justice provisions within a national policy could adopt the term 'stake holders' rather than 'victims and perpetrators' in order to reinforce the restorative nature of traditional justice processes. Stake holders could entail victims, perpetrators, and the affected community. This term could extend to civil society and other interested persons or organisations. The policy could also adopt the term 'harm' rather than 'offences or crimes or atrocities', since traditional justice processes should focus on the harm suffered and not individual criminal responsibility which may jeopardise the attainment of accountability, as was witnessed in Rwanda.

The above recommendation is feasible considering the fact that most of the atrocities were allegedly committed by LRA soldiers who mainly comprised of children. Some of these children were as young as six years at the time of abduction into the LRA, subjected to inhumane rituals, manipulated, and forced to commit atrocities.<sup>83</sup> Such activities transformed children into ruthless killers, which was mainly motivated by the need to survive.<sup>84</sup> Therefore, the focus on the harm suffered rather than individual responsibility advances a restorative mindset among all stake holders, which creates a better appreciation of any restorative outcomes. This could also minimise the re-traumatisation of former child soldiers and victims of atrocities committed.

### 3.2 Participation

Active participation is a fundamental precept of restorative justice processes where all stake holders to the crime committed come together to discuss the effects of the crime and ways to repair the harm caused. There are misconceptions among communities and former child soldiers in Uganda regarding the relevance of the International Crimes Division and amnesty towards accountability.<sup>85</sup>

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82 Mato Oput Project (n 28 above) 18.

83 C Bellamy *The state of the world's children: Childhood under threat* (2005) 44.

84 P Krijn & P Richards 'Fighting with open eyes: Youth combatants talking about the war in Sierra Leone' in PJ Bracken & C Petty (eds) *Rethinking the trauma of war* (1998) 76.

85 Justice and Reconciliation Project *Who forgives whom? Northern Uganda's grassroots views on the Amnesty Act* (2012) 1-8. Such mixed reactions were also raised prior to the lapse of the grant of amnesty. See Justice and Reconciliation Project *Situational analysis: To pardon or to punish* (2011) 1-3. See also the case of Thomas Kwoyelo, an allegedly former child soldier who was denied amnesty. Sudan Human Security Baseline Assessment *The Lord's Resistance Army* (2011) 5-6.

Such inconsistencies could jeopardise the extent of participation in traditional justice processes.

The national transitional policy could therefore emphasise that amnesty was primarily aimed at attaining peace, which is fundamental to the commencement of transitional justice processes that advance accountability and reconciliation. Therefore, all stake holders, including children and adults who were granted amnesty, should participate in traditional justice processes and other transitional justice processes. Besides, a clear distinction of restorative and punitive measures should be emphasised in order to wade off speculations of punitive measures which might jeopardise the already fragile peace<sup>86</sup> which was attained through amnesty.

The article proposes that the modifications to traditional justice processes should also ensure the participation of former LRA child soldiers. Some of these children, especially youth, have continuously been subjected to stigmatisation and rejection by their communities, including family members. Some children have been verbally called 'rebels', 'killers', and publically accused of abducting other children and participating in the attacks among communities.<sup>87</sup> Some girls are referred to as rebel wives, and their children as 'rebel's children'. This forced some of these children to relocate to towns away from home.<sup>88</sup> Such stigmatisation could discourage these children from participating in these processes due to fear of traumatisation, and the use of their testimonies to implicate them.

In order to ensure the participation of children in traditional justice processes, the policy should recognise the need to strengthen efforts that foster the comprehensive revitalisation of the social and cultural structures that were devastated during the conflict.<sup>89</sup> These structures formed the bedrock of traditional justice processes, and were used as channels for the cultural socialisation of the younger generation.<sup>90</sup> Education efforts, especially for children and youth, should be emphasised. The need for such efforts was reflected in a study by Annan *et al* on female youth where the majority of participants did not appreciate the relevance of traditional leaders and the justice process. Some participants used the words 'useless', 'wasteful' and 'outdated' to articulate the insignificance of these processes.<sup>91</sup>

86 The LRA is still active in neighbouring Central African Republic, the Democratic Republic of Congo, South Sudan; Sudan Invisible Children, and Resolve *LRA crisis tracker: Mid-year security brief [January-June 2012]* (2012) 1-14.

87 B Verhey *Child soldiers: Preventing, demobilising and reintegrating* (2001) 16.

88 G Akello *et al* 'Reintegration of former child soldiers in Northern Uganda: Coming to terms with children's agency and accountability' (2006) 4 *Intervention* 229.

89 J Annan *et al* *The state of female youth in Northern Uganda: Findings from the survey of war affected youth, Phase II* (2008) 45. For details of the armed conflict, see United Nations Children Fund *A report on the situation of children and women in the Republic of Uganda* (2005).

90 Hovil & Quinn (n 33 above) 8 9.

91 Annan *et al* (n 89 above) 45.

However, the policy could recognise the current efforts among communities towards the progressive revitalisation of these structures. These efforts have been spearheaded by traditional institutes like the Acholi Cultural Institute and other organisations, which are training community reconciliation promoters, providing financial support for communal cleansing ceremonies and the construction of memorials, and mediating land disputes within communities.<sup>92</sup> The policy could further emphasise the creation of child-friendly platforms for discussions on how best they can participate in these processes, and what should be done in the furtherance of reconciliation and reintegration. Such participation should also take into consideration the maturity of children.

### 3.3 Truth telling

Affected communities have prioritised the process of truth telling as an important component of any forthcoming transitional justice mechanism in order to ensure closure and acknowledgment of the harm suffered.<sup>93</sup> While most communities acknowledge the significance of truth telling, they are of the view that the sole use of this process is inadequate for the realisation of reconciliation. Therefore, such a process should be accompanied by traditional justice processes.<sup>94</sup>

Truth telling is one of the precepts of restorative justice processes, truth commissions and traditional justice processes. Restorative justice processes within the criminal justice system engage all parties in the establishment of truth and foster understanding regarding the offence.<sup>95</sup> In the transitional context, truth commissions are mandated to establish the truth through testimonies and confessions from participants.<sup>96</sup> The concept of truth telling has also been incorporated in conditional amnesties like in South Africa.<sup>97</sup> Within the traditional justice processes in Uganda, the offender was required to make an honest confession of any acts or omissions that subsequently informed the relevant process to be adopted. Truth telling was also evident during meetings between the parties or clans

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92 Other organisations include the War-Affected Children's Association (WACA); Gulu Theatre Artists (GTA); War-Affected Youth Association (WAYA) and Acholi Religious Leaders Peace Initiative (ARLI). DM Okot A *successful Mato Oput* (2011) <http://www.arli.org/archieve-of-arli-articles/a-successful-mato-oput> (accessed 28 June 2013) 1.

93 Justice and Reconciliation Project *The cooling of hearts: Community truth-telling in Acholi-Land* (2007) 6. See also R Cecily 'Looking beyond amnesty and traditional justice and reconciliation mechanisms in Northern Uganda: A proposal for truth telling and reparations' (2008) 28 *Boston College Third World Law Journal* 360-361.

94 Justice and Reconciliation Project (n 93 above) 9.

95 H Zehr *Changing lenses: A new focus for crime and justice* (2005) 186.

96 Hayner (n 50 above) 604.

97 Sec 4(c) Promotion of National Unity and Reconciliation Act 1995; see Truth and Reconciliation Commission of South Africa *Report 2003* (6) <http://www.info.gov.za/otherdocs/2003/trc/rep.pdf> (accessed 30 March 2011) 22-32.

to discuss the crime, its effects, and the compensation to be paid to the victim's family or clan.<sup>98</sup>

In the context of the present atrocities, the application of the truth-telling process as used within traditional justice processes could be limited by complexities in identifying individual stakeholders to the harm caused by the atrocities. This was fundamental to the commencement of traditional justice processes and the payment of compensation.<sup>99</sup> During the armed conflict, some child soldiers randomly and repeatedly committed atrocities in numerous villages, thus making it virtually impossible to identify the stakeholders to these atrocities.<sup>100</sup> The truth-telling processes could also be limited by uncertainties as to the effects of amnesty, and possible prosecution by the International Crimes Division. Moreover, there is distrust among community members due to the presence of ex-combatants and alleged LRA spies within the community.<sup>101</sup> These shortcomings were witnessed during the *Gacaca* trials in Rwanda where the parties gave false testimonies, concealed the truth and admitted to lesser offences. This undermined the effectiveness of the *Gacaca* courts in ending impunity.<sup>102</sup>

Therefore, the national policy should first and foremost emphasise the mandate of the truth-telling process, which could include closure as to the causes and extent of the crimes committed and reparation or compensation, among others. In order to overcome the limitation regarding identification of individual stakeholders to the crimes committed, the policy should primarily emphasise communal rather than individual approaches of truth telling.

The national policy should also put emphasis on the participation of children in truth telling since they are the most vulnerable group affected by the conflict.<sup>103</sup> Such participation in traditional justice processes could be informed by the child-friendly measures adopted within the commissions in South Africa, Sierra Leone and Liberia. For instance, children shared their experiences *in camera* within a child-friendly environment, and child care officers were involved in the entire process to ensure that such participation complied with international standards.<sup>104</sup>

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98 SA Lamony *Approaching national reconciliation in Uganda: Perspectives on applicable justice systems Ugandan* (2007) 11; Concerned Parents Association & Lango Cultural Foundation (n 6 above) 11-15.

99 Hovil & Quinn (n 33 above) 15.

100 Mato Oput Project (n 28 above) 18.

101 Hovil & Quinn (n 33 above) 8.

102 Rwandan League for the Promotion and Defence of Human Rights (n 65 above) 2.1.1.13.

103 T Dagne *Uganda: Current conditions and the crisis in North Uganda* (2011) Congress Congressional Research Service, <http://www.fas.org/sgp/crs/row/RL33701.pdf> (accessed 20 May 2012) 7.

104 Cook & Heykoop (n 54 above) 173.

Therefore, the national policy could recommend the modification of traditional justice processes with child-friendly participation measures. Such participation should be monitored by child rights-centred organisations like World Vision and Save the Children, among others. The policy could further emphasise the voluntary nature of such participation taking into consideration the maturity of the child, and the process must be guided by child-friendly questions. The element of voluntary participation within restorative processes is premised on the argument that crime primarily affects people and relationships.<sup>105</sup> Therefore, the policy could reinforce voluntary participation through the education of child soldiers and communities on the various aspects of traditional justice processes as earlier highlighted, and emphasise the aspect of ownership which is later presented. These measures could be coupled with psychological counselling to prepare the children and community for such participation. This is a more appropriate approach than the use of law enforcement bodies to compel participation as was done in Rwanda.<sup>106</sup>

The truth-telling process could foster healing which in the context of restorative justice has been equated to providing victims with a certain degree of closure and a feeling of safety and control rather than forgetting the wrong.<sup>107</sup>

### 3.4 Ownership

The ownership of the process is an important aspect of restorative justice processes, which may be attained through consultations to ensure that the process adopted suits the needs of the parties involved, thus fostering participation.<sup>108</sup> This approach was used in Sierra Leone prior to the adoption of the *Fambul Tok*. Through grassroots and nationwide consultations, most communities in Sierra Leone expressed an urgency for processes that promote accountability and reconciliation. This resulted in the nationwide endorsement of *Fambul Tok*.<sup>109</sup>

In Uganda, there is wide support for the adoption of traditional justice processes for the atrocities committed by child soldiers. In order to promote a sense of ownership, the policy provisions on these processes could recommend regular consultations among the affected communities as to the modifications to traditional justice processes that suit their needs. This information can be attained through

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105 Declan (n 26 above) 30.

106 The local paramilitary forces compelled people to attend the pilot stage of the Gacaca trials. Those who were absent were fined and threatened. Penal Reform International *Research on Gacaca (Report V)* (2003b).

107 Zehr (n 95 above) 186.

108 Bazemore & Umbreit (n 23 above) 3.

109 Fambul Tok International (n 73 above) 10-13; LS Graybill 'Traditional practices and reconciliation in Sierra Leone: The effectiveness of Fambul Tok' (2010) 3 *Conflict Trends* 44.

grassroots and nationwide consultation as was done in Sierra Leone. The consultation process could be conducted through interviews, group discussions and debates among community members. These consultations should involve all stake holders, and should be representative of all groups regardless of age, sex and disability.

Ownership and participation in traditional justice processes can also be reinforced by maintaining the authority of community members or elders to preside over these processes. This approach is maintained in the peace-making circles among the Navajo which are led by traditional leaders or respected persons within the community.<sup>110</sup> In the transitional context, the modified *Gacaca* courts were presided over by *inyangamugayo*, comprising of Rwandese who were trained in the pilot stage.<sup>111</sup> In Uganda, traditional justice processes are presided over by traditional leaders, mediators, elders and spiritual leaders.<sup>112</sup> It is therefore of paramount importance to maintain the role of traditional leaders, elders, and respected community members in order to enhance participation in these processes.

Since the conflict resulted in the distrust, the death, and the displacement of most traditional or community leaders,<sup>113</sup> there is a need to educate other respected community members who will assist in guiding the traditional justice processes in the various communities. Ownership may be compromised by imposing trained professionals. Nonetheless, the policy could emphasise that any modifications to these processes should accommodate the presence of trained child welfare officials and independent observers who will reinforce child-friendly participation and outcomes in compliance with international instruments and national laws. The knowledge and skills of traditional institutions like Acholi Cultural Institute (Ker Kwaro Acholi), and Lango Cultural Foundation could be employed during the entire process. These modifications should also engage the expertise of other organisations such as the War-Affected Children's Association (WACA), the War-Affected Youth Association (WAYA) and the Acholi Religious Leaders Peace Initiative (ARLI), among others.<sup>114</sup> Such modifications could also accommodate independent observers to ensure compliance with fundamental human rights.

Last but not least, ownership could be reinforced through the advancement of already-existing positive justice practices that aim at

110 *Naat'aanii* (meaning teacher, leader and healer) maintained order, and ensured the participation of all parties. The *Naat'aanii* applied the Navajo common law and traditions. D Sullivan 'Navajo peace-making history, development, and possibilities for adjudication-based systems of justice: An interview with Zion' (2002) 5 *Contemporary Justice Review: Issues in Criminal, Social, and Restorative Justice* 167-188.

111 H Scanlon & N Motlafi 'indigenous justice or political instrument? The modern *Gacaca* courts of Rwanda' in CL Sriram & S Pillay (eds) *Peace versus justice? The dilemma of transitional justice in Africa* (2010) 302.

112 Concerned Parents Association & Lango Cultural Foundation (n 6 above) 10.

113 Lui Institute for Global Issues & Gulu District NGO Forum (n 76 above) 20-22.

114 Ch 5.

repairing the harm caused, truth telling and reintegration. This will foster a sense of ownership since communities are familiar with such practices.

### 3.5 Catering for the needs of all stake holders

The policy could also underline the importance of tailoring traditional justice processes to suit the needs of the different parties, taking into consideration the existing traditions and customs within those communities. This restorative attribute is maintained within the peace-making circles used among the Navajo which are designed on a case-by-case basis depending on the nature of the crime committed and the needs of the parties. These processes may vary in content but maintain uniformity through the emphasis on repairing the harm caused, the voluntary participation of all parties, active responsibility, and restorative outcomes such as reparation to the victim and reintegration of the offender.<sup>115</sup> Within the *Fambul Tok* in Sierra Leone, uniformity is maintained through the emphasis on the active participation of all persons in attendance, the use of bonfires, voluntary confessions, the incorporation of traditional practices, and the adoption of restorative outcomes that promote reconciliation and rebuild trust among community members.<sup>116</sup>

In Uganda, the traditional justice processes among affected communities vary in content and procedure.<sup>117</sup> However, provisions on traditional justice processes within the national policy could provide a framework of comparable restorative practices and values that should be maintained. Some of these practices include truth telling, reparations through compensation, reconciliation, deterrence, the reintegration of offenders, and the use of traditional leaders or community members. These practices could cater for the needs of the parties and reinforce consistency.

### 3.6 Active responsibility

Active responsibility is a fundamental precept of restorative justice processes which provides opportunities for all stakeholders to repair the harm caused by the offence. Some restorative outcomes may entail obligations that range from direct or indirect assistance to the victim.<sup>118</sup> Within traditional justice processes, the payment of compensation was intended to ensure the active responsibility of the offender towards the reparation of the victim(s). The application of this kind of responsibility to the present atrocities is limited by the

<sup>115</sup> KE Gross *Evaluation/assessment of Navajo peace-making* (2001) NCJRS Document 187675 US Department of Justice Research Report <https://www.ncjrs.gov/pdffiles1/nij/grants/187675.pdf> (accessed 24 September 2011) 5. Traditional leaders were well versed with the Navajo history; Creation Scriptures and Journey Narratives, Austin (2009). *Navajo courts and Navajo common law* 9-10.

<sup>116</sup> Graybill (n 109 above); Fambul Tok International (n 71 above) 11-31.

<sup>117</sup> Lui Institute for Global Issues & Gulu District NGO Forum (n 76 above) 26.

<sup>118</sup> Van Ness & Strong (n 22 above) 48-49.

devastated economic structures or livelihoods, and the decline in social cohesion during the conflict.<sup>119</sup>

In the transitional context, the *Gacaca* courts in Rwanda embraced active responsibility through community service, as already discussed. In Sierra Leone, the outcomes of the *Fambul Tok* process entailed communal activities intended to provide perpetrators with the opportunity to make amends as well as to reinforce communal values and unity. Such activities include the communal construction of buildings such as health care centres and community centres, and communal farms.<sup>120</sup>

The policy provisions on traditional justice could emphasise the restorative aspect of active responsibility. This could be drawn from the processes developed within the *Gacaca* courts in Rwanda and the *Fambul Tok* process in Sierra Leone. This approach has the potential to rebuild trust and unity and to promote reconciliation.

### 3.7 Reparation or compensation

Community members affected by the conflict in Uganda have emphasised the need for compensation rather than punishment such as imprisonment.<sup>121</sup> This is attributed to the traditional justice concept where punishment is equated to compensation.<sup>122</sup> Compensation within traditional justice processes in Uganda was mainly in the form of livestock and girls, and the amount depended on the nature of the crime committed.<sup>123</sup> The use of girls is later criticised in this article as a violation of fundamental human rights.

In the context of armed conflict, the nature of the atrocities raises concerns as to the proportionality of compensation to these atrocities.<sup>124</sup> It would be difficult to determine the appropriate compensation for victims of abduction, rape, mutilations, and orphaned children.<sup>125</sup> The determination of proportional compensation and who to compensate would also be problematic in incidents where the perpetrators committed multiple atrocities.<sup>126</sup> Moreover, the individual compensation of victims using livestock is impractical considering the presence of multiple or unknown victims, the difficulty in identification of specific parties or clans to the

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119 Hovil & Quinn (n 33 above) 13.

120 *Fambul Tok International* (n 71 above) 13-18.

121 Justice and Reconciliation Project *Victims' voices: JRP Community Dialogues 2008* (2008) 9-11.

122 Lui Institute for Global Issues & Gulu District NGO Forum (n 76 above) 15.

123 A specified number of livestock was paid if a clan mate was murdered. The victim from another clan was compensated with a girl who would give birth to a child to replace the life of the deceased. Lamony (n 98 above) 17.

124 Lui Institute for Global Issues & Gulu District NGO Forum (n 76 above) 4.

125 These crimes are alien to traditional justice processes. Lui Institute for Global Issues & Gulu District NGO Forum (n 76 above) 4.

126 Hovil & Quinn (n 33 above) 14.

atrocities committed, and the devastated economic structures.<sup>127</sup> Last but not least, the commission of atrocities by perpetrators from different regions and clans complicates the determination of the justice processes to be adopted, the amount of compensation to be paid, and who should pay the compensation. Moreover, these communities have different gods, sacred sites, cultural leaders and traditional justice practices.<sup>128</sup>

Rather than individual compensation, the policy could recommend communal compensation in the form of subsidised health services and counselling, vocational training, agricultural tools, livestock, medicine and household goods. Although this may not be proportionate to the harm suffered, it will provide some form of reparation to stakeholders. Symbolic reparations could be in the form of community monuments that acknowledge the harm suffered, advance apologies from government and LRA soldiers, reinforce unity, and positive community values.

### 3.8 Follow-up

Within some restorative justice processes like peace-making circles, follow-up processes are usually organised in order to ensure that the parties complied with the outcomes of those processes, and to reinforce the restorative values that were discussed during the peace-making circle.<sup>129</sup> The *Fambul Tok* process in Sierra Leone also adopted follow-up communal activities such as feasts, dances, friendly games and communal farming, which are intended to reinforce positive community values and trust.<sup>130</sup>

Therefore, it is vital for the policy on traditional justice processes to emphasise the relevance of follow-up processes which reinforce the fulfilment of outcomes reached by the different communities. These processes may differ from one community to another depending on the needs of a particular community. Follow-up processes will further reconciliation which is considered a gradual process. With regard to former child soldiers, follow-up processes will assist the progressive and successful reintegration of such children into communities. Follow-up activities like friendly games, communal feasts and dances, as was done in Sierra Leone, could also be conducted in order to reinforce unity and restorative values.

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127 The burden of compensation was borne by all clan members. Hovil & Quinn (n 33 above) 13. The communities experience extreme levels of poverty emanating from a severe reduction of livestock and land ownership. M Bøås & HA Fafo *Northern Uganda internally-displaced persons study profiling* (2005) 7 24.

128 Lamony (n 98 above) 18.

129 Umbreit *et al* (n 44 above) 269-270.

130 Fambul Tok International (n 71 above) 8.

### 3.9 Harmonisation with fundamental human rights

The national policy should recommend the harmonisation of traditional justice practice with fundamental human rights enshrined in the Constitution and international instruments.<sup>131</sup> Traditional justice processes embody harmful practices such as corporal punishments which were used especially for children, and the use of girls as compensation for the offence of murder.<sup>132</sup> Moreover, the traditional patriarchal system reinforced discrimination against women, girls and children, which constrained their participation in traditional justice processes.<sup>133</sup> Such practices should be proscribed in order to eliminate any participation or outcomes that violate fundamental human rights.

## 4 Conclusion

The practical adoption of traditional justice processes for atrocities committed by child soldiers necessitates restorative justice modifications that advance an inclusive approach to address the needs of all affected parties. Although restorative justice processes and outcomes may not guarantee absolute justice and restitution for the atrocities committed by child soldiers, in the context of restorative justice processes justice means encouraging offenders to appreciate and acknowledge the harm caused, and providing them with opportunities to make amends. Moreover, this goes hand-in-hand with the participation of victims during the entire process, especially in determining their needs and how they should be addressed.<sup>134</sup> Thus, traditional justice processes should be modified with restorative justice processes within the criminal justice system and transitional justice approaches, in order to enhance their practical application to the atrocities committed by child soldiers.

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131 Inhumane treatment is prohibited under art 24 of the Constitution of the Republic of Uganda, 1995. Art 31(1) of the 1995 Ugandan Constitution sets the minimum age for marriage at 18 years. The right to marry with free and full consent which is enshrined in art 16(1)(b) Convention on the Elimination of All Forms of Discrimination Against Women.

132 Lamony (n 98 above) 21.

133 Lamony (n 98 above) 32.

134 Zehr (n 95 above) 194.