

THE UNIVERSITY OF THE WESTERN CAPE

FACULTY OF LAW

**Uganda's response to the phenomenon of enforced disappearances
and the transitional justice response in Uganda**

**Research paper submitted in partial fulfilment of the requirements
for the award of the LLM degree in Transnational Criminal Justice and
Crime Prevention- An International and African Perspective**



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KEY WORDS

Transitional Justice

Enforced Disappearances

International Criminal Law

Crimes against Humanity

Victims

Human Rights

Lord's Resistance Army

Uganda



ABBREVIATIONS

LRA	Lord's Resistance Army
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICED	International Convention for the Protection of All persons from Enforced Disappearances
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICL	International Criminal Law
JLOS	Justice, Law and Order Sector
NGO	Non-governmental Organisation
UNCAT	United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment
UN WGEID	United Nations Working Group on Enforced Disappearances

ABSTRACT

Enforced disappearances are a heinous violation of numerous human rights enshrined in many international conventions. However, they have not been adequately addressed in many jurisdictions. This crime is very common within countries on the continent of Africa, which despite having plenty of conflicts, under report cases of enforced disappearances. This research paper investigates the transitional justice mechanisms implemented in Uganda to deal with the phenomenon of enforced disappearances. It analyses the mechanisms implemented by the Government of Uganda and those by Non-Governmental Organisations. The paper examines also how the phenomenon of enforced disappearances has been dealt with in other countries such as Morocco, Kenya and South Africa. The paper suggests several recommendations to Uganda after having made a comparison with the selected countries on how to deal with the crime of enforced disappearances.



DEDICATION

This research paper is dedicated to all persons working on enforced disappearances.

Your efforts are not in vain!



DECLARATION

I, Mugero Jesse declare that 'Uganda's response to the phenomenon of enforced disappearances and the transitional justice response in Uganda' is my own work and that it has not been submitted for any degree or examination in any other university or institution. All the sources, which I have used, referred to or quoted, have been duly acknowledged.

Student: Mugero Jesse

Signed:

Date:

Supervisor: Professor Lovell Fernandez

Signed:

Date:



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The fear of the Lord is the beginning of knowledge; but fools despise wisdom and instruction. Proverbs 1: 7 (KJV)

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CHAPTER 1

INTRODUCTION AND OVERVIEW OF STUDY

1.1 Statement of the Problem

The reluctance with which the world's justice systems delayed to categorise enforced disappearance as a crime against humanity shows that it is yet to be appreciated as a crime which questions our co-existence as a human race.

This was manifested during deliberations leading up to the adoption of the Rome Statute, as delegates wondered whether the crime of enforced disappearance was worthy of being put in the same category as rape, murder and torture.¹ However, the Latin American states demanded the explicit recognition of enforced disappearance as a crime against humanity.² Their argument was also rooted in international instruments which recognize it as a crime against humanity.³ Eventually the crime of enforced disappearance was included in the ICC Statute under crimes against humanity.⁴ The International Convention on the Protection of All Persons from Enforced Disappearance (2006) also criminalizes enforced disappearances.

The history of enforced disappearances can be traced to the Third Reich's Night and Fog program whose purpose was two-pronged: first, to disappear an individual from

¹ Herman H and Darryl R 'Crimes Within the Jurisdiction of the Court,' in Roy S. Lee (ed) *The International Criminal Court: The Making Of The Rome Statute* (1999) 79, 102.

² Herman and Darryl (1999) 102.

³ Declaration on the Protection of all persons from Enforced Disappearance adopted by General Assembly Resolution 47/135 of 18 December 1992, United Nations General Assembly Official Records, Forty – seventh Session Supplement No. 49, A/47/49 (1992), 207.

⁴ Article 7 (i) and 2 (i) of the International Criminal Court Statute, 1998.

protection of the law and second, to cause uncertainty and anxiety among the missing person's family.⁵ The victim's well being is at the mercy of his captors since there is no monitoring of his condition while he is in detention and his whereabouts remain unknown to the world. The harshness of the crime of enforced disappearances is that it enables the perpetration of numerous other crimes, such as abductions, secret detentions, extra judicial killings and torture. It erodes numerous human rights, including the right to life, the right to dignity, the right to liberty, the right not to be tortured, the right to a fair trial, the right to access to justice⁶ and the right to an identity.⁷ The victim is deprived of protection of the law.⁸

The crime of enforced disappearances violates numerous treaties. These include the International Covenant on Civil and Political Rights (ICCPR), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the Convention on the Rights of Child (CRC), the Convention on the Elimination of All Forms of Discrimination against Women Convention (CEDAW) and the Universal Declaration of Human Rights (UDHR). In violation of the mentioned treaties, enforced disappearances thus violate regional human rights treaties, including the American

⁵ Firucane B 'Enforced disappearance as a crime under International law, A Neglected origin in the laws of war'(2010) 35 *Yale Journal of International Law* 171.

⁶ It has been held that the right to family life, economic, social and cultural rights are violated by enforced disappearances. The Inter-American Court of Human Rights and European Court of Human Rights have held that disappearances "generate suffering and anguish, in addition to a sense of insecurity, frustration and impotence in the face of the public authorities' failure to investigate", and constituted the family members as victims of inhuman treatment. See *Blake v. Guatemala*(1998)available here http://www.corteidh.or.cr/docs/casos/articulos/seriec_36_ing.pdf accessed on 13 April 2016 and *Tas v. Turkey* http://www.1cor.com/1315/?form_1155.replyids=599 accessed on 13 April 2016.

⁷ An enforced disappearance causes the disappeared person's legal existence and thus, strips him or her of their human rights and freedoms. Also discussed in L. Avery, 'A Return to Life: The Right to Identity and the Right to Identify Argentina's "Living Disappeared"', 27 *Harvard Women's Law Journal* (2004) 235 -259.

⁸ Werle G and Jessberger F *Principles of International Criminal law* 3 ed (2014) 382.

Convention on Human Rights (ACHR), the European Convention on Human Rights (ECHR) and the African Charter on Human and People's Rights (ACHPR).⁹

The circumstances that enable enforced disappearances grow and take root include erosion of the rule of law, wars, states of emergency, and the war against terrorism.¹⁰ For example, after the 11 September 2001 terror attacks the USA, President Bush supported the secret detention facilities in his war on terror. It has also been established that numerous victims suffered human rights abuses at these facilities.¹¹

Since its inception in 1980, the Working Group against Enforced Disappearance or Involuntary Disappearance (WGEID), a thematic working group set up by the United Nations Commission on Human Rights¹² has received and reviewed 54 557 cases of alleged enforced disappearances from 105 states.¹³ There are 43 653 cases under active consideration, involving 88 states.¹⁴ WGEID observes that, despite the many conflicts on the African continent, the number of reported cases of enforced disappearances misrepresents the extent of the phenomenon. This is because many cases are not reported.¹⁵

⁹ Sarkin J 'Why the Prohibition of Enforced disappearance Has Attained *Jus Cogens* Status in International Law' (2012)81 *Nordic Journal of International Law* 537.

¹⁰ University of Essex Human Rights Project, 'An Interview with Jeremy Sarkin, Chair-Rapporteur of the United Nations Working Group on Enforced and Involuntary Disappearances, on the joint study on Global Practices in Relation to Secret Detention' (2010) 1.

¹¹ Paust J 'Secret Detentions, Secret Renditions, And Forced Disappearances During The Bush Administration's "War" On Terror' in Nadya L, Sadat L, Sharf M.P (eds)*Essays in Honour of M. Cherif Bassiouni* (2008) 253-268.

¹² By resolution 20 (XXXVI) of 29 February 1980, the Commission on Human Rights decided to "establish for a period of one year a working group consisting of five of its members, to serve as experts in their individual capacities, to examine questions relevant to enforced or involuntary disappearances of persons". It is available here http://www.ohchr.org/Documents/Issues/Disappearances/E-CN.4-RES-1980-20_XXXVI.pdf (accessed on 22 April 2016).

¹³ United Nations 'Report of the Working Group on Enforced or Involuntary Disappearances' (2015) 3 .

¹⁴ United Nations (2015) 3 .

¹⁵ Ott L *Enforced disappearance in International law* (2011) 5.

There is a dearth of literature on the subject of enforced disappearances in Africa, and this research paper attempts to fill that gap. While it will deal with enforced disappearances in the African context, it focuses mainly on Uganda. From colonial times to 2006, Uganda experienced at least 125 conflicts which have had a negative impact on the country.¹⁶ The focus of this research paper will be on the war in Northern Uganda which ravaged the region for more than 20 years, from 1986 to 2006. The root cause of the war was the government's alienation of the people of Northern Uganda from the rest of the country.¹⁷

After the end of the conflict between the government and the Lord's Resistance Army (LRA) and other armed forces, various transitional justice accountability mechanisms were implemented, including the indigenous justice mechanisms used by the Acholi people of Northern Uganda. The latter gained even more attention after Agenda Item Three of the 2007 Juba Agreement on Accountability and Reconciliation recommended the use of traditional justice mechanisms to support the accountability and reconciliation process.¹⁸ These include reintegration;¹⁹ cleansing²⁰ and dispute resolution ceremonies.²¹ Amnesty has also been granted to former rebels who denounced subversive activities. Judicial accountability mechanisms have also been applied, and these include criminal trials held before the International Crimes Division of the High Court (ICD); referrals to the International Criminal Court (ICC). Of the LRA

¹⁶ Refugee Law Project ' *Compendium of conflicts in Uganda, Findings of the National Reconciliation and Transitional Justice Audit,* (2014) 4.

¹⁷ Refugee Law Project ' *Behind The Violence: Causes, Consequences And The Search For Solutions To The War In Northern Uganda*' (2004) 4.

¹⁸ In Acholi culture, the spiritual realm is considered as important as the life of the living. Therefore if the spiritual demands are not met especially with regard to looking after dead bodies and proper burial ceremonies, there are repercussions on the entire community as a whole.

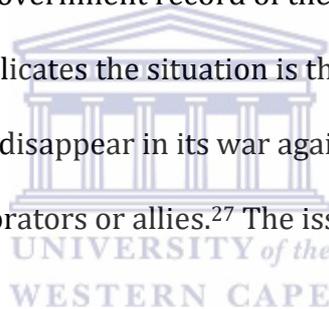
¹⁹ Lonergan K and Justice and Reconciliation Project *Gender and Generation in Acholi Traditional Justice Mechanisms* (Field Note XVII) (2012) available at <http://justiceandreconciliation.com/wp-content/uploads/2012/11/Gender-and-Generations-in-Acholi-Traditional-Mechanisms-Web.pdf> (Accessed on 18 March 2016).

²⁰ Lonergan K and Justice and Reconciliation Project (2012) 5.

²¹ Lonergan K and Justice and Reconciliation Project (2012) 5.

rebel leader, Joseph Kony, and his top five commanders.²² As well as the Juba peace talks with the LRA, which eventually flopped, without any concrete cessation of hostilities between the two parties to put an end to the war. There is also the transitional justice policy that is being worked on by the Justice, Law and Order Sector (JLOS).²³

The war left more than 1.4million people displaced. ²⁴Reports indicate that between 24 000-38 000 children were abducted and forced to become child soldiers. ²⁵ A 2012 research project found that 56% of the families in the Acholi sub-region had at least one family member missing due to the war.²⁶ But the true number is unknown because, at the time of writing, no official Government record of the actual number of child soldiers has been published. What complicates the situation is that the government is also accused of having made people disappear in its war against the LRA, because it suspected them of being collaborators or allies.²⁷ The issues surrounding victims of



²²ICC-02/04-01/05 *The Prosecutor v. Joseph Kony and Vincent Otti* available at < https://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200204/related%20cases/icc%200204%200105/Pages/uganda.aspx> and ICC-02/04-01/15

The Prosecutor v. Dominic Ongwen available at < https://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200204/related%20cases/ICC-02_04-01_15/Pages/default.aspx> (accessed on 13 April 2016).

²³ The Transitional Justice Policy is an overreaching framework of the Government of Uganda, designed to address justice, accountability and reconciliation needs of post conflict Uganda. The policy, which is the first of its kind in Africa and the world at large provides a holistic intervention to achieving lasting peace in a country whose history until recently, has been marred by political and constitutional instability. By April 2014, a 4th draft of the policy was already available.

²⁴ Refugee Law Project 'Behind the Violence: Causes, Consequences and the Search for Solutions to the War in Northern Uganda' (2004)4.

²⁵Phuong P, Patrick V, and Stover E *Abducted: The Lord's Resistance Army and Forced Conscriptioin in Northern Uganda* (2007). UC Berkeley: Human Rights Centre.

²⁶ Justice and Reconciliation Project 'UG Reconciliation Barometer; a 2012 Transitional Justice Monitoring Survey'(2012) Available here http://justiceandreconciliation.com/wp-content/uploads/2012/11/UG_Barometer_Report_Final-2012-11-16.pdf (Accessed on 22 April 2016).

²⁷ The NRA abducted mainly girls for use as wives or sex slaves. For example, in Burcoro, after four days of brutally torturing the local community, the NRA's 22nd Battalion abducted thirty to fifty women, and three men. Most of those abducted are still missing. Unfortunately, the exact number of abductions carried out by the NRA is unknown. Additionally, families of the missing who blame the NRA for abductions do not know where to turn to report the missing and they fear government persecution if they do. Justice and Reconciliation Project 'The Beasts at Burcoro: Recounting Atrocities by the NRA's 22nd Battalion in Burcoro Village in April 1991 (2013).

enforced disappearances and missing persons need to be addressed to ease reintegration, reconciliation, peace and development in Northern Uganda.

1.2 Hypothesis

The crime of enforced disappearance sets in motion an endless state of emotional distress for family members of the disappeared person, since they do not know his or her whereabouts, or have any contact with someone who does. They are also financially crippled if the disappeared person was the sole bread winner of the family.²⁸ Enforced disappearances in Uganda have resulted in the country losing potential manpower that could have otherwise have contributed to national economic development.

Enforced disappearances promote impunity and a total disregard for the rule of law. It is imperative that Uganda addresses enforced disappearances with appropriate transitional justice mechanisms in order for the victims to know what happened to their disappeared relatives, to help repair the torn social fabric, to heal communities, to bring perpetrators to book, and to promote a culture of respect for human rights and the rule of law.

1.3 Significance of the Study

Enforced disappearances constitute a pressing problem that is yet to receive the attention it deserves in order for it to be addressed properly through transitional justice mechanisms in Uganda. This study will analyse the crime of enforced disappearances in Uganda and it is hoped that it will come up with recommendations that will influence policy makers on the issue of combating enforced disappearances.

²⁸ Justice and Reconciliation Project *'The right to Know Policy recommendations for addressing the rights of the missing and their families in northern Uganda'* (2014) available here <http://justiceandreconciliation.com/publications/statements-briefs/2014/the-right-to-know-policy-recommendations-for-addressing-the-rights-of-the-missing-and-their-families-in-northern-uganda/> (accessed on 22 April 2016).

1.4 Research Questions

This study seeks to answer the following questions:

1. To what extent have transitional justice mechanisms in Uganda been able to deal with the crime of enforced disappearances?
2. How have other African countries dealt with the crime of enforced disappearances?

1.5 Literature Survey

Ott examines the crime of enforced disappearance from an International law perspective. She addresses the crime with a three-pronged approach, based on international human rights law, international humanitarian law and international criminal law.²⁹ Much as her research canvasses international law, she focuses more on case law from the Inter- American and European Court of Human Rights. She devotes little attention to the cases in Africa.

Sarkin narrates how the crime of enforced disappearance has gained *jus cogens* status in International law.³⁰ This is important in laying an historical background that gave rise to the crime.³¹

Vermuelen focuses on determining state responsibility under the International Convention for the Protection of All Persons from enforced disappearances.³² His research is important for highlighting the point that the state has a primary duty to protect its citizens from enforced disappearances. While, all the above-mentioned

²⁹ Ott (2011) 6.

³⁰ Sarkin (2012) 537.

³¹ University of Essex Human Rights Project (2010) 2.

³² Vermuelen M L *Enforced disappearance, Determining State Responsibility under the International Convention for the Protection of All Persons from Enforced disappearance* (unpublished PhD thesis, Utrecht University, 2012).

authors have focused mainly on criminal prosecutions as a main solution for combating the crime, less or no attention has been paid to the role of other transitional justice mechanisms.

Rodriguez has examined the right to truth for victims of enforced disappearance in the transitional justice context in Colombia.³³ This is helpful for understanding the importance of the right to truth as a remedy for victims of enforced disappearance. However, it is based on the situation in Colombia. This study, however, focuses on Uganda. It is also narrow as it is premised on making use of the right to truth as a remedy. But this right can complement other accountability mechanisms that can be brought into play.

The NGO, Justice and Reconciliation Project, has published on the right to know.³⁴ It addresses the rights of missing people and their families in Northern Uganda. Much as it is helpful, it does not show the full extent to which transitional justice mechanisms have been used in Uganda to address the crime of enforced disappearance.

Unlike all the above-mentioned studies, this research paper will focus on the transitional justice response in Uganda in addressing enforced disappearances, and will include also a pool of lessons from other African countries (South Africa, Kenya and Morocco) that have dealt with the crime of Enforced Disappearance.

1.6 Methodology

This research paper will be a qualitative desktop study. Primary sources such as, the relevant international treaties and conventions, customary law, domestic legislation and

³³ Rodriguez M G L *Transitional Justice and Enforced disappearance: The Right to Truth and the obligation to search for disappeared persons. The Colombian case.* (unpublished LLM thesis, University of Oslo, 2013).

³⁴ Justice and Reconciliation Project (2014) 6.

case law will be consulted. Secondary sources such as text books, academic journals, advocacy papers and other relevant publications will be critically examined in order to fortify the primary sources in answering the research questions. The paper will compare how South Africa, Kenya and Morocco, which, too, have faced the vice of enforced disappearances, have sought to deal with this problem. The three comparators have been chosen mainly because they, like Uganda, are African countries that have experienced the problem of enforced disappearances and had to react to it. They have approached the problem in varying ways. Exploring these will create a pool of experiences and lessons that can be learned from or recommended to other countries dealing with the same.

1.7 Structure of the Paper

Chapter one

This chapter will provide the background to the study and will, inter alia, set out the research questions and the methodology that will be followed in the writing of this research paper.

Chapter two

This chapter will delve into the crime of enforced disappearances; explain its origin and how it has come to be classified as constituent crime of crimes against humanity.

Chapter three

This chapter will describe the transitional justice accountability mechanisms that Uganda has put in place in Uganda to come to grips with enforced disappearances. These will include community-led initiatives and those implemented by non-governmental organisations.

Chapter four

This chapter will be a comparative analysis of how three countries in Africa have dealt with the crime of enforced disappearances.

Chapter five

This chapter will set out the recommendations to Uganda emanating from the analysis of the crime of enforced disappearances and will conclude the study.



CHAPTER 2

THE ORIGIN OF THE CRIME OF ENFORCED DISAPPEARANCES

2.1 Introduction

The purpose of this chapter is two-fold. First, it explains the legal origin of enforced disappearance and its criminalization. Second, it examines the elements which constitute the crime.

In explaining the origin and development of the crime of enforced disappearance, the relationship between international humanitarian law, human rights law, international law and international criminal law will be assessed. The discussion will include an analysis of the various treaties and laws against enforced disappearances.

2.2 International law

Initially, international law was defined as a body of laws governing relations between states. However, this has changed because the law as an entity reflects the culture and values of human society.¹ The dominant view of international law comes from a positivist interpretation. Other authors submit that international law includes not only societal and cultural values, but also pronouncements made by states, values underlying universal rights and duties, judicial decisions and scholarly commentaries.²

Article 38 of the International Court of Justice identifies four sources of International law:

¹ Shaw MN *International law* 6 ed (2008) 211.

² Sarkin (2012) 537.

- a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b. international custom, as evidence of a general practice accepted as law;
- c. the general principles of law recognized by civilized nations;
- d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Initially, International law was viewed as applicable only to states and nations.

However, after the horrors experienced by the human race in World War II, this outlook changed. The concept of human rights came to the fore in the interpretation of international law to give it a human face.

2.3 International human rights law

The Universal Declaration of Human Rights³ has been vital in the development of international law since its adoption. In its charter, it reaffirms faith in fundamental human rights and in the inherent dignity and worth of a person. It also encourages respect for and observance of human rights.⁴ Though the declaration is not legally binding, it proclaimed the first generation rights (civil and political) and the second generation rights (economic, social and cultural). It also inspired the adoption of the International Covenant on Civil and Political Rights (ICCPR)⁵ and the International Covenant on Economic, Social and Cultural Rights (ICESCR).⁶

These human rights covenants currently make up the foundation of international human rights law and are part of international customary law.

³ Universal Declaration of Human Rights, adopted by the General Assembly of the United Nations G.A. res. 217A (III) of 10th December 1948, U.N. Doc. A/810 at 71 (1948).

⁴ Article 1 of the UDHR promotes and encourages human rights and article 55 promotes respect for and observance of human rights.

⁵ Adopted by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 23 March 1976.

⁶ Adopted by General Assembly resolution 2200A (XXI) of 16 December 1966 and entry into force 3 January 1976.

Also, as a result of World War II, states are currently obligated to protect and promote human rights. ⁷The thrust of human rights law has now focused on the protection of human rights and placed this obligation on states. This is also manifest in other conventions that were adopted by the United Nations. For example, the Convention on Elimination of all forms of Discrimination against Women (CEDAW) was adopted to start the process of abolishing discriminatory tendencies, cultural practices and laws that were discriminatory to women⁸; The United Nations Convention against Torture and other cruel, inhuman or degrading treatment (UNCAT) was adopted by the UN to protect all persons from being subjected to torture, cruel, inhuman or degrading treatment⁹; and the Convention on the rights of the Child (CRC)¹⁰ was created to ensure protection of the well being of a child in a family.

Case law on the interpretation of the human rights treaties has progressively interpreted the protection of human rights in a progressive way. For example, in the case of *Velasquez v Honduras*,¹¹ the Inter-American Court of Human Rights stated that the state has a duty to investigate, identify, punish and compensate victims. This will be relevant in the discussion regarding the development of the criminalization of enforced disappearances.

Enforced disappearances are a major human rights violation because of the multiple human rights violations that occur. Enforced disappearances corrode the right to an effective remedy; the right to life; the right not to be tortured or subjected to cruel, inhuman or degrading treatment or punishment; the right to liberty and security of the

⁷ Article 2 of the ICCPR requires states to respect and ensure fulfilment of the rights guaranteed.

⁸ Adopted by the General Assembly Resolution 34/180 of 18 December 1979.

⁹ Adopted by the General Assembly Resolution 39/46 of 10 December 1984.

¹⁰ Adopted by General Assembly Resolution 44/25 of 20 November 1989.

¹¹ *Velasquez v Honduras* 1988 (IACHR) 4 available at: <http://www.refworld.org/docid/40279a9e4.html> [accessed 30 August 2016].

person; the right of detainees to be treated with humanity and respect and dignity; the right to recognition as a person before the law and the right of children to special measures of protection.

The state has three obligations deriving from human rights. The first is the 'duty to respect', which prohibits arbitrary governmental violations of a right. For example, states are prohibited from interfering arbitrarily with an individual's liberty.¹² The second is, the 'duty to protect', which requires that states implement positive measures to protect the individual from interventions by third parties. The duty to protect also arises under a condition that a state party ought to be aware of the impending risk and that they avert it, using the necessary factual and legal means to stop it.¹³ The final duty is to ensure enjoyment of the respective human rights. This is also known as the 'duty to fulfil.' It means that a state should put in place comprehensive legal and administrative processes to ensure the legal, institutional and procedural pre-conditions for the full implementation of the human right.¹⁴ This includes the duty to investigate and punish human rights violations.¹⁵

2.4 International humanitarian law

International humanitarian law (IHL) refers to a body of law that was established to reduce human suffering in armed conflict.¹⁶ It seeks to limit the extent of human suffering. IHL is derived from the principle of humanity. This principle prohibits

¹² Kalin W and Kunzli J *The law of International Human Rights Protection* (2009) 79.

¹³ Kalin and Kunzli (2009) 110 and *Velasquez v Honduras* paras 175.

¹⁴ Human Rights Committee (HRC), General comment No.13 (2004) para 7 and also in Kalin W and Kunzli J *The law of International Human Rights Protection* (2009) 112

¹⁵ HRC, General Comment No.31 (2004), *Velasquez v Honduras* para 1988 (IACHR) 176 available at: <http://www.refworld.org/docid/40279a9e4.html> [accessed 30 August 2016].

¹⁶ Kalshoven F and Zegveld L *Constraints on the waging of war* 3ed (2001) 12.

military action that causes human suffering which is unnecessary to achieve a specific military objective.¹⁷

The four Geneva Conventions and the Additional Protocol 1 are the rules applicable for protection of individuals in international armed conflict.¹⁸ However, for protection of individuals in non-international armed conflict, Common Article 3 of the Geneva Convention¹⁹ is applied, along with Additional Protocol 2.

Although enforced disappearance is prohibited under international humanitarian law, both in international and non-international armed conflict, all the Geneva Conventions and additional protocols do not refer to it expressly. International humanitarian law has several guarantees in place which, when abused, conclude that enforced disappearances are prohibited under international humanitarian law. These include three major prohibitions. The first is the prohibition of arbitrary deprivation of liberty as highlighted in the Geneva Conventions²⁰, additional protocols²¹ and customary international humanitarian law.²² The second is prohibition of inhuman treatment of persons who have ceased taking part in armed conflicts or those not participating. They should be treated humanely, as highlighted by the Geneva Convention.²³ Finally, international humanitarian law prohibits wilful killing. Enforced disappearances usually involve instances of killing the victim. Even though international humanitarian law

¹⁷ Greenwood C *Historical development and legal basis*, in Fleck Dieter (ed), *The Handbook of International Humanitarian Law*, 2 ed (2008) 35.

¹⁸ Geneva Convention (I) on Wounded and Sick in Armed Forces in the Field, 1949, Geneva Convention (II) on Wounded, Sick and Shipwrecked of Armed Forces at Sea, 1949, Geneva Convention (III) on Prisoners of War, 1949, Geneva Convention (IV) on Civilians, 1949 and Additional Protocol (I) to the Geneva Conventions, 1977 .

¹⁹ Art. 1 additional protocol II for the threshold of application of additional protocol II.

²⁰ The Geneva convention common article 3 (1) (d), article 21 and 118 of the Third Geneva convention, article 42 and 78 of the Fourth Geneva convention.

²¹ Article 75(3) additional protocol 1 and article 4, 5 and 6 of additional protocol 2.

²² Henckaerts JM and Doswald BL *Customary International Humanitarian law* (2005) 344(Rule 99).

²³ Article 12 Geneva convention .

accepts that a civilian may be killed as a result of warfare, the Geneva Conventions prohibit the deliberate and wilful killing of civilians.²⁴

Studying the relationship between international humanitarian law and international human rights law is essential to understanding the origin of the prohibition of enforced disappearances.

2.4.1 The nexus between international human rights law and international humanitarian law

After World War II, the relationship between international humanitarian law and international human rights law has become complementary.²⁵ However, to appreciate the differences between both bodies of law, it bears noting that they both developed independently and were directed toward different situations.²⁶ Human rights law protects bodily integrity and dignity from harm by the government and purposes to protect all individuals in all circumstances. On the other hand, international humanitarian law governs war. Another traditional view is that human rights law applies only during peacetime and international humanitarian law applies only during armed conflict.²⁷

A key distinction between both bodies of law is that criminal sanctions existed against individuals for violations of the laws of war but not for violation of human rights law,²⁸ except under the UN Torture Convention.

²⁴ Common article 3 (1) a to the Geneva convention and article 32 of the fourth Geneva convention

²⁵ Meron T, *The Humanization of Humanitarian Law*, 94 *American Journal of International law* (2000) 239.

²⁶ Kolb R *Ius in bello* 2 ed (2009) 126 .

²⁷ Greenwood Historical development and legal basis , in Fleck Dieter (ed), *The handbook of International Humanitarian law*, 2 ed (2008) 74.

²⁸ Meron (2000) 239 .

Today it is accepted that during armed conflict, human rights law is applicable alongside international humanitarian law.²⁹

2.4.2 The development of the crime of enforced disappearances

Firucane states that the origin of the prohibition of enforced disappearances is found in International Humanitarian Law's protection of family rights including the right to know the fate of what happened to a loved one.³⁰ In tracing the origin of the prohibition of enforced disappearances, he makes reference to the judgment of the International Military Tribunal (IMT) at Nuremberg.³¹ However, Nowak traces the origin of criminalization of enforced disappearances in the right to the UN Declaration on the Protection of All Persons from Enforced Disappearance.³² I find the submission of Firucane more convincing because it was the IMT that first found enforced disappearances to be amounting to crimes against humanity and this established a precedent for criminalisation under human rights law.

Field Marshall Keitel, one of the most responsible leaders in Nazi Germany, was tried for, among other offences, his role in the carrying out of Hitler's night and fog decree.³³ It is important to note that the objective of the decree was to achieve, "efficient and enduring intimidation." In the conviction, the judges established that such conduct was prohibited under customary international law.

²⁹ Chesney RM Leaving Guantanamo: The law of International Detainee Transfers *University of Richmond Law Review* 40 (2006) 703.

³⁰ Firucane (2010) 174.

³¹ *The United States of America, The French Republic, The United Kingdom of Great Britain and Northern Ireland and The Union of Soviet Socialist Republics v Goring and others*. (Nuremberg: IMT, 1947) herein after the trial of the War Criminals before the International Military Tribunal 1 (1946) 1-50.

³² Nowak M Monitoring disappearances – the difficult path from clarifying past cases to effectively preventing future ones 4 *European Human Rights Law Review* (1996) 348

³³ Trial of the War Criminals before the International Military Tribunal 1 (1946) 1-50.

The Nuremberg Military Tribunals (NMT) was a series of tribunals by the Allied powers after World War 2 and they prosecuted prominent members of the Nazi Germany who were involved in Politics, the Military and the Judiciary. An important case by the NMT is the Justice Trial. This was about German jurists and lawyers who worked in Nazi Germany in various capacities such as in the Reich Ministry of Justice, Prosecutors and Judges in the People's courts and Special courts. They were tried for their role in implementing the night and fog decree, among other crimes, the tribunal held that enforced disappearance is a crime against humanity as well as a war crime. It relied on customary international law and established that the offence would be criminal even if committed outside the context of military occupation.³⁴

The judgments of the NMT have now been accepted as customary international law. This is a precedent that shows that the offence of enforced disappearance carries individual criminal liability under customary international law.³⁵

The judgment by the NMT depicted how the decree violated family rights. It found it to be in contravention of Article 6 (b) of the IMT charter and in contravention of Article 46 of the 1907 Hague regulations that provided for the protection of family honour. By emphasising the effects of the decree on families of the missing, the judgment shows that the NMT considered enforced disappearances to be a violation of family honour and of the rights guaranteed under customary international law, as articulated in the 1907 Hague regulations.

In the justice trial, the accused were tried for their role in implementing the decree amongst other crimes. The prosecution stressed the fact that the defendants

³⁴ *The United States of America v Wilhelm von Ammon et al* (The Justice case) (Nuremberg: NMT, 1946 – 1949) herein after Trial of the war criminals before the Nuremberg Military Tribunal (1946 – 1949) 30.

³⁵ Trial of the War Criminals before the International Military Tribunal 1 (1946) 1-50.

deliberately prevented friends and family of the disappeared from knowing about their whereabouts.³⁶

The NMT held that implementation of the night and fog decree resulted in war crimes because it violated customary international law as articulated in Article 5, 23(h), 43 and 46 of the 1907 Hague regulations. It held further that international law of war protects the civilian population of any territory occupied by an enemy.³⁷

The NMT also found that these offences committed pursuant to the night and fog decree were crimes against humanity. This finding was based on a report by the Commission of Responsibilities for the Violations of Laws and Customs of War of the 1919 Paris conference, according to which “widespread or systematic terrorism” against a civilian population was a criminal violation of the laws of humanity.³⁸

The tribunal also held that the “enforcement and administration “ of the night and fog decree violated international common law relating to recognized human rights as well as article 2 (i) (b) and (c) of control council law. ³⁹

It is important to note the emphasis put on the effect that the night and fog decree had on the families of the missing. Criminalisation of enforced disappearances is based on this effect.

The text below will discuss how enforced disappearances became criminalised in international criminal law.

³⁶ Trial of the war criminals before the Nuremberg Military Tribunal (1946 – 1949) 78.

³⁷ Trial of the war criminals before the Nuremberg Military Tribunal (1946 – 1949) 78.

³⁸ Trial of the war criminals before the Nuremberg Military Tribunal (1946 – 1949) 1058.

³⁹ Trial of the war criminals before the Nuremberg Military Tribunal (1946 – 1949) 1057.

2.5 International Criminal law

Crimes under international law refer to acts or omissions in violation of international law which are harmful to the interests and goods of the international community to such an extent that the states agree on the necessity to prosecute and punish such acts.⁴⁰

Crimes under international law encompass all crimes that involve direct individual criminal responsibility under international law, namely, genocide, crimes against humanity, war crimes and the crime of aggression. These so called core crimes are the “most serious crimes of concern to the international community.”⁴¹

The Rome Statute of the International Criminal Court (ICC) is the first instrument of international criminal law that formally lists enforced disappearances as a specific crime against humanity.⁴²

The qualification of an act as an international crime is based on customary law.⁴³ According to the Rome Statute, if enforced disappearances are perpetrated in the context of a widespread or systematic attack, they amount to a crime against humanity and constitute an international crime.

For individual criminal responsibility to be established for the crime of enforced disappearances under international law, the following ingredients should be proved by the prosecution;

⁴⁰ Casese A International Criminal Law 2ed (2008) 11.

⁴¹ Article 5 Rome Statute .

⁴² Article 7 (i) Rome Statute .

⁴³ International Comission of Jurists , *Bamaca Velasquez v Guatemala* 62(2001) The Review 128.

First, it needs to be proved that the enforced disappearance was part of a wide spread attack against a civilian population, since it is categorised as a crime against humanity.⁴⁴

Emphasis is placed on the “pattern of conduct” to establish the existence of a crime against humanity. However, this means that a single case of enforced disappearance committed outside the parameter of a widespread or systematic attack as presented by the Rome Statute cannot be prosecuted using the Rome Statute.⁴⁵

Second, the attack must be directed against a civilian population. The notion of “attack” means any kind of maltreatment of a civilian population.⁴⁶ The attack could consist of any of the acts listed in Article 7 of the Rome Statute.⁴⁷ As long as it is a widespread or systematic attack, even a single act of enforced disappearance by a perpetrator would entail individual criminal responsibility.⁴⁸

The reference to “widespread” refers to the quantitative element of the attack. The International Criminal Tribunal for Rwanda (ICTR) has defined it to mean “massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims.”⁴⁹ The reference to “systematic” is the qualitative element. The ICTR has defined it to mean that there should be a thorough

⁴⁴ Article 7 (1) of Rome Statute .

⁴⁵ Ott quoting Grammer who regrets this restriction, because currently, mostly isolated cases are observed worldwide and because the unlawfulness of enforced disappearance is realized with one single act in *Enforced Disappearance in International law* (2011)142.

⁴⁶ *Prosecutor v Kunarac et al* (Appeal Judgment), IT-96-23 and IT-96-23/1-A, International Criminal Tribunal for the former Yugoslavia (ICTY), 2002, available at: <http://www.refworld.org/docid/3debaafe4.html> [accessed 31 August 2016] 86.

⁴⁷ Article 7 (2) of Rome Statute .

⁴⁸, Anderson K How effective is the International Convention for the protection of all persons from enforced disappearance likely to be in holding individuals responsible for acts of enforced disappearance? 7/2 *Melbourne Journal of International law* (2006) 258 .

⁴⁹ *The Prosecutor v Jean-Paul Akayesu* (Trial Judgement), ICTR-96-4-T, International Criminal Tribunal for Rwanda (ICTR), 2 September 1998, available at: <http://www.refworld.org/docid/40278fbb4.html> [accessed 31 August 2016] 580.

organisation and regular pattern on the basis of a common policy involving substantial public or private resources.⁵⁰

However, statutes of limitation do not apply for crimes against humanity.⁵¹ States may establish universal jurisdiction in order to prosecute suspected perpetrators of enforced disappearance.⁵²

The *actus reus* in respect of the elements of the offence of enforced disappearance comprises two actions. First is the deprivation of liberty which could take the form of an arrest, detention or abduction.⁵³ Second, the failure to provide information,⁵⁴ which means a refusal to acknowledge the deprivation of freedom or to give information on the fate or whereabouts of those persons.⁵⁵

The *mens rea* required to be proved is the fact that the suspect knew that his act was part of a larger attack and he acted with the intention regarding enforced disappearance.⁵⁶

However, at time of writing, there is yet to be case before the ICC on the charge of enforced disappearances. It is hoped future case law will help to clarify the uncertainties regarding the elements of the crime.

⁵⁰ *The Prosecutor v Jean-Paul Akayesu* (Trial Judgement), ICTR-96-4-T, International Criminal Tribunal for Rwanda (ICTR), 2 September 1998, available at: <http://www.refworld.org/docid/40278fbb4.html> [accessed 31 August 2016] 580.

⁵¹ Anderson (2006) 254 and Article 29 of the Rome Statute .

⁵² Anderson (2006) 257.

⁵³ Article 7(2) (a) and (i) of the Rome Statute.

⁵⁴ Article 7 (2) (a) and (i) of the Rome Statute.

⁵⁵ Article 7 (2) (i) Rome Statute.

⁵⁶ Article 7(i) Rome Statute.

2.6 Other developments that contributed to the criminalization of enforced disappearances.

This section will focus on the development of the legislation in an effort to curb enforced disappearances.

After the fall of Nazi Germany, the tactic of making people disappear was used widely during the reign of the military junta in Argentina, as well as the dictatorial regimes in numerous African countries such as Uganda and Kenya, and in Asian countries such as Sri Lanka and Iraq.

Associations of the relatives, friends and family of the disappeared have been active in generating awareness about this heinous crime.⁵⁷

In the mid 1960s, the Inter-American Commission on Human Rights (IACHR) of the Organisation of American States (OAS) visited Guatemala to address the issue of forced disappearances through its monitoring of military and other state forces, and through its decisions on individual petitions alleging human rights violations.⁵⁸

After the 1973 coup d'etat in Chile, the United Nations (UN) reviewed its Commission on Human Rights, leading to more forceful action regarding disappearances.⁵⁹

In 1978, a UN working group visited Chile in an investigative mission focused on enforced disappearances.

The UN General Assembly was appalled at the rate of "disappearance of persons as a result of reckless law enforcement and security authorities."⁶⁰ It called upon

⁵⁷ Brody R and Gonzalez F "Nunca Mas: An Analysis of International Instruments on "Disappearances" (1997) 19 *Human Rights Quarterly* 369.

⁵⁸ Brody and Gonzalez (1997) 362.

⁵⁹ Brody and Gonzalez" (1997) 364.

governments "to quickly and impartially investigate and hold the culprits"⁶¹
accountable for their actions."⁶²

In 1979, the UN Commission on Human Rights selected two experts to assess the
"question of the fate of missing and disappeared persons in Chile."⁶³

The report presented to the General Assembly characterised the disappearances as a
"continuous situation of gross and flagrant violation of human rights," and called on the
Chilean government "to investigate and clarify the fate of persons reported to have
disappeared for political reasons, to inform the relatives of the outcome, and
to institute criminal proceedings against those responsible for such disappearances and
to punish those found guilty."⁶⁴

The OAS General Assembly in 1979 adopted a resolution on Chile, in which it declared
that "the practice of disappearances is an affront to the conscience of the hemisphere."⁶⁵

In September 1979, the IACHR visited Argentina to examine the claims of enforced
disappearances. On this mission it collected a vast amount of evidence indicating a large
scale and systematic practice of enforced disappearances.⁶⁶ But, the OAS General

⁶⁰ Disappeared Persons, G.A. Res. 33/173, U.N. GAOR, 33d Sess., Supp. (No. 45), at 158, U.N. Doc. A/Res./33/173 (1978).

⁶¹ Disappeared Persons, G.A. Res. 33/173, U.N. GAOR, 33d Sess., Supp. (No. 45), at 158, U.N. Doc. A/Res./33/173 (1978).

⁶² Disappeared Persons, G.A. Res. 33/173, U.N. GAOR, 33d Sess., Supp. (No. 45), at 158, U.N. Doc. A/Res./33/173 (1978).

⁶³ Study of reported violations of human rights in Chile, with particular reference to torture and other cruel, inhuman or degrading treatment or punishment, 1 6(b), U.N. ESCOR, Supp. (No.6), at chap. XXIV, U.N. Doc. E/1979/36 (1979).

⁶⁴ Human Rights in Chile, G.A. Res. 34/179, 96, U.N. GAOR, 34th Sess., Supp. (No. 46), U.N. Doc. A/34/36 (1979).

⁶⁵ Human Rights in Chile, G.A. Res. 34/179, 96, U.N. GAOR, 34th Sess., Supp. (No. 46), U.N. Doc. A/34/36 (1979).

⁶⁶ Buergeth T et al., *Protecting human rights in the Americas: selected problems* (3d ed. 1990) 291 .

Assembly did very little in response to what it found because Argentina had threatened to withdraw its membership of the OAS.⁶⁷

In 1980, the General Assembly was concerned that Chile had not yet implemented any of its recommendations, such as informing relatives of the disappeared and declared that Chile's actions constituted a gross and flagrant violation of human rights⁶⁸

In 1983 and 1984, the General Assembly, while responding to numerous calls from relatives' organizations and NGOs, described the enforced disappearances as a *crime against humanity*.⁶⁹ When two Honduran disappearance cases, *Velasquez Rodriguez v Honduras*⁷⁰ and *Godinez Cruz v Honduras*⁷¹ became the first contested cases to reach the Inter-American Court of Human Rights, the Court cited these General Assembly resolutions in describing the horrible nature of the crime.

In the 1980s, several groups, including the Human Rights Institute of the Paris Bar Association, the Permanent Assembly for Human Rights (Argentina), and the Argentinean-based Initiative Group for an International Convention Against Forced Disappearance FEDEFAM,⁷² prepared draft Declarations and Conventions on Forced Disappearances.⁷³

⁶⁷ GAS Doc. AG/Res. 510 (X-01 80), *compiled in* Proceedings: tenth regular session (of the GAS General Assembly) 79 (1981).

⁶⁸ Protection of human rights in Chile. G.A. Res. 35/188, 91 6-7, U.N. GAOR, 35th Sess., Supp. (No. 48), U.N. Doc. A/35/48 (1978).

⁶⁹ Disappeared Persons, G.A. Res. 33/173, U.N. GAOR, 33d Sess., Supp. (No. 45), at 158, U.N. Doc. A/Res./33/173 (1978).

⁷⁰ *Velasquez v Honduras* 1988 (IACHR) 4 available at: <http://www.refworld.org/docid/40279a9e4.html> [accessed 30 August 2016].

⁷¹ *Godínez Cruz v Honduras*, Inter-American Court of Human Rights (IACrHR), 10 September 1996, available at: <http://www.refworld.org/docid/3ae6b66448.html> [accessed 31 August 2016].

⁷² The Grupo de Iniciativa comprises FEDEFAM and leading Argentine human rights groups and associations of the relatives of the disappeared.

⁷³ Brody and Gonzalez (1997)369.

The Paris Bar also described enforced disappearances as a crime against humanity. It interpreted enforced disappearances liberally, as "any act capable of affecting the integrity or the physical, psychic or moral security of any person."⁷⁴

The processes of drafting the UN Declaration on the Protection of All Persons from Enforced Disappearance (UN Declaration)⁷⁵ and the OAS Inter-American Convention on Forced Disappearance of Persons (OAS Convention)⁷⁶ began almost at the same time and this helped them to reinforce each other.

In 1987, the Inter-American Commission on Human rights was instructed by the OAS General Assembly to prepare a first draft of an Inter-American Convention on Forced Disappearance of Persons.⁷⁷ The first draft was produced in 1988.⁷⁸

The first draft of the UN Convention was based to a large extent on the UN Convention against Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment.⁷⁹

Feedback from NGOs and the International Commission of Jurists helped to inform the next draft. The text approved by the inter-sessional working group⁸⁰ was adopted by

⁷⁴ Brody and Gonzalez (1997) 373.

⁷⁵ Declaration on the Protection of All Persons from Enforced Disappearances, G.A. Res. 47/133, U.N. GAOR, 47th Sess., Supp. (No. 49), U.N. Doc. A/47/49 (1992).

⁷⁶ Inter-American Convention on the Forced Disappearance of Persons, adopted 9 June 1994, OAS Doc. OEA/Ser.P/AG/Doc.3114/94 (1994).

⁷⁷ Resolution Concerning 1986/87 Annual Report of the Inter-American Commission on Human Rights, 9 11, OAS Doc. AG/Res. 890 (XVII-0/87), compiled in Proceedings: seventeenth regular session (of the OAS General Assembly) 54 (1987). The General Assembly itself was acting on a suggestion from the IACHR. *See Annual Report of the Inter-American Commission on Human Rights*, OAS Doc. OEA/Ser.P/AG/doc.2167/87 (1987).

⁷⁸ *Comments on Draft Inter-American Convention on Forced Disappearance of Persons*, in Annual report of the inter-American commission of human rights, OAS Doc. OEA/Ser.L/V/ 11.74/Doc.10/Rev.1, at 346, 346-47 (1988).

⁷⁹ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* 10 Dec. 1984, G.A. Res. 39/46, U.N. GAOR Supp. (No. 51), at 197, U.N. Doc. A/39/51 (1985).

⁸⁰ *Report of the Working Group on the Declaration on the Protection of All Persons from Enforced Disappearance*, U.N. Doc. E/CN.4/1992/19/Rev.1 (1991).

the Commission, by the Economic and Social Council, and finally, in December 1992, by the General Assembly.⁸¹

Both the UN declaration and the OAS instrument have been important in developing states' duties to check, investigate, and punish enforced disappearances. States are obligated not to practice or tolerate forced disappearance;⁸² to co-operate in the efforts to eradicate forced disappearances;⁸³ and to implement effective legislative, administrative and judicial measures to eventually end it. This flows from the duty of states to take reasonable steps to prevent human rights violations."⁸⁴

In 1998, with the creation of the Rome Statute of the International Criminal Court, enforced disappearances were included as a crime against humanity.⁸⁵ However, due to some shortcomings, such as a lack of a mechanism to prosecute disappearances not amounting to crimes against humanity, there remained a gap in the law. This created a need for a universally binding agreement on enforced disappearances, since the phenomenon was still on the increase worldwide.⁸⁶ The 2006 Convention for the Protection of All persons from Enforced Disappearances (ICED) was adopted by the United Nations General Assembly in effort to reduce this trend.⁸⁷

⁸¹ *Analysis of the Draft Inter-American Convention on the Forced Disappearance of Persons*, at 3, OAS Doc. OEA/Ser.G/CP/CAIP-890-93 (1993).

⁸² UN Declaration art. 2 and OAS Convention art. 1(a).

⁸³ UN Declaration art. 2 and OAS Convention art. 1(a).

⁸⁴ *Velasquez v Honduras* 1988 (IACHR) 4 available at: <http://www.refworld.org/docid/40279a9e4.html> [accessed 30 August 2016].

⁸⁵ Article 7 (1) (i) Rome Statute .

⁸⁶ Citroni G The International Convention for the Protection of All Persons from Enforced Disappearance: A Milestone in International Human Rights Law (2006) *TRIAL* 3.

⁸⁷ Adoption of the 2006 Convention by the United Nations General Assembly on 20th December 2006, UN Doc. A/RES/61/177 (2006).

The ICED criminalises those disappearances which do not amount to war crimes or crimes against humanity.⁸⁸

There are two important differences between the Rome Statute and the ICED. First, the definition in Article 7(2) (i) of the Rome Statute includes ‘arrest, detention or abduction’ carried out by or without the authorisation, support or acquiescence of a ‘political organisation.’ It widens the size of the net to incriminate potential perpetrators than the convention does.⁸⁹

Second, Article 7(2)(i) of the Rome Statute adds an additional *mens rea* element by requiring that there is an intention to remove the detainee from the protection of the law for a long period of time.⁹⁰

The Convention represents a landmark in international human rights law as it expressly recognises the non-derogable right of every one not to be subjected to enforced disappearance. The Convention is also recognises the right to know the truth regarding the circumstances of the disappearance and ongoing investigations.⁹¹

The Convention fills a legal gap and represents an effective tool to prevent and suppress the international crime of enforced disappearance, and signals a political message that this odious practice will no longer be tolerated.⁹²

⁸⁸ Firucane (2010) 174.

⁸⁹ McCrory S The International Convention for the Protection of all Persons from Enforced Disappearance 7/3 (2007) *Human Rights Law Review* 546 and Article 3 of the ICED.

⁹⁰ McCrory (2007) 547 and Article 3 of the ICED.

⁹¹ Citroni (2006) 3.

⁹² Citroni (2006) 3.

2.7 Conclusion

As has been shown, the journey towards prohibition of enforced disappearances can be traced to both international humanitarian law and human rights law. The traditional view of both conflicting bodies of law has been removed. The intersection of the two bodies of law created a background for the prohibition and punishment of enforced disappearances.

International law has addressed the issue of enforced disappearances by way of setting up a robust legal framework. This includes the Declaration on the Protection of All Persons from Enforced Disappearance, the Inter-American Convention on Forced Disappearance of Persons, the Rome Statute of the International Criminal Court (ICC) and the International Convention for the Protection of All Persons from Enforced Disappearance (ICED).

However, there is yet to be a case before the ICC to help ease in interpretation of the legal provisions. Also, it is hoped that all states will have the political will to enact laws that criminalise enforced disappearances.

CHAPTER 3

THE TRANSITIONAL JUSTICE MECHANISMS IMPLEMENTED IN UGANDA TO DEAL WITH ENFORCED DISAPPEARANCES

3.1 Introduction

The purpose of this chapter is to describe the transitional justice accountability mechanisms that Uganda has put in place to address the phenomenon of enforced disappearances. It will cover two items, first, a discussion of the history of enforced disappearances in Uganda and the mechanisms put in place to address it. Second, the mechanisms currently in place dealing with enforced disappearances implemented by the government and non-governmental organisations.

3.2 History of dealing with enforced disappearances in Uganda

The first government initiative to deal with enforced disappearances in Uganda was the commission of inquiry into the disappearance of people in Uganda since 25 January 1971. It was established by President Idi Amin Dada in June 1974.¹ This was due to strong public pressure to know the whereabouts of the disappeared people. The commission conducted public hearings and wrote a report which it handed to the president confidentially. Amnesty International in London obtained a microfilm of the copy of the report. In its findings, the inquiry established that 308 persons had been made to disappear and that the government agencies, namely, the Public Security Unit and the National Investigation Bureau were responsible. As a result of these findings,

¹ United States Institute of Peace: Truth Commission Uganda 74 available at <https://www.usip.org/publications/truth-commission-uganda-74> (accessed on 6 October 2016).

the commissioners had to flee the country to save their lives from reprisals by the government.²

The second government initiative to deal with enforced disappearances in Uganda was the commission of inquiry into violations of human rights in Uganda from 1986 to 1994. It was established by President Museveni in an effort to improve the human rights situation in the country.³ It suffered numerous constraints that prevented it from doing its work successfully. The institutional constraints included lack of adequate funding and a very wide mandate to investigate all human rights abuse from 1986-1994. The lack of political will also prevented it from being effective. A published copy of the report was presented to the president and to the Danish Ministry of Foreign Affairs which, through the Danish International Development Agency (DANIDA), had been the largest donor to the commission.⁴



The legacy of the commissions of inquiry continues to haunt Uganda. They are largely unknown because their work was not published for the general public. The few copies available in print are not accessible to the ordinary citizen. The legacy of enforced disappearances has, therefore, yet to be dealt with comprehensively. The two investigations depict also the culture of militarism that characterised the dawn and preservation of the state.

² Carver R Called to account: How African governments investigate human rights violations *African Affairs* 89 (1990)391-415.

³ United States Institute of Peace: Truth Commission Uganda 86 available at <https://www.usip.org/publications/truth-commission-uganda-86> (accessed on 6 October 2016).

⁴ Quinn J Constraints: The undoing of the Ugandan Truth Commission *Human Rights Quarterly* 26 (2004) 414. DANIDA provided \$363,000 to the commission in addition to equipment.

3.3 Transitional justice mechanisms used to deal with enforced disappearances after the conflict in Northern Uganda

To start with, there was the 2007 Juba Agreement on the cessation of hostilities between the Government of Uganda and the Lord's Resistance Army (LRA). Though this agreement was never signed, it created an opportunity for temporary peace. This gave the government an opportunity to: implement a strategy for disarmament, demobilisation and re-integration (DDR); conduct criminal investigations; and create a specialised division of the High Court to prosecute the persons suspected of perpetrating human rights violations during the conflict.⁵

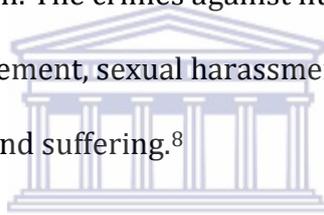
The second transitional justice mechanism applied consisted in the referral of the situation in Uganda to the International Criminal Court (ICC) by the government of Uganda in January 2004.⁶ The ICC opened investigations in Uganda which focused on war crimes and crimes against humanity committed in the context of a conflict between the LRA and the government, dating from 1 July 2002. However, the problem was and is still is that the LRA leadership cannot be located physically. Another limitation is that the investigations by the ICC are confined to crimes committed only after 1 July 2002, whereas the conflict between the LRA and the government began in 1986. The crimes committed between 1986 and 1 July 2002 should, in fact, be investigated and prosecuted before the national courts since the ICC is a court of last resort and has limited jurisdiction.

⁵ Agreement on Cessation of hostilities between the Government of Uganda and the Lord's Resistance Army annexure 1,2,3,4,5 and 6. (Hereinafter called "the juba agreement")

⁶ The situation in Uganda and referral to the ICC available here <https://www.icc-cpi.int/uganda> (accessed on 6 October 2016).

Dominic Ongwen, who was part of the leadership of the LRA, is presently being held in custody by the ICC. His trial is scheduled to start on 6 December 2016. He is charged with crimes against humanity, namely, murder, enslavement, and inhumane acts of inflicting serious bodily injury and suffering. He is charged also with war crimes, including murder, cruel treatment of civilians, intentionally directing an attack against a civilian population, and pillaging.⁷

The ICC is investigating, too, war crimes allegedly committed by Joseph Kony and Vincent Otti, leaders of the LRA. These are murder, cruel treatment of civilians, intentionally directing an attack against a civilian population, pillaging, inducing rape, and forced enlistment of children. The crimes against humanity for which they are being charged include murder, enslavement, sexual harassment, rape, and inhumane acts of inflicting serious bodily injury and suffering.⁸



However, there is no charge on the crime of enforced disappearance. This is because it is hard to collect sufficient evidence to sustain the charge. Also, Uganda has a very strong oral tradition compared to what is contained in written records. Most of the potential witnesses in cases of enforced disappearances are likely to have died in the conflict, or may not be able to recall events vividly because of old age. There might be no other independent way to test the veracity of their testimonies.

The third mechanism available to try those suspected of violating human rights during the conflict is the International Crimes Division of the high court of Uganda (ICD). The

⁷ The Prosecutor v Dominic Ongwen available here <https://www.icccpi.int//Pages/item.aspx?name=pr1216> (accessed on 6 October 2016).

⁸ The situation in Uganda available here <https://www.icc-cpi.int/uganda> (accessed on 6 October 2016).

only person facing charges before this tribunal is Thomas Kwoyelo,⁹ who is charged with 53 counts of war crimes and crimes against humanity. None of them includes the crime of enforced disappearances.

The fourth example of a mechanism of transitional justice is the transitional justice policy that the government intends to implement to address the consequences of the conflict in Northern Uganda. However, this policy is still in the pipeline, for it has been more than seven years that it is still being discussed by the cabinet. The victims in Northern Uganda and commentators are sceptical about the motives of the government and strongly believe that there is lack of political will to give effect to the policy.¹⁰

The final transitional justice mechanism that has been brought to bear is the granting of amnesty. The amnesty process has its genesis in the Amnesty Act, which allowed those rebels who wanted to surrender to the government to stop fighting.¹¹ Amnesty was very popular among the religious leaders in Uganda and it also served the purpose of weakening the LRA. Amnesty was granted to 26 232 rebels and of these, 20 263 were re-integrated into society.¹² Re-integration into society was a process that involved training former combatants with practical skills to improve their livelihood. These skills included agricultural management, metal works, motor vehicle repair and carpentry. They were also given some financial support to help them start afresh as civilians.¹³

⁹ Uganda v Kwoyelo (International Crimes Division) Case No.1 of 2016.

¹⁰ Okiror S Truth and reconciliation in limbo: Ugandan cabinet drags on enacting transitional justice policy. Available here <http://letstalk.ug/article/truth-and-reconciliation-limbo-ugandan-cabinet-drags-enacting-transitional-justice-policy> (accessed on 06 October 2016).

¹¹ Government of Uganda Amnesty Act 2000.

¹² Kato D The Amnesty Commission: DDR in Uganda available here http://www.tdrp.net/PDFs/KampalaPPT_Kato.pdf accessed on 08-10-2016.

¹³ Kato (2012) 5.

However, the amnesty and DDR process have been criticised by the victims of the conflict as being only perpetrator friendly, concentrating more on the welfare of ex-combatants and ignoring the plight of the victims. As a result, it is difficult to measure the effectiveness of the DDR process. The resettled ex-combatants are still marginalised by the community into which they have resettled, which makes it difficult for them to enjoy a normal civilian life.

3.4 The transitional justice mechanisms to deal with enforced disappearances implemented by NGOs.

The discussion above shows that the government has invested some efforts in dealing with enforced disappearances. At best, these served mainly to pacify the LRA. The crime of enforced disappearance is not being investigated by any law enforcement agency at the time of writing. The amnesty process has been viewed as skewed in favour of the perpetrators. It is only the non-governmental organisations (NGOs) that are pursuing the fate of disappeared persons. NGOs have filled this void in three ways.

First, NGOs have promoted the use of memorialisation as a way for relatives and friends of the disappeared to remember them. They have consulted with communities affected by the conflict for purposes of dedicating a specific day of the year to commemorate the disappeared.¹⁴ The memorial events are marked by prayers for the missing, those feared to have been killed or whose whereabouts are unknown. Other activities include

¹⁴ For example, the Justice and Reconciliation Project (JRP) a grass roots NGO has developed a Peace and Conflict calendar which identifies days for memorialising conflicts among different communities in northern Uganda. It can be seen on the website at this link <http://justiceandreconciliation.com/resources/calendar/> (accessed on 08 October 2016).

the rendering of songs, poems and staging drama plays in remembrance of those persons who disappeared in the conflict.¹⁵

NGOs have also established permanent memorials such as a statue signifying a conflict that affected a particular community.¹⁶ Unfortunately, in some communities government officials continue to contest the numbers of people who reportedly missing, as well as the numbers of the dead.¹⁷ However, since there is yet to be an official government publication about the number of persons disappeared as a result of these conflicts, the NGOs usually rely on testimony of survivors and eyewitnesses to the conflicts.

Community-led documentation centres and museums have also been established by NGOs to help survivors of the conflict remember the disappeared.¹⁸ The community-led documentation centres have been found to have a therapeutic effect in assisting the survivors to heal from the wounds of the conflict. The museums have assisted in preserving the history of the conflict. They have collected and preserved experiences of survivors and drawn up lists of persons known to have disappeared during the conflict.

¹⁵ A group of women who were victims of the conflict in an area called Rwot Lakica worked with a local musician to produce a song entitled "*Lubanga Ber* (God is good)" available here <http://justiceandreconciliation.com/blog/2015/rwot-lakica-womens-group-releases-video-for-lubanga-ber-god-is-good/> (accessed on 8 October 2016).

¹⁶ Monuments in Burcoro and Odek community built by community in partnership with an NGO JRP available here <http://justiceandreconciliation.com/blog/2015/monuments-in-odek-and-burcoro-bring-communities-full-circle/> (accessed on 8 October 2016).

¹⁷ In Barlonyo, a community in Northern Uganda district of Lira, the Government set up a memorial and inscribed on it that 121 people were killed by the LRA yet the community leaders state that 300 people were killed. This contention can be found here <http://www.africanyouthinitiative.org/the-barlonyo-memorial.html> (accessed on 10 October 2016).

¹⁸ Community led documentation in Lukodi community by survivors of the Lukodi massacre available here <http://justiceandreconciliation.com/media/newsroom/in-the-news/2013/a-community-led-documentation-project-launched-by-lukodi-massacre-victims-acholi-times/> and the National Memory and Peace Documentation Centre (NMPDC) established by another NGO the Refugee Law Project (RLP) available here <http://www.refugeelawproject.org/nmpdc> (accessed on 8 October 2016).

NGOs have implemented informal truth telling and storytelling sessions to aid the victims in their recovery from the conflict.¹⁹ These have given victims and survivors of the conflict an opportunity to tell their experiences and to talk about the disappeared. These sessions have resulted in the discovery of names and identities of some of those killed as well as the location of hidden mass graves. But only a tiny few exhumations have taken place, mainly because the government lacks the political will to allow NGOs to conduct further investigations.²⁰ Despite these impediments, the knowledge gained from survivors has been published for future reference and has given them a platform to share their experiences.²¹

Second, NGOs have advanced the issue of disappeared persons in the transitional justice discourse in Uganda. This has been done through publication of advocacy papers highlighting the need for the government to find solutions to the issue of disappeared persons. Sometimes, the NGOs have elicited positive political responses as a result of such advocacy. For example, the Parliament of Uganda adopted a measure to provide redress for women in Northern Uganda who suffered sexual and gender-based violence during the conflict.²² Although there have been minor achievements on this front, the government is yet to implement a policy to ensure that the measure is implemented.

¹⁹ JRP organised a group of women whose husbands had disappeared as a result of the conflict to meet for regular story telling sessions and it resulted into a publication called *Adyebo*. Available here <http://justiceandreconciliation.com/publications/2013/adyebo/> (accessed on 8 October 2016).

²⁰ Agencies, Parliament passes controversial bill on the eve of the Pope's arrival The Daily Monitor 27 November 2015 available here <http://www.monitor.co.ug/News/National/Parliament-passes-controversial-NGO-bill/688334-2974692-8n2co1/index.html> (accessed on 8 October 2016).

²¹ Justice and Reconciliation Project (2014) 3.

²² Nyeko O, Applauding Parliament for adopting a resolution on reparations for war affected women and children available here <http://justiceandreconciliation.com/blog/2014/applauding-parliament-for-adopting-a-resolution-on-reparations-for-war-victims/> (accessed on 8 October 2016).

Third, NGOs have encouraged the use of traditional justice mechanisms to help victims and survivors of the conflict deal with enforced disappearances. Traditional justice mechanisms in the Acholi-sub region gained popularity after they were included in Agenda Item number 3 of the Juba Agreement.

In the Acholi-sub region, the spiritual world is well revered and respected.²³ Local community leaders believe that they must appease the spiritual world in order for them to have a fruitful life on earth. Victims and survivors have often complained of suffering from unknown illnesses and crop failure, which they attribute to failure to appease the spiritual world.²⁴ Failure to appease the spiritual world has been blamed on not having had proper burial ceremony for dead family members or the disappeared that were killed. NGOs have sponsored a few reburial ceremonies and the carrying out of traditional ceremonies. The traditional ceremonies include: *laketeket*, which is carried out to rid an individual of an evil spirit; *moyo piny*, which is performed to cleanse an area of evil spirits; and *lwoko pik wong*, which is meant to wash away tears of a family which had mourned for a relative, believing that he was dead or disappeared, but has now returned home.²⁵

The traditional ceremonies have helped some families to continue living normal lives with the knowledge that they have taken care of their disappeared or dead relatives and friends.

²³ Lonergan and Justice and Reconciliation Project (2012)1.

²⁴ Lonergan and Justice and Reconciliation Project (2012)3.

²⁵ Lonergan and Justice and Reconciliation Project (2012) 13.

The main drawback of the traditional justice mechanisms is their tendency to exclude women and youth from participation. This inhibits women and youth who were also victims of the conflict from participating fully in the healing process.

3.5 Conclusion

The chapter has discussed the transitional justice mechanisms implemented in Uganda to deal with the crime of enforced disappearances. An historical overview has showed that the government implemented a commission of inquiry to investigate enforced disappearances in 1974 and 1986, but, the final reports were not widely published and are impossible to access.

After the conflict in Northern Uganda, the government put in place several transitional justice mechanisms to deal with the crime of enforced disappearances. However, the criminal prosecutions at the ICC and in Uganda at the ICD do not include any charge on the crime of enforced disappearances. The Amnesty and DDR process have been found to be aimed at helping former ex-combatants start new lives as civilians. The transitional justice policy is yet to be implemented. It is against this background that NGOs have attempted to fill the void left by the government by promoting memorialisation, advocating for the rights of the disappeared and promoting the use of traditional justice mechanisms as a way to help victims and survivors of the conflict deal with the crime of enforced disappearance. However, the ability for NGOs to help has been hampered by the lack of political will on the part of the government.

CHAPTER 4

COMPARATIVE ANALYSIS OF TRANSITIONAL JUSTICE MECHANISMS IMPLEMENTED BY THREE AFRICAN COUNTRIES TO DEAL WITH ENFORCED DISAPPEARANCES

4.1 Introduction

The purpose of this chapter is to compare how three African countries have dealt with the crime of enforced disappearances. The chapter will analyse the transitional justice mechanisms that Morocco, South Africa and Kenya have implemented to counter enforced disappearances. The discussion of each country will include a historical context, the transitional justice mechanisms implemented, and the challenges faced.

Morocco

4.2 Historical context

Morocco gained its independence from France in 1956, and the monarchy was restored. However, the struggle for independence was a source from which post-independence violence and conflict would spring. The monarchy felt threatened by two political parties, namely, the Istiqlal Party (conservative nationalist) and the Union National des Forces Populaire (a leftist offshoot of Istiqlal). In view of this threat, the monarchy sought to eliminate members of the two parties.¹

King Mohamed V, the first ruler after independence, carried out a reign of terror (also known as the years of lead) in regions populated by what he perceived to be his

¹ Maghraoui A M 'Democratization in the Arab World: Depoliticization in Morocco' (2002) 13 *Journal of Democracy* 4.

opponents. For example, in the Northern rif region in 1958 there was an uprising that was brutally crushed, leading to the loss of thousands of lives. In 1961, Hassan II inherited the throne and continued with the legacy of brutality, using appeasement as a technique to reduce opposition to the monarchy. For example, he provided handsome business opportunities and well-paying government jobs for politicians opposing his rule. When this failed, he simply eliminated his opponents.² For example, between the 1960s and 1970s, there was a widespread onslaught on members of the left-leaning National Union of Popular Forces Party (UNFP), and its leader Mehdi Ben Barka was forced into exile in France and then forcibly disappeared. It is reported that he was later killed by a trio of Moroccan, French and American security agents.³

Between 1970 and 1971, there were two unsuccessful coup d'état attempts. This led to massive reprisals by the monarchy against anyone thought to have participated in the failed coup d'état. Enforced disappearances increased sharply, so too the number of places for secret detention. The infamous secret detention places included Tazmamert, Agdz, Qal'al m'gouna, Dur al -mokri and Derb moulay cherif.⁴ During this time until 1975, the Sahrawis in the region of Western Sahara suffered the most reprisals. Morocco had always laid claim to the territory of Western Sahara and this remains a contentious issue up to the present day. Currently, Western Sahara is on the United Nations list of non-self-governing territories.⁵ The Sahrawis desired to establish an independent Sahrawi Arab Democratic Republic (SADR) and they formed the Polisario front. After they signed a peace treaty with Mauritania, they had to fight against

² Maghraoui A M, 'Political Authority in Crisis' (2001) 218 *Middle East Report*.

³ International Centre for Transitional Justice *Transitional Justice in Morocco: A progress report* (2005) 1-11.

⁴ International Centre for Transitional Justice *Transitional Justice in Morocco: A progress report* (2005) 7.

⁵ United Nations *United Nations and Decolonisation report* available here <http://www.un.org/en/decolonization/nonselvgovterritories.shtml> (accessed on 26 October 2016).

Morocco because after the Spanish colonialists had left, both Morocco and Mauritania had started claiming ownership to the Western Sahara. According to Amnesty International, over 900 people disappeared from the Western Sahara region from mid-1960s to the early 1990s.⁶ However, the International Centre for Transitional Justice (ICTJ) estimates that, given the difficulty of detecting enforced disappearances, the number of disappeared persons could be as high as 2 000, as thousands of people are still unaccounted for.⁷

4.2.1 Transitional Justice Mechanisms implemented

In 1990, there were two publications which exposed the human rights abuses in Morocco to the whole world. One was a report by Amnesty International, which in great detail showed the human rights abuses at the Tazmamert prison that King Hassan II had always denied even existed.⁸ The report was widely circulated in many countries with which Morocco had diplomatic ties. The second publication was a book entitled *Notre Ami le* authored by Roiby Gilles Perault in Paris, France, where most Moroccan exiles were based. The book described the numerous human rights abuses and disclosed the location of several secret detention centres within Morocco. However, the book was banned in Morocco.⁹ These publications embarrassed the monarchy of Morocco. In response to these developments, in 1991 the King released 300 persons who had been disappeared. Some had been disappeared for almost 18 years.¹⁰

⁶ Amnesty International *Turning the Page: Achievements and Obstacles* available at <https://www.amnesty.org/en/documents/mde29/001/1999/ar/> (accessed on 26 October 2016).

⁷ International Centre for Transitional Justice *Transitional Justice in Morocco: A progress report* (2005) 3 - 13.

⁸ Amnesty International *Disappearances and political killings: Human rights crisis of the 1990s, a manual for action, Chapter C-6, Morocco: The "disappeared" reappear* (1993) 64 - 77.

⁹ International Centre for Transitional Justice *Transitional Justice in Morocco: A progress report* (2005) 8.

¹⁰ International Centre for Transitional Justice *Transitional Justice in Morocco: A progress report* (2005) 8.

4.2.2 The King's Human Rights Council

In 1998, the King established the King's Human Rights Council whose purpose was to advise him on all matters concerning human rights. The first task given to the council was to investigate the cases of disappeared persons in Morocco. The council's work was to evaluate how legal and administrative laws had promoted a culture of impunity. For example, the Code on Criminal Procedure did not limit the time spent in police custody. The council recommended that code be amended and established that there were only 112 cases of disappeared people. It found that 56 had died, 12 were declared alive but their place of residence was unknown and it could not establish the fate of 44 people. These findings were criticised as inaccurate by relatives of the disappeared and NGOs.¹¹ Not a single Sahrawi case had been investigated and there were no details about the persons declared dead. Also, the council's work had not directly dealt with the legacy of oppression by the Monarchy during the years of lead. However, the council set in motion a positive trend for development of a culture of accountability for human rights abuses. In its recommendations to the king, it requested that the king set up another committee to investigate thoroughly disappearances within Morocco and to set up a reparations committee to provide compensation to the victims of enforced disappearances.¹²

4.2.3 The Independent Arbitration Panel

In 1999, the king approved the implementation of an Independent Arbitration Panel to determine the different levels of compensation for cases of arbitrary detention and enforced disappearances. When the king died, his successor Mohamed VI promoted the

¹¹ NGOs which were active in the public domain in Morocco include Moroccan Association for Human Rights, Moroccan Organisation for Human Rights and Amnesty International.

¹² International Centre for Transitional Justice *Transitional Justice in Morocco: A progress report* (2005) 13.

panel's work and acknowledged state responsibility for the disappearances. The panel commenced its work on 1 September 1999 and set a deadline for receiving applications for compensation to be 31 December 1999. Though this was a rigid deadline, it received 5 217 applications and then over 6 000 applications were submitted after the deadline. It operated for four years. The panel found 3 681 cases to be successful and it awarded a total of US \$100 million as compensation. It rejected 889 cases since they had no relation to enforced disappearances or arbitrary detention, and 133 cases were also rejected because they lacked sufficient evidence.¹³

However, the panel was criticised firstly for the inconsistencies in the amounts of money given to different individual victims. The method that the panel used to compute the amount of money to give to a victim was highly contentious. Secondly, the panel reparations were solely of a monetary nature yet the victims and their families had hoped that they would be issued with death certificates for their deceased relatives, the return of any body parts of the deceased, and health services, including psychosocial support. Thirdly, the panel did not investigate extra-judicial killings even though they are common when enforced disappearances take place. Fourthly, the panel set a tight deadline within which to receive applications and as a result, over 6 000 applications were ignored. Fifthly, there was no publicity about the work of the panel so its impact was felt only by the few who had known about it.¹⁴

4.2.4 The Equity and Reconciliation Commission

An NGO, the Moroccan Forum for Truth and Justice began a campaign for an independent truth commission and created awareness for the need for a broader

¹³ International Centre for Transitional Justice *Transitional Justice in Morocco: A progress report* (2005) 11.

¹⁴ International Centre for Transitional Justice *Transitional Justice in Morocco: A progress report* (2005) 11-15.

working definition of reparations. Several conferences were organised in Morocco during 2003 and a consensus was reached to present a formal request to the king to establish a truth commission. The king acceded to the request and set up a truth commission by decree called a *dahir*.¹⁵ He inaugurated the commission on 7 January 2004. The truth commission was called the “Equity and Reconciliation Commission.” Some of the commissioners were former arbitrators on the Arbitration Panel and others were prominent human rights activists, including the commission’s President, Driss Benzekri, who himself had been a victim of an enforced disappearance and torture. ¹⁶

The mandate of the commission was to investigate human rights violations from the time of independence in 1956 until 1999. However, its subject matter was limited to enforced disappearances and cases of arbitrary detention. Its territorial jurisdiction included violations committed both in Morocco and Western Sahara. It had three working groups, namely, the Investigations working group, whose purpose was to investigate cases of enforced disappearances not yet clarified. Second, the Reparations working group, whose purpose was to complete the work of the earlier arbitration board on reparations for moral and material damages suffered by victims of enforced disappearances. Third, was the Research working group whose purpose was to carry out the necessary research as requested by the commission. ¹⁷

Truth Commissions expert, Priscilla Hayner, has praised the Equity and Reconciliation Commission as one of the strongest truth commissions.¹⁸ Apart from being the first of its kind in the Arab world, it received massive publicity. Its workings were recorded live

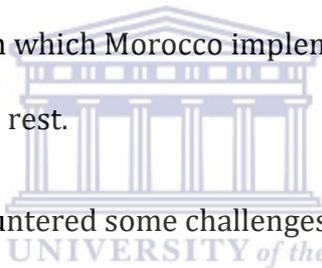
¹⁵ Kingdom of Morocco, Dahir number 1.04.42 issued on April 10, 2004.

¹⁶ Kingdom of Morocco *Summary of the Final Report of the Justice and Reconciliation Commission* (2005) 5.

¹⁷ Kingdom of Morocco *Summary of the Final Report of the Justice and Reconciliation Commission* (2005) 6.

¹⁸ Hayner P B *Unspeakable truths: Transitional justice and the challenge of truth commissions* (2011) 42.

on Moroccan national television and radio and were broadcasted throughout the Middle East region by *Al-Jazeera*, a popular broadcasting network in that region. The commission identified also state actors who were responsible for the disappearances. It provided reparations to more than 7 000 victims who had applied, giving out more than US \$ 100 million and starting a communal reparations program. This included providing resources to meet the social and economic needs of specific communities such as Zagora and Hay mohamedi in Casablanca. The commission's work resulted also in the creation of memorials at former centres of detention such as the Tazmamert prison.¹⁹ By 2006, the commission had paid reparations amounting to US \$ 85 million to contribute to provision of health services in the areas ignored by the panel, for example Al-hoceima and Khenifa. The efficiency with which Morocco implemented its reparations program makes it to stand apart from the rest.



However, the commission encountered some challenges during its operations. First, there was only one permanent office located in Rabat. This meant that the operations of the commission were confined to its main office or where the hearing was taking place. As a result, it was not accessible to all who needed its services. Second, some victims perceived it as lacking independence because some of the commissioners had been judges in the Arbitration Panel. They therefore could not tell whether there was a difference between the two or not. Third, the commission also cancelled its only hearing in the Western Sahara region. The Western Sahara was gravely affected by enforced disappearances and hearings held there would have added very important knowledge and material to the transitional justice discourse in Morocco. Finally, the commission

¹⁹ Kingdom of Morocco *Summary of the Final Report of the Justice and Reconciliation Commission* (2005) 15.

was unable to solve some cases of enforced disappearance despite promising the victims that it would do so.²⁰

In sum, the pivotal transitional justice mechanism employed by Morocco to combat enforced disappearance was the Equity and Reconciliation Commission. It was set in motion by the Independent Arbitration Panel which was established by the King's Human Rights Council. The Equity and Reconciliation commission was the first of its kind in the Arab world, and has been exemplary with the efficiency within which it ensured that reparations are paid out to victims. In addition, it promoted social and economic development in areas that had suffered the brunt of the years of lead which ushered in numerous disappearances. Its major shortcoming was its failure to address the issue of enforced disappearances in the Western Sahara.



²⁰ Kingdom of Morocco *Summary of the Final Report of the Justice and Reconciliation Commission* (2005) 10.

South Africa

4.3 Historical context

Native black South Africans suffered numerous human rights abuses during the reign of the colonial apartheid regime. The black South Africans were stripped of their human rights. Apartheid was institutionalised in virtually every sector of life. The black South Africans, through organisations such as the Africa National Congress (ANC), fought back against the apartheid regime. The regime reacted swiftly and vehemently against any opposition. Enforced disappearances were amongst the human rights violations perpetrated by the regime. Notable persons who were disappeared included Mtimukulu Sphiwo, Phila Ndwande and many others.²¹

However, because international pressure against the apartheid policy and the economic sanctions applied by the international community, the regime agreed to negotiations with the ANC between 1990 and 1993. Democratic elections were held in 1994, a new constitution was passed by the Parliament, and a Truth and Reconciliation Commission was set up by Parliament.²²

Transitional Justice Mechanism implemented

4.3.1 The Truth and Reconciliation Commission

The Truth and Reconciliation Commission (TRC) was established under the Promotion of National Unity and Reconciliation Act.²³ The TRC was in operation for seven years (from 1995 – 2002). It was given a mandate to investigate human rights abuses such as torture, abductions, disappearances, murder, and others in between the timeframe

²¹ Institute for Justice and Reconciliation *Truth, Justice, Memory – South Africa's Truth and Reconciliation Process* (2008) 1-5.

²² Republic of South Africa *Truth and Reconciliation Commission Volume 1* (2003) 24-44.

²³ Republic of South Africa, Promotion of National Unity and Reconciliation Act, No. 34 of 1995.

1960 – 1994 committed by the state and liberation movements. The TRC had three committees, first the Human rights violations committee whose duty was to hear the human rights violation statements and then refer the victims to the reparations and rehabilitation committee.²⁴ It received 21 290 statements and identified 19 050 as victims of violation. From these, it selected 2 000 people who told their stories publicly. However, since it could investigate only human rights abuses from 1960, numerous human rights abuses committed by the apartheid regime from 1948, when apartheid became an official policy, were ignored. The committee has also been criticised for its definition of human rights violations because it did not include gender violence.²⁵

The second committee was the amnesty committee whose duty was to grant amnesty to an applicant in exchange for receiving a testimony of the whole truth. An applicant was allowed to apply for amnesty in reference to any act committed between 1 March 1960 and 6 December 1993. The application would then be considered and would be either rejected or accepted. Applicants had to testify under oath and were cross-examined to establish the veracity of their involvement in politically motivated crimes. The amnesty commission received 7 112 applications. It accepted only 849 and rejected 5 392. The Amnesty Committee's decision could be subjected to review by the High Court. To date, there have been only eight review proceedings. The Amnesty committee forwarded 800 cases to the National Prosecuting Authority of South Africa (NPA) but there have only been five prosecutions.²⁶

²⁴ Republic of South Africa *Truth and Reconciliation Commission ,Human Rights Committee definition of Human rights violation historical context Volume 2* (2003) 1-42.

²⁵ Institute for Justice and Reconciliation *Legacy of the Truth and Reconciliation Commission* (2008).

²⁶ Institute for Justice and Reconciliation *Legacy of the Truth and Reconciliation Commission* (2008).

The third was the reparations and rehabilitation committee whose purpose was to help restore dignity and assist in the healing process. The committee had a five-part plan comprising interim reparations, individual reparations grants, symbolic reparations, legal and administrative measures, community rehabilitation programmes, and institutional reform. The reparations and rehabilitation committee envisioned a restorations process which included individual survivors, their families and communities being healed, thus creating space for healthy co-existence and non-repetition.²⁷

The committee recommended each victim be paid a reparation grant of ZAR 21 700 per annum for six years. However, the government made only a once-off payment of ZAR 30 000.²⁸

The Human rights committee identified four categories of missing persons.²⁹ It identified those who were victims of enforced disappearances, those missing in exile, those who had gone missing due to periods of unrest, and cases of indeterminate cause. It established that 474 people were missing. This was in sharp contrast to the estimation by the Khulumani support group which had stated that at least 2 000 people are still missing,³⁰

The TRC's final report recommended that a task team be set up to investigate the unresolved cases of missing persons that had been reported to the TRC. In 2004, the Missing Persons Task Team was established within the Priority Crimes Litigation Unit

²⁷ Institute for Justice and Reconciliation *Legacy of the Truth and Reconciliation Commission* (2008).

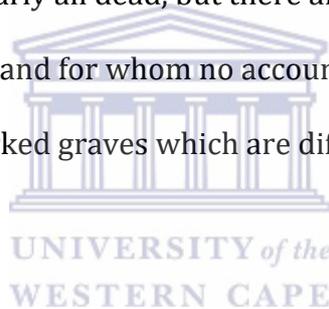
²⁸ Institute for Justice Reconciliation *Legacy of the Truth and Reconciliation Commission* (2008).

²⁹ Republic of South Africa, *Truth and Reconciliation Commission, Human Rights Committee Volume 2* (2003) 1-42.

³⁰ Aronson J D, 'The strengths and limitations of South Africa's search for apartheid era missing persons' 2011 *International Journal of Transitional Justice* 262 – 281.

(PCLU) in the National Prosecution Authority of South Africa (NPA) in 2004. The task team is headed by Madeleine Fullard, a former researcher with the TRC who works with the Argentinean Forensic Anthropology Team. The team investigated cases of missing persons who disappeared in political circumstances from 1 March 1960 to 10 May 1994. To date, 54 exhumations have taken place. For example on 12 March 2013, the NPA exhumed graves of Sono and Shabalala who had been couriers for the Umkhonto we sizwe (MK, meaning spear of the nation), the armed wing of the ANC in exile. This was after confirmation that the family had positively identified them.³¹

The main challenge faced by the NPA is that most of the eye witnesses to the murders during the apartheid era are nearly all dead, but there are still very many people whose whereabouts are still unknown and for whom no account can be given.³² In most cases the killed were buried in unmarked graves which are difficult to detect without prior knowledge.



³¹ Republic of South Africa, 'NPA's missing persons task team to exhume graves of Sono and Shabalala' 11 March 2013 available here <http://www.gov.za/npas-missing-persons-task-team-exhume-graves-sono-and-shabalala> (accessed on 26 October 2016).

³² Fullard M *The disappeared are reappearing: the art of memory* 11 August 2016, Presentation at the Institute for Justice and Reconciliation(IJR), IJR office, Hartfield street, Gardens, Cape Town.

Kenya

4.4.1 Historical context

Kenya obtained its independence from the British colonialists on 12 December 1963.

After independence, the presidents of Kenya continued the colonialists' policy of ruling people by use of divide and rule policy. President Jomo Kenyatta, who was of the Kikuyu tribe during his tenure from 1963 to 1978, ensured that the Kikuyu benefitted unfairly from the national cake to the detriment of other tribes. He put in place land reforms in which most of the fertile and arable land recovered from the British colonialists was handed over to the Kikuyu people. President Arap Moi, who ruled from 1978 – 2002, was of the Kalenjin tribe and ensured that the people who were of the Kalenjin tribe were elevated economically at the expense of other tribal groups. During his reign there were many corruption scandals and he ran Kenya as a one-party state. Opposition political parties were banned because of the then existing tension among the tribes. Moi dealt ruthlessly with his opponents. Examples are massacres perpetrated at the in 1980 and in Wagallain 1984. Both these were investigated in 2011.³³ Before the end of his reign Parliament amended the constitution to allow for a multi-party system in which other political parties were allowed to participate. President Mwai Kibaki, who ruled from 2002 – 2013, was also a Kikuyu and ensured that the Kikuyu people continued to benefit economically and politically. He tried to ensure that Kenya would recover economically and its annual economic growth increased. However, he failed to address rampant tribal conflicts caused by unequal access to economic opportunities and to land, as well as pervasive corruption.³⁴

³³ Republic of Kenya *Truth Justice and Reconciliation Commission Volume 1* (2013) 1-3.

³⁴ Republic of Kenya *Truth, Justice and Reconciliation Commission Volume 1* (2013) 1-3.

The 2007 Presidential elections were contested fiercely by two candidates. On the one hand was Mwai Kibaki of the National Rainbow Alliance, which was composed mostly of Kikuyus, and on the other was Raila Odinga of the Orange Democratic Movement, which was dominated by the Luo and Kalenjin tribal groups. All parties in the election accused each other of vote rigging. When the electoral commission declared Kibaki the winner on 30 December 2007 he was sworn in hastily sworn in that very evening.³⁵

Odinga refused to contest the election results in court, stating that, “the courts are controlled by Kibaki.” He instead encouraged all his supporters to reject the results of the elections. This sparked off tribal riots and violence across the whole country, with attacks aimed mainly against the kikuyus. An estimated 1 000 people were killed and over 300 000 were displaced. John Kuofofor, the Ghanaian president at that time, met with both Kibaki and Odinga separately and he described both dialogues as encouraging.³⁶ Kofi Annan subsequently mediated the dispute between Kibaki and Odinga. They signed a peace agreement on 28 February 2008 which known as the National Accord and Reconciliation Act. They agreed to form a coalition government. Kibaki became president and Odinga prime minister.

The peace negotiations included the setting up of several commissions of inquiry which included the Commission of Inquiry on Post Election Violence, the Independent Review Commission on the Elections, the National Ethnic and Race Relations Commission and the Truth, Justice and Reconciliation Commission.³⁷

³⁵ Republic of Kenya *Truth, Justice and Reconciliation Commission Volume 1* (2013) 1-3.

³⁶ Khadiagala G M ‘Forty days and nights of peace making in Kenya’ 7 *Journal of African elections* (2008) 1 - 29.

³⁷ United States Institute of Peace information about the peace process in Kenya available here, <https://www.usip.org/publications/truth-commission-kenya> (accessed 26 October 2016).

The Independent Review Commission on the Elections found that politicians on all sides were responsible for the post-election violence. It recommended that a special tribunal be set up to try all those implicated.³⁸ The commission submitted privately to Kofi Anan the names of those implicated in the post-election violence. In October 2008, the Kenyan parliament enacted a law providing for the creation of a Truth, Justice and Reconciliation Commission.³⁹

Transitional justice mechanism

4.4.2 The Truth, Justice and Reconciliation Commission

The mandate of the Truth, Justice and Reconciliation Commission was to investigate human rights abuses that occurred from 12 December 1963 to 28 February 2008. It was tasked with finding out the causes of tribal conflicts and economic crimes such as corruption and illegal acquisition of land, making recommendations regarding reparations for victims, making recommendations for prosecutions, and providing amnesty when satisfied that the applicant had made a full disclosure of the relevant facts. It had seven members, three of which were foreigners from the USA, Zambia and Ethiopia.

The commission established that it was mainly the Kenya Police Force and military who were responsible for the coerced disappearances and extra-judicial killings.⁴⁰ The commission distinguished the legal difference between extra judicial killings and enforced disappearances, but acknowledged that they were closely related. In its report it stated that though Kenya is a signatory to the International Convention for the

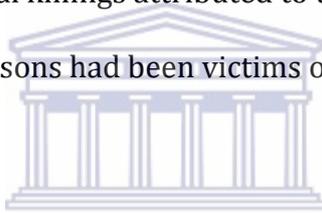
³⁸ Republic of Kenya Report of the Independent Review Commission (2008).

³⁹ United States Institute of Peace information about the peace process in Kenya available here, <https://www.usip.org/publications/truth-commission-kenya> (accessed 26 October 2016).

⁴⁰ Republic of Kenya, *Truth Justice and Reconciliation Commission Volume II A* (2013) 477.

Protection of All persons from enforced disappearance, it hardly submits any reports to the United Nations Working Group on Enforced Disappearances (UN WGEID). The UN WGEID's 2016 report stated that, despite all the urgent requests it made to the Kenyan government; it still has not received a reply about the status of the 72 people missing.⁴¹

The commission established, too, that there were no credible police records on who was in custody and who were killed extra-judicially.⁴² Therefore the exact number of persons who were forcibly disappeared from 1963 till 2008 is unknown. The commission in most cases had to rely on NGO reports and publications. In 2007, an NGO named the Kenya National Commission of Human Rights, monitored cases of enforced disappearances and extra judicial killings attributed to the Kenya police force. It established that at least 300 persons had been victims of extra-judicial killings and that over 200 are still missing.⁴³



The Truth, Justice and Reconciliation Commission bemoaned the fact that police were reluctant to investigate cases of enforced disappearances. The commission recommended reparations for the victims of enforced disappearances. It called for transformation of the Kenyan Police Force and for the construction of memorial structures such as at Nyayo house in Nairobi which was a notorious place of torture.⁴⁴

The commission completed its task and handed over a final report to the current President Uhuru Kenyatta on 21 May 2013. However, although it completed its task, the commission encountered numerous impediments in carrying out its mandate. These

⁴¹ United Nations Working Group on Enforced Disappearance 2016 Annual report available here http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/33/51 (accessed on 26 October 2016).

⁴² Republic of Kenya *Truth Justice and Reconciliation Commission Volume II A* (2013) 478.

⁴³ Kenya National Commission on Human Rights *The cry of blood* (2008).

⁴⁴ Republic of Kenya *Truth, Justice and Reconciliation Commission Volume IV* (2013) 3.

included political pressure being brought to bear upon the Kenyan commissioners to alter the report on the chapter on land redistribution. The commission also lost the support of civil society organisations in Kenya because its first chairperson, Kiplagat, had been implicated in numerous human rights abuses during the reign of Daniel Arap Moi. His presence on the commission led many human rights activists to question the credibility of the commission.⁴⁵ Kiplagat eventually had to step down from the commission. The mandate of the commission to investigate every human rights violation from 1963 -2008 was also too broad and vague.⁴⁶

The Commission was the main transitional justice mechanism used in Kenya to address the crime of enforced disappearance. The commission's work exposed the fact that tribal divisions continued, even within political parties, and that unequal access to economic opportunities was a major cause of the conflict. It made strong recommendations that have the potential to restore peace to Kenya and to prevent enforced disappearances. Most importantly, it singled out the need for an institutional reform of the Kenya Police Force and the military, both of which have been at the forefront of committing enforced disappearances.

4.5 Conclusion

The purpose of this chapter was to compare how three African countries that have dealt with the crime of enforced disappearances.

It illustrated how Morocco used the Equity and Reconciliation Commission to deal with enforced disappearances in both Morocco and the Western Saharan region. South Africa

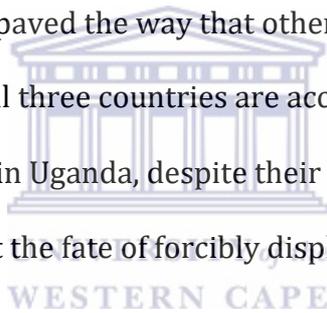
⁴⁵ International Centre for Transitional Justice *Lessons to be learned; An analysis of the final report of Kenya's Truth, Justice and Reconciliation Commission* (2014) 2.

⁴⁶ International Centre for Transitional Justice *Lessons to be learned; An analysis of the final report of Kenya's Truth, Justice and Reconciliation Commission* (2014) 4.

used the Truth and Reconciliation Commission to bring healing to victims of enforced disappearances or their families. Kenya used the Truth, Justice and Reconciliation Commission to deal with enforced disappearances. The three countries adopted truth commissions to deal with the crime of enforced disappearances but that there have been no prosecutions in any of them to follow up on the findings and recommendations of their respective truth commissions.

Morocco was by far the most generous country when it comes to making reparations, with South a far second. It is hoped that once the reparations are made available to victims in Kenya, for this will restore their dignity.

All three comparator countries paved the way that other countries can follow. The reports of the commissions in all three countries are accessible on the internet, unlike the reports of the commissions in Uganda, despite their being the first to be mandated with uncovering the truth about the fate of forcibly displaced persons.



CHAPTER 5

RECOMMENDATIONS AND CONCLUSION OF THE STUDY

5.1 Introduction

The purpose of this chapter is to provide recommendations to Uganda on dealing with the crime of enforced disappearances and to conclude the research paper by summarising its major findings.

5.2 Recommendations to the Government of Uganda

The government is encouraged to expedite efforts of documenting persons who suffered human rights abuses in northern Uganda, including those who disappeared during the conflict with the LRA and to make the findings public. This will help victims know the fate of their relatives and friends who are still missing. This documentation program should be coupled with the provision of counselling services and other related health services to help the victims deal with the trauma of giving testimony. Also, it would be beneficial to all concerned Ugandans if the government made public the findings of the previous two truth commissions.

It is incumbent upon the government to improve its relationship with NGOs in order to address the issues of the victims of conflict more thoroughly. The government should ensure that instead of enacting repressive laws that are aimed at curtailing the work of NGOs, they should work together as partners to help the victims.

The government and NGOs need to prioritise economic empowerment for the victims of the conflict in order to help them live a dignified life and break the vicious cycle of poverty. This is because most families lost their bread earners and are helpless.

Empowerment programs would include providing loans for small businesses, providing scholarships to help children attend school, and teaching vocational skills such as plumbing and carpentry to increase chances of employment.

The government needs to put in place legal reforms that will help family members of disappeared persons recover property that their family members owned. The current law in Uganda on missing persons caters inadequately for persons disappeared because its criteria for a missing person are narrow. It defines a missing person as one who disappears from Uganda without making provision for the management of his estate and cannot be located by any investigation.¹ This narrow definition which has resulted in inadequate investigations, with many persons not categorised as missing and their estates have been tampered with by third parties. Also, due to the uncertainty regarding whether or not the persons have been disappeared and whether or not they will return, and if they do return when they will do so, the family is unable to make closure and carry on with its life. However, once there is a law providing for a category of “victims of an enforced disappearances”, it will help surviving family members to inherit the family property.

The government needs to establish a truth commission that will deal specifically with the conflict in northern Uganda. The focus of the commission should be specifically on the fate of persons forcibly disappeared and the persons responsible for the disappearances.. This investigation should be followed by exhumations to identify the remains of those disappeared and later killed. The remains can be given to family members for proper reburial.

¹ Republic of Uganda The estate of missing persons (Management) Act of 1973, s 1(f) and S.20.

Prosecutions should be pursued once the judiciary is independent and the political leadership is willing to pursue justice for the victims of enforced disappearances and ensure that the path for true reconciliation is paved after dealing with those responsible for disappearances. Research from other jurisdictions such as Spain and Argentina has showed that prosecutions help to make the truth authoritative.²

The government is encouraged to support communities and families affected by enforced disappearances through supporting the memorialisation initiatives already being implemented by NGOs. For example, this might include creating a public holiday on the national calendar to honour all persons disappeared during the conflict.

5.3 Recommendations to NGOs

The NGOs working on issues of transitional justice and enforced disappearances need to forge partnerships to share their experiences in the search for disappeared persons. An example of this kind of partnership is the African Transitional Justice Research Network, which is a consortium of NGOs in Africa working on transitional justice issues. This network of NGOs organises on an annual basis a transitional justice institute in which transitional justice practitioners from various countries converge to share experiences and develop research on this subject in Africa. Ugandan NGOs need to liaise or join this network.³

NGOs should continue to advocate and lobby for the rights of victims at both local and international forums. This will help to ensure that the issues affecting victims of war are constantly in the media and less likely to be ignored by policy makers and legislators

² Rubin SJ 'Transitional justice against the state: Lessons from Spanish civil society led exhumations' (2014) 8 *International Journal of transitional justice* 99.

³ Mncwabe N 'African Transitional Justice research network: Critical reflections on a peer learning process' (2010) 4 *International Journal of Transitional Justice* 497.

5.4 Conclusion

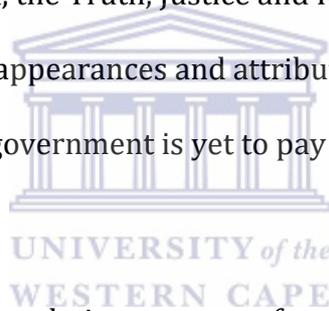
Chapter 1 of the study has showed that there is a dearth of literature on the subject of enforced disappearances in Africa. It is common for cases of enforced disappearance to be under-reported despite the fact that the continent has experienced many conflicts.

Chapter 2 has explained the international law response to the crime of enforced disappearance through the adoption of a declaration and conventions. These are the Declaration on the Protection of All Persons from Enforced Disappearance, the Inter-American Convention on Forced Disappearance of Persons, the Rome Statute of the International Criminal Court (ICC) and the International Convention for the Protection of All Persons from Enforced Disappearance (ICED). All these conventions declare that enforced disappearances are criminal acts.

Chapter 3 has dealt with the crime of enforced disappearances in Uganda and the transitional justice response. It has established that though Uganda instituted truth commissions in 1974 and 1986 to deal with enforced disappearances, the findings of these commissions have not been made public. In the aftermath of the conflict with the LRA, the government of Uganda has tried to restore peace, but its methods, such as use of amnesty, referral of the top leadership of the LRA to the ICC, and the establishment of the ICD to try those most responsible for the conflict in Uganda, have been geared only towards the perpetrators and has ignored the victims of the conflict. NGOs have filled that void by promoting memorialisation efforts, setting up museums and documentation centres, promoting informal truth telling and the use of traditional

justice mechanisms. These have helped ensure that the victims of the conflict are part of the transitional justice discourse in Uganda.

Chapter 4 has been a comparative study of how three African countries have dealt with the crime of enforced disappearances in Africa. It has explained how Morocco used the Equity and Reconciliation commission to address the legacy of enforced disappearances following up on work done previously by the King's human rights council and the Independent Arbitration Panel. Reparations were provided to victims at an individual and community level. Regarding South Africa, it has been explained how it used the TRC to deal with enforced disappearances. Reparations were provided to victims as a one-off final payment. Finally, in Kenya, the Truth, Justice and Reconciliation Commission dealt with the history of enforced disappearances and attributed responsibility to the army and police force. However, the government is yet to pay reparations to any of the victims.



Chapter 5 has provided recommendations as a way forward for the government of Uganda and NGOs dealing with this same issue. It is hoped that the government can help victims secure justice for this crime by establishing what happened to the disappeared persons and providing a suitable working environment for NGOs to work as partners for the benefit of the victims.

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