

**EXAMINING THE USE OF TRANSITIONAL JUSTICE  
MECHANISMS TO REDRESS GROSS VIOLATIONS OF  
HUMAN RIGHTS AND INTERNATIONAL CRIMES IN THE  
NORTHERN UGANDA CONFLICT**

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## DECLARATION

I, ROBERT MUGAGGA MUWANGUZI, declare that 'EXAMINING THE USE OF TRANSITIONAL JUSTICE MECHANISMS TO REDRESS GROSS VIOLATIONS OF HUMAN RIGHTS AND INTERNATIONAL CRIMES IN THE NORTHERN UGANDA CONFLICT' is my own work and that it has not been submitted before for any degree or examination in any other university, and that all sources I have used or quoted have been indicated and acknowledged as complete references.

Signed: \_\_\_\_\_

**Robert Mugagga Muwanguzi**

**1st July 2017**



Signed: \_\_\_\_\_

**Professor Lovell Fernandez**

**1st July 2017**

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Putting together this academic piece has not been easy. Even the long journey leading to this feat was riddled with many challenges but the journey was made easier and more enjoyable by a number of people and institutions. I cannot begin to conclusively mention each and every one of them here, but am very grateful to all.

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Last but certainly not the least, God the Almighty has been a mainstay in my life and throughout the execution of this study, I am eternally grateful to Him!

## DEDICATION

This dissertation is dedicated to the following people: Taata James Francis Kigumba Kanya and Maama Margret Nabwere Ssejjobwe Kanya (for the gift of life and hope); Taata ne Maama David Bikokoto Mayanja (for your selfless hearts and sacrifices); Ba Maama bange abalungi enyo Beatrice Ssejjobwe, Dorothy Mirembe and Victo Ssejjobwe (for your undiminishing love), Jjaja wange Margerita Ssejjobwe and lastly but certainly not the least Sengas Gertrude Kanya and Robinah Kanya. You all have made deep footprints in my life.

One way or the other, you all have made my life bearable amidst its tragedies!



## LIST OF ACRONYMS

AAR	Agreement on Accountability and Reconciliation
ACS	Agreements on Comprehensive Solutions
AWDC	Acholi War Debt Claimants
BJP	Beyond Juba Project
DRC	Democratic Republic of Congo
CICC	Coalition for the International Criminal Court
CPA	Comprehensive Peace Agreement
DPP	Directorate of Public Prosecutions
FPA	Final Peace Agreement
GOSS	Government of South Sudan
HSM	Holy Spirit Mobile Forces
HURIFO	Human Rights Focus
HRW	Human Rights Watch
Hurinet-U	Human Rights Network Uganda
ICC	International Criminal Court
ICD	International Criminal Division
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal of Yugoslavia
ICTJ	International Center for Transitional Justice
IDP	Internally Displaced Person
IPSS	Institute of Peace and Strategic Studies
JLOS	Justice Law and Order Sector
JRP	Justice and Reconciliation Project
KKA	Ker Kwaro Acholi
LRA	Lord's Resistance Army
NGO	Non-Governmental Organisation
NRA	National Resistance Army
NURP	Northern Uganda Reconstruction Program



NUTJWG	Northern Ugandan Transitional Justice Working Group
OTP	Office of the Prosecutor
PRDP	Northern Uganda Peace, Recovery and Development Plan
RC	Resistance Council
RLP	Refugee Law Project
SPLA	Sudanese People's Liberation Army
TRC	Truth and Reconciliation Commission
TJWG	Transitional Justice Working Group
UCICC	Ugandan Coalition for the International Criminal Court
UN	United Nations
UNDP	United Nations Development Program
UNLA	Ugandan National Liberation Army
UPDF	Ugandan People's Defense Force



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## ABSTRACT

Uganda and her citizens have endured a troubled, violent, conflict-prone history since independence from the British on 9<sup>th</sup> October 1962. Conflict in Uganda, just like in many an African country, has its primary root causes in the colonial legacy which sowed a fertile ground for several other secondary causes of present day subsisting conflicts. During Uganda's various military conflicts millions have had their human rights and civil liberties violated with impunity. At the end of each conflict and / or crisis, Uganda has had to grapple with the challenge of finding a lasting solution amidst the significant losses made by the country, many ethnic groups and her citizens. No long term viable and efficient solution or mechanism has been introduced or instituted to forestall future conflicts. What appears to have been introduced or instituted are stopgap measures.

Since President Yoweri Museveni took over power on 26 January 1986, a military conflict has been raging in northern Uganda and the surrounding areas spanning eastern Uganda, South Sudan, the Democratic Republic of Congo (hereafter: 'DRC'), the Sudan and the Central African Republic (hereafter: 'CAR'). In this decades-old conflict, the war has primarily pitted the Lord's Resistance Army (hereafter: 'LRA') against the Uganda Peoples Defence Forces (hereafter: 'UPDF'). Like many conflicts, the more than twenty-year-old contestation has resulted in the gross violations of human rights of millions of people situated across five African states. The human rights violations, which have resulted in the commission of international crimes have been perpetrated and perpetuated with impunity by both warring parties (LRA and UPDF). Although initially an internal conflict, the conflict in northern Uganda has catapulted itself into an international conflict based on the parties involved, the interest generated, the crimes committed and the areas and people affected by it.

In 2007, the LRA and the UPDF signed a few preliminary peace agreements in Juba, South Sudan, with a view to ending the conflict. However, the LRA abandoned the peace talks because there was disagreement as to who was responsible for the atrocities perpetrated,

and how the accountability mechanisms envisaged in the peace agreements were to be implemented. A few years prior to these talks, five of the top leadership of the LRA had been indicted by the International Criminal Court for committing international crimes, but none from the UPDF or the political leadership of the Government of Uganda. Academics, scholars, policy analysts, diplomats, statesmen, lawyers, and civil society have all weighed in with proposals (transitional justice mechanisms inclusive) on how to end the northern Uganda military conflict and most importantly how to deal with the criminality that it spawned.

This thesis investigates how transitional justice mechanisms and a certain extent international criminal justice mechanisms have been used, or are being proposed to be used, to redress gross violations of human rights and international crimes that were committed in the military conflict in northern Uganda. It may be pointed out at the outset that, how to deal with a country's legacy of gross violations of human rights or situations where international crimes are committed is a major challenge for many post-conflict societies. For years now, emerging democracies and post conflict states have had to grapple with the issue of determining the appropriate mechanisms to be used to hold the persons responsible for the gross human rights violations to account, but at the same time ensure long-lasting peace prevails. Although there is no a universally agreed standard model for dealing with a country's atrocious or violent past, a number of scholars and policy-makers have advocated for use of certain Transitional Justice (hereafter: 'TJ') and Criminal Justice mechanisms. It is the conclusion of this study that such mechanisms could be used by post-conflict states or governments in developing appropriate and efficient policy and institutional frameworks for matters relating to conflict resolution, reparations, accountability, reconciliation and peace-building.

This thesis shows that much of the debate or research in this area has revolved around which transitional justice mechanisms should be used for dispensing justice or ensuring accountability, promoting peace and reconciliation in northern Uganda. At the centre of this debate is how to balance the varying competing interests after a conflict that gave rise to the commission of international crimes. It is generally assumed that there is a 'tension'

between the objectives of international criminal justice and international transitional justice mechanisms when both these notions are pursued together in post-conflict states or during ongoing conflicts such as in Uganda.

The study traces the history, root causes and impact of conflict(s) in Uganda generally and of the northern Uganda conflict, more particularly. It investigates also the current use, and in some cases, the proposed use of various TJ and or ICJ mechanisms in northern Uganda. To arrive at plausible conclusions and recommendations on how to redress the gross violations of human rights, the study incorporates and uses a comparative discourse of TJ mechanisms used by number post-conflict African states.



## CHAPTER ONE

### GENERAL INTRODUCTION

#### 1.1 INTRODUCTION

The Preamble to the 1995 Constitution of the Republic of Uganda partly captures the history, goals and vision of Uganda and her citizens. It provides as follows:

'We the people of Uganda: RECALLING our history which has been characterised by political and constitutional instability...COMMITTED to building a better future by establishing a social, economic and political order through a popular and durable national constitution and based on the principles of unity, peace, equality, democracy, freedom and social justice and progress. DO HEREBY ... adopt, enact and give to ourselves and our posterity this Constitution...'

The Preamble shows clearly that when the new Constitution was promulgated in 1995, Ugandans were conscious of their country's chequered history, which is tainted with conflict after conflict. Uganda, like many countries emerging from severe internal conflict or from oppressive and despotic rule, has to confront its past, the effect of which transcends the change that is sought.<sup>1</sup> Uganda has been afflicted by conflict since 1894, when the country was declared a British Protectorate.<sup>2</sup> The search for solutions to problems created by (armed) conflict in any given state is neither easy nor is it a given fact.

Many governments of countries undergoing political transition have, over almost the past three decades, set up accountability mechanisms aimed at holding to account all those who were most responsible for the atrocities perpetrated under the previous order. This is necessary for a number of reasons, not least of which is to redeem the dignity of the victims

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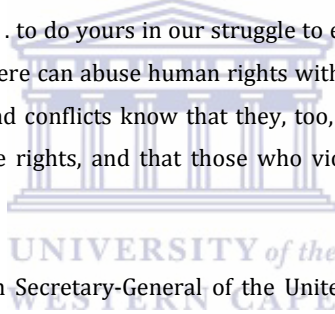
<sup>1</sup> See L.M. Keller (2007:210); CHR. Michelsen Institute (2011); United States Institute of Peace (2008:1). It should be pointed out that modern day conflicts are increasingly intra-state struggles, rather than delineated international conflicts involving several states.

<sup>2</sup> Some of these conflicts were brought about by struggles for independence or challenging colonial policies, religious wars, ethnic tension and differences, dictatorships, armed rebellion, and greed for political power.

of such egregious human rights violations. From the mid-1980s to the mid-1990s, transitional justice theorists tended to justify the need for accountability on the ground of establishing peace in the new democracy. More recent experiences have shown that justice and peace are not mutually exclusive, but are complementary to each other.<sup>3</sup> The challenge, therefore, is to balance the competing interests of confronting past human rights violations, punishing those who committed heinous crimes, and seeking redress for victims without undermining the peace process.<sup>4</sup> Uganda, too, faces this onerous task.

## 1.2 BACKGROUND TO THE STUDY

'In the prospect of an international criminal court lies the promise of universal justice. That is the simple and soaring hope of this vision. We are close to its realisation. We will do our part to see it through till the end. We ask you . . . to do yours in our struggle to ensure that no ruler, no state, no junta and no army anywhere can abuse human rights with impunity. Only then will the innocents of distant wars and conflicts know that they, too, may sleep under the cover of justice; that they, too, have rights, and that those who violate those rights will be punished'.<sup>5</sup>



These were the words of Kofi Annan, the then Secretary-General of the United Nations. Although this epic statement was made shortly before the International Criminal Court (ICC) was established, it could have been made any time in the past and in the future, for it

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<sup>3</sup> For a discussion of this debate, see M.C. Okello (2008:1). See also Y. Siman-Tov (2009:2); J.N. Clark (2011:3); A.K. Iversen (2009:5). Also see Address of Honourable Lloyd Axworthy, Minister of Foreign Affairs, Canada, at United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (15 June 1998), *quoted* in L.E. Fletcher and H.M. Weinstein (2002:578). The UN also emphasizes that justice is a key component in the consolidation of peace in post-conflict situations. See Report of the Secretary General on *The rule of law and transitional justice in conflict and post-conflict societies*, UN SC S/2004/616, General 23 August 2004.

<sup>4</sup> See A. Elena (2013:62); C. Loyle (2013:3/4; K. Ambos (2009:1/6); E. Posner and A. Vermeule (2004:761); Y. Sooka (2006:316).

<sup>5</sup> See Statement made by Kofi Annan, then United Nations Secretary-General, at the opening of the Preparatory Commission for the International Criminal Court, New York, 16 February 1999, *quoted* in A. Kirsten (2011: 309).

reflects universal hopes and desires. To be protected by the law and to be able to appeal to it when rights are violated arbitrarily is a cornerstone of the Rule of Law. Over the past half a century, judicial bodies have been established after each major episode of gross human right violations to hold the perpetrators accountable and to enhance the international character of the Rule of Law.<sup>6</sup> There has been, since the end of the Second World War, three generations of such international criminal bodies<sup>7</sup>, namely the Nuremberg and Tokyo Tribunals<sup>8</sup>; the Special United Nations ad hoc tribunals, namely the International Criminal Tribunal for the Former Yugoslavia (ICTY)<sup>9</sup> and the International Criminal Tribunal for Rwanda (ICTR)<sup>10</sup>; the Hybrid or Specialised Courts<sup>11</sup>, and the ICC.

The above-mentioned international tribunals show that the use of international criminal bodies or institutions<sup>12</sup> to adjudicate gross human rights violations during or after conflicts is not a novelty, but a practice to end impunity adopted by the international community since the mid-20<sup>th</sup> Century. The establishment of the permanent ICC was a milestone in

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<sup>6</sup> See M. Jonneke et al (2006:11).

<sup>7</sup> Either called a 'court' or 'tribunal'.

<sup>8</sup> See *Charter of the International Military Tribunal*, Appendix to the *Agreement for the prosecution and Punishment of the major War Criminals of the European Axis* of 8 August 1945, 39 *AJIL* (1945) suppl. 257.

<sup>9</sup> See *Statute of the International Criminal Tribunal for the Former Yugoslavia* (ICTR Statute), Annex to UN Security Council Resolution 827 (1993), available at [http://www.icty.org/x/file/Legal%20Library/Statute/statute\\_sept09\\_en.pdf](http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf) (accessed on 9th May 2014).

<sup>10</sup> See *Statute of the International Criminal Tribunal for Rwanda* (ICTR Statute), Annex to UN Security Council Resolution 955 (1994), available at <http://www.unictr.org/Portals/0/English/Legal/Tribunal/English/2007.pdf> (accessed on 9th May 2014).

<sup>11</sup> For example, the Extraordinary Chambers in the *Courts of Cambodia (ECCC)*, A/RES/57/228 B, 13 May 2003; the Special Court for Sierra Leone (SCSL), established by the Statute of the Special Court for Sierra Leone, Annex to UN Security Council Resolution 1315 (2000), available at <http://www.refworld.org/docid/3dda29f94.html> (accessed 9th May 2014); Special Tribunal for Lebanon (STL), established by the Statute of the Special Tribunal for Lebanon, Annex to UN Security Council Resolution 1757 (May 30, 2007), available at <http://www.stl-tsl.org/en/documents/statute-of-the-tribunal/statute-of-the-special-tribunal-for-lebanon> (accessed on 9th May 2014).

<sup>12</sup> When used in small letters 'international criminal courts', reference herein is to the three generations of such international criminal bodies as articulated under this chapter.



efforts so far taken towards ending impunity for those responsible for committing serious crimes. It is, however, debatable how far international courts like the ICC can in the same breath encourage or guarantee that peace, general stability and the social well-being for conflict-prone societies are secured whilst justice and accountability are pursued. It has been argued that such courts as those found in Uganda operate in a complex environment characterised by an ongoing armed conflict where one (or all) of the parties to the conflict is or are actually suspected of committing international crimes. Yet it may be the same party or parties that are involved in peace negotiations.<sup>13</sup>

All states emerging from internal violent conflict or despotic rule grapple with the issue of how to deal with the issues of ensuring accountability for gross violations of human rights, instituting peace-building mechanisms, and providing reparations for affected individuals or communities. In fact, the Preamble to the Rome Statute recognises the intrinsic link between concepts of peace and justice by noting that 'grave crimes threaten the peace, security, and well-being of the world' and affirming that, 'States Parties are determined to put an end to impunity for the perpetrators of these crimes and thus contribute to the prevention of such crimes.'<sup>14</sup>

During the Rome Conference that came up with the final draft of the ICC Statute, Lloyd Axworthy, the Canadian Minister of Foreign Affairs, described as follows this essential link between the concepts of peace and justice: 'By isolating and stigmatizing those who commit war crimes or genocide, and removing them from the community, the court will help to end cycles of impunity and retribution. Without justice, there is no reconciliation, and without reconciliation, no peace'.<sup>15</sup> On the other hand, in September 2009, the United Nations Secretary-General Ban Ki-Moon acknowledged that the debate is no longer between peace

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<sup>13</sup> See M. Otim (2012:1).

<sup>14</sup> See Preamble to the Rome Statute of the International Criminal Court, 2187 U.N.T.S. 90, entered into force 1 July 2002.

<sup>15</sup> See Statement by Lloyd Axworthy, then Canadian Foreign Affairs Minister, in his address at the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 15 June 1998, available at: <http://www.un.org/speeches/615can.htm> (accessed on 22nd February 2012).

and justice, but between peace and what kind of justice.<sup>16</sup>A few years ago, the standard prescription for dealing with mass atrocities arising from an armed conflict or war was to offer blanket amnesty to all perpetrators on all sides of a dispute, but today the dominant theory, promoted through the International Criminal Court, is that those bearing major responsibility for international crimes should be prosecuted.<sup>17</sup>

It is thus clear that the pursuit of peace, reconciliation, accountability and justice related to the commission of international crimes, although closely linked, often presents significant challenges to post-conflict states. This is as a result of the fact that individuals suspected of involvement in committing or perpetrating international crimes may in most cases play an unavoidable role in peace negotiations and in peace-building contexts.<sup>18</sup> The UN has argued that the consolidation of peace in the immediate post-conflict period, as well as the maintenance of peace in the long term, cannot be achieved unless the population is confident that redress for grievances can be obtained through legitimate structures for the peaceful settlement of disputes and the fair administration of justice.<sup>19</sup>

This study is about examining the northern Uganda armed conflict and analysing how various transitional justice mechanisms are being used or being proposed to be used to redress the gross violations of human rights that occurred within the conflict. Suffice to say that the northern Uganda conflict raged on militarily between the Lord's Resistance Army (hereafter: 'LRA') and the Ugandan government army known as the Uganda Peoples Defence Forces<sup>20</sup> (hereafter: 'UPDF') for over two decades, starting soon after the overthrow of the regime of Tito Okello Lutwa by guerilla rebel forces led by Yoweri Kaguta

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<sup>16</sup> See ICC Document, ICC-ASP/8/55, 1.

<sup>17</sup> See C. Villa-Vicencio (2009:11).

<sup>18</sup> See ICC Document, ICC-ASP/8/55, 1.

<sup>19</sup> See Report of the Secretary General on *The rule of law and transitional justice in conflict and post-conflict societies*, UN SC S/2004/616, General 23 August 2004.

<sup>20</sup> The 'UPDF' was previously called the 'National Resistance Army'. With the promulgation of 1995 Constitution of the Republic of Uganda, 'National Resistance Army' was renamed the 'Uganda Peoples Defence Forces'.

Museveni. Although the armed conflict was originally limited to the Acholi sub-region, it later spread to Lango sub-region, the West Nile sub-region (all in northern Uganda) and to the Teso sub-region (in eastern Uganda). At present the conflict has been exported outside Uganda<sup>21</sup> to neighbouring countries like the Central African Republic, South Sudan and the Democratic Republic of Congo. During the course of this conflict, gross violations of human rights were allegedly committed by both the LRA and the UPDF in various forms, including but not limited to killings, abductions of children and adults, sexual crimes, forceful displacements and maiming millions of people living in the region. The scale and nature of human rights violations perpetrated in the northern Uganda conflict have been deemed to amount to international crimes. Since the start of the conflict to the time of writing, no court, whether national, foreign or international, has convicted anyone for any of the grave crimes, whether they were perpetrated by the LRA or the UPDF. The victims of the conflict continue to await remedial justice now that the war has been brought to a temporary end.

The question that this study seeks to answer is how post-conflict states such as Uganda can or should use transitional justice mechanisms to address the gross violations of human rights or international crimes that were committed in the northern Uganda armed conflict. Various proposals have been put forward by scholars, civil society, technocrat civil servants, diplomats, traditional leaders, religious leaders, the LRA and the victims. Some of these proposals or suggestions are today being tested in practice while others remain moot and abstract. At the crux of this central debate concerning the how, which and when to use transitional justice mechanisms are a maze of secondary and competing debates that seem to be superseding the main discussion. These include contestations over whether international criminal justice (hereafter: 'ICJ') mechanisms should prevail over transitional justice (hereafter 'TJ') mechanisms; whether localised criminal justice mechanisms should take precedence over international criminal law; whether restorative justice should substitute retributive justice; whether the interests of national peace should be subordinated to the demands for justice; and whether the interests of victims should

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<sup>21</sup> Since 2006/2007, the LRA left Uganda and now operate in the countries of Central African Republic, South Sudan and the Democratic Republic of Congo.

dominate the interests of perpetrators. These polarising opinions have diverted attention from the main questions, which is how states such as Uganda, which are recovering from armed conflict should deal with gross human rights violations that have dehumanised citizens and that have elicited international disgust.

### **1.3 STATEMENT OF THE PROBLEM AND EPISTEMOLOGICAL BASIS OF THE STUDY**

This thesis analyses the potential use of transitional justice mechanisms in Uganda to redress the gross human rights violations committed in the northern Uganda military conflict.

The two parties to the conflict are the government of Uganda or the national army called Uganda Peoples Defence Forces<sup>22</sup> (hereafter: 'UPDF') headed by President Yoweri Kaguta Museveni and the Lord's Resistance Army (hereafter: 'LRA') headed by Joseph Kony. The LRA is a rebel group fighting to overthrow the Museveni-led government and create a state based on Kony's interpretation of the biblical Ten Commandments.<sup>23</sup> However, the fact that the LRA have attacked church-based institutions and members of the clergy does not lend credence to Kony's professed desire to found a state to be run on scriptural tenets. It is, therefore, hard to escape the impression that the primary objective of the LRA is to obtain state power in Uganda.

In northern Uganda, the bitter experience of an unending conflict has generated a remarkable commitment to reconciliation, healing and to the peaceful settlement of the conflict, rather than calling for retribution against the perpetrators of international crimes.<sup>24</sup> Civic, cultural and religious leaders have called on government to engage in dialogue with the LRA and to introduce a comprehensive amnesty for combatants involved

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<sup>22</sup> The Uganda Peoples Defence Forces replaced (in 1995 with the promulgation of the new Uganda Constitution) the defunct National Resistance Army that overthrew the previous Uganda government on 26<sup>th</sup> January 1986.

<sup>23</sup> See HRW (2012), Q&A on Joseph Kony and the Lord's Resistance Army.

<sup>24</sup> See A.Z. Lomo (2006:2).

in the conflict as a confidence-building measure for ensuring sustainable peace in the region.<sup>25</sup> This call for amnesty was underpinned by the ordinary people's faith in their cultural institutions to manage effective reconciliation, notwithstanding the international dimension of the crimes committed.

In 2007, after over two decades of war, the Government of Uganda and the Lord's Resistance Army (LRA) signed a number of peace agreements in Juba, South Sudan.<sup>26</sup> Under the Agreement on Accountability and Reconciliation, both parties committed themselves to promoting "national legal arrangements, consisting of formal and non- the conflict",<sup>27</sup> instituting formal criminal and civil justice mechanisms for trying people who committed serious crimes in the course of the conflict,<sup>28</sup> and providing different forms of reparations to victims of the conflict.<sup>29</sup> The above-mentioned agreement shows that Uganda is interested in pursuing both international, transitional and national criminal justice mechanisms.

The research problem at hand, therefore, involves an investigation of the effectiveness of using the various available transitional justice mechanisms to redress gross violations of human rights, restoring the dignity of an affected community, ensuring accountability, while ensuring sustainable peace for a post-conflict state. History has proven time and

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<sup>25</sup> See T. Allen (2006:117); A.K. Bangura (2008:2).

<sup>26</sup> See Agreement on Comprehensive Solutions between the Government of the Republic of Uganda and Lord's Resistance Army (2007)/ Movement, Juba, Sudan, 2 May 2007; and the Agreement on Accountability and Reconciliation between the Government of the Republic of Uganda and the Lord's Resistance Army / Movement, 29 June 2007.

<sup>27</sup> See Agreement on Comprehensive Solutions between the Government of the Republic of Uganda and Lord's Resistance Army (2007:3).

<sup>28</sup> See Agreement on Comprehensive Solutions between the Government of the Republic of Uganda and Lord's Resistance Army (2007:5).

<sup>29</sup> See Agreement on Comprehensive Solutions between the Government of the Republic of Uganda and Lord's Resistance Army (2007:8). The Juba Peace Agreements of 2006 acknowledged the need to grant reparations in various forms, including compensation, restitution and rehabilitation. This formed the basis for which the Ugandan Government was to frame the delivery of reparations to the victims.

again that the joint pursuit of peace, justice, reconciliation and eventually reparations in conflict-afflicted communities, where international crimes were committed, is a daunting task.<sup>30</sup> Individuals suspected of involvement in international crimes may more often than not play a key, unavoidable role in peace negotiations and peace building initiatives, although they are the same people who must be brought to account and who must make reparations. In effect, there cannot be sustainable peace without the perpetrators' consent to end the conflict, but the international community may demand a certain level of accountability. Victims, too, expect some form of reparations to be made to them.

A review of all the country situations under ICC investigation reveals that the common denominator to all of them is that there is a perceived tension between peace and justice.<sup>31</sup> There is, therefore, a need to reconcile the contradictory values embedded in the concepts of peace, justice, reconciliation, restoration and reparations. The emergence and development of international criminal law and transitional justice has called into question mechanisms that do not guarantee a co-existence among the interests of peace, justice and reparations.

All victims of gross human rights violations have the right to an effective remedy. The Human Rights Committee's General Comment 31, Paragraph 16, requires that "States Parties make reparation to individuals whose Covenant rights have been violated".<sup>32</sup> It is clear that without reparations made to individuals whose Covenant rights have been violated, the obligation to provide an effective remedy, which is crucial, is not discharged. In reality, experiences in different jurisdictions show that fighting impunity by using international criminal justice mechanisms has challenges of its own, since each new conflict situation reveals its own distinctive challenges and opportunities.<sup>33</sup> Transitional justice is

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<sup>30</sup> Examples in this case include: various European countries and Asia after the Second World War, Uganda, Kenya, South Africa plus countries in Eastern Europe and South America at the end of the Cold War.

<sup>31</sup> See Review Conference of the Rome Statute Document, RC/ST/V/M.8, 19.

<sup>32</sup> See Human Rights Committee, General Comment 31, Nature of the General Legal Obligation on State Parties to the Covenant, U.N. Doc CCPR/C/21/Rev. 1/Add.13/ (2004).

<sup>33</sup> See Review Conference of the Rome Statute Document, RC/ST/PJ/M.2, 1. See also G.M. Musila (2009:1).

applicable and can withstand situations where there is a complicated relationship with truth and history; yet it is through revisiting the past that one is better placed to understand the way forward.<sup>34</sup>

Gross violations of human rights usually take place during times of conflict, and the task of bringing to book the culprits most responsible for these violations is invariably initiated by the international criminal tribunals themselves. Usually, it is also an international criminal court that kick-starts or is at the centre of the debate concerning transitional justice processes or mechanisms to be adopted for a conflict-ridden society. Examples in this regard are the International Military Tribunals for Germany and Japan after the Second World War, the adhoc Tribunals for Rwanda and the former Yugoslavia, and the ICC in the case Uganda and Kenya.

The involvement of the international criminal court is a complementary one to the national efforts in holding the perpetrators of gross violations of human rights accountable in situations where the state is unable or unwilling to do so. In the case of Rwanda, the civil war led to the collapse of the judicial system, which necessitated the establishment of the International Criminal Tribunal of Rwanda to try those involved in committing acts of genocide, war crimes and crimes against humanity. The ICTR operated alongside other national efforts such as the indigenous gacaca court system.

The ICC's indictment of senior ranking LRA officers sparked the debate in Uganda on the appropriateness of using international criminal justice and / or transitional justice mechanisms as a way of addressing the conflict in northern Uganda, promoting reconciliation, peace and holding those responsible for committing heinous crimes accountable. To date, a draft Transitional Justice policy has been developed and it provides for a truth-telling process, traditional justice, and a reparations procedure for victims of gross human rights violations. Furthermore, an International Crimes Division of the High

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<sup>34</sup> See R. Teitel (2003:18); L.J. Lisa (2009:333); B.K. Elin (2007:59); A. Paige (2009: 327).

Court has been established and is charged with the task of adjudicating those accused of perpetrating international crimes during the conflict in northern Uganda. All these developments were initiated after the ICC had intervened and indicted the LRA officers-an incident that subsequently form part of the Juba Peace Agreements.

It is usually the real or perceived fear of states parties to submit their nationals to the jurisdiction of the international criminal court that causes national justice authorities to investigate the individual's criminal conduct. The main reason is that states do not want to have their jurisdiction ousted. However, even when a country appears to be stabilising peacefully in the aftermath of internal conflict, and when reconciliatory efforts are underway, should there still be loud calls for international criminal trials? This question crystallizes the research question of this study.

The international community has agreed to end to impunity by requiring states to investigate, prosecute and punish perpetrators of international crimes. This obligation, however, poses a dilemma for Uganda where, over two decades, gross violations of human rights on an unprecedented scale were perpetrated in the northern and north eastern regions. These atrocities involved murders, mass kidnappings and abductions, mutilations and sexual crimes committed against women and young girls.<sup>35</sup> These atrocities were committed by both the LRA and members of the UPDF.<sup>36</sup> For example, the former is alleged to have committed acts of regular looting and rape in the IDP camps, assaulting and torturing civilians, and even committing murders.<sup>37</sup> However, most of these crimes went unpunished.<sup>38</sup> The negative effects of the northern Uganda conflict were catastrophic. An

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<sup>35</sup> See D. Đukic (2007:691). See also Review Conference of the Rome Statute Document, RC/ST/V/M.7, 1.

<sup>36</sup> See Uganda Human Rights Commission and UN Office of the High Commissioner for Human Rights (2011:12).

<sup>37</sup> See RLP (2013:14).

<sup>38</sup> See RLP (2013:14).



estimated 75 000 people were abducted and up to 1 800 000 internally displaced in camps for long periods.<sup>39</sup>

In January 2003, the government of Uganda referred the conflict to the ICC<sup>40</sup> which, on 14 October 2005, issued warrants for the arrest Joseph Kony, the leader of the rebel guerrilla group, the LRA, and four other LRA commanders accused of committing crimes against humanity and war crimes.<sup>41</sup> However, in recent years, the unacceptably high costs of the civil war have caused post-conflict Uganda to reassess how to resolve the conflict with the LRA. The Juba Peace Agreement on Accountability and Reconciliation (named after the capital of South Sudan, Juba, where the talks took place) that was concluded in June 2007 proposed that criminal trials be held in Uganda, and that transitional justice accountability mechanisms, such as a truth commission and reparations, be implemented, that use be made of indigenous justice procedures, that a specific law regulating international crimes be enacted.<sup>42</sup>

Uganda needs to learn from other countries that have used TJ mechanisms successfully to move on from their violent past. It is the assumption of this study that a holistic adoption of TJ mechanisms within Uganda's policy and legal framework will address the question of accountability and justice arising from the northern Uganda conflict, and will help the Ugandan government resolve the root causes of the conflict within the country and guide future generations on how to deal with internal conflicts.

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<sup>39</sup> See J. Egeland (Security Council Meeting Record S/PV.5331 from 19 December 2005). See also OCHA, "Consolidated Appeals Process (CAP): Mid-Term Review of the Humanitarian Appeal. 2005 for Uganda," Geneva, 22 June 2005, available at <http://www.reliefweb.int/rw/RWB.NSF/db900SID/HSHU-6DL849?OpenDocument&rc=1&emid=ACOS-635PRQ&cc=uga>. (accessed on 28th February 2012).

<sup>40</sup> See [http://www.amicc.org/docs/AMICC\\_UgandaQ&A.pdf](http://www.amicc.org/docs/AMICC_UgandaQ&A.pdf) (accessed on 22nd February 2012).

<sup>41</sup> See <http://www.iccnw.org/?mod=northernuganda> (accessed on 22<sup>nd</sup> February 2012). Uganda signed the Rome Statute on 17 March 1999 and ratified it on 14 June 2002.

<sup>42</sup> The International Criminal Court Act was consequently passed in March 2010 by the Ugandan Parliament.

#### 1.4 AIMS AND OBJECTIVES OF THIS STUDY

This study deals with a fluid, ongoing conflict which is constantly giving rise to new issues. However, the primary aim and objective of this thesis is to examine whether TJ mechanisms lend themselves to redressing the gross violations of human rights that took place in that conflict in Northern Uganda. The idea is to arrive at a middle ground which could afford an opportunity to implement the most appropriate transitional justice mechanisms. However, in order to arrive at an informed conclusion, the discussion will necessarily have to take account of several secondary aims and objectives that are inextricably related to the topic at hand. These include:

- The historical context that characterises the northern Uganda military conflict. To this end, the study will tackle issues such as the causes of the military conflict, the main national and international actors in the conflict, the effects of the conflict, and the various efforts that have so far been undertaken to resolve the conflict;
- A study of transitional justice mechanisms and the theories underpinning them, as well as the extent to which they have been applied to resolve the northern Ugandan conflict;
- An inquiry into the evolution of the concepts 'conflict', 'peace building', 'justice', 'reconciliation', 'accountability', 'restoration and reparation', as part of the transitional justice framework that is at play in the northern Ugandan conflict;
- An examination of the prosecution framework of international crimes under both the ICC Statute and national law of Uganda. Here the discussion will focus on the mandate of the ICC and Uganda's International Crimes Division of the High Court. An assessment will also be made of how the human rights principles are embedded in the Ugandan Constitution and national laws, how they are applied and how they measure up to international standards;

- A comparative survey of how some post-conflict states have used transitional justice mechanisms to render justice, ensure accountability and to foster reconciliation in the wake of gross human rights violations; and
- An appraisal of how transitional justice mechanisms, including indigenous customary law procedures and amnesties under the Amnesty Commission, the Uganda Human Rights Commission, and the proposed Truth and Reconciliation Commission could be used to complement, but not replace international criminal justice processes.

### **1.5 SIGNIFICANCE OF THE STUDY**

It is hoped that this thesis will contribute to the broad discussion on effectiveness of TJ mechanisms in redressing gross violations of human rights, thereby serving as a guide to policy makers in Uganda in resolving the violent internal conflicts.

The author does not necessarily intend to come up with new arguments in favour of or against TJ mechanisms. The aim is more to use existing TJ theories and practices in the Ugandan situation. Previous studies dealing with the Ugandan situation have dealt mostly with the history of the conflict, and have paid little attention to the need to understand how other African countries in particular have gone about attempting to solve their respective internal conflicts that resulted in atrocities.

The Ugandan conflict is particularly relevant for the fact that it is an ongoing conflict which provides a unique opportunity to study the proposed TJ mechanisms that have been embraced by other countries. The idea is to see which of these lend themselves most suitably to the Ugandan situation.

It is also uncertain when the conflict between the Government of Uganda and the LRA will be resolved. The situation has been rendered more nebulous now that the LRA has, after failing to sign a comprehensive peace agreement with the Ugandan government, gone into

hiding in parts of South Sudan, the Central African Republic and the Democratic Republic of Congo.

As a States Party to the ICC Statute, Uganda has an obligation to prosecute persons suspected of committing international crimes on its territory. Uganda has chosen to refer the situation in Northern Uganda, which was tormented by the LRA, to the ICC. But to date, Kony has escaped all attempts to arrest him and his henchmen and to secure their presence before the Court. The continuing attempts to arrest Kony and his commandants for purposes of subjecting them to international criminal justice has practically ruled out the possibility of making him and his associates subject to indigenous customary legal processes, which require the parties to be present at the proceedings.

The value of this study lies in the fact that it seeks to establish how traditional customary law practices could, in the Ugandan context, be harnessed to function alongside formal international criminal justice processes to produce common outcomes, namely punishment, atonement and reparations for the victims. The question is whether the two legal systems are mutually exclusive or whether they can operate side by side. It is indeed the author's hope that this study will generate a more searching discussion of how indigenous law, like formal national law, can be brought within the rubric of complementarity as understood under international criminal law.<sup>43</sup>

The final outcome of this study will be a concrete proposal for the resolution of the northern Uganda conflict, using TJ mechanisms or processes.

## **1.6 SCOPE OF THE STUDY**

There are a number of violent conflicts that have afflicted pre-and post-independent Uganda that deserve closer scrutiny. However, this study limits itself to northern Uganda, and more specifically, to the conflict involving Joseph Kony's LRA, starting with the year

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<sup>43</sup> Complementarity means that where the one legal system is unable or where it fails to hold the suspect to account, the other legal system will assume this responsibility.

1986 when President Museveni assumed the helms of power. This thesis confines itself to evaluating the transitional justice mechanisms that could be used to redress the gross violations of human rights in present Uganda.

### **1.7 METHODOLOGY**

The thesis first seeks to clarify the concepts that will recur in the text and will look to see how they are related to one another. Having established the theoretical reference framework, the focus turns to the actual conflict in Uganda. It looks into the origins and the causes of the conflict and, how it has evolved, until the present. The history of the conflict is important, for it affords an insight into what the conflict has cost the country in lives, social cohesion, and how this has impacted on the victim societies or economy. Furthermore, the history is crucial for showing what has been done at both the national and international level to bring about peace. After examining the history and root causes of the northern Uganda conflict, the study explores the mechanisms of International Criminal Justice and Transitional Justice that have been proposed to resolve the conflict in Uganda. In this discussion, the likely challenges in implementing each of the mechanisms are highlighted. The study then uses a comparative analysis of how TJ mechanisms have been used in South Africa, Rwanda, Kenya and Sierra Leone. The study draws important lessons from these case studies that can inform the conclusions and recommendations of this study.

This thesis is essentially a desk-top study. It is based on primary and secondary sources on international criminal law, human rights law and transitional justice at both the international and domestic level. Much of the secondary sources relied upon deal with the northern Uganda conflict and the attempts at resolving it.

### **1.8 REVIEW OF LITERATURE ON THE NORTHERN UGANDA CONFLICT**

In their research report, Nabudere and Mukasa sought to investigate how international criminal law could be made more effective by being applied alongside indigenous African law, with its emphasis on restorative justice. They explain that, whereas the ICC seeks to prosecute individuals who are accused of having committed crimes against humanity, war crimes and genocide, it has found itself involved in local conflicts that have become

'regionalised' or 'internationalised'. Several of the states in which these conflicts are occurring have become so-called 'failed states' that are unable to control the conflicts.<sup>44</sup>

The two authors state that because of the internal conflicts, the states themselves have become perpetrators of serious crimes against their own citizens. As a result, the ICC has found itself caught in a very difficult situation in implementing its mandate, which is aimed at combating impunity arising out of serious crimes committed in such conflicts, when the states with which it needs to co-operate are themselves implicated in the commission of international crimes.

On the 'Justice versus Peace' debate, they argue that although it is important that peace be given priority in order for society to function at all, there should not, however, be a dichotomisation between the two,<sup>45</sup> for it could equally be argued that there can be no peace without justice. They thus contend that in order to overcome these two apparently contradictory notions, it is necessary to develop an integrated solution, one which enables society to pursue peace while not overlooking the need for justice, since the two are not mutually exclusive.<sup>46</sup>

Knoops explains that the ICC is one of the most important international criminal tribunals affecting international peace and security.<sup>47</sup> He argues that, faced with the issue of international peace and security, one may say that it is doubtful whether the ICC, as part of an ongoing process that was catalysed in Nuremberg and reinforced by the *ad hoc* tribunals, will enhance peace and security in a practical manner.<sup>48</sup> He attributes this to the fact that not all world states have signed and ratified the ICC Statute, including key countries like United States, China, the Russian Federation, India, Israel, Syria and Egypt. Although Knoops' book is important in providing a vital assessment of the present and

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<sup>44</sup> See D.W. Nabudere and B.L. Mukasa (2008:3).

<sup>45</sup> See D.W. Nabudere and B.L. Mukasa (2008:18).

<sup>46</sup> See D.W. Nabudere and B.L. Mukasa (2008:27).

<sup>47</sup> See G.J.A. Knoops (2006:4).

<sup>48</sup> See G.J.A. Knoops (2006:16).

future role of the ICC in so far as world peace and security are concerned, it overlooks the role that alternative justice mechanisms, such as African traditional justice systems, can play in dealing with issues of peace and security. Secondly, it does not analyse or assess the ICC's impact on the conflict situation in northern Uganda or in any other African country.

Ochieng argues that the current northern Uganda war has its roots in the colonial mentality.<sup>49</sup> He explains that the British colonisation of Uganda created an ethnic imbalance in the security services by recruiting mainly the Acholi on the basis that they were stout and courageous. For this reason, they were the dominant Ugandan tribe in the King's African Rifles,<sup>50</sup> the police and prison services, a state of affairs which continued throughout the period preceding independence and thereafter.<sup>51</sup> Thus, when the people from the north lost power to the people from the south, relations between the north and the south became characterised by animosity and antagonism. Ochieng notes that, given the turbulent political history of Uganda that brought the current NRM government to power in 1986, after ousting the Acholi generals who were in power, the ground was set for the current conflict.<sup>52</sup> This is because in Acholi land, the local people perceived the NRM and its armed wing, the NRA, as a foreign force that had removed them from power, firstly because they believed that the army belonged to the Acholi, and secondly because the government by then was headed by two Acholi generals, Tito Okello and Basilio Olara Okello.

Ochieng explains further that the LRA has no defined ideology apart from its fanatic espousal of the biblical Ten Commandments and its reported close links with the Islamic

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<sup>49</sup> See L. Ochieng (2002:179).

<sup>50</sup> The King's African Rifles (KAR) was a multi-battalion raised from various British possessions in East Africa from 1902 until independence in the 1960s. The KAR comprised soldiers who were recruited from Somaliland, British East Africa (Kenya from July 1920), Uganda, Nyasaland, and Tanganyika. It performed both military and internal security functions within the East African colonies as well as external service.

<sup>51</sup> See L. Ochieng (2002:179).

<sup>52</sup> See L. Ochieng (2002:182).

fundamentalist regime in Sudan.<sup>53</sup> His book is useful for providing background information to the genesis of the LRA rebellion in northern Uganda. However, it, too, takes no cognisance of the Ugandan traditional, indigenous justice systems and their potential role in diffusing the tension between the north and south, nor does it look at how the ICC processes could be brought to bear in dealing with the military conflict and the wide array of gross human rights violations perpetrated and perpetuated in the course of the conflict.

In their book, Naber and Watson provide information on the ICC, its importance, mandate and mission, victims' rights and gender crimes, case studies of the Democratic Republic of the Congo, Uganda and Sudan and traditional African and religious approaches to justice and reconciliation.<sup>54</sup> The authors argue that although there is no uniform African perspective, some traditional approaches to justice and accountability have long been practised, often in the absence of modern justice systems, and continue to influence the perspectives of local people concerning issues of justice and peace.<sup>55</sup> They contend that it is, therefore, important to be aware of and sensitive to local perspectives as they may clash with Western legal perspectives. They further argue that, in order to fully understand the context, values, beliefs, fears, suspicions, interests, needs, relationships and networks need to be explored deeply. The authors are of the view that it is important to be realistic about community-based reconciliation as well as international prosecutions, since both have opportunities as well as limitations.<sup>56</sup> They note that western approaches, for instance, tend to focus on the rule of law even in parts of the world where such rule of law does not exist because of war. They state that western traditions of justice emphasise the

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<sup>53</sup> See L. Ochieng (2002:184).

<sup>54</sup> See J.M.M Naber and R. Watson (2006:95).

<sup>55</sup> See J.M.M. Naber and R. Watson (2006:95).

<sup>56</sup> See J.M.M. Naber and R. Watson (2006:87). See also Report of the African Union Panel of the Wise (2013:14). The report emphasizes that no single mechanism is capable of sufficiently addressing huge justice demands, and that transitional justice mechanisms are most effective when implemented as part of a holistic strategy. The report further states that different transitional justice mechanisms apply in specific situations and therefore require careful sequencing, planning, and timing is imperative.



establishing of individual guilt and punishment through physical and material penalties,<sup>57</sup> with limited attention being paid to the healing and the re-integration of the offender into the community.

The authors state that traditional approaches to reconciliation are, on the other hand, commonly inclusive, and involve the identification of the root causes and solutions through meetings involving family and community members from both sides in a dispute.<sup>58</sup> They, therefore, suggest that in general, to achieve a successful resolution of a dispute in Africa, the parties must: acknowledge guilt and responsibility for harming the other; repent and be truly sorry; ask for forgiveness and be open to forgiving the other; pay compensation; and participate in ritual ceremonies with the other party and family to show reconciliation.

One key element of the many African approaches identified by Naber and Watson is the centrality of the family and collective responsibility of the community for resolving disputes.<sup>59</sup> Some of the weaknesses of traditional approaches that have been identified include the lack of women's involvement in the decision-making process, and the difficulty in applying such community-based approaches to widespread atrocities and conflicts that transcend national boundaries. The scope of many community-based processes is also limited to one particular ethnic or religious group, meaning that not all people in a given area are able to participate. Although this is a very basic, informative handbook on both

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<sup>57</sup> See J.M.M. Naber and R. Watson (2006:86-87); B. Brock-Utne (2001:3). See also B. Brock-Utne (2004:1), who asserts that the Western judicial system is based on punishment, unlike the traditional African judicial system which is more concerned with reintegration of the plaintiff into the social community. Customary legal practice has long been denounced as primitive and inhumane: see S.C. Hascall (2011:36).

<sup>58</sup> See J.M.M. Naber and R. Watson (2006:88). S.C. Hascall (2011:37) also emphasizes that from customary/traditional practices involve the community, families, perpetrators and victims in sentencing decisions.

<sup>59</sup> See J.M.M. Naber and R. Watson (2006:88). See also C. Chapman and A. Kagaha (2009:4) who argues that by imposing collective sanctions, the traditional system created a feeling of collective responsibility on part of the members in the family and clan, which resulted in discipline being exerted on members found guilty of infractions.

the ICC and general tenets of the African traditional justice systems, it does not mention *MatoOput*, which is the Acholi traditional justice system practiced in northern Uganda.

Allen gives an extensive background to the military conflict in northern Uganda. He discusses the question of amnesty, peace talks and the ICC prosecutions, as well as *Mato Oput*. He traces the decision to create a permanent international criminal tribunal or court to the late 1940s under the wording of the Genocide Convention, which indicated that one would be established, and draft structures which were prepared by the International Law Commission, the UN body responsible for codifying international law.<sup>60</sup> In fact, Article 6 of the Genocide Convention provides for the trial of perpetrators for acts of genocide stipulated in the Convention by a competent tribunal of the state or an international penal tribunal. The crime of genocide is one of the crimes under the jurisdiction of the International Criminal Court.<sup>61</sup>

Allen states that the LRA is commonly characterised in the Ugandan and international media as a barbaric and insane cult, with no discernible political agenda.<sup>62</sup> He argues that a point often overlooked in the discussion of this region of Africa is that war and mass, forced displacements are even older than they at first appear to be. The lands of what has become the Uganda-Sudan border zone were devastated from the 1850s by armed traders and adventurers who reached this part of the Upper Nile from Khartoum. The raiders were also interested in slaves, partly to carry the ivory north and partly for the sexual gratification of themselves and their private armies.<sup>63</sup>

Allen states that the effects of the LRA campaign and the Ugandan government's response have been catastrophic for the local population, leading to abandonment during the insurgency of many of the northern Uganda districts such as Gulu, Amuru, Apac, Pader,

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<sup>60</sup> See T. Allen (2006:16-18).

<sup>61</sup> Article 6, Rome Statute to the ICC

<sup>62</sup> See T. Allen (2006:16).

<sup>63</sup> T. Allen (2006:16).

Kitgum, Lira and Adjumani.<sup>64</sup> The author adds that by the end of 2004, it seemed that, after 18 years of war, things were about to change. Processes were occurring that resulted in reduced LRA attacks against civilians, thus raising hopes of ending the conflict. First, after a great deal of activism on the part of civil society groups, NGOs and concerned politicians, an amnesty was offered to the rebels. Second, efforts to negotiate a ceasefire and restart talks had begun to produce results. Third, President Museveni had referred the situation in northern Uganda to the ICC and criminal investigations by the Office of the Prosecutor had commenced. He explains that the latter appeared to undermine the other two.<sup>65</sup> The author further contends that essentially the main concerns about the ICC intervention in Uganda are the following: it is biased; it will exacerbate the violence; it will endanger vulnerable groups, notably witnesses and children; it is spoiling the peace process by undermining the amnesty and the ceasefire; and it ignores and debilitates local justice procedures.<sup>66</sup>

Smith and others examine and analyse the goals of accountability mechanisms. They consider how different approaches have both succeeded and failed in achieving each of their stated objectives.<sup>67</sup> The authors recognise that no single mechanism can meet a country's accountability needs, and argue that there is need for an interplay between different mechanisms and their potential contribution to accountability for war crimes, crimes against humanity and genocide. They, therefore, strongly argue that a process that fails to make an effort to facilitate reparations is unlikely to be viewed as a success, even where the goals of truth-seeking and acknowledgement are achieved.<sup>68</sup> Consequently, reparations show a genuine attempt to redress violations of the past and acknowledge wrongdoing.

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<sup>64</sup> See T. Allen (2006: 53). Further on the impact of the war to the northern Uganda region and communities, see Sverker

Finnström (2008:2); S.B. Tindifa (2006:3); Refugee Law Project (2004:2); Refugee Law Project (2005:1).

<sup>65</sup> See T. Allen (2006:72).

<sup>66</sup> See T. Allen (2006:72); A.Z. Lomo (2006:10); D. Lanz (2007:9-10).

<sup>67</sup> See A. Smith et al (2010:54).

<sup>68</sup> See A. Smith et al (2010:54).

They further highlight some of the challenges of instituting reparations measures in a post-conflict society. These include: how to frame objectives and expectations clearly and realistically; how to respond fairly and in a way that can be justified to a large number of victims who have suffered a wide range of violations; how to address the needs of the most vulnerable victims; how to link reparations to acknowledgement of wrong-doing; and how to devise policies aimed at advancing victims' rights and preventing further abuse.<sup>69</sup> In effect, therefore, reparations should not substitute broader efforts to give effect to accountability.

Kleffner postulates that traditionally, national criminal justice systems have in principle been mandated with the exclusive role of investigating and prosecuting the core international crimes of genocide, crimes against humanity and war crimes.<sup>70</sup> However, the record of success of national criminal justice systems in fulfilling the central task that international law assigns to them has been modest, and states have been slow in adopting the necessary laws to respond to core crimes adequately. He blames this on the lack of national laws which enable states to investigate, prosecute and adjudicate cases.<sup>71</sup> Where such laws do exist, their definition of the core crimes and principles governing, say, modest of liability, might differ.

Peskin's work focused mainly on an analysis of the workings of the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the former Yugoslavia (ICTY) against state co-operation. The author states that the ICC's stature internationally and in targeted states may largely depend on the extent to which it is seen to be a neutral actor.<sup>72</sup> Maintaining the reality and the perception of neutrality may be particularly complicated in situations such as Uganda, where the state has invited the ICC into the country to prosecute atrocities perpetrated by rebel groups. He states that the ICC

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<sup>69</sup> See A. Smith et al (2010:56).

<sup>70</sup> See J.K. Kleffner (2008:1).

<sup>71</sup> See A. Smith et al (2010:1).

<sup>72</sup> See V. Peskin (2008:256).

has to demonstrate the political benefits of international justice. International war crimes prosecutions, we are told, will succeed in reconciling enemies, deterring revenge killings and bringing an end to the culture of impunity.<sup>73</sup> In this regard, the ICC must demonstrate an ability to deter new cycles of violence and not to exacerbate armed conflicts or cause regional and domestic instability. The pursuit of criminal justice is crucial to universal peace and the ICC's role should be limited where it will hamper an already established peace process.<sup>74</sup>

Steiner and Alston are of the view that the idea of a permanent international criminal court has been a part of the human rights movement since 1948, when the General Assembly instructed the International Law Commission to study the possibility of establishing one.<sup>75</sup> Consequently, in 1992, the General Assembly requested the ILC to draft a statute for such a court. Six years later the Rome Diplomatic Conference, held on the premise of discussing the issue of the need to establish the court, culminated in the overwhelming adoption of a Statute for the International Criminal Court by a vote of 120 to 7, with 21 abstentions. Although this is a highly recommended and regarded document, it is mostly silent on the ICC's procedures and investigatory processes in various parts of the world, including Uganda, and it does not mention other transitional justice accountability mechanisms.

Bainomugisha and Tumushabe contend that the rebellion of the LRA in northern Uganda, led by Joseph Kony, is one of the worst tragedies of Africa that will keep Ugandans with bitter memories for a long time.<sup>76</sup> They remark that the conflict was characterised by wanton and indiscriminate killings, abduction of children, sex, slavery and rape. Hundreds of people have been killed and maimed while others are currently internally displaced.<sup>77</sup> Currently, it is estimated that over 1.5 million people, that is, about 80 per cent of the entire Acholi population live in internally displaced camps in appalling conditions, where they

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<sup>73</sup> See V. Peskin (2008:254).

<sup>74</sup> See J. Sinclair (2010: 81).

<sup>75</sup> See H.J. Steiner and P. Alston (2000:1192).

<sup>76</sup> See A. Bainomugisha and G. Tumushabe (2005:4).

<sup>77</sup> See A. Bainomugisha and G. Tumushabe (2005:5).

risk cholera outbreaks and other hygiene-related diseases.<sup>78</sup> The authors also state that the grievances of the LRA/M rebellion have never been clearly articulated, although they have been advocating that Uganda be ruled according to the biblical Ten Commandments. They also claim to be fighting for the restoration of political pluralism in Uganda and against the economic marginalisation of the Acholi people by the current government.<sup>79</sup> The rebellion has far-reaching consequences such as: massive human displacement; abject poverty; insecurity and economic stagnation; and is also likely to hamper the democratisation process. Although the study is important in providing background information on the northern Ugandan conflict, however, it lacks concrete information on the ICC and the *mato oput* system of African traditional justice.

Lucima argues that *mato oput*, as a model for war termination and an African traditional justice system, makes no distinction between the degree of gravity of crimes on the one hand, and on the other, the categories of responsibility of perpetrators and abducted children, the abductors who trained and deployed them, and the crimes they committed.<sup>80</sup> Yet, he also contends that the principle of retributive justice demands that there must be proportionality and that the punishment must be commensurate with the crime. He notes that war crimes and crimes against humanity are committed against persons as subjects entitled to their human rights.<sup>81</sup> Consequently, by overemphasising the fears, misery and psychological trauma of a collective, faceless, nameless mass of Acholi survivors, and their wish for a quick fix, focus is removed from the necessity of exacting justice, also for those who died horrible deaths because of abuses. Lucima is of the view that the adoption of this approach results in the vindication of human rights by punishing unjustifiable abuses committed in the conduct and duration of the conflict. He therefore argues that to have *mato oput* and supplemental state or ICC special courts that will try only alleged LRA perpetrators, biases the whole process of *mato oput* as a war termination model. This has the effect of favouring the strengthening of national security to the detriment of human

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<sup>78</sup> See A. Bainomugisha and G. Tumushabe (2005:5).

<sup>79</sup> See A. Bainomugisha and G. Tumushabe (2005:7).

<sup>80</sup> See O. Lucima (2008:1).

<sup>81</sup> See O. Lucima (2008:1).

security. His view is that the LRA would thus not be punished for crimes committed against northern Ugandan non-combatants, for which the NRA / UPDF are equally culpable, but for crimes against the Ugandan state. He concludes that *mato oput*, as a war termination model that ought to lay claims to justice and equity, would not be ensuring equal justice, but abetting a possible NRA / UPDF victor justice, a justice girdled by political expediency.<sup>82</sup> The defeat or punishment of the perpetrators is the only means of vindicating the rights of the victims. Lucima further argues that *mato oput*, as a model, seems inadequate to make these transcending moral and political arguments.<sup>83</sup>

Afako explains that the Acholi tradition embodies the principles and practices that have been central to supporting reconciliation and amnesty within the Acholi community.<sup>84</sup> He states that through the mediation of traditional chiefs (*Rwodi*), many offences, including homicides, had traditionally been resolved by reconciliation. Whenever a homicide took place the *rwodi* intervened to 'cool down the temperature' and to offer mediation. The unique contribution of the *rwodi* is through their mediation in the reconciliation process. Many Acholi, therefore, believe that *mato oput* can bring true healing in a way that a formal justice system cannot. Afako explains further that the ceremony of clan-and family-centred reconciliation incorporates the acknowledgement of wrongdoing, the offering of compensation by the offender, a process which then culminates in the sharing of a symbolic drink.<sup>85</sup> He notes conclusively that the breadth of support for restorative justice in Acholi culture indicates a popular recognition of the complexities of the current conflict and of the inability of formal processes to deal adequately with serious violations within the community.

Human Rights Focus' report discusses the two transitions, from 21 years of war to tentative peace, and from over a decade of mass internal displacement to the current returning

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<sup>82</sup> See O. Lucima (2008:7).

<sup>83</sup> See O. Lucima (2008:7).

<sup>84</sup> See B. Afako (2002:1).

<sup>85</sup> See B. Afako (2002:1).

home, which is underway in the Acholi sub-region of northern Uganda.<sup>86</sup> It identifies the existing and potential obstacles to sustainable and inclusive peace from a human rights perspective. The report's fundamental conviction is that the Acholi community can and should itself lead the processes of returning the people from the IDP camps to their original homes and spearhead the reconstruction, justice and reconciliation efforts, and so all external interventions, whether centred on return, economic development, human rights, women's empowerment, or justice and reconciliation, should be limited to providing the "minimum effective dose" needed to enable the Acholi community to rebuild itself in an inclusive manner.<sup>87</sup>

The report also argues that although accountability, justice and reconciliation in northern Uganda are essential from a human rights perspective, these can be addressed effectively and legitimately only after the war has ended and the people have returned home.<sup>88</sup> The report notes that it is absurd that tens of millions of dollars are being spent on interventions claiming to help bring about justice and reconciliation, the ICC being the most striking example, when peace is not yet secured and most Acholi people are still living and dying in squalid displacement camps. The report emphasises that what constitutes accountability, reconciliation and justice should be determined by the survivors themselves.

In one of its reports, the Office of the United Nations High Commissioner for Human Rights explores the perceptions among northern Ugandans on the themes of accountability, reconciliation and transitional justice. The report states that there is no universal "northern Uganda" view of who is responsible for causing harm to civilians nor is there consensus of what form of accountability should be taken.<sup>89</sup> The UN agency explains that the general population believes that both the LRA and the Government, and specifically their leaders, should be held accountable for the harms they caused during the conflict. The Report

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<sup>86</sup> See Human Rights Focus (2010:3).

<sup>87</sup> See Human Rights Focus (2010:10).

<sup>88</sup> See Human Rights Focus (2010:11).

<sup>89</sup> See Office of the United Nations High Commissioner for Human Rights (2007:52).



further reveals that the overwhelming majority of the Acholi population argued that they had limited exposure to traditional practices such as *mato oput* and *gomo tong* due to the fact that cultural norms and knowledge of traditional practices had dissipated during the conflict, and that social structures had been disrupted by the forced displacement of civilians into the IDP camps.<sup>90</sup> Across all sub-regions, the report quotes respondents as having voiced their scepticism about the long-term value of local practices. For instance, in the Acholi sub-region, some respondents went further to argue that local practices were outdated, while others maintained that each region had its own practices and that these could not be extended across regions and into other ethnic groups.

In a journal article, Pain explains that the principle underlying conflict resolution in Acholi is to achieve reconciliation, bringing the two sides together.<sup>91</sup> The process of reconciling individuals involved the elders, particularly the moral authority of the *Rwot kaka*, who investigated the circumstances of the conflict. This was followed by an acceptance of responsibility for carrying out a wrong action and an indication of repentance. Then terms were laid down by the elders. The terms laid down, for example, that the loss of life had to be compensated by 10 cows or a girl for a future marriage, which meant replacement in the case of death and restoring a nexus of relationships. Then subsequent reconciliation occurred with the simultaneous drinking of a bitter root extract drink from a common calabash set on the ground— "*mato oput*." Between groups, the process required a delegation of elders to investigate the fault and identify the cause of the conflict and for those concerned to accept their responsibility. The acceptance of responsibility is a group acceptance which does not assign fault to any person. Once the type of compensation is determined, which, traditionally, can be either cattle or girls, reconciliation occurs with the "bending of two spears" and *mato oput*.

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<sup>90</sup> See Office of the United Nations High Commissioner for Human Rights (2007:54).

<sup>91</sup> See D. Pain (1997:83).

Pain argues that for reconciliation to be effective today in Acholi, it is important that some measure of justice is dispensed to the victims.<sup>92</sup> While many suggested that the Acholi, for the sake of peace and the return of their children, were ready to forgive the LRA fighters without their paying compensation, this was recognised as being in breach of tradition, and also potentially seen as not applying a sense of justice, which might leave former rebels open to private action in the courts.

Villa-Vicencio has argued that a holistic understanding of justice in a post-conflict situation demands an extensive programme that draws on a variety of local and international agents.<sup>93</sup> He adds that no justice mechanism can stand the test of time if it fails to embrace holistically the post-conflict challenges in a specific context, that is, if it does not enjoy local ownership, and does not promote the need to build positive and constructive relationships between former enemies and adversaries as a basis for redressing past wrongs and promoting preventative measures to limit future conflicts.<sup>94</sup>

De Temmerman's book is primarily one that documents the stories of children abducted during the war in northern Uganda.<sup>95</sup> It recounts the journey of two Aboke girls who managed to escape from the LRA. In his book, the author also investigates the aspect of using child soldiers in wars by bringing to life the story of one of the abductors, a 14-year-old-boy who was part of Kony's elite troops. Furthermore, the book also documents a nun's tireless search for her missing pupils from her school in northern Uganda.

De Temmerman argues that the roots of the northern Uganda conflict lie in colonial government policies, according to which British administrators recruited most of colonial civil servants from the South of Uganda and most of the colonial soldiers from the north.<sup>96</sup> This policy made the 'northerners' become the *crème de la crème* of the military while the

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<sup>92</sup> See D. Pain (1997:85).

<sup>93</sup> See C. Villa-Vicencio (2010:8).

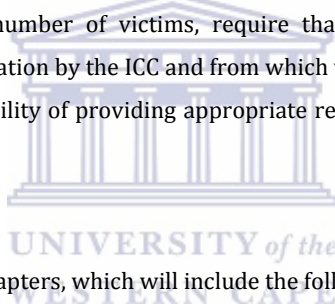
<sup>94</sup> See C. Villa-Vicencio (2010:9).

<sup>95</sup> See E. De Temmerman (2001:1).

<sup>96</sup> See E. De Temmerman (2001:7).

'southerners' became the intellectuals. Hence, she notes that most development occurred in the parts of the south, a source of great discontentment, animosity and acrimony for many people from the north to south.

Musila's doctoral thesis focuses on the right of victims to participation and to reparations under the Rome Statute of the ICC. The thesis argues that the ICC offers an opportunity for the entrenchment of the concerns of victims in the international criminal process.<sup>97</sup> It suggests that the ICC should adopt a restorative justice paradigm in order to give full effect to the rights of victims, while protecting the rights of the accused and meeting the law enforcement functions of the Court.<sup>98</sup> The study concluded that while the Rome Statute offers an important opportunity for victims as regards reparations, various challenges, including shortages of funds and the large number of victims, require that situation countries, which are those states under investigation by the ICC and from which victims are drawn, not to abandon their primary responsibility of providing appropriate remedies for victims.<sup>99</sup>



### **1.9 SUBSEQUENT CHAPTER OUTLINES**

The research study will be organised in eight chapters, which will include the following:

**Chapter One: It is essentially the introductory chapter of the thesis.**

**Chapter Two: Establishing conceptual basis of transitional justice**

This chapter focuses on investigating the following: the meaning behind the concepts of conflict, peace and justice; the historical, theoretical origins, goals plus different approaches and mechanisms of transitional justice.

**Chapter Three: Establishing conceptual basis of international criminal law / justice**

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<sup>97</sup> See G.M. Musila (2010:2).

<sup>98</sup> See G.M. Musila (2010:5).

<sup>99</sup> See G.M. Musila (2010:5).

This chapter focuses on investigating the following: the meaning behind the concepts of; the historical and theoretical origins and goals of international criminal law / justice, the types or mechanisms of international criminal justice; the notions of 'human rights' and 'international crimes' in conflict situations; the element of 'gross violations of human rights' in conflicts; the duty to punish international crimes under international law; the role of the international community in conflicts; the relevant international regime for international criminal law, human rights and transitional justice to conflict; and the possibility of establishing a possible nexus between international criminal law, human rights and transitional justice.

**Chapter Four: The genesis of the northern Uganda conflict, its impact and gross violations of human rights**

This chapter focuses on investigating the following: The brief history of the country called Uganda, composition and origin of conflict in Uganda, the historical context of the ongoing northern Uganda conflict; the impact of the conflict and gross violations of human rights in northern and north eastern Uganda; the domestic and international initiatives taken to resolve the conflict; and the UN Standby Military Force in DR Congo, Republic of South Sudan and Central African Republic.

**Chapter Five: An examination of the use and work of the International Criminal Law / Justice framework in the northern Uganda conflict**

This chapter focuses on investigating the following: The referral of the northern Uganda conflict to the ICC; the international crimes under investigation and their perpetrators; Uganda's main treaty obligations pertaining to international crimes, meeting and determining the threshold for gross violations of human rights, and the domestic prosecution of international crimes in Uganda; and the legal and institutional ICL framework in Uganda. The chapter also analyses the challenges faced by international criminal justice in Uganda and the constraints pertaining to non-prosecution of international crimes.

### **Chapter Six: Examining the application of Transitional Justice mechanisms in the northern Uganda conflict**

This chapter focuses on investigating the following: The different mechanisms of transitional justice in Uganda; a review of Uganda's transitional justice laws and policies, a review of Juba Peace Agreements; African traditional justice systems in Uganda, an assessment of the Amnesty Commission of Uganda; the Equal Opportunities Commission of Uganda and the proposed Truth and Reconciliation Commission in Uganda; the status of amnesties under international law and Uganda's laws; victim rights and reparations for victims under Uganda's transitional justice framework; the work of the Trust Fund for Victims of the ICC in Uganda; the reconciliation, peace building and truth telling in Uganda; and challenges faced in using transitional justice mechanisms in Uganda.

### **Chapter Seven: Comparative analysis of TJ mechanisms used in country case-studies**

Using a comparative analysis of the chosen country case-studies of South Africa, Rwanda, Sierra Leone and Kenya, this chapter focuses on investigating the following: Gross violations of human rights in other country case-studies; the use of transitional justice mechanisms used in case-studies, consideration of notions of peace, justice and reparation in different case-studies; the consequences of non-prosecution because of interests of transitional justice; and the consequences of using international criminal justice mechanisms.

### **Chapter Eight: Important lessons learnt, conclusions and recommendations**

This chapter focuses on presenting important lessons learnt from the study that inform the concluding remarks and recommendations.

## CHAPTER TWO

### EXAMINING THE CONCEPTUAL UNDERPININGS OF TRANSITIONAL JUSTICE

#### 2.1 INTRODUCTION

In the last 100 years, the world has witnessed violent conflicts, from the First and Second World Wars up till the present. Some of the wars have been orchestrated under the guise of self defence, while others are internal in nature, at times with external support. These wars have resulted in innumerable deaths of people, displacement of people, and hundreds of thousands of orphans.

There are several legal instruments that guide states or warring parties in international and non-international armed conflicts.<sup>1</sup> In addition, a number of institutions and mechanisms have been created to ensure that perpetrators of acts prohibited in international law are held accountable for their actions. Although the efforts to punish violators of human rights during the course of the First and Second World Wars were well-intentioned, they were marked by unfairness as they aimed to suit the victorious powers, thereby exhibiting selective justice.<sup>2</sup>

In transitional justice, international criminal law / justice (ICL/J), and human rights studies plus other related fields within legal studies, a number of key concepts appear regularly.

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<sup>1</sup> These include, the Geneva Convention relative to the Protection of Civilian Persons in Time of War, 75 U.N.T.S. 287, *entered into force* Oct. 21, 1950; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol 1), 1125 U.N.T.S. 3, *entered into force* Dec. 7, 1978; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 75 U.N.T.S. 31, *entered into force* Oct. 21, 1950; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 75 U.N.T.S. 85, *entered into force* Oct. 21, 1950; Geneva Convention relative to the Treatment of Prisoners of War, 75 U.N.T.S. 135, *entered into force* Oct. 21, 1950.

<sup>2</sup> See W. A. Schabas (2010:1).

The key concepts in this study are conflict, accountability, justice, peace, reconciliation and restoration.

With the advent of international criminal law, the scope of the crimes prohibited under international law has been widened. This development has ensured that perpetrators of international crimes can no longer commit crimes with impunity. For example, Article 17 of the Rome Statute that brought into existence the ICC, provides for the conducting of investigations and prosecutions in circumstances where the affected state is unable or unwilling to investigate and prosecute the alleged criminal. Therefore, states can no longer shield their nationals or citizens from prosecution for their crimes. However, with the emergence of the broader concept of the transitional justice, there seems to be a disconnection between the goals of international criminal justice and transitional justice. Therefore, this chapter delves into examining the conceptual underpinnings of the concept of transitional justice. In chapter four, this study explores how international criminal justice, as part of the transitional justice approach or framework, can be utilised to meet the goals of both fields.

Conflict can be part and parcel of the necessary stages of development of any given society or community of people. However, what is very controversial and important is understanding and agreeing to the most appropriate and effective mechanisms to implement to resolve a violent conflict and to ameliorate its effects or impact on the population. Reconciliation has been invoked as an aspiration in almost all post-conflict or post-authoritarian situations.<sup>3</sup>The fact of the matter is that all efforts to reconcile societies after a violent conflict are always difficult and will inevitably be met with criticism.

Post-conflict societies grapple with the problem of how to dispense justice to the people who have suffered, how to punish the perpetrators, and how to prevent the violence from erupting again.<sup>4</sup> As a result, a number of transitioning societies emerging from periods of

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<sup>3</sup> See B. Ferencz (2000:11).

<sup>4</sup> See M.J. Soerensen (2007:3).

mass violence or dictatorship have recognised the limits inherent in criminal prosecutions and have chosen to prosecute only the persons who were most responsible for gross human rights violations. Alternatively, they have created alternative justice mechanisms to address the crimes committed by lower-level actors. South Africa and Rwanda, for example, have differed significantly in their response to the mass atrocities committed in their tainted history.<sup>5</sup>

The case of Rwanda is especially intriguing because so many people were affected,<sup>6</sup> either as victims or perpetrators. Since it was practically impossible to prosecute all perpetrators within the then existing legal system, Rwanda modified its traditional dispute resolution fora, the *gacaca* courts, to try persons implicated in the genocide.<sup>7</sup> Rwanda's decision to use the *gacaca* courts is rooted in Rwanda's unique historical and social circumstances and in the broader context of worldwide attempts to respond to mass atrocities.<sup>8</sup> On the other hand, South Africa's choice to adopt a policy of conditional amnesty for perpetrators who came out to speak the truth about their crimes was part of a negotiated settlement between the new political leaders and the outgoing Apartheid regime.

At the centre of the basis and nexus between the ICJ and TJ are the concepts of 'conflict', 'justice', 'human rights' and, 'peace'. Each of these concepts will be briefly analysed below.

## 2.2 THE CONCEPT OF CONFLICT

There is no universal agreement among scholars on what constitutes a conflict. Most definitions of conflict associate it with behaviour, which thus implies the absence of aggression. Wallensteen defines a conflict as a 'social situation in which at least two parties at the same time try to acquire the same set of material or immaterial resources, of which

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<sup>5</sup> See C.J. Le Mon (2007:1).

<sup>6</sup> The exact number of the people who were killed in the genocide will never be known, but the most frequently cited number is 800,000 out of a population of 8 million; with most of the victims being Tutsis and moderate Hutus.

<sup>7</sup> See M. J. Soerensen (2007:4).

<sup>8</sup> See C. Honeyman et al (2004:2).



there is not enough to satisfy all parties simultaneously.<sup>9</sup> Some definitions equate conflict with conflict behaviour, implying that if aggression is absent, then there is no conflict. A useful definition should cover a broad range of situations, whether armed or unarmed, manifest or latent. Some basic components of a definition can be identified. First, there must be parties to have a conflict. Second, the parties must disagree on or compete over something, that is, there must be an issue, an incompatibility. Thirdly, there must be an element of scarcity involved.<sup>10</sup> Conflict is thus defined as a 'social situation in which at least two parties at the same time try to acquire the same set of material or immaterial resources, of which there is not enough to satisfy all parties simultaneously.'<sup>11</sup>

Although it has been stated that 'conflict' is derived from 'competition', it is not necessarily true that violence results from competition, neither automatically nor inevitably.<sup>12</sup> Ordinarily, conflicts arise from human relations in two primary ways: firstly, individuals or groups of individuals have different values, needs and interests; secondly, most resources are not available in unlimited quantities, which means that access to them must be controlled and contested.<sup>13</sup> The above-mentioned two factors cause conflicts or wars or violence intrinsically and in the same vein take away peace and societal harmony. There is, therefore, nexus between violence and conflict. Violent conflict has been a major hindrance to the development of Africa, her people and economies. It has inflicted human suffering through death, destruction of homes and livelihoods, constant displacement and insecurity;

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<sup>9</sup> See P. Wallensteen (1988: 120). See also T. Ohlson (1998:31/35). Ohlson observes that a useful definition should cover a broad range of situations, whether armed or unarmed, manifest or latent. He adds that some basic components of a definition can be identified: firstly, there must be parties to have a conflict; secondly, the parties must disagree on or compete over something, that is, there must be an issue, an incompatibility; thirdly, there must be an element of scarcity involved. See also W. Quincy (1942:864); J. Galtung (1969:167-192); J. Galtung and T. Hoivik (1971:73-76).

<sup>10</sup> T. Ohlson (1998:32).

<sup>11</sup> T. Ohlson (1998:32).

<sup>12</sup> See I.W. Scroder and B.E. Schmidt (2001:2). Ingo W. Scroder and Bettina E. Schmidt contend however that although violence can ultimately be traced to a condition of conflict, not all competition must be solved by violent means.

<sup>13</sup> See A. Toumani - Toure (2002:23); J.P. Lederach (2003:23); A. Nhema (2008:4) and M. Minow (1998:9).

and has also disrupted the process of production through pillage of the countries' resources and diverted their application from development purposes to servicing war.<sup>14</sup> According to the World Bank, violent conflict is the epitome of 'development in reverse since it blurs, and subsequently unravels, years of hard-won economic and social development'.<sup>15</sup>

International humanitarian law distinguishes between two kinds of armed conflict—international and non-international armed conflict. International armed conflicts are those between two or more opposing states, whereas non-international conflicts are those between the government forces and non-governmental forces of a country or between the latter groups only. From 1990 to 1998, there were 118 armed conflicts worldwide, involving 80 states and two para-state regions. These conflicts resulted in the death of approximately six million people.<sup>16</sup> Armed conflicts within states are usually political in nature and involve citizens fighting for domestic political change, while in other cases they are organised as secessionist movements that take up arms to fight for the establishment of either an autonomous entity within an existing state or an entirely new and independent state of their own.<sup>17</sup>

A number of treaties and conventions have been adopted to guide states in the conduct of war. For example, the Geneva Conventions of 1949 prescribe the standards of international law for the humanitarian treatment of the victims of war. These include the First Geneva Convention that deals with the amelioration of the condition of the wounded and the sick armed forces in the field (1864); the Second Geneva Convention, which concerns itself with the amelioration of the condition of the wounded, the sick and shipwrecked members of

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<sup>14</sup> See A. Adedeji (1999: Xiii). Violent conflict is thus responsible for perpetuating misery and underdevelopment in the continent.

<sup>15</sup> See World Bank (2005: xi). It further notes that almost 60 percent of countries rated 'low' on the Human Development Index have been involved in conflicts since 1990, in contrast to less than 25 percent of the 84 countries that have a 'medium' rating.

<sup>16</sup> See D. Smith (2003:2).

<sup>17</sup> See <http://www.un.org/esa/socdev/rwss/docs/2001/15%20Armed%20Conflict.pdf> (accessed on 12<sup>th</sup> December 2014).

armed forces at sea (1906); the Third Geneva Convention, which regulates the treatment of prisoners of war (1929), and the Fourth Geneva Convention, which focuses on the protection of civilian persons in time of war (1949). Other conventions include the Hague Conventions II (1899) and IV (1907) that guide the conduct of war on land.

### 2.3 THE CONCEPT OF JUSTICE

The term 'justice' differs in every culture, since cultures are usually dependent upon a shared history, codes of ethics and set of values. The word 'justice' originates from the Latin 'justitia' or 'justus', words which today literally carry the meaning of 'the maintenance of legal, social, or moral principles by the exercise of authority or power; assignment of deserved reward or punishment'.<sup>18</sup>

Essentially, the concept of justice is understood as meaning and entailing the values or elements of accountability and fairness in the protection and vindication of rights, and the prevention and redress of wrongs. Justice must be administered by institutions and mechanisms that enjoy legitimacy in order to comply with the rule of law and are consistent with international human rights standards.<sup>19</sup> For quite a long time, the practice of making compromises on justice with perpetrators of heinous crimes has been part of the peace negotiations and agreements in ending conflicts. Justice has over time been sacrificed in the interest of peace and this has been done through the granting of amnesties for international crimes such as war crimes and crimes against humanity.

Justice is an important element of accountability and fairness in the protection and vindication of rights and the prevention and punishment of wrongs.<sup>20</sup> Justice implies regard for the rights of the accused, for the interests (or wishes) of victims and for the well-

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<sup>18</sup> See W.J. Stewart (2007:1481).

<sup>19</sup> See Nuremberg Declaration on Peace and Justice, UN Doc. A/62/885, 19 June 2008, available at <http://www.peace-justice-conference.info/download/Nuremberg%20Declaration%20A-62-885%20eng.pdf> (accessed on 24<sup>th</sup> November 2013).

<sup>20</sup> See Report of the Secretary General to the United Nations Security Council on the rule of law and transitional justice in conflict and post-conflict societies, para.1-2, UN.Doc. S/2004/616, 23 August 2004.

being of society at large.<sup>21</sup> It is a concept rooted in all national cultures and traditions and, while its administration usually implies formal judicial mechanisms, traditional dispute resolution mechanisms are equally crucial. In this 'peace versus justice' debate, the choice for transitional governments addressing past crimes is often framed in a false dichotomy between the extremes of entirely forgiving and forgetting the past through blanket amnesty laws for the sake of 'reconciliation', or pursuing retributive justice against every perpetrator of human rights violations at the risk of destabilizing delicate political transitions. In this approach to transitional justice, amnesties are equated with amnesia.<sup>22</sup> The impact of amnesties on long term reconciliation is often subject to debate. Amnesty is frequently justified by politicians as a means of promoting reconciliation. Some scholars have argued that, if after a war, the victors impose conditions that 'involve crushing the dignity of the vanquished the peace will not last.'<sup>23</sup> This is drawn from the example of Germany, which had conditions imposed on it after the First World War and this further perpetuated the conflict.

A study conducted by the Human Rights Centre of the University of California, in Berkley, the Payson Centre for International Development at Tulane University, and the International Centre for Transitional Justice in New York, in 2007 revealed the perceptions of the people on how they understood the term "justice" in the context of the northern Uganda war. The study found out that 41 per cent understood the term as "being fair", 29 per cent associated it with "trials", and 26 per cent defined it as "holding the wrong doer accountable," whereas 17 per cent associated it with reconciliation and 8 percent with compensation.<sup>24</sup> Justice should therefore aim to strike a balance between ensuring the protection of the rights of the defendant, taking care of the desires of the victims and interests of society.

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<sup>21</sup> See Nuremberg Declaration on Peace and Justice, UN Doc. A/62/885, 19 June 2008.

<sup>22</sup> See L. Mallinder (2008:16); C.L. Sriram (2009:1).

<sup>23</sup> See L. Mallinder (2008:16).

<sup>24</sup> See HRC et al (2007:35).

Conceptually, justice is often classified into two distinct categories, that is, retributive and restorative. The former is commonly associated with accountability and punishment, and focuses on forcing the perpetrator of a crime to “pay” for his or her actions, while the latter deliberates over past crimes, giving centre stage to both the victim and the perpetrator, with special emphasis placed upon contextual factors such as poverty and the position of the perpetrator in terms of command responsibility.<sup>25</sup> It can be said that restorative justice approach refers to situations or mechanisms that use or seek to emphasise forgiveness, reconciliation, confession of the truth, acknowledgement of wrongdoing and reparation of some sort that are used as part of dispute resolution mechanism.

From the above-mentioned concepts, reconciliation seems to be the complex term, and there is little agreement on its definition. This is mainly because it is both a goal – something to achieve and a process – a means to achieve that goal. A great deal of controversy arises from confusing these two ideas. The goal of reconciliation is a future aspiration, something important to aim towards, perhaps even an ideal state to desire. But the process is very much a present tense way of dealing with how things are – building a reconciliation process means to work, effectively and practically, towards that final goal – and is invaluable in itself. Reconciliation is an overarching process which includes the search for truth, justice, forgiveness, healing and so on.<sup>26</sup> At its simplest, it means finding a way to live alongside former enemies – not necessarily to love them, or forgive them, or forget the past in any way, but to coexist with them, to develop the degree of cooperation necessary to share society with them, so that all have better lives together than separately.

In essence, reconciliation means different things to different people. Its significance varies from culture to culture, and changes with the passage of time. Ideally reconciliation prevents, once and for all, the use of the past as the seed of renewed conflict. It considers peace, breaks the cycle of violence and strengthens newly established or reintroduced democratic institutions. Reconciliation brings about the personal healing of survivors, the

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<sup>25</sup> See S. Dinnen (1997:245-262).

<sup>26</sup> See D. Bloomfield (2010:12).

reparation of past injustices, the building of non-violent relationships between individuals and communities, and the acceptance by the former parties to a conflict of a common vision and understanding of the past. It also enables victims and perpetrators to get on with life and, at the level of society, to establish civilized political dialogue and an adequate sharing of power.

Under Islamic International law (which is known as *Siyar*), reconciliation (*Sulh*) refers both to a ritualized process of restorative justice and peacemaking and to the actual outcome or condition sealed by that process. The aim of reconciliation is to end conflict and hostility among Muslims so that they can live harmoniously in peace and harmony. Rashied and Khutuba emphasize that reconciliation under Islam is a process rather than an event, and needs to be nurtured over time so as to realize its fruits of justice and peace.<sup>27</sup> The authors recognize the cumbersomeness and the difficulties involved in the process of reconciliation and note that the process can never be perfect. However, they observe that the contradictions within the process must not be waived but rather challenged and that this requires magnanimity on the part of the parties.<sup>28</sup> Reconciliation therefore requires undertaking a several aspects so as to ensure that the parties appreciate the process, and build trust and faith in it, to ensure that issues that could provide a fertile ground for vengeance from the victim or further harm from the perpetrator are addressed. If the underlying causes of the harm or violence are not addressed, and the reconciliation process is not appreciated by the parties, it creates room for further violence.

It bears noting that retributive justice approaches seek to ensure that there is consistent treatment and proportionate punishment of offenders under a criminal justice system.<sup>29</sup> To this end, retributive justice approaches tend to regard punishment as meted out to convicts as some form of payment for the wrong or ill done arising or as evidence in the immoral conduct that goes against the norms of society. On the other hand, restorative justice sees

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<sup>27</sup> O. Rashied and A. Khutuba (2010).

<sup>28</sup> O. Rashied and A. Khutuba (2010).

<sup>29</sup> See G. M. Musila (2009:8). See also L. Zedner (1994:57); S. Wilson (2001:531); H Strang (2002:4-6); J. Dignan and Cavadino (1996:155); M. Heikkila (2002:26).

greater value in educating and rehabilitating an offender than in simply incarcerating him. To this end, restorative justice is not an advocate for punishment of offenders. In addition, restorative justice envisages that victims will play a primary role in criminal proceedings and that their concerns or interests will be at the centre of the criminal justice system. It can thus be concluded that retributive approaches to justice aim to appease the society or state through punishment and at the same time respect rights of the offender but ignore concerns of victims. The reality is, however, that retributive impulses promoted through international courts and tribunals invariably take precedence over traditional practices in most transitional situations. The Military Tribunals that sat in Tokyo and Nuremberg and the Ad hoc UN Tribunals, namely, the ICTR and ICTY, are classical examples of international courts that operated and adopted a kind of retributive justice approach in their statutes. The Truth and Reconciliation Commission of South Africa is, on the other hand, an example of a justice framework that adopted both retributive and restorative justice approaches.

Justice, under the transitional justice framework, consists of the elements of criminal justice, truth seeking, reparations and institutional reform, as well as the fair distribution of, and access to, public goods, and equity within society at large. There have been arguments as to whether justice could be a hindrance to peace. The pursuance of justice often conflicts with the efforts towards peace.<sup>30</sup>

There must be peace for justice to prevail and there must be justice for peace to endure – requiring a form of justice that addresses the demands of transition and restoration along with accountability, which may include prosecutions. For this to occur, three salient principles need to be followed. First is the need to find an appropriate balance between accountability and human rights on the one hand, and peace and reconciliation on the other. This involves a compromise with which those directly involved in the conflict are prepared to live. The second principle reiterates the caveat that transformation can only achieve what is acceptable to those involved and what is possible at a given time and in a given place. Third, to ensure that neither justice nor reconciliation is sacrificed under the

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<sup>30</sup> See K. Ambos et al (2009:19).

guise of good intentions by all who are party to the negotiations, peace pacts need to be subjected to relentless scrutiny, with special attention being given to the needs and demands of the oppressed who are struggling to overcome past abuses.<sup>31</sup> These principles require a balance between demands for trials as a basis for establishing the rule of law and a level of political reconciliation that is likely to entail legal compromises.

Different schools of thought have advanced the pros and cons for prosecuting perpetrators of crimes of gross human rights violations. First, punishing the perpetrators of the old regime advances the cause of building or reconstructing a morally just order. The second reason has to do with establishing and upholding the young democracy that succeeds the authoritarian system. On other hand, prosecuting those alleged to bear responsibility for the crimes of the past is not without considerable ambivalence. There is no guarantee that its effects will be merely beneficial for democracy. Ghosts of the past cannot be chased away if feelings of revenge prevail. In the final analysis, punishment is one instrument, but not the sole or even the most important one, for forming the collective moral conscience.<sup>32</sup>

Therefore, the challenge is to ensure that in the search for peace, justice should not be placed at the periphery, but be part of the mechanisms in the search for peace. Pham and Vinck state, that although there can be some principles of justice that are the same in all or most of the cultures, these are insufficient to create a uniform perception of justice. They emphasise that the concept of justice embodies the act of being fair and just and it is based on any of the following: ethics, natural law, rationality, religion, law or equity.<sup>33</sup>

#### **2.4 CONCEPT OF HUMAN RIGHTS**

There are divergent views put forward with regard to the origins of human rights, with some suggesting that their existence can be traced to 13th Century Europe and to various predominately European Schools of thought and philosophies on liberty, rights, rule of law,

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<sup>31</sup> See C. Villa – Vicencio (2009:32).

<sup>32</sup> See M.C. Bassiouni (2008:501).

<sup>33</sup> See P. Pham and P. Vinck (2010:40).



and natural law.<sup>34</sup> However, what is not in doubt is that the concept of 'human rights' has its origins in all the value systems of different cultures thriving in the world.<sup>35</sup> There is no universally agreed upon definition of the concept 'human rights'. However, there is some degree of consensus that human rights are entitlements or rights of all human beings without distinction.<sup>36</sup> Some have defined human rights as those rights that belong equally to every human being in every human society.<sup>37</sup> Implied in one's humanity, human rights are generally presented as being inalienable and imprescriptible. They cannot be transferred, forfeited, or waived.

The concept of human rights is understood differently in the western world and the non-western world. In fact, it has been argued that human rights are a western creation that emerged during the era of enlightenment, and the historical developments of the French and American revolutions, and ultimately in 1948 UDHR.<sup>38</sup> In the former, human rights are regarded as entitlements due to an individual by virtue of being human and that one can make against the state and society a whole.<sup>39</sup> Emphasis is placed on individual rights over society. The western view emphasizes absolute individual. The non-western world, also commonly known as the Third world, suggests that each continent or religious tradition attaches different meaning to the concept of human rights.<sup>40</sup> For example, the African societies, being community or group-oriented, places greater emphasis on the community basis of rights and duties.<sup>41</sup> It views the individual as integral to society, group, clan, tribe or family and therefore derives rights by virtue of his belonging to a particular community.

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<sup>34</sup> See R.K.M. Smith (2014:5).

<sup>35</sup> See I. Bantekas and L. Oette (2013:9) who argue that, 'On closer inspection, it becomes evident that the term human rights is used freely and sometimes loosely by members of different disciplines and the public at large, meaning different things – both positive and negative – to different people depending on the context and purpose for which it is used'.

<sup>36</sup> See OHCHR (2000:2); J.P. Martin (2006:107).

<sup>37</sup> See M.B. Dembour (2006: 1); M.B. Dembour (2006:1).

<sup>38</sup> P.T Zeleza and P.J. McConaughay (2004: 23)

<sup>39</sup> See A.A. An-naim & F.M. Deng (1990: 2).

<sup>40</sup> A.A. An-naim & F.M. Deng (1990: 2).

<sup>41</sup> A.A. An-naim & F.M. Deng (1990: 2), S. Tharoor (1999/2000).

However, while this is the case, it does not mean that the individual lose any protection from abuses of society. Although there is divergence in the conceptualization of human rights from the western and non-western world, however, what is important is that they both place emphasis on the human dignity of the person and his or relations with society.<sup>42</sup> At present, human rights are recognised as being universal. Their world-wide acknowledgement is evidenced in the Universal Declaration of Human Rights. The Declaration was adopted by the United Nations General Assembly on 10 December 1948 in Paris.<sup>43</sup> Human rights are often labeled, sometimes mockingly, as the new religion, an appellation which illustrates the elevated status they appear to enjoy.<sup>44</sup> On closer inspection, it becomes evident that the term human rights is used freely and sometimes loosely by members of different disciplines and the public at large, meaning different things – both positive and negative – to different people, depending on the context and purpose for which it is used.

Human rights play an important dual function as they are claims based on particular values or principles and often also legal rights that entail entitlements and freedoms.<sup>45</sup> Ancient and traditional cultures and societies, and the world's major religions, share a deep concern about human nature, ethics and justice. African societies have also developed intricate principles and rules that have governed the rights and duties of their members.

So important are human rights to humanity that they are emphasised in United Nations Charter, beginning with its preamble which 'reaffirm(s) faith in fundamental human rights, in the dignity and worth of human person, in the equal rights of men and women and of nations large and small'. Further to the above, article 1 of the UN Charter sets out the purpose of the body as being to achieve international cooperation in promoting and encouraging respect for human rights and fundamental freedoms, and to achieve these purposes, the Charter imposes obligations on the Organisation and all member states.

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<sup>42</sup> A.A. An-naim & F.M. Deng (1990: 3).

<sup>43</sup> See W. Benedek (2012:38).

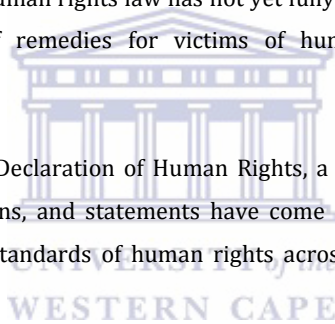
<sup>44</sup> See I. Bantekas and L. Oette (2013:9).

<sup>45</sup> See I. Bantekas and L. Oette (2013:9).

Article 55 calls on the United Nations to promote 'universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion'. In article 56, 'all members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55.' The United Nations has determined that states that engage in a consistent pattern of violating internationally guaranteed human rights breach this Charter obligation.

The respect, protection and promotion of human rights is currently, generally recognised to be a fundamental aim of modern law. Despite its emergence and development in key fields in both international and domestic law, human rights law has not yet fully developed a coherent theory or consistent practice of remedies for victims of human rights violations.<sup>46</sup>

However, since the adoption of the Universal Declaration of Human Rights, a number of international human rights treaties, declarations, and statements have come into being, resulting in the propagation of international standards of human rights across an ever-expanding spectrum.<sup>47</sup>



## 2.5 THE NOTION OF PEACE

The notion of peace and how it is linked to the concept of violence is a controversial subject that has elicited differing views from both peace and human rights activists. Many of these contestations centre on whether peace should be seen as the absence of direct physical violence—that is, a narrow definition suggesting the presence of stability and order, often also referred to as 'negative peace' or, more broadly, as encompassing also the presence of

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<sup>46</sup> See D. Shelton (1999: 2). It is to be stated that remedies have a reparative effect since they help to promote justice / accountability, redress individual injury, promote reconciliation and sanctioning wrongdoers and serve societal needs. In fact, the principle of 'Ubi jus, ibi remedium: Where there is a right, there is a remedy. See also Black's Law Dictionary (1990:1120).

<sup>47</sup> See H.M. Stacy (2009:5).

equity and justice, often referred to as 'positive peace'.<sup>48</sup> The latter definition suggests a measure of fairness in human and societal interactions. The related notions of violence are referred to as direct and indirect or structural violence, respectively. Negative peace thus connotes the absence of direct violence, while positive peace assumes the absence of structural violence.<sup>49</sup> There are four major elements constituting the concept of peace: First, the definition of peace should be universally applicable and not culture specific. Second, peace needs to be defined in a way that makes it a characteristic applicable to an individual, to groups and societies. Third, the conception of peace needs to go beyond the meaning of being merely the absence of war; it needs to embrace a broad spectrum of what might be needed to maintain a decent living. Fourth, peace needs to be defined in a way consistent with major ideas in sociological theory, most specially liberty and freedom.<sup>50</sup> The most simplistic but yet popular meaning attached to peace is that it is the opposite of conflict or violence.<sup>51</sup> It has been defined as 'the absence war, fear, conflict, anxiety, suffering and violence'.<sup>52</sup> If, indeed, peace means the absence of war, then the absence of peace can and must include not only the absence of war but also the establishment of positive, life-affirming, and life-enhancing values and social structures.<sup>53</sup> The absence of

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<sup>48</sup> T. Ohlson (1998:31).

<sup>49</sup> See J. Galtung (1969); J. Galtung and T. Hoivik (1971); G.B. Shedrack (2004:17).

<sup>50</sup> See B.E. Fogarty (2000:35).

<sup>51</sup> See I.O. Albert (2008:28-29). The author notes that peace being a universal concept, every society desires it and therefore none can exist without it. He observes thus that the term features prominently in the world's two leading religions in the world – Christianity and Islam where for example, the salutation 'shalom' is as popular among the Christians and Jews as 'Asalaamaleikum' is among Muslims; with both terms meaning 'Peace be unto you'.

<sup>52</sup> See D.J. Francis (2002:16/17). He however observes that in general, 'six meanings of peace are agreed on by many peace researchers including; peace as the absence of war (absence of direct violence), peace as justice and development (absence of structural violence), peace as respect and tolerance between people, peace as Gaia (balance in and with the ecosphere), inner peace (spiritual peace), and peace as 'wholeness' and 'making whole'. He also argues that 'peace' is the most valuable but elusive 'public good' in contemporary Africa.

<sup>53</sup> See D.P. Barash and C.P. Webel (2002:3). See also O. Ibeanu (2004:12). He notes that four kinds of peace process can be identified, namely: peacekeeping, peace enforcement, peacemaking and peace building. It is no be noted that according to the author each of them 'expresses a specific articulation of conflict and

direct violence in a relationship may mask a latent conflict. It does not guarantee the absence of animosity and hatred. It may also result from powerlessness on the part of some actor, that is, whatever stability exists may be a product of domination, coercion or subordination.<sup>54</sup> Peace defined negatively thus suggests that highly unacceptable social orders and peace could be compatible. We can identify four forms of peace process, namely, peacekeeping, peace enforcement, peace-making and peace building.<sup>55</sup> Each of them expresses a specific articulation of conflict and development. A situation in which conflict processes are low and the conditions for development are limited, the peace process takes the form of peacekeeping. However, where conflict is high and conditions for peace remain limited, peace enforcement is needed to create the space for increasing development and reducing conflict. Peace-making arises in situations where conflict is high but there are viable conditions for pursuing development, while peace-building applies to a situation of low conflict and high prospects for development.

## 2.6 THE CONCEPT OF WAR AND VIOLENCE

Ferguson has advanced six interrelated preconditions which combine to make the inception or intensification of a war more likely to happen or develop, at different times. They are: '(1) sedentary existence, often following agriculture (although war existed in some places before plant domestication); (2) increasing population density; (3) social hierarchy; (4) trade, especially of prestige goods; (5) bounded social groups; and (6) serious ecological reversals. As the preconditions became more common, war began in more places and spread gradually to surrounding areas. Also, the rise of ancient states projected militarism deep into their peripheries and along trade routes. In addition,

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development. A situation in which conflict processes are low and the conditions for development are limited, the peace process takes the form of peacekeeping. However, where conflict is high and conditions for peace remain limited, peace enforcement is needed to create the space for increasing development and reducing conflict. Peacemaking arises in situations where conflict is high but there are viable conditions for pursuing development, while peace-building applies to a situation of low conflict and high prospects for development'.

<sup>54</sup> T. Ohlson (1998:32).

<sup>55</sup> G.A. Shedrack (2004:12).

western expansion since the late 15th Century often generated or intensified war in contact zones.<sup>56</sup>

Violence can be defined as 'direct but unwanted physical interference by groups and / or individuals with the bodies of others, who are consequently made to suffer a series of effects ranging from shock, speechlessness, mental torment, nightmares, bruises, scratches, swellings, or headaches or death.'<sup>57</sup> Violence can be used or deployed by perpetrators as a political weapon to force through their own desire to belong by destroying similar claims of belonging by the victims, and in many cases this has the ultimate effect of fragmenting old structures and constructing new ones.<sup>58</sup> The intention of using the weapon of violence is not to stop at crippling physical bodies, but also to create political acquiescence or terror, and subsequently political inertia; the intension is also to create hierarchies of domination and submission based on the control of force.<sup>59</sup>

## **2.7 EXAMINING THE CONCEPT TRANSITIONAL JUSTICE**

### **2.7.1 Articulating the vision of transitional Justice**

In periods of political transitions, from authoritarian, dictatorial regimes or from civil conflicts to democracy, transitional justice has often provided opportunities for such societies to address past human rights abuses, mass atrocities, or other forms of severe trauma in order to facilitate a smooth transition into a more democratic or peaceful future. The concept of TJ as it stands today has spread out to include several mechanisms or processes that embrace both retributive and restorative justice, and has also embraced

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<sup>56</sup> See R.B. Ferguson (2009:35); A. Nhema (2008:4); M. Minow (1998:9).

<sup>57</sup> See J. Keane (2004:35). John Keane further explains that 'the task of clearly defining violence is complicated by the fact that since the middle of the eighteenth century the term itself has undergone a definite 'democratisation', by which I mean three things. The scope of application of the term violence has been broadened; its meaning has come to be seen as heavily context-dependent and, hence, as variable in time and space; in consequence of which the term violence and its negative connotations are now notoriously contested in several fields'.

<sup>58</sup> See V.Broch-Due (2005:17); D. Bloomfield (2003:12).

<sup>59</sup> See C. Nordstrom (2004:61).

measures that include not just peace building, but also concrete measures that aim at providing solutions that are directed at addressing or answering the root causes of conflicts.

During and after armed conflicts have ended, which involve gross violations of human rights, the victims have some established rights: a right to justice, a right to truth and a right to reparations that need to be addressed. If grievances related to these three rights are left un-redressed or unaddressed then it is unlikely that the society or communities in which the victims live can attain development, have social cohesion and sustainable peace. The transitional justice approach tries to resolve the most pertinent concerns of post-conflict societies through its traditional mechanisms, which are criminal prosecutions, truth commissions, institutional reform and reparations. Some post-conflict states have gone further, proposing that use be made of other facets, such as traditional conflict resolution mechanisms and amnesties.

Transitional Justice has been the object of great attention in conflict and post-conflict societies. The concept has recently received greater attention and has generated much political and legal debate. The reason for this lies in the fact that transitional justice embodies a range of heavily debated judicial and non-judicial accountability mechanisms that come into play when emerging democracies seek to address past gross human rights violations.

In effect, transitional justice processes attempt to break through the on-going social effects of authoritarianism or internal physical conflict. Transitional justice framework recognises that transitions are complex and often characterised by both impediments and opportunities for new and creative democratic strategies. Countries transiting from autocratic rule or conflict to democracy are invariably confronted with the question of how to go about redressing the gross human rights violations perpetrated by the predecessor

regime.<sup>60</sup> More concretely, the new government has to decide on what mechanisms to use to hold the perpetrators to account, while at the same time attending to the pressing needs of the victims and the survivors. The success of transitional justice depends on the extent it contributes to true reconciliation and the consolidation of democracy and the domestic judicial system.<sup>61</sup>

There are three forms of transitional justice: retrospective / corrective justice (that aims to pursue a civil remedy to compensate the injured party for a wrong(s) of the past), prospective / restorative / distributive justice (the aim is change society for the future through re-construction or restoration), and adjustment of the juridical order to achieve retrospective and prospective justice (involves adjustment of state institutions to the complex reality of society).<sup>62</sup> Indeed, TJ aims at ensuring justice and peace at the same time, but refraining from criminal prosecution and/or punishment seems sometimes necessary to facilitate a peaceful transition, the issuing of an amnesty being the most important technique of exemption from criminal prosecution.<sup>63</sup>

### **2.7.2 The convergence of definitions explaining the concept of transitional Justice**

The fact of the matter is that there are no universally agreed-upon ways of dealing with the challenges faced by post-conflict states recovering from phases of violent conflict involving commission of grave human rights abuses. To start with, “transitional justice” does not lend itself to a uniform definition. The 2004 UN Secretary General’s Report to the Security Council on the Rule of Law and Transitional Justice in Conflict and Post-conflict Societies defines transitional justice as “the full range of processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large scale past abuses, in order to

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<sup>60</sup> See E. van Sliedregt and D. Stoitchkova (2010:272); K. Ambos (2006:19). These authors contend that it is a holistic approach to justice which seeks to balance the need for accountability and for recognition of the victims’ suffering with the desire to achieve lasting peace and true reconciliation.

<sup>61</sup> See K. Ambos (2006:19).

<sup>62</sup> See J. Webber (2012:102-8).

<sup>63</sup> See K. Ambos (2006:19).



ensure accountability, serve justice, maintain peace, and achieve reconciliation”.<sup>64</sup> It recognises the need for a complementary approach to transitional justice, through the application of both judicial and non-judicial mechanisms, in addressing the legacy of large-scale human rights violations. Transitional justice is, in essence, a way or channel through which post-conflict societies sit in judgment of themselves through a range of mechanisms that deal with wrongs committed in the past, such as reparations, truth-telling, traditional justice and prosecutions.

TJ has also been defined as (a) a package of judicial and non-judicial responses to gross human rights violations, implemented by either government officials or non-governmental advocates, or (b) as a response to repression when a society is confronted with the difficult legacy of the past, after a period of violence.<sup>65</sup> The term TJ is used to refer to and analyse how societies undergoing political change address the issue of human rights violations committed by former regimes.<sup>66</sup> A more holistic definition would be that TJ is, “the array of processes designed to address past human rights violations following periods of political turmoil, state repression, or armed conflict.”<sup>67</sup> As Domingo has rightly observed, this definition brings together different contexts where TJ may apply, for it is descriptive enough, avoids unnecessary assumptions, and does not limit the scope of TJ to any specific situation.<sup>68</sup> Redressing the wrongs committed through human rights violations is not only a legal obligation, but also a moral obligation imposed on governments of the world.<sup>69</sup>

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<sup>64</sup> See Report of the Secretary-General, 23.8.2004, S/2004/616, at para. 8. See also J. Balint (2014:194). Balint notes that today, ‘transitional justice’ mechanisms have increasingly become the dominant international framework for redressing mass atrocity.

<sup>65</sup> See N. Zupan and S. Servaes (2007:5); E.A. Cole (2007:115); F. Pingel (2008: 181); P. Torsti (2007:78); N. Roht –Arriaza (2006:2).

<sup>66</sup> See C. Collins (2010:7).

<sup>67</sup> See T. Olsen, L. Payne and A. Reiter (2010:11); P. Domingo (2012:2).

<sup>68</sup> See P. Domingo (2012:2); E. Lutz (2006:3); N. Roht – Arriaza (2006:2).

<sup>69</sup> See J.E. Mendez (1997:1).

On the other hand, Teitel defines transitional justice as “the conception of justice associated with periods of political change, characterised by legal responses to confront the wrongdoings of repressive predecessor regimes.”<sup>70</sup> She defines periods of political change as “a bounded period spanning two regimes.”<sup>71</sup> However, going by the current developments in transitional justice and the conflicts raging in different parts of the world, gross human rights violations are committed by states and non-state actors alike.<sup>72</sup> It bears noting that Teitel’s definition leaves out an important element of conflict situations leading to gross violations of human rights, a situation with which a number of African<sup>73</sup> and Arab countries<sup>74</sup> are presently confronted.

Therefore, Teitel’s assertions that regimes in power are responsible for the wrongs committed and that transitional justice is associated with periods of political change do not apply in all cases. Roht-Arriaza and Mariezcurrena define transitional justice as “the set of practices, mechanisms and concerns that arise following a period of conflict, civil strife or repression, and that are aimed directly at confronting and dealing with past violations of human rights and humanitarian law”.<sup>75</sup> This definition implies that transitional justice can

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<sup>70</sup> See R.G Tietel (2003:2, 69). In her journal article, the author develops ‘transitional justice genealogy’ that places the development of this concept of field in three phases: 1. The post war phase that began in 1945 with the Allied – run Nuremberg Trials, 2. The period of accelerated democratization and political fragmentation that was characterised as ‘third wave’ of transition after the collapse and disintegration of the Soviet Union, and lastly 3. The steady – state phase that emerges and is characterised by the ‘fin de siècle’ acceleration of transitional justice phenomena associated with globalization and reflected by periods of political instability and violence. For a survey of the various accountability mechanisms, see later on Chapters 2, 3, 5 and 6 of this thesis. Also see generally N. J. Kirtz (1995:2); P. R. Dubinsky (2005: 281); E.M. Evenson (2004:731).

<sup>71</sup> See R.G Tietel (2000:1).

<sup>72</sup> The conflict in northern Uganda is good example, where human rights violations were perpetrated by both the Ugandan national army officers and the officers of the rebel movement led by Joseph Kony.

<sup>73</sup> Examples include: Uganda, Central African Republic, DRC, South Sudan, Sudan, Nigeria, and Somalia.

<sup>74</sup> Examples include: Egypt, Libya, Syria, Palestine, and Iraq.

<sup>75</sup> See N. Roht-Arriaza and J. Mariezcurrena (2006:2). See also United Nations Security Council, *The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies*, Report of the Secretary General, S/2004/616 (United Nations Security Council, August 2004), and

take place only after a conflict, which is not always the case. In fact in many jurisdictions, transitional justice mechanisms were implemented or are currently being implemented in ongoing conflicts, for instance, in Uganda. Bickford offers a broader definition of the term transitional justice. He defines it as “a field of activity and inquiry focused on how societies address legacies of past human rights abuses, mass atrocities, or other forms of severe social trauma, including genocide and civil war, in order to build a more democratic, just and peaceful future.”<sup>76</sup>

Transitional justice, as a form of accountability for redressing past human rights atrocities, thus comes into play where a society comes out of a period of prolonged internal conflict or out of the yoke of a dictatorship.<sup>77</sup> In sum, therefore, transitional justice encompasses a number of accountability mechanisms, the chief of which are criminal prosecutions, the establishing of truth commissions, reparations, institutional reform, vetting and dismissal of public servants previously involved in gross human rights violations. Individual prosecutions involve bringing the perpetrators of the grave crimes to justice and punishing them for the crimes committed. The truth process involves putting in place a body to investigate the crimes committed and bring to light what happened; to establish who were responsible; and where the remains are of those who might have lost their lives. A reparations process involves setting up programmes to redress victims for the wrongs suffered and to assist them to cope with the hardships resulting from their being gravely victimised. Institutional reform involves the dismantling of abusive state institutions such as armed forces, police and courts, and restructuring them to prevent recurrence of serious human rights abuses and impunity.

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<http://daccessddsny.un.org/doc/UNDOC/GEN/N04/395/29/PDF/N0439529.pdf?OpenElement> (accessed on 13th August 2014).

<sup>76</sup> See L. Bickford (2005:1045); P.R. Dubinsky (2005:281); E.M. Evenson (2004:731).

<sup>77</sup> See C. Binder (2013:9); N.J.Kritz (1995:12); L.Bickford (2005:8); P.Van Zyl (2005:27); N. Roht-Arriaza and J.Mariezcurrena (2006:31); P.Farmer (2003:14); L. Bickford (2005:1045).

### 2.7.3 Historical origins of the concept of transitional justice

Transitional justice is distinct from 'ordinary justice' because of the fact that it has to deal with large scale and especially serious abuses committed or tolerated by a normally authoritarian regime within the framework of a military or at least violent socio-political conflict. It is not a special form of justice but rather a justice adapted to societies transforming themselves after a period of pervasive human rights abuses. However, transitional justice accountability mechanisms are not a universal panacea for addressing past injustices.

Each country has its own way of processing its past, and experience shows that political transitions are influenced by various and differing considerations, such as: the nature of the regime change; the potential political instability posed by remnant groupings loyal to the predecessor regime; the political will on the part of the new government to prosecute those responsible for the egregious crimes under the old political order; the availability of witnesses to testify in court or before truth commissions; the degree to which the new government can dispense with public functionaries from the past without causing a collapse of the civil service; the ability of the new government to finance reparations and rehabilitation schemes for the victims or survivors of past atrocities.

Even as they may be initiated with the best intentions, transitional justice mechanisms almost always have unexpected outcomes that emerge out of the 'frictions' between these global mechanisms and local realities. Political transition may be accompanied by amnesties, prosecution in national courts and prosecution in international tribunals or a combination of these, each having its benefits and its drawbacks. Undoubtedly, the future understanding of transitional justice will involve an appreciation of the need for all of these, sometimes in combination, depending on the particular context.<sup>78</sup>

The term 'transitional justice' is of recent origin and generally focuses on how states in transition from war to peace or from authoritarian rule to democracy address their

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<sup>78</sup> A. O'Shea (2004:96).

particular legacies of mass abuse.<sup>79</sup> The field of transitional justice arose as a result of many global developments, including the events and aftermath of the Second World War – which witnessed major war crimes trials, massive reparation programs, and widespread purges – as well as transitions out of war in places ranging from former Yugoslavia, Rwanda, Sierra Leone, Southern Europe in the 1970s, Latin America in the 1980s, Africa, Asia, and Central and eastern Europe in the 1990s and thereafter.<sup>80</sup>

Although Teitel<sup>81</sup> traces the origins of the concept to World-War I, the origin of the modern conception of transitional justice is traceable to the Nuremberg and Tokyo trials that followed World-War II, when the victorious allied forces subjected the leaders of Nazi Germany and the political leaders of Japan to criminal trials for crimes committed during the war. But transitional justice came into its own only during the 1980s and early 1990s, in response to the toppling of dictatorships in Latin America and Eastern Europe, and to demands in these regions for justice.<sup>82</sup>

During this time, human rights activists and others wanted to address systematic abuses committed by predecessor regimes, but without endangering the political transformations that were underway. Since these changes were popularly called “transitions to democracy,” people began calling this new multidisciplinary field became popularly known as

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<sup>79</sup> See L. Bickford (2005:1045). Bickford describes Transitional Justice as a field of activity and inquiry focused on how societies address legacies of past human rights abuses, mass atrocity, or other forms of severe social trauma, including genocide or civil war, in order to build a more democratic, just, or peaceful future. Also see H. van Merwe et al (2009:2), L. Huyse (1996:496), R. Sifris 2010 (:272).

<sup>80</sup> M. Freeman (2006:4); H. van Merwe et al (2009:1); J. Lincoln (2011:21); T.D. Olsen et al., (2010:1); K. McEvoy (2010:37), A.L. Hinton (2010:2), Bickford (2005:1046); R. Mani (2007:30).

<sup>81</sup> See R.G. Teitel (2003: 70). See also H. Steiner and P. Alston (2000: 12); P. Huntington (1991: 34); J. Elster (2002: 5).

<sup>82</sup> See P. Domingo (2012:2). A. Branch (2004: 22–6); A. Branch (2007); K. Southwick(2005: 113–14); K.P. Apuuli (2006:179–87); L. Hovil and J. Quinn (2005); M. Wierda and M. Otim(2008: 21–8); Baines (2007: 91–114); T. Harlacher and CARITAS Gulu Archdiocese(2006); J. Quinn (2007:389–407); Refugee Law Project (2009).

“transitional justice.”<sup>83</sup> In this regard, some authors like Viallaba have supported this school of thought and contended that the ‘term transitional justice was coined in 1995, as a result of the publication of *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, edited by Kritz.’<sup>84</sup>

How to deal with a legacy of gross violations of human rights in a post-conflict environment has spawned the notion of ‘transitional justice.’<sup>85</sup> Transitional justice is concerned with the question of how to confront a situation of past large-scale human rights violations and humanitarian abuses in a period of transition to peace and democracy. Thus some have argued that just like concept of international criminal justice, the concept of transitional justice has its origins in the post-World War II era,<sup>86</sup> although it gained currency in the aftermath of gross violations of human rights that took place in South Africa, South America, Rwanda and more recently in Sierra Leone in the second half of the 20th century. At the centre of the concept of transitional justice is a link between two seemingly distinct concepts of transition and justice. The concept of transitional justice can be misleading since it more commonly refers to ‘justice during transition’ than to any form of modified or altered justice.<sup>87</sup> In essence therefore transitional justice concerns itself with how states undergoing transition for armed conflict or repression can transit to state of justice and accountability.

Transitional justice seeks to bring to the fore the social and political contexts within which massive abuses occur. It aims to build the rule of law and democracy, recognise individuals as citizens with equal rights, build civic trust among citizens and create justice to build

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<sup>83</sup> See ICTJ (2009:1).

<sup>84</sup> See C.S. Villaba (2011:2).

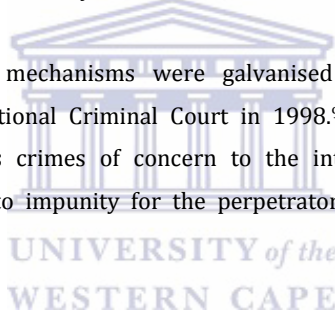
<sup>85</sup> This notion or concept will be analyzed in greater detail in the subsequent chapters.

<sup>86</sup> See L.K. Bosire (2006:72). See also Report of the Secretary- General on the Rule of Law and Transitional Justice in Conflict and Post- Conflict Societies, UN Doc S/2004/616 (3 August 2004) and Report of the African Union Commission Consultation with African Union Member States on Transitional Justice, 2011.

<sup>87</sup> See L. Bickford (2005: 1046); L. Stan and N. Nedelsky (2013:1); J. Lincoln (2011:21).

sustainable peace.<sup>88</sup> In practice, transitional justice initiatives produce mixed results, with some countries placing more emphasis on achieving certain outcomes than others. For example, whereas some South American countries that overthrew their dictatorships started criminal prosecutions against the authors of grave human rights violations under the dictatorships,<sup>89</sup> others, such as South Africa, for example, have hardly prosecuted anyone who was denied amnesty by the Truth and Reconciliation Commission.<sup>90</sup> In some cases, the erstwhile dictators have fled the country to escape prosecution by the incoming, democratically elected government. Examples of such despots who looted their state treasuries before seeking and finding political asylum elsewhere are Idi Amin of Uganda; Sani Abacha of Nigeria; Mobutu Sese Seko of the then Zaire; Mengistu Haile Mariam of Ethiopia; Ferdinand Marcos of the Philippines; and “Baby Doc” Duvalier of Tahiti.<sup>91</sup>

However, transitional justice accountability mechanisms were galvanised with the adoption of the Rome Statute of the International Criminal Court in 1998.<sup>92</sup> The ICC exercises jurisdiction “over the most serious crimes of concern to the international community as a whole” and to ‘put an end to impunity for the perpetrators of these



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<sup>88</sup> See UNDP (2007: 2); R.G. Teitel (2003: 69).

<sup>89</sup> See N. Roht-Arriaza (2005:40); K. Ambos (2006: 410-417); S. Brett (2008:1).

<sup>90</sup> See V. Nerlich (2002:223-242); O. Bubenzer (2009:128-156); L. Fernandez (2005:65-82). See also generally, International Human Rights Clinic Human Rights Program (Harvard University) (2009: Chapters 4 and 5; 74-124).

<sup>91</sup> See G. Robertson (2006: 176-179; 462-463).

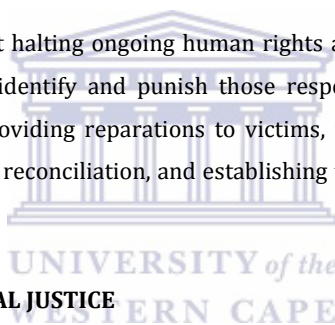
<sup>92</sup> See Rome Statute of the International Criminal Court (1998) UN Doc.A/CONF.183/9, *International Legal Materials*, 1998, 999. The final text was adopted by 120 states, with seven voting against it, and 21 states abstaining. The emergence of international criminal law and the creation of a permanent court to adjudicate international crimes dates back to the establishment of the International Military Tribunal of Nuremberg after the Second World War. See *Charter of the International Military Tribunal*, Appendix to the *Agreement for the prosecution and Punishment of the major War Criminals of the European Axis* of 8 August 1945, 39 *AJIL* (1945) suppl. 257. See also G. Werle (2009:1-25); C. de Than and E. Shorts (2003: 315-318); J. Dugard (2001:151-154).

crimes”.<sup>93</sup> These crimes are: genocide, war crimes, and crimes against humanity, with the crime of aggression still pending.<sup>94</sup>

#### **2.7.4 The goals and aims of transitional justice**

The concept of transitional justice seeks to serve eight broad objectives: establishing the truth, providing victims a public platform, holding perpetrators accountable, strengthening the rule of law, providing victims with compensation, effectuating institutional reform, promoting reconciliation, and promoting public deliberation.<sup>95</sup> In effect, the long-term goals of transitional justice are: peace; reconciliation; the building of democracy and the criminalisation of human rights violations.

In essence therefore transitional justice aims at halting ongoing human rights abuses and investigating past crimes. It further seeks to identify and punish those responsible for human rights violations. It is also aimed at providing reparations to victims, preventing future abuses, fostering individual and national reconciliation, and establishing the Rule of Law.<sup>96</sup>



#### **2.8 TYPES OR MECHANISMS OF TRANSITIONAL JUSTICE**

Transitional justice takes the form of different interventions or mechanisms. Transitional justice measures involve a number of responsive strategies that can be applied to address past systematic and widespread human rights violations.<sup>97</sup> However, the measure adopted depends on the particular situation. In order to be effective, the measures should be part of a comprehensive drive to pursue justice and political and institutional transformation. The discussion below focuses on each of the mechanisms that constitute what is known as a “transitional justice”. It is submitted that states transiting from periods of authoritarianism

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<sup>93</sup> See Preamble, Rome Statute.

<sup>94</sup> See Article 5, Rome Statute.

<sup>95</sup> See Guidance note of the Secretary-General United Nations Approach to Transitional Justice, 25 S/2004/616, 23 August 2004.

<sup>96</sup> See C.M. Fombad (2008:7); C. Collins (2010:7).

<sup>97</sup> See S. Winter (2013:224).



or repressive governance or violent conflicts involving gross violations of human rights to democracy will (or are expected to) implement one or some or all of the following mechanisms.

### **2.8.1 Individual Criminal prosecutions:**

The investigation and prosecution of international crimes arising from gross violations of human rights is a fundamental component of transitional justice.<sup>98</sup> Prosecutions are instituted against individuals who bear the greatest responsibility for crimes committed during the period of the preceding conflict or autocratic rule. Today, the international community expects that perpetrators of gross violations of human rights must be held accountable for serious crimes they committed. The prosecution of international criminals can take place at a national or international level. Carrying out prosecutions against individuals who have committed past crimes is the most direct form of accountability possible.<sup>99</sup>

Prosecutions for international crimes have more potential for making an impact when they are held domestically, within the society where the crimes occurred.<sup>100</sup> This presupposes that the state has the political will and both material and personnel resources to hold the trials. The institution of prosecutions will demonstrate the state's zeal to fight against impunity and to instil hope in the victims that the state values human dignity. To this end, the enactment and eventual implementation of the ICC Act in Uganda is to be seen in the context of the wider transitional justice agenda of Uganda. The UN notes that transitional justice mechanisms that incorporate prosecution initiatives that punish those responsible for committing sexual violence and other women's rights abuses during conflict can help ensure accountability for conflict-related women's rights abuses and that oppression or maltreatment of women is not perpetuated into the future.<sup>101</sup>

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<sup>98</sup> See ICTJ (2009:1).

<sup>99</sup> See United States Institute of Peace (2008:4); N.J. Kritiz (1995:4); P. Hayner (2001:3); L. Huyse and M. Salter (2008:2).

<sup>100</sup> See ICTJ (2009:1); J. Mendez (1997:5); C. Sriram (2009:3); E. Skaar (2011:7).

<sup>101</sup> See UN (2010:5).

Prosecution of those responsible for gross human rights violations secures a sense of justice for victims and furthers the aims of redress, reparation and reconciliation.<sup>102</sup> It provides the most direct form of accountability, and it works best when there are credible courts – national, international, or hybrid –to hold trials. Prosecutions send the strongest statement against impunity and this would be a form of deterrence against any individual who might have any thoughts of engaging in such acts in future.<sup>103</sup> However, prosecutions are lengthy and financially costly, and address only the crimes of individuals. Therefore, state authorities need have the political will to provide resources to prosecute individuals who commit gross violations of human rights.

### **2.8.2 Truth Commissions:**

Truth-telling, as a pillar in transitional justice processes, is considered a necessary aspect in bringing about lasting peace. Truth-telling serves the objectives of promoting justice, furthering social and psychological healing, fostering reconciliation and in deterring future crimes.<sup>104</sup> Despite the contributions of the other transitional justice mechanisms, truth commissions have come to be closely aligned with the right to truth, whereas criminal trials are associated mostly with criminal justice.

Truth commissions have shaken off the perception that they are inferior substitutes for criminal prosecutions and are increasingly recognised as an important element of Transitional Justice strategies to address past abuses.<sup>105</sup> Truth Commissions and criminal prosecutions ought to be viewed not as mutually exclusive alternatives, but as being contemporaneously complementary.

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<sup>102</sup> See C. Pegorier (2013:134).

<sup>103</sup> See C. Pegorier (2013:135).

<sup>104</sup> See Beyond Juba Project (2010:17); D. Cassel (2007:5); M. Freeman and P. Hayner (2003:122); N. Valji (2009: 4); E. Wiebelhaus-Brahm (2003:3); T. Buergenthal: (2006:272); P. Hayner (1994:283). See also the Report of the Office of the United Nations High Commissioner for Human Rights entitled 'Study on the right to the truth' of 8 February 2006, E/CN.4/2006/91, 505.

<sup>105</sup> See A. Bisset (2012:1).

The relationship between formal truth-telling and social as well as individual healing is not a simple one, because it can both benefit and wound those who appear before the Truth Commission and the audience. The establishment of Truth Commissions represents the best known form of truth-telling.<sup>106</sup> Public and official truth-telling are often viewed with scepticism for fear of retaliation by the government in situations where high state officials were part of the old order in which human rights atrocities were committed. Truth-telling requires that whoever appears before, say, a truth commission, be it a perpetrator or victim or witness, should tell the whole truth of what happened under the predecessor regime or during the internal violent conflict. The truth-telling should be in respect of alleged gross human rights violations committed, which may possibly amount to international crimes. It is critical that such abuses are specified and recognised in order to uncover the crimes and to raise awareness about them.

The telling of the truth is critically important for the purposes of establishing the victim's right to reparations. From an historical point of view, truth telling is essential for purposes of building up a shared memory of historical events.<sup>107</sup> It also plays a critical role in a country struggling to come to terms with a history of massive human rights crimes.<sup>108</sup> Non-judicial mechanisms, such as truth commissions, can play a significant role in enhancing accountability for human rights abuses through complementing judicial processes. They can signal a break with the past and assist in engendering trust and confidence in newly reconstituted justice and security institutions.<sup>109</sup> In some instances, states have created commissions of inquiry that are mandated to investigate and report on key periods of

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<sup>106</sup> See N. Zupan and S. Servaes (2007:5); T. Borer (2006: 73); D. Bronkhorst (2003:15); N. Roht-Arianza and J. Mariezcurrena (2006:11); T. Buergenthal: (2006:273); P. Hayner (1994:283); M. Freeman (2006:2).

<sup>107</sup> See Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation, section 3 (c), available at [http://www.fidh.org/IMG/pdf/NAIROBI\\_DECLARATIONeng.pdf](http://www.fidh.org/IMG/pdf/NAIROBI_DECLARATIONeng.pdf) (accessed on 29th November 2013).

<sup>108</sup> See P. Hayner (2002:225).

<sup>109</sup> See United Nations Security Council, "The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies," Report of the Secretary-General, S/2004/616, 23 August 2004, para., 23.

recent abuses.<sup>110</sup> They are often official state bodies that make recommendations to remedy such abuses and to prevent their recurrence.<sup>111</sup>

### **2.8.3 Reparations:**

The making of reparations to the victims of gross human rights violations perpetrated under the predecessor regime or preceding conflict demonstrates the determination of an emerging democracy to attach a high premium to safeguarding human dignity.<sup>112</sup> International law obligates states to make reparations to victims of gross violations of human rights or victims of violence.<sup>113</sup> Reparations are an integral part of the processes that assists societies to recover from armed conflict. Victims of abuses are entitled to adequate and effective reparation in proportion to the harm suffered. States have a legal duty to acknowledge and address widespread or systematic human rights violations in cases where the state caused the violations or did not seriously try to prevent them. National governments bear the primary responsibility to make such reparations within an environment that guarantees safety and human security. The international community, too, shares this responsibility.<sup>114</sup>

According to the Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (hereafter 'U.N. Basic Principles on Reparations'), victims are defined as persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law.<sup>115</sup>

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<sup>110</sup> Examples include Uganda and Kenya.

<sup>111</sup> See ICTJ (2008:1).

<sup>112</sup> See P. Domingo (2012:5).

<sup>113</sup> See N. Zupan and S. Servaes (2007:5); M. Freeman and P. Hayner (2003:122).

<sup>114</sup> See The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, item 6.

<sup>115</sup> See U.N. Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of international Humanitarian Law,

In affirming the relationship between direct and indirect victims, the U.N. Basic Principles on Reparations further provide that where appropriate, the term also includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimisation.<sup>116</sup> The victims have a right to: equal and effective access to justice; adequate, effective and prompt reparation for harm suffered; and access to relevant information concerning violations and reparation mechanisms.

The legal concept of reparations has two components: the right of the victim of an injury to receive reparation, and the duty of the party responsible for the injury to provide redress. Governments need to guard against over emphasising the importance of undertaking grandiose development projects at the expense of making reparations to the victims and survivors of past atrocities. It has been argued that international bodies and actors frequently disregard victims' calls for reparations and rather focus on punishing the offender, as evidenced by the massive investment in international criminal tribunals and ICC prosecutions, as contrasted with the minimal funding designated for reparations.<sup>117</sup>

All post-conflict societies need both reconstruction and development, of which reparation programmes are an integral part.<sup>118</sup> Individuals can seek reparations via the courts where the state fails to make such reparations of its own volition. On the other hand, the state may adopt policies to address the concerns or needs of a wider populace as a more general form of making reparations to the population as a whole. The U.N. Basic Principles describe five formal categories of reparations:

**(i) Restitution**

This process involves the restoration of the victims to the original state they were in before the abuses occurred. Restitution measures may include the restoration of liberty,

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Adopted at 64th plenary meeting of the UN General Assembly. Issued in GAOR, 60th sess., Suppl. no. 49." A/RES/60/147, 21 March 2006, section IV, principle 8.

<sup>116</sup> See U.N. Basic Principles and Guidelines on Reparations.

<sup>117</sup> See M.C. Okello (2010:280).

<sup>118</sup> See Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation, Section 3(b).

enjoyment of human rights, identity, family life and citizenship, return to one's place of residence, restoration of employment and return of property.<sup>119</sup>

### **(ii) Compensation**

This is meant to cover economically assessable damage as appropriate and proportional to the gravity of the violation and the circumstances of each case, resulting from gross violations of human rights resulting in physical or mental harm; lost opportunities, including employment, education and social benefits; material damages and loss of earnings, including loss of earning potential; moral damage; and expenses incurred for legal or expert assistance, medical, psychological and social services.<sup>120</sup>

### **(iii) Rehabilitation**

This includes medical and psychological care, legal and social services.<sup>121</sup> Clara Sandoval observes that the only international convention that provides explicitly for a right to rehabilitation in a comprehensive manner is the UN Convention on the Rights of Persons with Disabilities (CRPD).<sup>122</sup> She further notes that under Article 26 of the CRPD, rehabilitation is not understood as a form of reparation, but as a primary right of any disabled person.<sup>123</sup> Nora Sveaass, a member of the Committee against torture, highlighted three problems in relation to rehabilitation of victims, namely, the lack of, or inadequacy of a legal framework for compensation and rehabilitation of torture victims; the lack of effective compensation programmes; the inadequacy of implementation of rehabilitation measures in practice; and the lack of information on compensation and rehabilitation for torture survivors.<sup>124</sup> Therefore, compensation and rehabilitation of victims of abuses should take place within a specified legal framework and the information on the rehabilitation and compensation centres established should be availed to the public. It is

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<sup>119</sup> See U.N. Basic Principles and Guidelines, section 19.

<sup>120</sup> See U.N. Basic Principles and Guidelines, section 20.

<sup>121</sup> See U.N. Basic Principles and Guidelines, section 21.

<sup>122</sup> See Redress and Essex Transitional Justice Network (2010:2).

<sup>123</sup> See Redress and Essex Transitional Justice Network (2010:2).

<sup>124</sup> See Redress and Essex Transitional Justice Network (2010:3).

also necessary to consider the effects of the abuses on families, communities and society in rehabilitation programmes in order to promote individual, family and social healing, recovery and reintegration.<sup>125</sup>

#### **(iv) Satisfaction**

Satisfaction seeks to redress general and long-term effects of the harm to victims of the gravest abuses of human dignity. This form of reparations goes beyond the individual victim; it covers the wider community. By satisfaction is meant the implementation of effective measures aimed at the cessation of continuing violations, verification of the facts, and full and public disclosure of the truth, to the extent that such disclosure does not cause further harm or threaten the safety and interests of the victim, the victim's relatives, witnesses, or persons who have intervened to assist the victim or prevent the occurrence of further violations.

Satisfaction focuses also on the search for the whereabouts of the disappeared, for the identities of the children abducted, and for the bodies of those killed. This reparations measure seeks to assist in the recovery, identification and reburial of the bodies in accordance with the expressed or presumed wish of the victims, or the cultural practices of the families and communities. More than this, satisfaction consists further in an official declaration or a judicial decision restoring the dignity, good name, the reputation and the rights of the victims and of persons closely connected with them. Satisfaction also requires that parties responsible for the abuses must make a public apology, including acknowledging the facts and acceptance of responsibility. Gratification is derived also from judicial and administrative sanctions against persons liable for the violations, and in the commemorations and tributes to the victims. Satisfaction as a form of reparation also involves the inclusion of an accurate account of the human rights violations that occurred in training and educational materials at all levels.<sup>126</sup>

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<sup>125</sup> See Redress and Essex Transitional Justice Network (2010:4).

<sup>126</sup> See Redress and Essex Transitional Justice Network (2010:22).

#### **(v) Guarantees of non-repetition**

The guarantee of non-repetition involves implementing measures to prevent future gross violations of human rights in order to secure communities from the horrors suffered in the past. Such guarantees are structural in nature and can only be assessed on a long-term basis.<sup>127</sup> Guarantees include ensuring effective civilian oversight over the police, military and security forces, and compliance with international standards of due process, fairness and impartiality in all civilian and military proceedings. Assurances of non-repetition are strengthened by the state's actual implementation and enforcement of laws to uphold and protect the ethical integrity of all professions and human rights groups.

Additionally, it further involves the strengthening of the independence of the judiciary. Furthermore, guarantees against non-repetition are reinforced where the state promotes the observance of codes of conduct and ethical norms pertaining to public servants and military personnel. Promoting mechanisms for preventing and monitoring social conflicts and their resolution, reviewing and reforming laws contributing to or allowing gross violations of international human rights law and serious violations of international humanitarian law also contribute to guaranteeing of non-repetition of abuses.<sup>128</sup>

#### **2.8.4 Institutional Reform:**

This measure involves the reviewing and restructuring state institutions in order to ensure that they respect human rights and the rule of law, and that they function in a transparent and accountable way.<sup>129</sup> Institutional reform and transformation involves the vetting of officials employed in the public service through examining their personal backgrounds during restructuring or recruitment in order to weed out abusive or corrupt persons. It includes, furthermore, enacting laws that protect and provide for the reintegration of former armed groups into society.<sup>130</sup> Institutional reform aims at acknowledging victims as citizens and rights holders and to build trust between all citizens

<sup>127</sup> See F. Val-Garijo (2010:64); G. Anders and O. Zenker (2015:398); P. De Greiff (2012:28-46).

<sup>128</sup> See U.N. Basic Principles and Guidelines on Reparations, section 23.

<sup>129</sup> See N. Roht-Arriaza (2006:12); ICTJ (2009:15); T. Olsen, L. Payne and A. Reiter (2010:9).

<sup>130</sup> See M.S. Ellis (1997:609); J. Gauk (1994:627).



and their public institutions. However, since the end of World War II many treaties have been signed that extend the protection of international law to individuals. These human rights treaties, such as the United Nations Convention against Torture (UNCAT), place obligations on signatory states to protect their citizens. International law permits, but does not compel states to exercise jurisdiction over international crimes. However, states parties to the Rome Statute are under an obligation to try international crimes, otherwise the International Criminal Court will exercise jurisdiction. This can be done through promoting freedom of information, public information campaigns on citizen's rights, and verbal or symbolic reform measures such as memorials or public apologies.

#### **2.8.5 Traditional Justice or Traditional conflict resolution mechanisms:**

In the most recent past, there has been a growing call for the use of traditional conflict resolution or African traditional justice mechanisms to process cases involving gross human rights violations as well as violations of international criminal law.<sup>131</sup> Such calls have been made against the backdrop of the mounting caseloads that clog the ordinary courts. Formal judicial proceedings are costly and protracted, factors which impede access to justice, especially where no legal aid schemes exist.

Traditional African and reconciliation practices, despite their limitations in terms of gender inclusion and legal procedures, give expression to the need for a high level of participation by victims and other citizens in decision making and conflict resolution.<sup>132</sup> It is this level of inclusivity rather than the precise forms of traditional courts that suggest they have an important contribution to make to post-conflict restoration that proponents of international law would do well to take into account. The appeal of traditional African structures is the provision of spaces and milieus that are conducive to victims and perpetrators being able to break their silence on the past within a context that is culturally familiar and as socially secure as possible.

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<sup>131</sup> See N. Zupan and S. Servaes (2007:6); L. Waldorf (2010:17); P. Clark (2010:11); L. Bosire (2006:13).

<sup>132</sup> See C. Villa – Vicencio (2009:130).

Traditional practices vary from country to country, at times within different parts of the same country. They often have no appeal beyond the confines of those communities that practise them. Despite the multiple different traditional practices in Africa, certain common threads run through these traditions. These include verbal and non-verbal healing, and relationship building.

The notion of 'tradition' can play a central role in emerging grassroots mechanisms or processes by furnishing a familiar framework for the unfamiliar process of learning to live together again after conflict.<sup>133</sup> Traditional justice procedures could also constitute one of the mechanisms under transitional justice mechanisms for holding perpetrators to account. Traditional justice may be resorted to for purposes of complementing formal justice mechanisms. Such indigenous customary law procedures have been used in East Timor and Rwanda, but exist in vary or differing forms in various African countries, depending on cultural and religious context.

## 2.9 CONCLUSION

It has been said that TJ is firmly on the international agenda in post-conflict and post-repression settings, and one cannot agree more.<sup>134</sup> The discussion above shows that the need to address the effects of dictatorial rule and conflict was central to the birth of transitional justice. The forms underlying the concept of transitional justice, such as truth telling and traditional justice mechanisms, are seen as stopping a culture of impunity for perpetrators of human rights violations. In as much as the international law prohibits the granting of amnesty to perpetrators of war crimes, genocide and crimes against humanity, there have been calls by peace activists to forego court action for the sake of peace. However, as noted in the discussion above, some states establish truth commissions in order to shield perpetrators from possible prosecution. The discussion also noted that there are difficulties in implementing the reparations programmes in states. Some programmes, such as rehabilitation, are provided to victims in the form of relief aid and

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<sup>133</sup> See A.R. Iliff (2012:253/254). See also A.K. Bangura (2008:143-144).

<sup>134</sup> See P. Domingo (2012:1).

therefore fail to acknowledge the suffering and the condition of the victims resulting from the violence. In addition, in relation to compensation and rehabilitation, the victims are unaware of the centres where they can seek assistance. Therefore, this discussion calls for the reparation programmes to be implemented within a legal framework, and also recommends alerting the victims to the existence of rehabilitation centres.

From the foregoing, it is the conclusion of the author that if not well harnessed and harmonised, there can be a complicated relationship in the transitional justice spectrum between the aims and goals of the criminal prosecution mechanism and those of other transitional justice mechanisms per se, and for that matter, between the competing notions of justice or accountability, truth, peace and reconciliation within a conflict situation.



## CHAPTER THREE

### EXAMINING THE CONCEPTUAL UNDERPININGS OF INTERNATIONAL CRIMINAL LAW / JUSTICE

#### 3.1 INTRODUCTION

International criminal justice (hereafter 'ICJ') mechanisms can be part and parcel of the much wider transitional justice mechanisms and to some extent vice versa. Both ICJ and TJ approaches embrace the use of criminal prosecution mechanisms with the salient objective of punishing perpetrators of gross violations of human rights or those responsible for committing international crimes. It is a given that the international community cannot and discourages impunity for those who grossly abuse human rights of others. Key to the development of international criminal justice is the notion that emerged after the Second World War that individuals who are responsible for orchestrating international crimes have to be held accountable. International law has therefore placed an intertwined duty on states to investigate, prosecute and punish perpetrators of atrocity or international criminality.

Thus far, international criminal courts are a justice framework used by the international community and some states to address and redress atrocities perpetrated in post- conflict societies. Indeed, one of the undisputed novelties of the past century and the present century was the emergence of three distinct generations of international criminal courts: the first generation being the Nuremberg and Tokyo Tribunals, the second generation being the ad hoc Courts or Tribunals and the ICC, and the third generation being the Internationalised Courts.<sup>135</sup>

In recent years, both fields of international criminal justice and transitional justice have been confronted with the 'peace versus justice' debate. The questions that arise are these:

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<sup>135</sup> See website literature available at <http://www.pict-pcti.org/courts/ICC.html> (accessed on 1st March 2011).

Does the pursuit of justice greatly undermine peace overtures in post-conflict states? Are the two processes mutually exclusive, or can they be complementary to each other? One pertinent question that this study aims to answer is whether ICJ and, for that matter, TJ approaches and their mechanisms serve the same or different purposes or complementary purposes. This chapter seeks to explain the conceptual underpinnings of international criminal law and justice as embedded within various scholarly definitions, goals and historical origins of the field(s).

### **3.2 THE DUTY TO PUNISH INTERNATIONAL CRIMES UNDER INTERNATIONAL LAW**

The law is no stranger to the idea of holding individuals responsible for egregious conduct toward their fellow human beings. As regards the position of the individual as subject, international criminal law and protection of human rights are two sides of the same coin: The individual human being becomes the addressee of international (human) rights and duties, the latter including criminal responsibility for actions or omissions. Domestic criminal law and part of civil law evolved precisely to regulate their behavior. International law, as it developed from the 17<sup>th</sup> to the early 20<sup>th</sup> century, primarily regulated external relations between the states comprising the international community. It consequently had little to do with events taking place within a state's sovereign territory.<sup>136</sup>

However, the emergence and establishment of individual criminal responsibility at the international level has faced severe challenges, opposition and criticism, since it is largely perceived as a threat to national sovereignty.<sup>137</sup> This is mainly so, because what can be considered an "international crime" is problematic, and often times blurred to many people.<sup>138</sup> In essence, the question of whether post-conflict states are under a duty to prosecute perpetrators of international crimes amidst other competing demands and interests is key to conceptualising ICL/J. However, there is no doubt that the rule of law is given credence when impunity for mass atrocities is countered with criminal

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<sup>136</sup> See Y. Shany (2007:9).

<sup>137</sup> See G. Werle (2009:3).

<sup>138</sup> See E.S. Podger & R.S. Clark (2008:210); M.C. Bassiouni (2001:42).

prosecutions.<sup>139</sup> Nelson Mandela once remarked as follows on the hard choices facing emerging democracies and post conflict states:

‘In recent years, particularly during the past decade, there has been a remarkable movement in various regions of the world away from undemocratic and repressive rule towards the establishment of constitutional democracies. In nearly all instances, the displaced regimes were characterized by massive violations of human rights and undemocratic systems of governance. In their attempt to combat real or perceived opposition, they exercised authority with little regard to accountability. Transition in these societies has therefore been accompanied by enormous challenges. While it has signified new hopes and aspirations, it has at the same time brought into sharp focus the difficult choices that these countries would have to make on their road to democracy and economic progress. Ironically, the advent of democracy has put the welcome endeavours for national consensus to a test.’<sup>140</sup>

It is submitted that the two primary goals of ICL/J are retribution and deterrence. The duty of states to prosecute and punish international crimes has been enshrined in several treaties and the obligations have become a custom over time due to their being adhered to by the international community.<sup>141</sup> Genocide, as well as war crimes and crimes against humanity belong to the category of *ius cogens* (compelling law) and therefore constitute obligations which are *erga omnes* (obligations owed towards all other members of the international community), creating non-derogable duties upon states to prosecute them.<sup>142</sup> The International Law Commission’s Draft Code of Crimes against the Peace and Security of Mankind imposes an obligation on states to prosecute or extradite individuals who are responsible for particularly serious crimes.<sup>143</sup>

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<sup>139</sup> See P. Alston and R. Goodman (2013:1281); A. Cassese, G. Acquaviva, M. Fan, and A. Whiting (2011:1).

<sup>140</sup> See N. J. Kritz (1995:xi). This was a Forward written by Nelson Mandela, then President of the Republic of South Africa.

<sup>141</sup> See K. Obura (2011:15).

<sup>142</sup> See C. Garuka (2011:224).

<sup>143</sup> See International Law Commission’s Draft Code of Crimes Against the Peace and Security of Mankind, Art. 9.

In 1991, the UN General Assembly adopted a Resolution on war criminals and emphasised that a state's refusal to co-operate in the arrest, extradition, trial and punishment of persons accused or convicted of war crimes or crimes against humanity is contrary to the UN Charter and to generally recognised norms of international law.<sup>144</sup> The duty of states parties to prosecute international crimes has been codified in numerous treaties, conventions and judicial decisions. The section below studies some of the legal instruments and judicial decisions setting out the obligations on states to prosecute international crimes.

### **3.2.1 The Geneva Conventions of 1949 and the 1977 Additional Protocols**

The four Geneva Conventions of 1949 are at the core of international humanitarian law, the body of international law that regulates the conduct of armed conflict and seeks to limit its effects. They prohibit violations of the laws of armed conflict and urge States Parties to prosecute persons who breach the provisions of the Geneva Conventions. In situations of an internal armed conflict, violations of Common Article 3 of the four Geneva Conventions 1949 and the Additional Protocols of 1977 of the Geneva Conventions of 1949 are prohibited and prosecutable by states parties. Some of these offences have attained the status of customary international law and are thus prohibited and prosecutable in all jurisdictions.

The 1949 Geneva Conventions and the 1977 Additional Protocols impose further upon states parties the duty to punish or extradite perpetrators of international crimes, and they direct states parties to put an end to grave breaches spelled out in the Conventions. The grave breaches enshrined in the 1949 Geneva Conventions and 1977 Additional Protocols are wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully

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<sup>144</sup> See M.C. Bassiouni (2008:9).

and wantonly.<sup>145</sup> Therefore, states parties are under obligation to investigate, prosecute and punish perpetrators of such grave breaches, unless they opt to hand over the culprits for prosecution to another state party.

### **3.2.2 Convention on the crime of genocide**

The Convention on the Prevention and Punishment of the Crime of Genocide was adopted by the United Nations General Assembly on 9 December 1948 and entered into force on 12 January 1951.<sup>146</sup> Its purpose is to prevent and punish actions of genocide in war and in peacetime.<sup>147</sup> The Convention defines genocide as any act committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, such as killing members of the group; causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group; forcibly transferring children of the group to another group.<sup>148</sup> Crimes punishable under the Convention include; genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide, and complicity in genocide.<sup>149</sup>

An advisory opinion of the International Court of Justice stated that the principles underlying the Genocide Convention are recognised by civilised nations as binding on states, even without conventional obligations,<sup>150</sup> and therefore bestows the duty to prosecute and punish perpetrators of genocide on all states. The crime of genocide is now part of international customary law as evidenced by the fact that it was included in the International Law Commission's Draft Code of Crimes against the Peace and Security of Mankind, as well as in the Rome Statute of the ICC.

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<sup>145</sup> See Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Article 51.

<sup>146</sup> See The Convention on the Prevention and Punishment of the Crime of Genocide, GA Res. 260/1948.

<sup>147</sup> See Genocide Convention, art 1.

<sup>148</sup> See Genocide Convention, Art 2.

<sup>149</sup> See Genocide Convention, art 3.

<sup>150</sup> See K. Obura (2011:17).



### 3.2.3 The Rome Statute of the International Criminal Court

The Rome Statute of the International Criminal Court (hereafter 'Rome Statute'), adopted on 17 July 1998, is the UN multilateral treaty that established the International Criminal Court (ICC) in 2002. The ICC can investigate and prosecute only the core international crimes of genocide, crimes against humanity, and war crimes in situations where states are unable or unwilling to do so themselves. The Rome Statute stresses that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.<sup>151</sup> Therefore, it is incumbent on states to put in place the required mechanisms and institutions for handling perpetrators of international crimes. However, the ICC can hear a case where a state is unable or unwilling to investigate alleged international crimes, and then prosecute the perpetrators.

### 3.2.4 Human rights conventions

Human rights treaties such as the International Covenant on Civil and Political Rights (ICCPR), the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), the African Charter on Human and Peoples' Rights (ACHPR), and the American Convention on Human Rights (ACHR) do not impose expressly upon states parties the duty to prosecute and punish gross human rights violations. However, states parties have the duty to respect, protect, promote and fulfil human rights enshrined in particular treaties to which a state is party. Therefore, the obligation to protect human rights ideally means that states have a duty to punish human rights violators, and a failure of the state to investigate, punish and prosecute the perpetrators of such acts amounts to failure of the state in honouring its international obligations.

Under Article 2(1) of the ICCPR, states parties are obliged to respect, protect and give effect to civil and political rights. In addition, Article 2(3) provides that each state party to the Covenant undertakes to provide an effective remedy to any person whose rights and freedoms have been violated, even if the violation has been committed by a person acting in an official capacity. In several of its decisions and concluding observations, the Human

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<sup>151</sup> See Preamble of the Rome Statute.

Rights Committee has held that states parties are under an obligation to bring perpetrators of human rights violations to justice.<sup>152</sup> In the case of *Bleir v Uruguay*,<sup>153</sup> the Committee urged the Uruguayan government to bring to justice any persons found to be responsible for the victims' death, disappearance and ill-treatment. In *Mianga v Zaire*,<sup>154</sup> the Committee held that Zaire should investigate the events complained of and bring to justice those held responsible for the author's treatment.

In the Committee's Concluding Observation on Nepal, the United Nations Human Rights Committee (HRC) noted that cases of summary and arbitrary executions, enforced or involuntary disappearances, torture and arbitrary or unlawful detention committed by members of the army, security or other forces were not followed up by making proper inquiries or investigations, and that the perpetrators of such acts were neither brought to justice nor punished. It also stressed that the victims or their families were not compensated.<sup>155</sup> The Committee recommended that systematic investigations be conducted into such acts in order to bring those perpetrators before the courts.<sup>156</sup> However, in the cited examples, the Committee applied the term 'to bring to justice', which does not say clearly whether this requires criminal prosecution and imprisonment.<sup>157</sup>

However, there are cases in which the HRC has stated explicitly how a violator should be brought to justice. For example, in the case of *Thomas v Jamaica*,<sup>158</sup> the Committee, in ascertaining a violation of Articles 7 and 10(1), merely stated that "the state party is under an obligation to investigate the allegations made by the author with a view to instituting as

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<sup>152</sup> See A. Seibert-Fohr (2002:318).

<sup>153</sup> See A. Seibert-Fohr (2002:318); HRC, *Eduardo Bleierv Uruguay*, Communication R.7/30, 23 May 1982, UN Doc. Supp. No. 40 (A/37/40), para., 15.

<sup>154</sup> See Communication No. 366/1989, 8 November 1993, U.N. Doc. CCPR/C/49/D/366/1989 (1993), para. 7.

<sup>155</sup> See Concluding observations of the Human Rights Committee: Nepal, CCPR/C/79/Add.42, para. 10

<sup>156</sup> See Human Rights Committee (Concluding observations: Nepal), para., 16.

<sup>157</sup> See A. Seibert-Fohr (2002:319).

<sup>158</sup> See *Damian Thomas v Jamaica*, Communication No 800/1998, U.N. Doc. CCPR/C/65/D/800/1998, 26 May 1999.

appropriate criminal or other procedures against those found responsible. In some instances, the HRC has asked for punishment of certain human rights violations. In its General Comment on Article 6 of 1982, the Committee urged states parties to take measures to punish deprivation of life by criminal act.<sup>159</sup>

In its General Comment of 1992 on Article 7, the Committee emphasised that those who violate Article 7, whether by encouraging, ordering, tolerating or perpetuating prohibited acts, must be held responsible.<sup>160</sup> In *Bautista de Arellana v Colombia*, the HRC emphasised that though there was no right for an individual to require the state to prosecute another person, the state party is under a duty to prosecute those held responsible for violations of forced disappearances and the right to life.<sup>161</sup> This, therefore, indicates that states parties are under an obligation to punish perpetrators of human rights violations, though the scope of the violations considered by the HRC was rather narrow. In its 1994 Comments on El Salvador, the Committee stressed that all past human rights violations should be investigated thoroughly and the offenders punished and victims compensated.<sup>162</sup>

The UN Convention against Torture, Inhuman and Degrading Treatment or Punishment (UNCAT) also imposes a duty on states parties to punish perpetrators of acts of torture as defined in Article 1 of the UNCAT. UNCAT obliges states parties to criminalise all acts of torture under their domestic laws,<sup>163</sup> and that they establish jurisdiction over such cases, in situations where the offences are committed in any territory within a state's jurisdiction or on board a ship or aircraft registered in that State or when the alleged offender is a national

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<sup>159</sup> See HRC, General Comment No. 06: The right to life (art. 6): 04/30/1982.

<sup>160</sup> See General Comment No. 07: Torture or cruel, inhuman or degrading treatment or punishment (Art. 7): 05/30/1982.

<sup>161</sup> See *Bautista de Arellana v. Colombia*, Communication No. 563/1993, U.N. Doc. CCPR/C/55/D/563/1993 (1995), para. 10.

<sup>162</sup> See HRC (Concluding Observations: El Salvador), CCPR/C/79/Add.34, Para., 13.

<sup>163</sup> See Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Art. 4.

of that State; and/or when the victim is a national of that State if that State considers it appropriate.<sup>164</sup>

Under Article 7 of UNCAT, states parties are under a duty to prosecute or extradite alleged perpetrators of acts of torture in the territory under whose jurisdiction they were committed.<sup>165</sup> UNCAT urges states parties further to include act(s) of torture as extraditable offences in any extradition treaty concluded between states parties,<sup>166</sup> and it also provides for consideration of extradition of alleged perpetrators of acts of torture upon request by a state party without an extradition treaty with a state on whose territory the alleged perpetrator is holed, resides or stays.<sup>167</sup> Therefore, this provision ensures that perpetrators of acts of torture are held accountable for their actions in any jurisdiction. However, the Committee against Torture<sup>168</sup> has held that the duty to prosecute or extradite is applicable only when the act(s) of torture occur after the convention has entered into force in the respective state party.<sup>169</sup>

In the decision by the House of Lords, the highest court of the United Kingdom, in the case of General Augusto Pinochet, in which he was challenging his extradition to Spain to face charges of ordering killings, abductions and torture of over 1000 Chileans and others during his 17 years of rule, it was ruled that a former Head of State had no immunity in respect of acts of torture or conspiracy to commit such acts, where such acts constituted international crimes.<sup>170</sup> The ruling by the House of Lords was a clear endorsement that torture is an international crime subject to prosecution under universal jurisdiction.

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<sup>164</sup> See Torture Convention, art 5.

<sup>165</sup> See Torture Convention, art 7.

<sup>166</sup> See Torture Convention, art 8 (1).

<sup>167</sup> See Torture Convention, art 8 (2).

<sup>168</sup> This is a committee established under Article 17 of the Convention against Torture, Inhuman and Degrading Treatment and Punishment.

<sup>169</sup> See K. Obura (2011:19).

<sup>170</sup> See H. Fox, et al (1999:689).

The African Commission on Human and Peoples' Rights (African Commission),<sup>171</sup> in interpreting the African Charter on Human and Peoples' Rights (African Charter),<sup>172</sup> held that states parties have a duty to prosecute and punish serious violations of certain rights under the African Charter for the crimes of extrajudicial executions, torture, slavery, and disappearances. The Commission has held also that amnesties covering serious violations of human rights are incompatible with the duty of states to prosecute and punish these violations under the African Charter.

The European Court on Human Rights, in the cases of *Zeki Aksoy v Turkey*,<sup>173</sup> *Keenan v United Kingdom*,<sup>174</sup> *Aydin v Turkey*,<sup>175</sup> has also stated that a state has an obligation to conduct investigations capable of leading to the identification and punishment of those responsible where the alleged acts include torture or arbitrary killing. Therefore, acts of torture in the respective jurisdictions are required to be thoroughly investigated and the perpetrators prosecuted.

### 3.3 THE MEANING BEHIND THE TERM 'INTERNATIONAL CRIMES'

There is no clearly agreed-upon definition of the term 'international crimes' in international law.<sup>176</sup> It is clear that the term is applied in the different jurisdictions and contexts to refer to particular crimes. Some authors stated that 'international crimes' refer to very serious offences prohibited under international conventions.<sup>177</sup> Key to the

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<sup>171</sup> See Body established under article 30 of the ACHPR to interpret all the provisions of the present Charter, ensure the protection of human and peoples' rights and to promote Human and Peoples' Rights.

<sup>172</sup> See The African Charter on Human and Peoples' Rights, CAB/LEG/67/3/Rev 5, entered into force on 21 October 1986.

<sup>173</sup> See *Aksoy v Turkey*, Application no. 21987/93, Judgment Strasbourg, 18 December 1996.

<sup>174</sup> See *Keenan v The United Kingdom*, (Application no. 27229/95) Judgment Strasbourg, 3 April 2001, available at [http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=003-68383-68851#{\"itemid\":\[\"003-68383-68851\"\]}](http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=003-68383-68851#{\) (accessed on 19 November 2012).

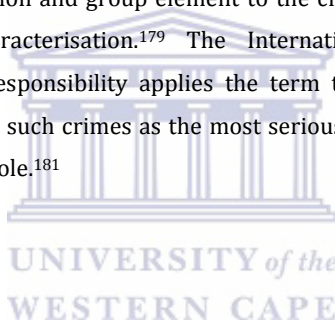
<sup>175</sup> See *Aydin v Turkey*, 24 May 2005 [ECtHR], Case no 25660/94, 25 September 1997.

<sup>176</sup> See K. Obura (2011:12).

<sup>177</sup> See B.M. Taylor et al (2010:21).

understanding of what meaning can be attached to 'international criminal law or justice' is 'international crimes'.

An international crime is an act which the international community recognizes as not only a violation of ordinary State criminal law but one which is so serious that it must be regarded as a matter for international concern; further, for one of a variety of reasons, it cannot be left to the State which would normally have jurisdiction over it.<sup>178</sup> The distinct nature of international crimes, that sets international crimes apart from domestic crimes, is that they meet two thresholds: the severity threshold (represents the gravity of the harm committed and demands that physical security human rights must be violated) and the associative threshold (represents the organisation and group element to the crime). Each international crime must exhibit this characterisation.<sup>179</sup> The International Law Commission's 2001 Draft Articles on State Responsibility applies the term to refer to crimes of a state.<sup>180</sup> The Rome Statute refers to such crimes as the most serious crimes of concern to the international community as a whole.<sup>181</sup>



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<sup>178</sup> See C. de Than and E. Shorts (2003:13); K. Kittichaisaree (2002:3).

<sup>179</sup> See J.F. Kirsten (2012:30).

<sup>180</sup> See International Law Commission's Draft on State Responsibility, art. 19.

<sup>181</sup> See Preamble of the Rome Statute of the ICC.

### **3.4 THE MEANING, GOALS AND HISTORICAL ROOTS OF INTERNATIONAL CRIMINAL LAW / JUSTICE**

#### **3.4.1 Defining and distinguishing between International Criminal Law and Justice**

International Criminal Law (hereafter: 'ICL') is a branch of Public International Law. ICL is a comparatively newer discipline of law that draws on theories / principles of international law, criminal law and human rights law.<sup>182</sup> The field of ICL/J is at the very confluence of treaty provisions and customary law originating from other important fields of law such as human rights law, international humanitarian law, public international law and criminal law.

But how then can one define 'international criminal law'? International criminal law can be described as a body of international rules promulgated to regulate and implement international substantive criminal law. It is also meant to refer to a set of rules according to which individuals may be prosecuted and tried for international crimes and subjected to the international penal system.<sup>183</sup> According to van Sliedregt and Stoitchkova, the term 'international criminal law' traditionally referred to the international aspects of national criminal law, but has evolved to refer at present to the criminal law aspects of international law that regulate the prosecution of international crimes at the international level.<sup>184</sup> Khan and Dixon define the term 'international criminal law' as referring to the legal discipline that governs the enforcement of the international humanitarian law and other substantive bodies of criminal law with an international dimension that encompasses all international crimes.<sup>185</sup>

On the other hand, Bassiouni defines it as a complex legal discipline that consists of several components bound by their functional relationship in the pursuit of its value-oriented goals such as the prevention and suppression of international criminality, enhancement of accountability and reduction of impunity, and the establishment of international criminal

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<sup>182</sup> See Fletcher (2008:1); W.A. Schabas (2007:547/548); A. Cassese et al (2011:1); J.K. Kleffner (2008:7-8).

<sup>183</sup> G.A. Knoops (2005:1).

<sup>184</sup> See E. van Sliedregt and D. Stoitchkova (2010:241).

<sup>185</sup> See K.A.A Khan and R. Dixon (2009: 21).

justice.<sup>186</sup> He describes International criminal law as a product of the convergence of international aspects of municipal criminal law and the criminal aspects of international law. Its origin and development must, therefore, be traced through these two branches of law.

Essentially, ICL is a body of international rules designed both to proscribe certain categories of international criminal conduct (war crimes, crimes against humanity, genocide, torture, aggression and terrorism) and make those persons who engage in such conduct criminally liable.<sup>187</sup> The term refers to a relatively new legal discipline that governs the enforcement of the international humanitarian law and other substantive bodies of criminal law with an international dimension.<sup>188</sup> In effect therefore, ICL regulates international proceedings before international courts and tribunals, for prosecuting and trying persons accused of such crimes.<sup>189</sup> The rules and principles of international criminal law are or have only just evolved and continue to emerge from the statutes and works of international criminal courts set up post Second World War.

ICL is a complex legal discipline that consists of several components bound by their functional relationship in the pursuit of its value-oriented goals. These goals include the prevention and suppression of international criminality, enhancement of accountability and reduction of impunity, and the establishment of international criminal justice.<sup>190</sup>

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<sup>186</sup> See M.C. Bassiouni (2003:1), Geert-Jan Alexander Knoops (2005:1); K.J. Fisher (2012:30); H. Olosolo (2012: 8); M.A. Drumbl (2007:25); S.R. Ratner and J.S. Abrams (2001:3); H.J. Steiner and P. Alston (2000:10); W.B. Gallie (1991:1); C. Damgaard (2010:12-13); C.J.M. Safferling (2001:1); P. Capps (2009:3); L.S. Sunga (1997:2); C. De Than and E. Shorts (2003:12-13); M.C. Bassiouni (1999:4); B.M. Yarnold (1999: 128); T. Buergenthal and H.G. Maier (1985:1); R. Cryer, H. Friman, D. Robinson and E. Wilmshurst (2007: 1); R. Cryer (2005:1); I. Natekas and S. Nash (2007: 1); and J.K. Kleffner (2008: 7-8). Each of ICL's components derives from one or more legal disciplines and their respective branches, including international law, international humanitarian law criminal law and human rights law.

<sup>187</sup> See A. Cassese (2008:3).

<sup>188</sup> See K.A.A. Khan and R. Dixon (2009:2).

<sup>189</sup> See A. Cassese (2008:3).

<sup>190</sup> See M.C Bassiouni (2003:1).



International criminal law encompasses all norms that establish, exclude or otherwise regulate responsibility for crimes under international law. An offence falls under international criminal law if it meets three conditions: First, it must entail individual responsibility and be subject to punishment. Second, the norm must be part of the body of international law. Third, the offence must be punishable regardless of whether it has been incorporated into domestic law.<sup>191</sup>

On the other hand, the term 'international criminal justice' refers essentially to a justice system or framework that encompasses the regulation and enforcement of individual criminal accountability or responsibility for crimes perpetrated under international criminal law that are prosecutable before international courts and / or by national courts over core or serious crimes or gross violations of human rights. The concept of international criminal justice is both simple and complex, in the sense that certain types of wrongdoing are generally recognised as international crimes, which may be prosecuted both before national courts and, in so far as international criminal courts have competence. The concept is complex in the sense that the relation between the role of national courts and international criminal courts may be problematic.

The international criminal justice is for all intents and purposes a combination of international institutions, such as the ICC, ad hoc tribunals, international investigating bodies, and national criminal justice systems working in a complementary fashion to maximise the opportunities of enforcing ICL. The enforcement of international criminal law consists of a horizontal component deriving from the different forms of international cooperation between states in criminal matters, and a vertical component wherein international criminal courts embody a supranational approach and procedure to the prosecution of certain international crimes.<sup>192</sup> The horizontal element of that prohibition

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<sup>191</sup> See G. Werle (2009:29).

<sup>192</sup> See K.A.A Khan and R. Dixon (2009: 22).

recognizes States' right or obligation to exercise one of the core elements of their sovereignty – the enforcement of criminal law – with regard to the prohibited conduct.<sup>193</sup>

ICL is enforced through norms requiring the application of sanctions against actors who perpetrate the crimes, or who generate the policies that bring about the commission of the international crimes.<sup>194</sup> Normally the establishment and enforcement of individual criminal responsibility through international criminal justice mechanisms faces two significant challenges: (i) the fact that it is states (and not individuals) that were originally the only subjects of international law, and (ii) Getting around the concept of state sovereignty, which is jealously guarded by states.<sup>195</sup>

#### **3.4.2 The evolution of International Criminal Law / Justice**

Since WW II, a huge conceptual transformation has occurred in the way politicians and lawyers think about individual rights against governments. After WW II, the American idea became the universal idea. Under the aspirations of Eleanor Roosevelt and the United Nations, the notion of rights based on personhood became applicable to the world.<sup>196</sup> Protection of Human Rights through International Criminal Law is, among other things, an instrument to protect human rights. It responds to massive violations of fundamental human rights. International criminal law provides an answer to the failure of traditional mechanisms for protecting human rights. Thus, the protection of human rights has three dimensions: the securing of rights in the conventional constitutional sense; the protection of all victims, not only those who are citizens of foreign states; and the necessity to stand trial for crimes committed against humanity.<sup>197</sup> The creation of these aspects to human rights testifies to the judicial creativity resulting from the vast abuses of human dignity in WW II.

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<sup>193</sup> See J.K. Kleffner (2008:7/8).

<sup>194</sup> See M.C. Bassiouni (2003:678); E. van Sliedregt and D. Stoitchkova (2010:254).

<sup>195</sup> See W.J. Stewart (2000); G. Werle (2009:3).

<sup>196</sup> See G.P. Fletcher (2008:1).

<sup>197</sup> See G.P. Fletcher (2008:1).

There is a common agreement that some form of accountability for state-sponsored atrocities should be part of the broader transitional justice framework.<sup>198</sup> However, in apportioning accountability, there are a number of practical concessions that must be made, since it is not always possible to punish all those responsible for human rights violations nor is it always possible to punish even those who bear the greatest responsibility, as society may demand an accountability process that does not involve criminal prosecutions.<sup>199</sup> The words accountability and responsibility are used interchangeably. Accountability does not merely seek to identify the responsible party; it seeks to make the responsible party account for its actions.<sup>200</sup> Accountability will 'ensure the discharge of responsibility', while the reverse does not necessarily apply.

From the outset, it is important to point out that all present day international criminal courts of whatever form owe their existence to the emerging the field of international criminal law. As already articulated in this chapter, ICL is essentially a body of international rules designed both to proscribe certain categories of international criminal conduct (war crimes, crimes against humanity, genocide, torture, aggression and terrorism) and make those persons who engage in such conduct criminally liable.<sup>201</sup> In effect therefore, ICL regulates international proceedings before international courts and tribunals, for prosecuting and trying persons accused of such crimes.<sup>202</sup> The rules and principles of international criminal law are or have only just evolved and continue to emerge from the statutes and works of international criminal courts set up after the Second World War.

As also already noted in this chapter, each of ICL's components derives from one or more legal disciplines and their respective branches, including international law, criminal law and human rights law. The discipline of ICL, thus, encompasses all international crimes and gross violations of human rights, and how their perpetrators are dealt with. The emergence and development of international criminal law and the protection of human rights are

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<sup>198</sup> See E. Hughes et al (2007:1).

<sup>199</sup> See E. Hughes and E. Thakur (2007:1).

<sup>200</sup> See L. Yarwood (2011:13).

<sup>201</sup> See A. Cassese (2008:3).

<sup>202</sup> See A. Cassese (2008:3).

closely related. Their common root lies in international humanitarian law. Human rights, which provide the basis for individual rights, and the norms of international criminal law, which ascribe individual responsibility, were originally alien to traditional, state-centred international law.

The evolution, emergence and eventual development of international criminal law arose out of the need to create an international criminal justice enforcement framework where those suspected of committing international crimes could be tried. The aspect of international criminal law grew out of various practices by states stemming from their international cooperation with regard to the enforcement of municipal criminal law. The aspect of international criminal law can be traced through several regulatory schemes, which are: (1) the control of war; (2) the regulation of armed conflicts; (3) the prosecution of violations of laws of war; and (4) common crimes of international interest.<sup>203</sup> International criminal law encompasses not only the law concerning genocide crimes against humanity, war crimes and aggression, but also the principles and procedures governing the international investigation and prosecution of these crimes.<sup>204</sup> International criminal law can be enforced directly (through international courts) or indirectly (through national courts). Both these mechanisms are today prominently being used in various situations or jurisdictions.

Closely linked to the emergence of ICL/J is the notion of a permanent international criminal court, as an institution which has been mooted since the 13th century.<sup>205</sup> However, some authors like Cakmak have argued that tribunals existed even before then, holding the individuals responsible for war crimes in Greece in 405 BC, and in China and Japan.<sup>206</sup> The first internationally known criminal trial was that of Peter von Hagenbach who was convicted by an ad hoc tribunal of the Holy Roman Empire in 1474 for atrocities (war

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<sup>203</sup> See M.C.Bassiouni (2008:70-3).

<sup>204</sup> See R. Cryer et al (2007:3).

<sup>205</sup> See C. Cakmak (2006:4).

<sup>206</sup> See C. Cakmak (2006:2); W.A. Schabas (2007:1).

crimes) committed during the occupation of the town of Breisach and Rhein.<sup>207</sup> The trial of Hagenbach is valued for having formulated an embryonic version of crimes against humanity and charging rape as a war crime. It was also the first recorded case in history to reject the defence of superior orders.<sup>208</sup>

As has been shown in this chapter, international law is central to the tenet of individual criminal responsibility in so far as treaties and customs clearly confer obligations and rights upon states to prosecute and punish certain acts that incur individual responsibility.<sup>209</sup> The international community holds direct and strong interest in ensuring that criminal justice is adequately dealt by any appropriate mechanism capable of reducing the destabilizing impact and the threat posed by such crimes to international peace and security. In order to ensure the timely punishment of those bearing the major responsibilities for international crimes, the international community has over time established various forms of super-national criminal justice, the first experiences being the Tribunals of Nuremberg and Tokyo.

The redressing of wrongs committed through human rights violations is not only a legal obligation, but also a moral obligation imposed on governments.<sup>210</sup> Under international law, states are under a universally recognized obligation to investigate and, where appropriate, prosecute those suspected of committing crimes under international law.<sup>211</sup> In essence, the development of ICL/J is linked to the development of international courts with a jurisdiction to try individuals responsible for committing international crimes. Some of the most prominent international courts with an international criminal jurisdiction are further discussed below.

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<sup>207</sup> See W. A. Schabas (2007:1); D. (2004: 13); E. Greppi (1995: 531); J. Iverson (2013:4).

<sup>208</sup> See K. Heller and G. Simpson (2013:48).

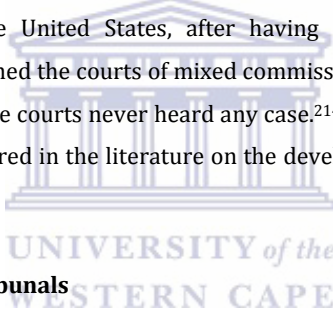
<sup>209</sup> See S.R. Ratner (2009:167).

<sup>210</sup> See J.E. Mendez (1997:1).

<sup>211</sup> See No Peace Without Justice (2010:26).

### 3.4.3 Courts of mixed commission

An important aspect that has not been ignored by scholars of international criminal law is the influence of the anti-slavery mixed commissions as one of the forerunner(s) of international criminal justice. Mixed commissions were established in the 18th century to adjudicate on vessels captured on suspicion of trading in slaves after the trade had been declared illegal.<sup>212</sup> The original courts which were created by the Anglo-Spanish, Anglo-Portuguese and Anglo-Dutch treaties sat in Sierra Leone, Havana and Rio de Janeiro, and began operations in 1819.<sup>213</sup> Later in the late 1830s and early 1840s, other countries such as Chile, the Argentine Confederation, Uruguay, Bolivia and Ecuador also committed themselves to participate in the mixed commission in Sierra Leone. In 1842, a new Anglo-Portuguese treaty was signed and mixed courts were established in Luanda, Boa Vista, Spanish Town and Cape Town. In 1862, the United States, after having refused to participate in this cause for a long time, established the courts of mixed commission in New York, Sierra Leone, and Cape Town, though these courts never heard any case.<sup>214</sup> However, the courts of mixed commission have been ignored in the literature on the development of international criminal law.<sup>215</sup>



### 3.4.4 The Nuremberg and Tokyo Military Tribunals

The creation of the Nuremberg and Tokyo international military tribunals represented the first proper expression of international criminal law, which also effectively denoted the emergence of international criminal law as an independent branch of law.<sup>216</sup> The development of international criminal law was further entrenched with the creation of the *ad hoc* Courts<sup>217</sup> and subsequently the Hybrid Courts.<sup>218</sup> In the same time period, the law,

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<sup>212</sup> See L. Bethell (1966:79).

<sup>213</sup> See J.S. Martinez (2008).

<sup>214</sup> See J.S. Martinez (2008:79); J. Allain (2015:254).

<sup>215</sup> See E. Haslam (2012:8); J. Allain (2015:255).

<sup>216</sup> See I. Bantekas and S. Nash (2007:495); C. Binder (2013:11); D.W. Nabudere (2008:5); M. Heikkilä (2013:94); P. Sands (2003:2); B. Ferencz (2000:8); D. McGoldrick (2004:15); J.F. Kirsten (2012:2).

<sup>217</sup> Such as the International Criminal Tribunals for the former territory of Yugoslavia and Rwanda.

however, also evolved through the adoption of international treaties, most importantly the Genocide Convention adopted in 1948 and the four Geneva Conventions in 1949.<sup>219</sup> However, the highest point and crystallisation of international criminal law was the adoption of the Rome Statute and the subsequent creation of the ICC.<sup>220</sup>

After the First World War in 1919, a number of initiatives were undertaken in the pursuit of establishing a permanent international criminal court.<sup>221</sup> These included the Treaty of Versailles<sup>222</sup> of 1919 that was adopted by the victor powers to set peace terms for the defeated Central Powers. The treaty provided for the prosecution of Kaiser Wilhelm II of Germany for the offence against international morality and the sanctity of the treaties.<sup>223</sup> However, the Dutch authorities refused to hand him over for trial. It also provided for the establishment of ad hoc tribunals to prosecute those alleged to have committed acts in violation of the laws and customs of war.<sup>224</sup> The Versailles Peace Treaty effectively laid the firm foundations upon which individual criminal responsibility for international crimes was established, and thereafter the international criminal courts.<sup>225</sup> It was, however, the Charter of the International Military Tribunal at Nuremberg<sup>226</sup> that is essentially considered the birth of international criminal law.

<sup>218</sup> Examples are the Special Court for Sierra Leone, and the Hybrid Courts in Cambodia, Lebanon and East Timor.

<sup>219</sup> See M. Heikkilä (2013:94); P. Sands (2003:3).

<sup>220</sup> See W. Gerhard (2009:3); P. Sands (2003:4).

<sup>221</sup> See C. de Than and E. Shorts (2003:271); No Peace Without Justice (2010:4).

<sup>222</sup> This was an agreement between the Allies (the victor countries of WWI mainly France, Italy, the United Kingdom, and the United States) that was created primarily so that the Allies could decide and agree upon what they wanted to do to the Central Powers (the losing countries of WWI, which were mainly Germany, Austria-Hungary, Bulgaria, and the Ottoman Empire).

<sup>223</sup> See Versailles Treaty Art 227. See also R. Gutman (2007:132).

<sup>224</sup> See Versailles Treaty, Arts 228-229.

<sup>225</sup> See W.J. Stewart (2000:1); F. Pocar (2008:20).

<sup>226</sup> The IMT Charter was an appendix to the London Agreement of 8 August 1945 whose article 1 provided for the creation of an international military tribunal 'for the trial of war criminals whose offences have no particular geographical location,' and article 6 provided for the following crimes: crimes against peace, war crimes and crimes against humanity. A key statement from the Nuremberg Tribunal Judgement stated,

Unfortunately, none of the tribunals were established due to Germany's refusal to handover the suspected war criminals for prosecution by the allied powers. However, Germany reached a consensus with the allied powers to have national prosecutions conducted in Germany.<sup>227</sup> Because of the stringent conditions that the Treaty of Versailles placed on Germany after the First World War, it has been argued that Germany's discontent was partly responsible for the outbreak of the Second World War.

After the Second World War, the Nuremburg and Tokyo tribunals were established to prosecute individuals for crimes against peace, war crimes and crimes against humanity.<sup>228</sup> In fact, it has been argued that the origins of international criminal courts lie in the Tribunals that tried members of the axis Powers after the Second World War on the basis that crimes of such seriousness and magnitude could not be left unpunished by the international community.<sup>229</sup> The Nuremburg and Tokyo tribunals were set up on the recommendation of the United Nations War Crimes Commission (hereafter UNWCC). It was initially called the United Nations Commission for the Investigation of War Crimes and was established on 20 October 1943 by the victorious Allies to investigate Nazi crimes, record them, and help prepare indictments. The aim was to make sure that the war criminals were arrested and the evidence of their crimes exposed. Furthermore, the idea was to find the legal basis for the punishment and extradition of the criminals and to determine what conduct should be included under crimes against humanity and the crime of genocide.<sup>230</sup> The Centres of Documentation of Nazi War Crimes were established throughout Germany

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'Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international be enforced.' Later the Charter of the International Military Tribunal for the Far East (was modelled on the IMT Charter) was crafted and released based on the directive of the Commander-in-Chief of the Allied Forces on 19 January 1946.

<sup>227</sup> See M.C. Bassiouni (2008:34).

<sup>228</sup> See E. van Sliedregt and D. Stoitchkova (2010:252); M.C. Bassiouni (2008:34). Provisions that regulated Nuremberg and Tokyo Tribunals were stated in the respective Charters of the two International Military Tribunals.

<sup>229</sup> See K.A.A. Khan and R. Dixon (2009:6); G. Mettraux (2011:5).

<sup>230</sup> See M.E. Bathurst (1945:568); C. Tomuschat (2006:205).



and Austria to aid research into the alleged crimes. However, because of the onset of the Cold War, the UNWCC was dissolved in May 1948 after various countries failed to extradite suspected war criminals.<sup>231</sup>

On 8 August 1945, the decree for the London Charter of the International Military Tribunal was issued.<sup>232</sup> It laid down the laws and procedures by which the Nuremberg trials were to be conducted. The Nuremberg tribunal had the jurisdiction to handle cases related to conspiracy, war crimes and crimes against humanity.<sup>233</sup> The Nuremberg tribunal consisted of one judge from each of the four Allied powers—France, the Soviet Union, the United Kingdom, and the United States—and each was represented on the prosecution team. Twenty-four leading Nazi officials were indicted under the Nuremberg Charter for war crimes. Of the 24, 16 were convicted of committing war crimes and crimes against humanity, 12 for committing crimes against peace, and eight for conspiring to commit crimes against peace.<sup>234</sup> One defendant committed suicide before the commencement of the proceedings while the other was found to be mentally and physically unfit to stand trial. Martin Bormann, who was Hitler's secretary and head of the Nazi Party Chancellery, was tried and convicted in absentia, as his whereabouts were unknown.

Following the model of the Nuremberg tribunal, on 19 January 1946, MacArthur, the then supreme commander of the allied powers, issued a special proclamation ordering the establishment of an International Military Tribunal for the Far East (hereafter 'IMTFE'). The Charter of the International Military Tribunal for the Far East (hereafter 'CIMTFE') prescribed how it was to be formed and the crimes that it was to try and how the tribunal

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<sup>231</sup>See A. Mikaberidze (2013:671); C. Tomuschat (2006:210).

<sup>232</sup> See United Nations, Charter of the International Military Tribunal - Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis ("London Agreement"), 8 August 1945. See also the Allied Control Law No. 10 issued on 20 December 1945; K. Kittichaisaree (2002:3).

<sup>233</sup> Article 6: Charter - II : Jurisdiction and general principles, Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal, London, 8 August 1945.

<sup>234</sup> See USAK Year Book (2010:81).

was to function. The tribunal had jurisdiction over the following crimes: crimes against peace, which included the planning, preparation, initiation or waging of a declared or undeclared war of aggression, or a war in violation of international law, treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;<sup>235</sup> conventional war crimes, which included violations of the laws or customs of war;<sup>236</sup> and crimes against humanity, which included murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political or racial grounds.<sup>237</sup> At the Tokyo tribunal, 28 Japanese military and political leaders were charged with waging aggressive war and with responsibility for conventional war crimes.<sup>238</sup> More than 5,700 Japanese lower-ranking personnel were charged with conventional war crimes in separate trials convened by Australia, China, France, The Netherlands, Philippines, the United States, and the United Kingdom.<sup>239</sup> The charges covered a wide range of crimes including prisoner abuse, rape, sexual slavery, torture, ill-treatment of labourers, execution without trial and inhumane medical experiments.

Whereas the Nuremberg and Tokyo Tribunals contributed to establishing much of the jurisprudence adopted by the newly-created United Nations, however, the Cold War prevented any further attempts to build on those foundations.<sup>240</sup> On the whole, the precedents set by the Nuremberg and Tokyo tribunals created new legal norms and standards of responsibility that have advanced the international rule of law, especially in regard to individual criminal responsibility<sup>241</sup> and the imposition of obligations on states

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<sup>235</sup> See Article 5(a).

<sup>236</sup> See Article 5(b).

<sup>237</sup> See Article 5(c).

<sup>238</sup> See S. Sharratt (2011:17); M. Noone (2009:408).

<sup>239</sup> See J. Doower (1999:447).

<sup>240</sup> See R. Gutman (2007:132).

<sup>241</sup> See C. Tomuschat (2006:210); T. Weigend (2010: 378); A. Cassese (2008:33); C. de Than and E. Shorts (2003:273); Y. Beigbeder (1999:27); R. Cryer et al (2007:1); K.A.A. Khan and R. Dixon (2009:6); L.S. Sunga (1997:6); E. van Sliedregt and D. Stoitchkova (2010:254). See also Article 6 of the IMFTE that stipulates that "Neither the official position, at any time, of an accused, nor the fact that an accused acted pursuant to order

parties to domesticate laws criminalising grave breaches enshrined in the Genocide Convention of 1948, the Geneva Conventions of 1949, the Apartheid Convention (1973),<sup>242</sup> the Hostage-taking Convention,<sup>243</sup> and the Torture Convention.<sup>244</sup> Therefore, a person cannot insulate themselves from individual responsibility by apportioning blame to their superiors, the government or on the basis of fulfilling their obligations. Under the traditional definition, only states were subjects of international law, that is, only states were deemed to have rights and obligations that international law recognised. Whatever benefits or burdens international law conferred or imposed on other entities or individuals were considered to be purely derivative, flowing to these so called 'objects' of international law by virtue of their relation to or dependence upon a state.<sup>245</sup>

In the field of the administration of criminal justice, international human rights provisions have influenced directly or indirectly the criminal procedural rules of various countries. Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.<sup>246</sup> This was the first attempt in modern times to hold accountable in criminal proceedings before an international tribunal the perpetrators of crimes against international law. This provision for individual responsibility was further entrenched in the

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of his government or of a superior shall, of itself, be sufficient to free such accused from responsibility for any crime with which he is charged, but such circumstances may be considered in mitigation of punishment if the Tribunal determines that justice so requires."

<sup>242</sup> See G.A. res. 3068 (XXVIII), 28 U.N. GAOR Supp. (No. 30) at 75, U.N. Doc. A/9030 (1974), 1015 U.N.T.S. 243, entered into force July 18, 1976.

<sup>243</sup> See UNGA Resolution 34/146 on 17 December 1979., 1316 UNTS 205 / [1990] ATS 17 / 18 ILM 1456 (1979), entered into Force: 3 June 1983.

<sup>244</sup> See GA Res. 39/ 46 of December 1984, entry in force 26 June 1987; see also Tim McCormack, 60 Years from Nuremburg: What Progress for International Criminal Justice? (Paper delivered at the Inaugural Law Week Oration and the Annual advocating for Justice Lecture), pp.7, available at [http://www.issafrica.org/anij/uploads/McCormack\\_60\\_Years\\_from\\_Nuremberg.pdf](http://www.issafrica.org/anij/uploads/McCormack_60_Years_from_Nuremberg.pdf) (accessed on 22nd November 2012); M.C. Bassiouni (2008:36).

<sup>245</sup> See M.N. Shaw (1997:1); T. Buergenthal and H.G. Maier (1985:1-2).

<sup>246</sup> See R. Gutman et al (2007:132); G. Kemp (2010:11).

Statutes of the ICTY<sup>247</sup> and the ICTR.<sup>248</sup> The principle of individual criminal responsibility has been also entrenched in the Rome Statute of the ICC,<sup>249</sup> with a specific provision on the responsibility of commanders and other superiors.<sup>250</sup>

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<sup>247</sup>See Article 7. The Article states that:

"1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.

2. The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.

3. The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

4. The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires."

<sup>248</sup>See Article 6. The Article provides that:

"1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 4 of the present Statute, shall be individually responsible for the crime.

2. The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.

3. The fact that any of the acts referred to in articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

4. The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him or her of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal for Rwanda determines that justice so requires."

<sup>249</sup> See K.A.A. Khan and R. Dixon (2009:6); S.R. Ratner and J.S. Abrams (2001:6-7). See also Article 25 of the ICC Statute provides for individual criminal responsibility for any person who, either as an individual, or jointly with others, commits, orders, solicits or induces or facilitates the commission of a crime under the jurisdiction of the court.

<sup>250</sup> See Article 28 of the Rome Statute provides that a military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed

Secondly, the Nuremberg and Tokyo trials set three substantive crimes that are punishable in international law and these have been codified in international treaties and agreements. The three crimes that have been enshrined in international law are war crimes, crimes against humanity and crimes in violation of international law. Previously, before the establishment of the Tokyo and Nuremberg tribunals, these crimes under the jurisdiction of the two bodies were not well-defined as crimes and person who committed such offences were not punished for their actions.

Whereas the Tokyo and Nuremberg tribunals have been lauded for setting the pace in the development of international criminal law, however, they also had shortcomings. First, the tribunals presided over trials over the vanquished forces, and were therefore viewed as dispensing justice on behalf of the victors. The crimes committed by the Allied powers were not within the jurisdiction of the IMT, much as all efforts to introduce the crimes were rejected by the court.<sup>251</sup> This eroded the legitimacy of the trials as they were one-sided. In addition and related to the above, the Nuremberg and Tokyo trials also saw the trial of people for crimes that were not previously defined as crimes.<sup>252</sup> The Charters were crafted in a way that suited the Allied Powers and seems to be purposely revenging on the losers.

Inconsistencies in the application of the law at the Nuremberg tribunal were a factor that further eroded the legitimacy of the trials at Nuremberg. Each of the four Allied Powers appointed a judge and a chief prosecutor, including the Soviet Union. Whereas the Soviet

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by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces. It provision further defines the relationship between the superior and a subordinate, by stating that the former shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates. Therefore, it is immaterial whether a person is aware or not of his actions or the actions of his subordinates, as all these actions/inaction are punishable under the ICC Statute.

<sup>251</sup> See C. Tomuschat (2006:832); K. Sellars (2011:1090).

<sup>252</sup> See C. Tomuschat (2006:833); K. Sellars (2006: 9010).

Union had suffered from the war in the 1920s and 1930s, it presided over the murder of millions of political opponents.<sup>253</sup> They lacked the moral authority to bring the Nazi military leaders to account and yet they had also committed crimes of the same magnitude.

### 3.4.5 The Ad hoc courts

The creation of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia (hereafter 'ICTY')<sup>254</sup> in 1993 and the International Criminal Tribunal for Rwanda (hereafter 'ICTR')<sup>255</sup> in 1994 contributed immensely to the development of international criminal justice system.<sup>256</sup> Both tribunals were a type of international criminal court that were collectively known as the Ad hoc courts. Before the creation of the ICTY and ICTR, the idea that international criminal law constituted a legitimate body of international law was in some doubt.<sup>257</sup> However, because of the nature of atrocities committed during the conflict and the magnitude of the impact arising there from, there was a rethink by the international community on how the perpetrators would be dealt with decisively so as to send a strong statement to the world and other would-be perpetrators that the commission of international crimes in one territory constituted an attack on the entire international community. A proper system of international justice, conceived as a response and reaction by the international community to the commission of atrocities

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<sup>253</sup> See K. Sellars (2011:9010).

<sup>254</sup> See UNSC Res. 827, adopted 25 May 1993. The ICTY was established to prosecute serious crimes committed during the wars in the former Yugoslavia, and to try their perpetrators. It has jurisdiction over crimes committed on the territory of the former Yugoslavia since 1991 relating to grave breaches of the Geneva Conventions, violations of the laws or customs of war, genocide, and crimes against humanity.

<sup>255</sup> See UN SC Res. 955 of 8 November 1994. The ICTR was created for the prosecution of persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and of Rwandan citizens responsible for such acts committed in the territory of neighboring states.

<sup>256</sup> The provisions that regulated the ICTY and ICTR were stated in the respective Statutes for each Ad hoc or International Criminal Tribunal.

<sup>257</sup> See G. Boas et al., (2011:3).

amounting to international crimes, has become a more concrete reality than in the past, although still a developing one.<sup>258</sup>

The genocide in Rwanda, which led to the establishment of the ICTR, started on 6 April 1994 after a plane carrying then Rwandan President Juvenil Habyarimana and other officials was shot down while approaching the capital, Kigali. The genocide resulted in the death of over 800,000 Tutsis, most of whom were children, women and the elderly during the 100 days that the violence lasted.<sup>259</sup> The then Rwanda Patriotic Front (RPF) UN representative urged the UN Security Council, stating that genocide had been committed against the people of Rwanda and urged the Security Council to set up a tribunal to prosecute those responsible for the genocide.<sup>260</sup> Later, a commission of experts that had been set up to determine whether serious breaches of humanitarian law, including genocide, had been committed, reported that genocide, crimes against humanity and serious breaches of humanitarian law had been committed and urged that the perpetrators be brought to justice before an independent and impartial criminal tribunal.

The success of the ICTR has primarily been attributed to the cooperation of states, especially in as far as the apprehension and transfer of suspects to Arusha, Tanzania where the court is located, are concerned.<sup>261</sup> Though the ICTY has been dogged by states not complying with its orders of turning over the indicted persons for trial,<sup>262</sup> its contribution to the development of international criminal justice by ensuring that perpetrators of international crimes are held to account is commendable. An example of the non-cooperation of the Government of the Federal Republic of Yugoslavia was when the then President Vojislav Kostunica, backed by a ruling of the Federal Court, refused to permit the

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<sup>258</sup> See S. D'Ascoli (2011:1).

<sup>259</sup> See R. Zacklin (1994:360); Y.N.W. Tamfuh (2010:268).

<sup>260</sup> See R. Boed (2008:105); A. Cassese (2002:17).

<sup>261</sup> See R. Boed (2008:110); A. Cassese (2002:18).

<sup>262</sup> See M.C. Bassiouni (2008:98-99); Cassese (2002:7).

extradition of Slobodan Milosevic<sup>263</sup> to The Hague for trial.<sup>264</sup> It was not until the United States and its European allies had threatened to withhold financial aid to Yugoslavia that he was finally transferred for trial.<sup>265</sup> This demonstrates the role the international community can play in ensuring that perpetrators of gross human rights violations are held to account.

Unlike the previous tribunals that were established to uphold the interests of the victor powers, the establishment of the ICTY and the ICTR, through the UN Security Council framework, shows the international community's determination to fight impunity. More than this, the tribunals developed the jurisprudence on the ICC, without political interference, thus placing international criminal justice on a firm basis.

#### **3.4.6 The Hybrid, Mixed or Internationalised Courts or Tribunals**

During the late 1990s and early 2000s the UN Security Council considered (but was eventually dissuaded) that the situations in, among other places, Sierra Leone, Cambodia and East Timor, were ideal for the establishment of Ad Hoc Courts.<sup>266</sup> Drawing from the lessons learnt with the creation of the Ad Hoc Courts, and criticisms levelled against the ICC, the UN came up with a new mechanism or innovation of international criminal justice that was tailored to meet the demands of each individual conflict situation where there were gross violations of human rights.

The new novel phenomenon is the enforcement of ICL by courts that form part of the domestic legal system but at the same time 'internationalized' in various ways and to different degrees.<sup>267</sup> Apart from being baptized 'internationalized', other words such as

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<sup>263</sup> Slobodan Milosevic was the President of Serbia (originally the Socialist Republic of Serbia) from 1989 to 1997 and the Federal Republic of Yugoslavia from 1997 to 2000. He was extradited to the ICTY to stand trial on charges of war crimes, including genocide, and crimes against humanity in connection to the wars in Bosnia, Croatia and Kosovo. However, he died on 11 March 2006 before the verdict would be given.

<sup>264</sup> See P.M. Scharf (2003:924); A. Pellet (1994:7).

<sup>265</sup> See P.M. Scharf (2003:925); M.C. Bassiouni (1994:784).

<sup>266</sup> See A. Cassese (2008:326).

<sup>267</sup> See W. Gerhard (2009:26).



'hybrid' and 'mixed' were used in reference to reflect their true nature. A characteristic feature of this novel 'hybrid' form of criminal justice is the combination of national and international elements, the latter typically being the involvement of the United Nations.<sup>268</sup> The Hybrid Courts take two forms, they may be part of the country's judiciary (such as in Cambodia, Kosovo, Scotland, Iraq and East Timor) and / or may be not be part of it though still having aspects that pick from the territory's judicial system (such as in Sierra Leone and Lebanon).<sup>269</sup> In addition, the judges of Hybrid Courts are mostly drawn from the state of commission and internationals from other countries.<sup>270</sup> In the case of the SCSL for instance, the judges are a mixture of Sierra Leone judges and those appointed by the Secretary General of the United Nations.<sup>271</sup> Lastly, the Hybrid Courts are usually inclined to use the established judicial system of the state of commission rather than being empowered to make their own Rules of Procedure and Evidence.

### 3.4.7 The International Criminal Court

The establishment of the ICC in July 2002 represents a major achievement in the architectural edification of international criminal law, symbolizing the international community's political resolve to prosecute individuals regardless of rank or official capacity for the most serious crimes of international concern.<sup>272</sup>

ICC represents the international community's most important means by which to enforce criminal responsibility in countries reeling from atrocities that may be perpetrated along national, racial, ethnic or religious lines. It also provides the means to help deter the gross violations of human rights. By dispensing justice to those who commit grave violations of human rights and international humanitarian law, the ICC makes effective the enforcement

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<sup>268</sup> See W. Gerhard (2009:27).

<sup>269</sup> See A. Cassese (2008:332).

<sup>270</sup> See A. Cassese (2008:331).

<sup>271</sup> See E.S. Podger & R.S. Clark (2008:218).

<sup>272</sup> See C.M. De Vos; S. Kendall and C. Stahn (2015:2); S. Nouwen (2013:3); C. Schwöbel (2014:4); D. Bosco (2014:3); A. Branch (2011:4); K.M. Clarke (2009:5); T. Allen (2006:9).

of international criminal law.<sup>273</sup> With the ICC in place, the obligation to prosecute perpetrators of international crimes has attained heightened significance in a context of the Rome Statute, premised on the principle of complementarity.<sup>274</sup> Consequently, it thus goes without saying that the expectations of international criminal law are that impunity shall not be tolerated in the world.

Accordingly, today criminal prosecution is considered by many to be the ideal mechanism of accountability for the commission of mass atrocities, not only because it ensures accountability, but also because it supposedly provides a fair hearing of the accused.<sup>275</sup> In fact, it has been argued that to respond to mass atrocity with legal prosecutions is to embrace the rule of law.<sup>276</sup> However, the limitation of international criminal mechanisms lies in the fact that they are restricted to “those who bear the greatest responsibility” or “those most responsible”, leaving those who bear a lesser degree of responsibility either to national jurisdictions, or to some other form of accountability.<sup>277</sup> The pertinent question that arises is whether criminal prosecutions are the only adequate or appropriate response to instances of grave violations of human rights, and if not, what then are the alternatives to prosecution?

The efforts to establish a permanent criminal court is traceable to the League of Nations, whose envisaged international criminal court was limited to the enforcement of only the Terrorism Convention of 1937. The Convention failed to gather the required member ratifications for it to enter into force and therefore collapsed after the outbreak of the

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<sup>273</sup> See Under the Preamble of the ICC Statute, it is provided therein that States Parties created this framework mindful OF the millions of victims of ‘unimaginable atrocities that deeply shock the conscience of humanity’, while affirming that serious crimes of concern to the international community should not go unpunished, determined by the need to ‘put an end to impunity for perpetrators’, and lastly there would be established for the sake of present and future generations an independent permanent International Criminal Court.

<sup>274</sup> See No Peace Without Justice (2010:26).

<sup>275</sup> See G. Gahima (2007:60).

<sup>276</sup> See P. Alston and R. Goodman (2013:1281).

<sup>277</sup> See No Peace Without Justice (2010:26).

Second World War.<sup>278</sup> In 1948, the UN tasked the International Law Commission (hereafter 'ILC') to study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide.<sup>279</sup> Following the ILC's conclusion that the establishment of an international court to try persons charged with genocide or other crimes of similar gravity was both desirable and possible, the General Assembly established a committee of experts to prepare proposals relating to the establishment of such a court. The committee prepared a draft statute in 1951 and a revised draft statute in 1953. However, the General Assembly decided to postpone consideration of the draft statute until the definition of aggression had been decided upon.

In 1994, the ILC submitted the draft statute to the General Assembly. However, in order to consider major substantive issues arising from the draft statute, the General Assembly established an Ad hoc Committee on the Establishment of an International Criminal Court.<sup>280</sup> The General Assembly created the Preparatory Committee on the Establishment of an International Criminal Court to prepare a consolidated draft text for submission and consideration by a conference of plenipotentiaries.<sup>281</sup> The General Assembly convened the UN Diplomatic Conference of Plenipotentiaries on the establishment of an International Criminal Court from 15 June to 17 July 1998 in Rome, Italy, to finalize and adopt the 'Rome Statute' on the establishment of an international criminal court (hereafter ICC Statute).<sup>282</sup>

The ICC Statute came into force on 1 July 2002 after gathering the required 60 ratifications. Currently there are 121 states parties, 33 of which are African states, 18 are from the Asia-Pacific region, 18 from Eastern Europe, 27 from Latin America and the Caribbean, and 25

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<sup>278</sup> See G. Marston (2002:1); M.C. Bassiouni (2008:117); A. Cassese (2002:16).

<sup>279</sup> See UN General Assembly Resolution 260 of 9 December 1948.

<sup>280</sup> See Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, General Assembly, Official Records, Fiftieth Session, Supplement No. 22 (A/50/22).

<sup>281</sup> See K. Ambos (1996:520); A. Cassese (2002: 17).

<sup>282</sup> See Rome Statute for the International Criminal Court adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 17 July 1998, A/CONF.183/9 (1998).

from Western European and other states.<sup>283</sup> Kofi Annan, speaking during his tenure as UN Secretary-General, stressed that the purpose of the ICC is to intervene only where the state was unwilling or unable to exercise jurisdiction over perpetrators. Annan stated as follows:

'It is to ensure that mass murderers and other arch-criminals cannot shelter behind a state run by themselves or their cronies, or take advantage of a general breakdown of law and order. No one should imagine that this would apply to a case like South Africa's, where the regime and the conflict which caused the crimes have come to an end, and the victims have inherited power. It is inconceivable that in such a case the Court would seek to substitute its judgement for that of a whole nation which is seeking the best way to put a traumatic past behind it and build a better future.'<sup>284</sup>

Article 1 of the ICC Statute gives the ICC jurisdiction to try persons accused of international crimes, as defined in the Statute. These are: the crime of genocide, crimes against humanity, war crimes and the crimes of aggression.<sup>285</sup> The jurisdiction of the ICC is complementary to national criminal jurisdiction. To date, three states parties to the Rome Statute, namely Uganda, the Democratic Republic of the Congo and the Central African Republic, have referred situations occurring in their respective territories to the Court. In addition, the UN Security Council has referred the situation in Darfur, Sudan, and the situation in Libya, both non-states parties to the Rome Statute of the ICC. In addition, the Prosecutor opened an investigation *proprio motu* in the situation in Kenya. The most notable provision of the Rome Statute of the ICC provides that the ICC can hear a case where the state is unable or unwilling to carry out genuine investigations and prosecutions.<sup>286</sup> This provision is crucial in addressing the problems that impeded tribunals that were established after the first and second world wars insofar as securing the presence of the accused at trial was concerned.

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<sup>283</sup> For a comprehensive list of states parties to the Rome Statute of the International Criminal Court, see <http://www.icc-cpi.int/Menus/ASP/states+parties/> (accessed on 22 November 2012).

<sup>284</sup> See Speech by the then UN Secretary General, Kofi Annan, at the University of Witwatersand, South Africa, 1 September 1998.

<sup>285</sup> See Rome Statute of the ICC, Art. 5, 6, 7, 8, 8 bis.

<sup>286</sup> See Rome Statute of the ICC, Art. 17.

### **3.5 Similarities in the different types of International Criminal Courts**

#### **3.5.1 Prosecution of crimes of international concern**

All the different types of international criminal courts, with the exception of the ICC, are typically post-conflict creations meant to redress wrongs that took place during the conflicts (Yugoslavia, Rwanda, East Timor, Lebanon, Sierra Leone and Cambodia.<sup>287</sup> In prosecuting international crimes, the international criminal courts are concerned solely with investigating and prosecuting criminal conduct that not only raises international concern, but international disgust as well. In this regard, the aim of the different international criminal courts was and remains to stop or prevent impunity, and redress injustices.<sup>288</sup>

#### **3.5.2 Focus placed on individual criminal responsibility**

All the present-day international criminal courts have a singular mandate of prosecuting natural individual persons of 18 years<sup>289</sup> with individual criminal responsibility for committing or assisting in the commission of crimes of gravest concern to the entire human mass. In effect this means that states or organizations cannot be tried (and convicted) in any of the present international criminal courts for international crimes or criminal conduct.

#### **3.5.3 Role played by United Nations in establishment and mandate**

It is important to point out that it is a given that for all the different types of international criminal courts, during their preparatory or formative stages leading to the establishment or execution of their mandates, the United Nations (most specifically the Security Council and / or the Secretary General) have played or continue to play fundamental roles. For instance, both the ITCY<sup>290</sup> and ICTR<sup>291</sup> were formed by the Security Council under its

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<sup>287</sup> It should be emphasized that even with the ICC, although existing as a permanent international criminal court, it was created to investigate and prosecute violations of international crimes that take place during a conflict.

<sup>288</sup> See A. Cassese (2008:326).

<sup>289</sup> See Rome Statute, Article 26.

<sup>290</sup> See Security Council Resolution 827 (1993).

powers for maintenance of international peace and security, and are funded out of United Nations budget.<sup>292</sup>

All the preparations for creating the Hybrid Courts have had the active involvement of the UN. An example can be seen where the Secretary General of the UN drafted the statute for the Special Court for Sierra Leone (hereafter SCSL), that became part of the Agreement of 16 January 2002 between the UN and Sierra Leone.<sup>293</sup> The UN Security Council also established a Special Tribunal for Lebanon under Chapter VII of the UN Charter.<sup>294</sup> It is also a given that the Rome Conference where the ICC statute was adopted, was held under the auspices of the UN.

#### **3.5.4 Similar court structures**

All the present international criminal courts have embraced largely a similar structure that has three basic organs of Prosecutor's Office, Registry, and Judges (Chambers), with distinct functions. The Ad hoc Courts, Hybrid Courts and ICC all have two Chambers (Trial and Appeal), although the latter also has the Pre-trial Chamber for confirmation of charges proceedings.



#### **3.5.5 No Presidential immunity or VIP immunity**

In regard to the ICC, the Ad hoc Courts and SCSL,<sup>295</sup> their statutes do not provide for presidential / VIP immunity or protections from prosecutions for international crimes. This has been the case, as the ICC has issued warrants of arrest for Sudanese President Omar Al Bashir and former DR Congo Vice President Pierre Bemba; the ICTR has prosecuted and convicted former Rwandese Prime Minister Jean Kambanda; the ICTY prosecuted former Yugoslav President Slobadan Milosevic, and the Special Court for Sierra Leone which tried former Liberian President Charles Taylor and found him guilty in April 2012 of various

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<sup>291</sup> See Security Council Resolution 955 (1994).

<sup>292</sup> See E.S. Podger & R.S. Clark (2008:205).

<sup>293</sup> See UN Doc. S/2000/915 and Security Council Resolution 1315 (2000).

<sup>294</sup> See Security Council Resolution 1757 (2007).

<sup>295</sup> See SCSL Statute, Article 6.

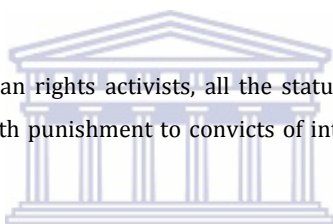
crimes against humanity and war crimes perpetrated in Sierra Leone. He was sentenced to 50 years' imprisonment.

### **3.5.6 Contribution towards documenting wars / conflicts**

Like Nuremburg Tribunal, a part from dispensing justice, both the fully international criminal courts and internationalized courts have done a significant job of documenting the history of wars and conflicts in terms of why they happened, how they were executed, the international crimes committed, and their effects or impact on communities. This is reflected through testimonies of witnesses and judgments; which then educate people and help in reconciliation processes.

### **3.5.7 Punishment of death penalty**

Possibly out of concerns and influence of human rights activists, all the statutes for the ICC,<sup>296</sup> ICTR and ICTY<sup>297</sup> do not render the death punishment to convicts of international crimes.



### **3.5.8 Criminalization of different forms of participation**

The statutes of the ICC,<sup>298</sup> ICTR,<sup>299</sup> ICTY<sup>300</sup> and SCSL<sup>301</sup> criminalize a number of different forms of participation (including for instance planning, instigation, ordering and commission), in the perpetration of international crimes.

### **3.5.9 Reliance on international community or state funding**

A clear similarity among all the different types of international criminal courts lies in respect to their reliance on the international community or state funding to execute their mandates. The international community, as represented by the United Nations, regional

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<sup>296</sup> See Rome Statute, Article 77

<sup>297</sup> See ICTY Statute, Article 24

<sup>298</sup> See Rome Statute, Article 25

<sup>299</sup> See ICTR Statute, Article 6

<sup>300</sup> See ICTY Statute, Article 7

<sup>301</sup> See SCSL Statute, Article 6

bodies such as the European Union, individual wealthy countries (such as Germany, United Kingdom, South Korea and Japan), and wealthy individuals contribute to the running costs of the international courts.

The ICC is funded by states parties to the Rome Statute, and by the UN for Security Council referrals.<sup>302</sup> The ICTY and ICTR, as subsidiary bodies established by the Security Council, draw their budget from the United Nations. In the case of the SCSL for instance, although not funded by the United Nations, it is heavily funded by voluntary contributions of the Donor Community.<sup>303</sup> The Hybrid Courts in most cases obtain their funding from the states of commission and from the UN or voluntary contributions of the individual states.

### **3.6 Differences in the different types of International Criminal Courts**

#### **3.6.1 Who initiated the creation of the court?**

Whereas the initiative to create the ICTY and the ICC was led by the United Nations the proposal for the establishment of the ICTR was an original initiative of the then new Rwandan Government.<sup>304</sup> Rwanda was the state of commission where the genocide took place. In the case of the SCSL which was created in 2002, a letter from President Alhaji Tejan Kabbah of Sierra Leone to the United Nations served as basis for the creation of the SCSL and later for conclusion of an agreement between the government of Sierra Leone and the United Nations.<sup>305</sup> But the ICTY and ICC were created on the grounds that the affected states were unable or unwilling to investigate and / or prosecute the international crimes that were committed on their respective territories.<sup>306</sup>

#### **3.6.2 Level of criminal responsibility**

It bears noting that, whereas the Ad hoc Courts and the ICC try only the individuals most responsible for the perpetration of international crimes, the Hybrid Courts may under their

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<sup>302</sup> See Rome Statute, Article 115

<sup>303</sup> See E.S. Podger & R.S. Clark (2008:218).

<sup>304</sup> See A. Cassese (2008: 327).

<sup>305</sup> See E.S. Podger & R.S. Clark (2008:205).

<sup>306</sup> See F. Pocar (2008: 21-22).



mandates also have the responsibility to try lesser responsible individuals. This is because the Hybrid Courts tend to have a broader mandate that includes other municipal crimes beyond the core international crimes and are closer to, or based in the territory where the crimes were committed.

### **3.6.3 Subject matter jurisdiction**

The statutes regulating the ICC,<sup>307</sup> ICTR,<sup>308</sup> ICTY<sup>309</sup> and Hybrid Courts<sup>310</sup> all provide for jurisdiction over at least three core international crimes, namely, crimes against humanity, war crimes and genocide. Hybrid Courts apply also local substantive law.<sup>311</sup> However, it is only the ICC Statute that provides specifically the crime of aggression, whereas the Hybrid Courts<sup>312</sup> tend to include other domestic crimes to be tried as well.

### **3.6.4 Treaty creation versus Security Council Resolutions and / or UN agreements**

Akin to the Nuremberg Tribunal being born out of the London Agreement, the ICC is a creation of a multilateral treaty adopted in 1998. The Ad hoc Courts and Hybrid Courts emanate from the UN Security Council Resolutions, which were reinforced by agreements signed between the UN and the state of commission.<sup>313</sup>

### **3.6.5 Concurrent versus complementary jurisdiction**

The ICC<sup>314</sup> has complementary jurisdiction to national jurisdiction. However, national courts enjoy primacy in respect of investigations and prosecutions of international crimes. Ad hoc Courts also have complementary jurisdiction to national jurisdiction, but have

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<sup>307</sup> See Rome Statute, Article 5.

<sup>308</sup> See ICTR Statute, Articles 2, 3, 4.

<sup>309</sup> See ICTY Statute, Article 2, 3, 4.

<sup>310</sup> See SCSL Statute, Articles 2, 3, 4.

<sup>311</sup> See A. Cassese (2008: 331).

<sup>312</sup> See SCSL Statute, Article 5.

<sup>313</sup> See G. Werle (2009:26).

<sup>314</sup> See Rome Statute, Article 17.

primacy over national courts in investigating and prosecuting international crimes.<sup>315</sup> As Hybrid Courts are, by design, part of the established judicial system in the affected country, but they enjoy primary jurisdiction.

### **3.6.6 Mandate and composition of the different courts**

The ICC and the Ad hoc Courts are composed entirely of international judges with vast experience in the field of international law, international criminal law and international humanitarian law. Hybrid Courts, on the other hand, are made up of judges who, for the most part, are from the state of commission, with a few judges from other countries.<sup>316</sup> In the case of the SCSL, for instance, the judges are a mixture of Sierra Leonean judges and those appointed by the Secretary-General of the United Nations.<sup>317</sup> The judges of the ICC and Ad hoc Courts are empowered to make rules of procedure and evidence that apply to their respective courts.<sup>318</sup> This is not necessarily true for the Hybrid Courts, since they may be inclined to use of the established judicial system of the state of commission.

### **3.6.7 Availability of law enforcement and prison facilities**

Neither the Ad hoc Courts nor the ICC have at their disposal police officers with powers to arrest or prisons dedicated to house persons whom they sentence to terms of imprisonment.<sup>319</sup> They, therefore, rely on the goodwill of the states parties or the UN to help arrest and hand over individuals indicted for committing international crimes. The prisoners awaiting trial and appeal are housed in places provided by the hosting states, namely, The Netherlands and Tanzania.<sup>320</sup> As Hybrid Courts are considered as a part of a state's judicial system, they tend to have at their disposal the state's police and prisons.

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<sup>315</sup> See ICTY Statute, Article 9(2) and ICTR Statute, Article 8 (2).

<sup>316</sup> See A. Cassese (2008:331).

<sup>317</sup> See E.S. Podger & R.S. Clark (2008:218).

<sup>318</sup> See E.S. Podger & R.S. Clark (2008:213).

<sup>319</sup> For the ICC, many of the accused like in the cases concerning Uganda and Sudan remain at large.

<sup>320</sup> See E.S. Podger & R.S. Clark (2008:213).

### **3.6.8 Victims' rights, participation, protection and reparations**

Under the present international criminal justice system, the fairness of a trial process is no longer judged solely by how the accused is treated in the criminal proceedings.<sup>321</sup> Both the ICC and the Cambodia Hybrid Court have distinct provisions that provide for the participation of victims in the trial. Victims are protected under witness protection programmes, and reparations are made to victims.<sup>322</sup>

The Rome Statute also differs from the statutes of the Ad hoc Courts in that it provides under Article 75 for reparations to victims of international crimes, in form of restitution, compensation and rehabilitation. Moreover, the Rome Statute provides for a Victim and Witnesses Unit,<sup>323</sup> an Office of Public Counsel for Victims and a Victims Participation and Reparation Section. These facilities are meant to secure the safety of victims and witnesses and to provide pro bono legal counselling services.

It bears noting, too, that the Rome Statute has created a unique institution within the ICC that is charged specifically with making reparations to victims. It is the Trust Fund for Victims.<sup>324</sup> It has been argued that by providing for the above procedures and offices, apart from it being a significant departure from the norm, the Rome Statute represents is taken to embrace a more magnanimous model of international criminal law, embracing social welfare and restorative justice features.<sup>325</sup>

### **3.6.9 Hybrid courts and incorporation of tenets of Transitional Justice**

The fact that Hybrid Courts may rely, too, on the tents of the domestic legal system, makes the amenable to being complemented by transitional justice mechanisms. For instance, the SCSL has been supplemented in its efforts to end impunity and upholding accountability by the Truth and Reconciliation Commission in Sierra Leone. The commission's mandate

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<sup>321</sup> See R.G. Kevin (2004:302).

<sup>322</sup> See Rome Statute, Article 68.

<sup>323</sup> See Rome Statute, Article 43(6).

<sup>324</sup> See Rome Statute, Article 79.

<sup>325</sup> See E. Haslam (2004:315).

included, among others, documenting violations and abuses of human rights, as well elements of international humanitarian law related to the Sierra Leonean conflict. The truth commission provided a platform to victims and witnesses to vent their grievances, telling their side of the story, something which would not necessarily be guaranteed in a criminal trial.<sup>326</sup>

### **3.6.10 Status of type of international criminal court**

The Ad hoc Courts and Hybrid Courts tend to have a temporary mandate, hence the appellation “Ad hoc”, in respect of time and territory.<sup>327</sup> The ICC, on the contrary, has a permanent mandate and has a wider territorial reach, given the number of states that have ratified the Rome Statute, as well as the number of self-declarations that could be made by non-state parties. What needs to be emphasised, however, is that the ICC has jurisdiction over international crimes committed only as of 1 July 2002.

### **3.6.11 International legal personality**

The ICC was created through treaty law. It thus has the status of an international legal personality in international relations, unlike the Ad hoc Courts or Hybrid Courts which were created by Security Council Resolutions.<sup>328</sup> This attribute, in effect, gives the ICC an independent, different and wider outlook on the international sphere, as is also reflected by the agreements it has signed with the UN and individual countries. On the other hand, the Ad hoc Courts, given the nature of their genesis, are regarded as subsidiary organs of the Security Council.<sup>329</sup>

### **3.6.12 Trigger mechanisms**

Article 12 of the Rome Statute provides for the jurisdiction of the ICC and how it can ultimately be triggered by referrals by a state party to the Rome Statute, or by the special powers of the Prosecutor, or by the Security Council, acting under Chapter VII of the UN

<sup>326</sup> See E.S. Podger & R.S. Clark (2008:221).

<sup>327</sup> See G. Werle (2009:26).

<sup>328</sup> See Rome Statute, Articles 1 and 4(1).

<sup>329</sup> See website literature available <http://www.pict-pcti.org/courts/ICC.html> (accessed on 31 March 2011).

Charter, in terms of which it is authorised to refer a situation to the ICC Prosecutor.<sup>330</sup> The Rome Statute envisages, too, that non-state parties to the Rome Statute may accept the jurisdiction of the ICC for a specific situation or case by lodging a declaration to that effect.<sup>331</sup> The above-mentioned features are unique mechanisms by which case or situation could be brought before the ICC. The Ad hoc Courts and Hybrid Courts have appointed prosecutors who have the discretion as to which cases to investigate and prosecute.

### **3.7 EXAMINING THE NEXUS BETWEEN INTERNATIONAL CRIMINAL JUSTICE AND TRANSITIONAL JUSTICE**

Under traditional international law, only states were subject of international law. For many years, individuals who were responsible for violations of human rights always committed such acts with impunity and states would not submit them to international jurisdiction based on the principle of state sovereignty.<sup>332</sup> The principle was used to justify states' non-recognition of foreign court judgments, refusal to extradite their own citizens, and attempts to claim the immunity clauses for those who commit international crimes in the course of executing their official functions.<sup>333</sup> The primary goal of international criminal law is to punish individuals who commit international crimes when the state within which such crimes are committed is unable or unwilling to institute a prevention.<sup>334</sup>

Not every violation of a human right is an international crime. The primary duty to protect human rights (*ultima ratio*) through criminal law lies with the states themselves. Redressing the wrongs committed through human rights violations is not only a legal obligation and a moral imperative imposed on governments. The hardest question of all is how to pursue the objectives of justice and reconciliation without falling into tokenism and a false morality that only thinly disguises the perpetuation of impunity. The objective of

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<sup>330</sup> See Rome Statute, Article 13(b).

<sup>331</sup> See Rome Statute, Article 12(3).

<sup>332</sup> See B. Graefrath (1990:73). The same argument was also raised by Kenya while protesting against the trial of President Uhuru Kenyatta and his Deputy, William Ruto.

<sup>333</sup> See B. Graefrath (1990:73).

<sup>334</sup> See G. Werle (2009:15); F. Jessberger and J. Geneuss (2012:461); C. Stahn (2011:193).

international criminal law is to protect the highest values of the international community as a whole. International criminal law thus seeks to give effect to the expectations of the UN Charter on peace, security and well-being of the world. International criminal law provides only subsidiary protection of individual rights where core values of the international community as a whole are concerned. To this end, the 'international element' links the individual perpetrator and the individual victim to the international stage. International criminal adjudication is but one tool of transitional justice that can be harnessed to address serious violations of human rights. It can be used to prevent egregious human rights violations.

The field of transitional justice has expanded and diversified, and has hereby gained an crucial status in the realm of international law.<sup>335</sup> There have been arguments in a number of social, political and legal fora that accountability for conflict-related human rights and international humanitarian law violations and abuses cannot be undertaken by the regular judicial system, but rather through the application of transitional justice mechanisms.<sup>336</sup> This erroneous interpretation surfaced at the time of making peace accords and interim constitutions in countries emerging from conflict or autocracy.

Van Zyl argues that prosecution and punishment should not be viewed as the only, or even the most important means to end impunity. He stresses further that in confining ourselves to courts in the struggle to guarantee human rights, we ignore many other important initiatives designed to assist victims, rebuild societies and defend democracies.<sup>337</sup> Boraine is of the view that the ICC should not discourage attempts by national states to come to terms with their past, and that every attempt should be made to assist countries to find their own solutions, provided that there is no blatant disregard of fundamental human rights.<sup>338</sup> For example, in Nepal, the Comprehensive Peace Accord that was signed on 21

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<sup>335</sup> See M. Adhikari (2012:4); B. Hayner (2002:23); Kritz (1995:6); C.S. Villalba (2011:2); C.M. Bassiouni (2002:3); Jelin et al (2003:44); McAdams (1997:3); J. Iverson (2013:14).

<sup>336</sup> See OHCHR (2001:3); C. Bell (2009:16).

<sup>337</sup> See P. Van Zyl (2000:42).

<sup>338</sup> See A. Boraine (2000:11).

November 2006 provided, among others, for the punishment of the perpetrators of war crimes. However, this requirement was diffused in the name of expediting the political process,<sup>339</sup> which in actual sense, makes those responsible for war crimes evade justice. These could be perceived as deliberate attempts to further perpetuate impunity for violations committed during the armed conflict. On the other hand, Louise Mallinder notes that in the 'peace versus justice' debate, the choice for transitional governments in addressing past human rights violations is often framed in a false dichotomy between the extremes of entirely forgiving and forgetting the past through blanket amnesty laws for the sake of 'reconciliation', or pursuing retributive justice against every perpetrator of human rights violations, at the risk of destabilising delicate political transitions.<sup>340</sup>

There continues to be much debate over the granting of amnesties after conflict.<sup>341</sup> International law expressly forbids the granting of amnesty for international crimes such as genocide, war crimes and crimes against humanity.<sup>342</sup> The question that arises is whether amnesties may be applied to crimes that constitute serious human rights violations, but do not fall into the category of treaty crimes, war crimes, or crimes against humanity.<sup>343</sup> Michael Scharf pointed out in 1996 that to fill the gap in the international law requiring prosecution, two approaches of either exploiting or attempting to fill the gap need to be exploited.<sup>344</sup> Truth commissions can occupy a space between blanket amnesty and broad-scale criminal prosecutions, and have a relationship to either or both, depending on their mandate and objectives. For example, the South African Truth and Reconciliation Commission had judicial powers to grant amnesty.<sup>345</sup> Of the 40 Truth commissions

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<sup>339</sup> See M. Adhikari (2012:1).

<sup>340</sup> See L. Mallinder (2008: 2).

<sup>341</sup> See N.L. Sadat (2005:2); M. Pinsky (2008:3); Y. Naqvi (2003:2); OHCHR (2009:5); C. Murungu (2011:1); J. Dugard (1999:2).

<sup>342</sup> See OHCHR (2009); C. Bell (2009:4).

<sup>343</sup> See J.L. Laplante (2008:943).

<sup>344</sup> See J.L. Laplante (2008:943).

<sup>345</sup> See Promotion of National Unity and Reconciliation Act 34 of 1995, s. 20(1), 20(7), available at <http://www.doj.gov.za/trc/legal/act9534.htm> (accessed on 20th June 2016).

established between 1974 and 2004, only five were allowed to recommend or grant amnesty, with the express exclusion of crimes under international law.<sup>346</sup> Truth commissions were lauded as complementary tools in the quest for justice and reconciliation and in restoring public trust in national institutions of governance.<sup>347</sup>

The Office of the High Commissioner for Human Rights (OHCHR) affirmed that a truth commission should be viewed as complementary to judicial action, not as a basis to supplant or suppress the regular judicial system.<sup>348</sup> Therefore, the regular judicial system cannot stop functioning because a commitment to establish transitional justice mechanisms has been made, even if these mechanisms are actually established and are functioning. States cannot escape the obligation to take clear steps to dispense justice for past gross human rights violations.<sup>349</sup>

In Sierra Leone, for example, the state revoked the blanket amnesty that had been offered in the peace negotiations and instead created a truth commission and instituted criminal prosecutions before the Special Court of Sierra Leone (SCSL) at the same time in 2002. The legal basis for prosecuting perpetrators of crimes was elaborated upon in the case of *Velásquez Rodríguez v Honduras*<sup>350</sup> in which the court found that all states have four fundamental obligations in the area of human rights. These are: to take reasonable steps to prevent human rights violations; to conduct serious investigations of violations when they occur; to impose suitable sanctions on those responsible for the violations; to ensure reparation for the victims of the violations. Therefore, there is need to find common ground where criminal justice and transitional justice interact and reinforce each other.

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<sup>346</sup> See Amnesty International (2010:5).

<sup>347</sup> See The rule of law and transitional justice in conflict and post-conflict societies: Report of the Secretary-General to the Security Council (S/2011/634).

<sup>348</sup> See OHCHR (2001:3).

<sup>349</sup> See OHCHR (2001:3).

<sup>350</sup> See *Velasquez Rodriguez Case*, Judgment of July 29, 1988, Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988), para., 174.



### 3.8 THE 'TENSION' BETWEEN INTERNATIONAL CRIMINAL JUSTICE AND TRANSITIONAL JUSTICE

The ICJ system has come to represent a web of international and national institutions, which includes the ICTJ, ICTR, investigating bodies, national criminal justice systems and the ICC.<sup>351</sup> As noted already in this chapter, it was the atrocities committed by the criminal Nazi dictatorship all over Europe which paved the way for a new understanding of the relationship between the individual, the state, and the international community. Never again could it be maintained that human beings were placed, by law, under the exclusive jurisdiction of their home state.<sup>352</sup> The transition from dictatorial regimes and impunity arising from violent conflicts to democratic and just systems places new democratic governments on the horns of new dilemmas.<sup>353</sup>

All national or domestic legal systems of law are designed to satisfy two basic needs, which are indispensable for the maintenance of social order: the regulation of human conduct and the peaceful settlement of disputes, with the former function achieved primarily through law-creating institutions, and the latter by dispute settlement mechanisms such as courts and other judicial and quasi-judicial tribunals or procedures.<sup>354</sup>

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<sup>351</sup> See M.C. Bassiouni (2003:69-71). The author further observes that historians record that 'in the last 35 000 years, some 40 civilisations rose and fell or merged into others. A characteristic present in all civilisations, their differences notwithstanding, is the existence of a legal system. These legal systems differed as to substantive legal norms, processes, and procedures, as well as the balancing of individual rights against social rights and political interests. Nevertheless, the very existence of these legal systems evidences the proposition that justice, no matter how pursued, is a social value that is an intrinsic part of organised society, whatever the stem of government. Legal systems always seek, *inter alia*, to preserve the domestic public order, which also means the preservation of the system of government and implicitly, the preservation of state structure within that system of government'.

<sup>352</sup> See C. Tomuschat (2008:22); D. Shelton (2005:10).

<sup>353</sup> See F.G. Morales (2012:31).

<sup>354</sup> See Y. Shany (2003:1); Y. Shany (2007: 9); S.R. Ratner, J.S. Abrams and J.L. Bischoff (2009:167); G.P. Fletcher (2008: 1); O. De Schutter (2010:3).

At the centre of the debate concerning the use of ICJ and/or TJ mechanisms is the perceived tension between 'peace' and 'justice' overtures. This debate has been propagated in many a post-conflict country, as well as by advocates of peace and human rights activists in Uganda. In recent times, it has been contended that there has been a shift away from the notion that new democracies have to choose between peace and justice to a very different viewpoint, namely, that justice is a prerequisite for peace.<sup>355</sup> Between the ideals of peace and justice lies the key concept 'transition'. It is a transit from one uncomfortable situation to comfortable another situation that afflicts the debate of peace and justice. It has been argued that the concept of transition has 'always been slippery in transitional justice debates'.<sup>356</sup>

There can be a tension that emerges in the use of law to advance transformation, as opposed to its role in adhering to conventional legality and in this is the dilemma of peace or justice that assumes numerous manifestations in transition, whether associated with wars, other forms of internal conflict or regime change.<sup>357</sup> It has also been said that dealing with the aftermath of a conflict resulting in widespread human rights violations presents very complex challenges.<sup>358</sup> Transitional societies are thus confronted with the dilemma of having to balance the need to end impunity with the imperative to promote stability and reconciliation in society.

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<sup>355</sup> See Clark (2010: 19-20); A. Fatic (2000); M. Humphrey (2003:495-505); L.A. Barria and S.D. Roper (2005:349-368); R. Kerr (2007:373-385).

<sup>356</sup> See S. Winter (2013:227).

<sup>357</sup> See R.G. Teitel (2000:51); Priscilla B. Hayner (2002:11). During or immediately after a war where human rights were grossly violated, there often emerges tension between proponents of peace and those of justice - a patent conflict between securing the peace and doing justice - as the threat of criminal accountability looms over the smooth progress of peace negotiations. It becomes clear, however, that there are a whole range of needs arising out of these circumstances that cannot be satisfied by action in the courts - even if the courts function well and there are no limits placed on prosecuting the wrongdoers, which is rare. Many alternative and complementary approaches to accountability have thus slowly taken shape.

<sup>358</sup> See G. Gahima (2007:159).

In resolving conflicts, where there have been gross violations of human rights, some place their hopes in international criminal justice, while others seek alternative modes of accountability such as those provided for by transitional justice. Transitional justice encompasses the full range of possible processes and mechanisms through which a society attempts to come to terms with a legacy of war crimes, crimes against humanity and other grave abuses.<sup>359</sup> On the one hand, the word 'transition' implies a passage or journey from one stage to another. On the other, 'transitional' signifies that the old order is dying but that the new order has not yet been born.<sup>360</sup> In sum, therefore, a state in transition is one which is emerging from one particular order and effectively charting ways of responding to the challenges of the new. To that end, transitional justice is thus meant to achieve a holistic sense of justice for all citizens, to establish or renew civic trust, to reconcile people and communities, and to prevent future abuses. However, the goals of transitioning can only be achieved if consideration is given to the existing socio-political concerns of any country, and which also calls for certain sacrifices as a people.

It is now generally agreed that there is bound to be some sort of tension when a society pursues justice, reconciliation and peace after a period of gross violations of human rights. This is likely to happen if reconciliation and peace are taken to mean only a cessation of hostilities, and if justice is taken to mean only formal legal measures such as prosecution of all responsible.<sup>361</sup> However, if justice is taken in its full expression to encompass not only the rectification of violations but also legal justice, or the rule of law, and social justice, or the fair and equitable distribution of economic, political and social resources, power and opportunities within society, then this clash is neither inevitable nor insurmountable.<sup>362</sup> The fact that there are strong legal and moral arguments in favour of prosecuting former human rights abusers does not eliminate the enormous political difficulties that the implementation of such a policy faces in the delicate balance of powers and needs that

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<sup>359</sup> See E.J. Parry (2004:4).

<sup>360</sup> See F. Halderman (2006:2).

<sup>361</sup> See R. Mani (2007:27).

<sup>362</sup> See R. Mani (2007:28).

characterise most transitional processes.<sup>363</sup> As will be shown later in this study, this was very true for Rwanda as well.

The intervention of the ICC in Uganda, brought to the fore tension that in most cases subsists between the use ICJ mechanisms and other TJ mechanisms that is situated in the debate concerning the perceived tension between peace interests and justice demands. Indeed, many conflict resolution practitioners argue that by issuing international arrest warrants against members of certain groups, like the LRA, that are involved in peace negotiations, this has had the negative effect of deterring or destroying any willingness to commit to peaceful settlement, thus complicating the peace process.<sup>364</sup>

### 3.9 CONCLUSION

This chapter discussed the obligations of the state to prosecute international crimes. It interrogated the different international treaties that impose a duty on a state to investigate and prosecute perpetrators of international crimes, such as war crimes, genocide, and crimes against humanity. It further noted that case law and customary law have also contributed to the development of criminal law through decisions and pronouncements that have entrusted the state with the duty to prosecute. However, it noted the ambiguities in the wording of the concluding observations and general comments to some provisions by the respective committees which create loopholes in the direction needed to be taken by the respective states under review or states parties to particular conventions. The implementation of such provisions is normally left to the discretion of the states under review or states parties to a convention.

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<sup>363</sup> See J.E. Mendez (1997:8).

<sup>364</sup> See M. Otim (2012:1). The author, Otim, notes that this was also evident in the Lome Peace negotiations concerned the armed conflict in Sierra Leone where rebels of RUF demanded for an amnesty from prosecutions before laying down arms. However, the armed conflict in northern Uganda presents a good examples where attempts to balance the two concepts of justice and peace created a lot of tension for the different actors.

The discussion also interrogated the relationship between criminal justice and transitional justice and noted that accountability for violations of conflict-related human rights and international humanitarian law cannot be undertaken by the regular judicial system, but through transitional justice mechanisms. Therefore, criminal justice and transitional justice processes need to complement each other and not the latter to supplant or suppress the former. This recognition, therefore, calls for harmonising the two processes since they all aim towards the one goal of achieving justice.

The ICC has jurisdiction over the most serious crimes: genocide, crimes against humanity and war crimes. Each of these crimes is clearly defined in the Rome Statute and texts related to it. For the ICC to try these crimes, at least one of the following conditions must be met: the accused must be a national of a State Party to the Statute; or the crime must have been committed on the territory of a State Party. In all situations, the Court has jurisdiction over crimes committed only after 1 July 2002, when the ICC Statute entered into force.

The ICC does not replace national criminal justice systems, but complements or supplements them. It may investigate and, if appropriate, prosecute and try individuals only when the states concerned are unwilling or genuinely unable to do so. Unjustified delays in conducting the criminal proceedings as well as proceedings undertaken for the purpose of shielding the accused from being held criminally liable will not, however, prevent the ICC from adjudicating the case. This is meant to guarantee state sovereignty in judicial matters. It is also important to note that the ICC cannot guarantee a total end to impunity, since the ICC cannot try all those who participated in committing the serious crimes.

## CHAPTER FOUR

### THE NORTHERN UGANDA CONFLICT: ORIGINS, DRIVERS AND IMPACT

#### 4.1 INTRODUCTION

Uganda has been plagued by a series of violent conflicts during the pre-colonial, colonial and post-independence periods. These conflicts have led to gross human rights violations, political instability, retarded economic growth and underdevelopment, distortion of constitutionalism and entrenchment of corruption. Whereas a number of people have fallen victims to these conflicts, justice has eluded them. There have been very limited efforts towards holding the perpetrators of gross human rights violations to account for their actions or even redressing the victims.

Since Uganda gained independence in 1962, it has had a chequered history, characterised by civil wars and successive dictatorships.<sup>1</sup> Each successive regime has faced armed resistance from different groups. From independence to date, approximately 44 different armed groups have emerged and taken up arms to fight against the government of the day.<sup>2</sup> Although the country has witnessed a number of conflicts, the major ones include: the 1966 Buganda Crisis; the Rwenzururu uprisings; the armed rebellions that characterised the reign of Idi Amin Dada and the rebellion that emerged in the aftermath of the disputed general elections of 1980. Since the National Resistance Army/Movement (NRA/M) under Yoweri Museveni captured state power in 1986, over 27 armed groups have emerged in violent resistance to his government.<sup>3</sup>

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<sup>1</sup> See J.R. Quinn (2005:1); P.M. Mutibwa (1992:42-96); T. Allen and K. Vlassenroot (2010:7); P.G Okoth (1997:258-265).

<sup>2</sup> See Refugee Law Project (RLP) and Democratic Governance Facility (DGF) (2013:33).

<sup>3</sup> Some of the conflicts that the current regime has faced include: cattle rustling in Karomoja region and neighbouring areas of Teso; the post 1986 northern Uganda armed conflict that has had different rebel groups ranging from the West Bank National Liberation Front, the Uganda People's Army, to the Holy Spirit Movement and the Lord's Resistance Army. Other conflicts include; the Itongwa rebellion of 1990s and the Allied Democratic Forces in south western Uganda.

The legacy of conflicts in Uganda is primarily due to religious differences, political greed for state power, marginalisation of particular regions, British colonial and subsequent governments' policies of dividing the country along regional or ethnic lines, and competition for access to the country's resources. The most violent rebellion experienced in post-colonial Uganda has been the northern Uganda conflict. The over two-decades-long insurgency has pitted the Lord's Resistance Army (LRA), under the leadership of Joseph Kony, against the government forces. This conflict has spilled over to the neighbouring countries of the Democratic Republic of Congo (DRC), the Central African Republic (CAR) and South Sudan.

This chapter examines the history of present-day Uganda, its evolution into a British Protectorate and emergence of conflict in Uganda. It analyses in particular the root causes of the conflict in northern Uganda which later spread to the eastern part of the country and the neighbouring countries, namely, the DRC, the CAR and South Sudan. The chapter explores the impact of the conflict on the northern Uganda region and the neighbouring countries as orchestrated by the LRA. It studies the devastating impact the conflict has had on the economy of the country and the population in the areas which have been the hotbed of the conflict.

#### **4.2 HISTORY OF UGANDA AND EFFECTS OF COLONIALISM**

Uganda, like most of East Africa, is a land of contrasts, with variations in altitude caused by tremendous upheavals of the earth's crust and intense volcanic activity that affected the distribution of rainfall, soils, plants, animals, and its human inhabitants. The latter fall into three main groups: Nilotic, Hamitic, and Bantu.<sup>4</sup> Africans are primarily divided into four linguistic classifications: the Niger–Congo group of languages (Bantu and Kwa languages), the Nilo–Saharan group of languages (Nilotic, Nilo–Hamatic and Hamitic languages), the Afro–Asiatic group of languages (Arabic and some of the Ethiopian languages), and Khoisan (the small language groups in southern Africa), all of whom translate into the Bantu, the

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<sup>4</sup> See S. Cole (1963:31/35). See also S.R. Karugire (2010:1) and J.J. Jorgensen (1981:35/36).

Nilotic, the Nilo-Hamatic and Sudanic peoples of Africa<sup>5</sup>. These groups have become more interconnected through culture, marriage, trade and language over the years. This has led to the breaking of the previous distinct barriers that differentiated and divided them. As a result, many of the African languages have a dialectal connection to each other.<sup>6</sup>

Jorgensen notes that because of migration, conquests, intermarriages and assimilation over the past two millennia and the increasing political atmosphere and technological change during the past five centuries, there are no pure ethnic groups in Uganda in the colonial sense of 'tribes' or 'physiognomic races'.<sup>7</sup> The current 'tribes' are at least, partially the product of amalgamations and divisions imposed by colonial occupation. Nevertheless, the diversity of peoples and polities in nineteenth-century Uganda can be illustrated in terms of languages and socio-political structures. Polities in Uganda ranged in size and complexity from centralised feudal kingdoms and loose confederations of mini-states to egalitarian, or at least less hierarchical, segmentary societies based on clans, lineages or age-sets.

In the book titled *My African Journey* of 1908, Winston Churchill, who later became the British Prime Minister, referred to Uganda as follows:

"The Kingdom of Uganda is a fairy tale. In the rich domain between the Victoria and Albert lakes an amiable, polite and intelligent race dwell together in an organised monarchy. Uganda is a pearl. Concentrate upon Uganda."<sup>8</sup>

Uganda was named after 'Buganda', the country's largest ethnic group. It was born out of the Berlin Conference held in Germany between 1884 and 1885 under the chairmanship of then Germany Chancellor, Otto von Bismarck, in order to regulate European colonisation

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<sup>5</sup> See Y. K. Museveni (2014:5). See also H.M. Stanley (1890:386). Stanley narrates the interconnectedness of the languages in Africa, which he had experienced in one of his expeditions during his explorations.

<sup>7</sup> See J.J. Jorgensen (1981:36).

<sup>8</sup> See P. Mutibwa (1992: ix/x).



and trade in Africa.<sup>9</sup> Prior to the Berlin conference, European powers were scrambling for colonies in Africa. Rival colonial powers were almost on the verge of going to war as a result of scrambling for territories in Africa. The conference was held at the urging of different groups whose interests required protection by their home governments. For example, the missionaries appealed for military protection, the explorers touted the riches found in the interior of Africa if only the local inhabitants could be 'pacified,' while the owners of trading companies wanted to shield their businesses from competition from other business entities.<sup>10</sup> However, in all the Berlin negotiations, the peoples of Africa were left out of the processes leading to the partitioning of their territories. They were denied the opportunity to participate in making decisions on matters relating to the determination of their destiny. This exclusion of Africans generally and Ugandan polities in the crafting of their future state has come back to haunt Uganda as the British colonial government and subsequent post-colonial governments sought to assert themselves.

Before the advent of colonialism, the different societies of Uganda were organised in kingdoms and chiefdoms. Most of the communities in Uganda shared common experiences and influenced each other in various ways.<sup>11</sup> Karugire observes that colonialism came to Uganda when most of the societies that constituted the territory were still in the process of fashioning the mechanism of their social and political organisation and when the various forms of relationship that had subsisted between them had not assumed permanent patterns. When Uganda was declared a British Protectorate in 1894, almost everything became irrelevant as colonial rule was extended all over the protectorate of Uganda.<sup>12</sup> In fact, it has been argued that most of the conflicts that the country experiences derive from

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<sup>9</sup> See S.R. Karugire (2010:1); C. Villa – Vicencio (2009:19); P. Mutibwa (1992:3); S. Kiwanuka (1970:6-7); T. O'Toole (2001:45).

<sup>10</sup> See T. O'Toole (2001:45).

<sup>11</sup> See S.R. Karugire (2010:1); C. Villa-Vicencio *et al* (2005:111).

<sup>12</sup> See S.R. Karugire (2010:1).

the colonial legacy.<sup>13</sup> Mahmood Mamdani states that colonialism 'brought within the fold of one country peoples at different levels of social development and without close historical contacts, while splitting nationalities and tribes into, or among, several countries'.<sup>14</sup> In fact, at the time of the negotiations during the partitioning of Africa, it had been suggested that because of the existing differences between the peoples of Lake Kyoga and those the south of it, the Nile should be made a national boundary and the north of it annexed to Sudan.<sup>15</sup> However, this suggestion was not adopted.

Kabwegyere comments that British colonial masters established three tiers of social structures in the country. The top stratum was made up of the British colonial elites who formed a tiny minority but enjoyed the monopoly of social power. The second stratum comprised Asian immigrants who ran the colonial economy on behalf of the colonialists and occupied clerical and artisan positions in the colonial administrative structure. The third stratum was made up of the Africans, who formed the majority in the protectorate.<sup>16</sup> However, among the latter group, namely, the Africans, differences in levels of development became manifest, a state of affairs which resulted in the British colonialists favouring certain ethnic groups over others. For example, the Bantu were regarded as more civilised than the Nile Negroes.

As can be discerned from the above discussion, Uganda was essentially a British colonial creation, with the name initially being used ambiguously to refer to both the Buganda kingdom and the Uganda Protectorate, and later to the protectorate as a whole.<sup>17</sup> The area

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<sup>13</sup> See C. Villa - Vicencio (2009:19) and M. Mamdani (2001:1047). See also J. El Bushra and E.P. Lopez (1994:4); D.J. Francis (2008:18); B.J. van der Walt (2006:29); D. Anglin (1999:2) and T. O'Toole (2001:45); E. De Temmerman (2001:11).

<sup>14</sup> See P. Mutibwa (1992:4); T.B. Kabwegyere (1995:94/99).

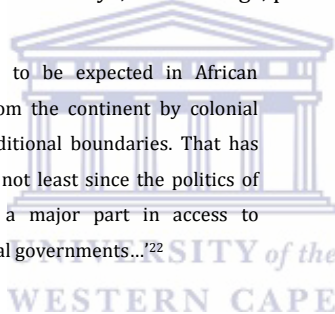
<sup>15</sup> See P.M. Mutibwa (1992:4).

<sup>16</sup> See T.B. Kabwegyere (1995:94/99).

<sup>17</sup> See T.B. Kabwegyere (1995:38); H.B. Hansen and M. Twaddle (1987:5). Administratively, it was an amalgam of a number of peoples occupying a particular section of East African interior and following widely differing political practices at the time of the European colonial partition at the end of the nineteenth century.

under the Uganda Protectorate was much larger than it is now, extending as it did as far as Kiambu and Lake Rudolf in present Kenya, and covering a large part of present-day Southern Sudan, as well as a section of the Congo.<sup>18</sup> By the time the first European explorer, John Hannington Speke, arrived in Uganda in 1862, the people of what is today known as Uganda, were organised in kingdoms, chiefdoms, and clan leaderships<sup>19</sup>. The three main kingdoms that existed at the time were Buganda, Bunyoro and Karagwe, with each having its own laws, customs and a king.<sup>20</sup> Villa-Vicencio notes that the effects of the scramble for Africa at the end of the 19th century constitute a crucial part of an historical context, where the would-be colonial masters at the Berlin Conference of 1885 parceled out land among themselves without regard to kith, kin, tribe, ethnicity, monarchies, chiefdoms, language, culture, or religion.<sup>21</sup> As the former Prime Minister of Kenya, Raila Odinga, puts it:

'Ethnic and other fault lines are to be expected in African countries, carved as they were from the continent by colonial powers with scant respect for traditional boundaries. That has made their management essential, not least since the politics of ethnic identity has played such a major part in access to resources and power in post-colonial governments...'<sup>22</sup>



In conclusion, colonialism sowed the seeds of conflict in Uganda as a result of the policies applied by the British colonial masters. Their policies sowed seeds of hatred between different groups of people. For example, there was hatred between the Protestants on the one side, against the Catholics and the Muslims on the other as the British allied with the

<sup>18</sup> See T.B. Kabwegyere (1995:50).

<sup>19</sup> See Y. K. Museveni (2014:5). All of the kingdoms: Buganda, Bunyoro, Toro and Ankole were indeed amalgamation of clans.

<sup>20</sup> See W. Lizzie (2014:75).

<sup>21</sup> See C. Villa – Vicencio (2009:19). Vicencio observes further that, 'the map on the conference table include huge sections of territory simply designated terra incognita, with boundaries between colonies being decreed by the drawing of geometric lines and the tracing of rivers – tearing clans, communities, and nations asunder. In many instances, diverse and separate groups – each with its own hierarchy of rulers, and devoid of a common history, culture, language, or religion – were compelled to live within common colonial borders'.

<sup>22</sup> Quoted in T. McNamee et al (2012).

former. Buganda was not in harmony with Bunyoro, as the British colonial masters granted administrative roles to the former in the latter's territories which the British had brought under its control. Justus Mugaju remarks that when Uganda gained independence from the British in 1962 it enjoyed a relatively prosperous economy, with sufficient food in production, a growing manufacturing sector, an untapped tourist potential, and a relatively developed social and physical infrastructure and public service.<sup>23</sup> However, writing in 1987, a year after President Museveni assumed power, Hansen and Twaddle<sup>24</sup> noted that Uganda had come to symbolise Third World disaster in its direst form, judged by the famine, tyranny, human rights atrocities, diseases, economic crime, tribalism and internal strife.<sup>25</sup> Under the same Museveni government, which still governs the country at the time of writing, Uganda has made significant gains and progress in nearly all sectors.

#### **4.3 ARMED CONFLICTS DURING THE NRM ERA**

In Uganda the military has been central in national politics right from the colonial, pre-colonial and post-independence eras. The military in Uganda has its genesis in the King's African Rifles (KAR), which was a British colonial regiment comprising of forces drawn from territories under its control from 1902 until independence in the 1960s, and purposely charged with the responsibility of protecting British interests in the colonies.<sup>26</sup> The members of the KAR were drawn mainly from the Central African Rifles, the Uganda Rifles, and the East African Rifles. The British applied the policy of divide and rule in Uganda, where some kingdoms were made more superior and favoured over the others. All successive post-independence governments followed the same trend set by the British, which directly or indirectly aroused hatred among different groups. This policy emphasised differences and prejudices amongst the different groups of people and it is unsurprising that the peoples of Uganda remained foreign to each other.<sup>27</sup> The departure of

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<sup>23</sup> See J. Mugaju (1999:10). Mugaju notes that in terms of overall economic progress, Uganda was comparable to Ghana, South Korea and Malaysia and was ahead of India and Indonesia. See also, P. Mutibwa (1992:ix/x).

<sup>24</sup> See H.B. Hansen and M. Twaddle (1987:1).

<sup>25</sup> See J. Mugaju (1999:10); S.R. Karugire (2010:1); H.B. Hansen and M. Twaddle (1987:5).

<sup>26</sup> See Daniel K. Kalinaki (2014:12).

<sup>27</sup> See T. Allen (2006:28); A.B. Kasozi (2005:1245); P. Mutibwa (1992: 4); C. Villa-Vicencio et al (2005:111).

the British and the subsequent conflicts that followed thereafter signaled the underlying issues that had been brewing among the different groups as a result of the divide and rule policy. This was evidenced in the 1966 crisis in which the then Prime Minister, Apollo Milton Obote, ordered government troops to attack the palace of the then President and also Kabaka<sup>28</sup> of the Buganda kingdom, Sir Edward Mutesa. The actions of Obote resulted in the persecution of the Baganda, and this fomented hatred of the Baganda towards the Langi, Obote's tribe. This was followed by the 1971-1979 Idi Amin era in which between 30,000 and 500,000 people are reported to have been killed.<sup>29</sup> Amin's regime was characterised by massive human rights violations, arbitrary arrests and detentions, nepotism, corruption and economic mismanagement.<sup>30</sup>

In the period 1980-85, a period during which Obote was returned to power following a rigged election, the security forces persecuted the Baganda for their support of the then rebel group, the National Resistance Army (NRA). The NRA was headed by Museveni, and had participated in the 1980 general elections which were largely won by the Democratic Party. This heightened tensions between the northerners and the southerners. When the southerners-dominated NRA ascended to power, the northerners, determined to cling onto power for fear of revenge, decided to wage war against the new regime.<sup>31</sup> Since the NRM government under the leadership of President Museveni seized power in 1986, about 20 armed groups have emerged to dislodge it from power.<sup>32</sup> Of the conflicts that have raged

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<sup>28</sup> 'Kabaka' is a title given to a king of Buganda kingdom.

<sup>29</sup> See International Commission of Jurists (1978); J.R. Quinn (2005:3).

<sup>30</sup> See P.M. Mutibwa (1992:42-96); T. Allen and K. Vlassenroot (2010:7); P.G Okoth (1997: 258-265).

<sup>31</sup> See International Crisis Group (2012:5); N. Nassir in J.Mugaju and J. Oloka-Onyango (2000:282); T. Allen (2006:28).

<sup>32</sup> Some of the armed groups that have emerged since NRM's ascendance to power in 1986 include the followings: the Allied Democratic Forces (ADF) in south western Uganda, the West Nile Bank Front in west Nile, the Uganda People's Democratic Army (UPDA), the Holy Spirit Movement, the Lord's Resistance Army (LRA), and the Uganda Peoples' Army in northern Uganda. Others include: Action Restore Peace, Apac rebellion, Citizen Army for Multiparty Politics, Force Obote Back, National Federal Army, National Union for the liberation of Uganda, Ninth October Movement, People's Redemption army, Uganda Christian Democratic Army, Uganda National Rescue Fronts I and II, among others.

under the NRM reign, the LRA rebellion has been the longest and most violent, with its resultant effects extending as far as the DRC, CAR and South Sudan.

The LRA insurgency has seen the Government of Uganda apply a multi-pronged approach of both military force and dialogue to end the conflict. The international community and civil society groups have also been part of the initiatives, although all efforts have been unsuccessful.

#### **4.3.1 Genesis of northern Uganda military conflict(s)**

At the end of the 15th Century or beginning of the 16th Century, the people of northern Uganda, who are primarily Nilotics or Luo-speaking peoples, migrated from the southern provinces of the present-day Republic of South Sudan,<sup>33</sup> into north-western Uganda, passing through Juba and Nimule.<sup>34</sup> The Luo-speaking people categorised themselves more by their clans rather than by their collective identity such as the Langi, Alur or Acholi. The clans, therefore, constituted the units comprising the collective identity, but not for purposes of collective action since clans rarely occupied a homogenous territory although they had a common culture.<sup>35</sup> Atkinson posits that 'ethnicity' is one of the most intractable problems facing Africa today and that no single sub-Saharan African country has been immune to the dynamics of ethnicity in the form of political upheavals, civil wars, rebellions, massive human displacements and dispossessions that have bedeviled the continent during the last few decades.<sup>36</sup>

The northern Uganda region in general and Acholiland in particular has been a hotbed for conflicts in Uganda. The Acholi, as a distinct and collective ethnic identity, have occupied the centre stage of national politics since 1962. They were the backbone of the first Obote

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<sup>33</sup> South Sudan comprised the grassland plains of the present Equatorial and eastern parts of Bahr-el-Ghazal provinces.

<sup>34</sup> See G.S. Were and D.A. Wilson (1984:42/43) and P. Shipton (2007:45); P. Shipton (2009:60); D. Uma-Owiny (2012:1).

<sup>35</sup> See T.B. Kabwegyere (1995:38). See also J. Mugaju (1999:11).

<sup>36</sup> See R.R. Atkinson (2010: v).

regime (1962 – 1971). The Acholi were the principal victims of Amin’s reign of terror (from 1971 to 1979). They played a crucial role in the rise and fall of the second Obote regime (1980 – 1985). Since 1986 when the NRA came to power, Acholiland has experienced insurgencies between the government forces and successive ethnic-inspired rebel groups in the region.<sup>37</sup> It has been argued that fierce hatred, conflict and animosity between the northern and southern peoples of Uganda have further exacerbated the conflict<sup>38</sup>. Just like in many African countries, one of the root causes of the northern Uganda armed conflict can, to reiterate, be traced to the British colonial divisive practices that predated the independence of Uganda, where the political and economic developments were concentrated in southern Uganda as opposed to northern Uganda.<sup>39</sup> The same policies were perpetuated by the subsequent independent governments of Uganda, with little effort being channeled to reverse the status quo, leading to marginalisation and neglect of northern Uganda. For instance, during colonial times, which lasted until 1962, the “northerners” were recruited in massive numbers into the armed forces, while the “southerners” took on the civil service positions.<sup>40</sup> This differentiation led to a two-tiered class system, namely a southern class of a more ‘developed’ and educated people, and a

<sup>37</sup> M. Schomerus (2007:10); R.R. Atkinson (2010:V).

<sup>38</sup> See J. Mugaju (1999: 14/15); A.B.K Kasozi (1999:203); World Bank (2005:xi/xv); and S.R. Karugire (2010:2). See also, G.S. Were and D.A. Wilson (1984:42/43) and P. Shipton (2007:45); P. Shipton (2009:60); and D. Uma-Owiny (2012:1).

<sup>39</sup> See R.R. Atkinson (2010:284); J.D. Barkan (2012:158); Human Rights Watch (1997:62). See also R. Downen (2009:40), who posits that in Uganda, the British designated the Baganda as the ‘most advanced tribe’ and used them in their sophisticated local government structures to rule other parts of Uganda. This stored up problems for the future. See also <http://genprogress.org/voices/2008/04/14/14914/ending-ethnic-conflict-in-uganda/> (accessed on 11<sup>th</sup> May 2016).

<sup>40</sup> See M. Mamdani (2011:36); G. Mokhtar (1990:40); G. Arnold (2006:279); Els De Temmerman (2001:11); J.D. Barkan (2012:150/151); P. Mutibwa (1992:6); Human Rights Watch (1997:62); J.J. Jorgensen (1981:122); A.B. Kasozi (2005:1245). Kasozi observes that the colonial legacy was one of the root causes of conflicts many African countries including Uganda. At independence, the British adopted policies of divide and rule, ethnic segregation and uneven development wherein the Southern parts of Uganda including Buganda together with the four smaller kingdoms of Ankole, Bunyoro, Busoga and Toro were given formal recognition and efforts were made to develop these favoured areas like constructing infrastructure such as hospitals, roads, electricity, schools and telecommunications.

second class consisting of the northerners, who were much poorer, relying on cattle husbandry and military service for subsistence.<sup>41</sup> These regional differences lasted until 1962 when Uganda attained independence.<sup>42</sup> Between 1962 and 1979, Uganda was ruled by two “northerners”, Milton Obote and Idi Amin Dada. In 1979, Amin was ousted by a coalition of forces led by the Tanzanian army, who were pro-Obote, and Yoweri Museveni supporters. The Uganda National Liberation Front restored a somewhat southern-led government of Yusuf Lule, who was later replaced by Godfrey Binaisa. For a few months, Paulo Muwanga, the chair of the Military Commission, ruled Uganda. The 1980 multiparty elections returned Obote as president of Uganda. Because all post-Amin rulers came from the south, Obote’s re-emergence on the political scene and the restoration of the Langi and Acholi soldiers seems to have increased the hatred between the north and the south.<sup>43</sup> This was further compounded by doubts surrounding the impartiality of the elections, which ignited the conflict.<sup>44</sup>

In 1981, the National Resistance Army (NRA), a guerilla movement composed of mainly southerners, waged war against the government of Milton Obote. The epicentre of this conflict was in the southern parts of Uganda and mainly in Buganda,<sup>45</sup> and Luwero Triangle in particular. However, because of the failure of Obote to end the war and the growing dissent between the Acholi and Langi factions within the army, in 1985, he was toppled by Tito Okello, an Acholi.<sup>46</sup> After assuming power, the Tito Okello-led government extended an olive branch to all forces that were opposed to Obote by granting them positions on the

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<sup>41</sup> See Human Rights Watch (1997:9).

<sup>42</sup> See T.A. Kennedy (1967:141).

<sup>43</sup> See M. El Zeidy (2005:85); Human Rights Watch (1997:63).

<sup>44</sup> See M. El Zeidy (2005:86).

<sup>45</sup> See C. Onyango - Obbo (2012: xii). The author contends that the NRA chose this area to begin the rebellion because the Baganda, who are the largest ethnic group in Uganda and which covers Buganda had never forgiven Obote for deposing in 1966 their King (Kabaka) Muteesa who was the at same time holding the constitutional title or office of President of the Republic of Uganda.

<sup>46</sup> See P. Acirokop (2012:3); J.D. Fage (1995:518); R.R. Atkinson (2010:278). Atkinson observes that the rigged election of 1980, in which Obote was declared winner was also a ground for Yoweri Museveni, a leading figure in the UNLA, to wage war against the UPC-led government.



Military Council, with the exception of the NRA, and amnesty to exiles who had supported Amin. Although the members of the Okello government and the NRA agreed to the Nairobi Ceasefire Agreement in 1985, neither party was committed to the agreement and the provisions in the accord were never implemented.<sup>47</sup> However, due to the advantageous position the NRA was in as it held considerable territories under its control, and the enormous successes the force had registered during the war, the NRA continued with the struggle until it assumed power on 26 January 1986. Okello and his soldiers retreated to the north to the districts of Gulu and Kitgum, while others marched into southern Sudan.<sup>48</sup> The retreating forces later regrouped and rallied themselves against the NRM government,<sup>49</sup> thus leading to the northern Uganda armed conflict.

Allen attributes the rise of the Joseph Kony and the LRA, and the northern Uganda conflict in general, to the NRA rebellion, whose epicenter was the 'Luweero Triangle'<sup>50</sup> rather than the north-south divide analogy within the raw political passions.<sup>51</sup> When the NRA waged war against the Obote government, they used Luweero as their base to start the rebellion. In a bid to contain the uprising, the Obote regime committed a number of atrocities against the people in Luweero, including arresting and killing both perceived supporters of the rebel group. The violence the people of Luweero experienced at the hands of the UNLF government, which was associated with the Langi and Acholi tribes, intensified animosity and hatred between the Baganda — the tribe that dominated Luweero, and the northerners

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<sup>47</sup> The talks took place from August 26 to 17 December 1985 in Nairobi, Kenya and were chaired by then President of Kenya, Daniel Arap Moi. These talks culminated into the 'Nairobi Accord'. The Accord provided for an immediate ceasefire, integration of the NRA and government forces, the formation of a new national army, then complete demilitarization of Kampala, and the establishment of a 20-member Military Council. The composition of the Council was to be constituted as follows: Head of State as Chairman; 7 members from the UNLA; 7 members from the NRA; 1 member from the Uganda Freedom Movement; 2 members from the Federal Democratic Movement; One member from the Former Uganda National Army; and one member from the Uganda National Rescue Front.

<sup>48</sup> See Human Rights Watch (1997:63).

<sup>49</sup> See M. El Zeidy (2005:87); P. Oringa (2014:5).

<sup>50</sup> This is large part of southern / central Uganda (Buganda) that covers several districts.

<sup>51</sup> See C. Onyango - Obbo (2012: xii).

— the Acholis and Langis. In fact, Allen observes that the dilemma the NRA faced during the war of choosing whether to fight a high-minded war against the regimes of Obote and Lutwa, as proposed by the leftist-purists, or to exploit the southern tribal hatred, which approach was advanced by the tribalist conservatives.<sup>52</sup> After assuming power and the adoption of the latter approach, there were persecutions, arbitrary arrests, summary executions and lynchings by the NRA and their allies such as the Uganda Freedom Movement (UFM) of the defeated government soldiers, leading politicians and their supporters, of whom the majority were northerners.<sup>53</sup> The loss of political power by the northerners to the southerners meant also that they had not just lost economic power<sup>54</sup> but also suffered an embarrassing psychological defeat.<sup>55</sup>

Although there is no single factor to explain the cause of the northern Uganda conflict, however, a combination of them noted above contributed to its outbreak. It is also undisputable that the actions of the victorious NRA rebels and their allies in the north of Uganda and against the northerners laid a fertile ground for the defeated retreating forces and their supporters to form the first rebel force against the new Museveni government under the Uganda People's Democratic Movement / Army (hereafter 'UPDM/A').<sup>56</sup> Even

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<sup>52</sup> See C. Onyango-Obbo (2012: xii). According to Onyango-Obbo, the southerners had profound hatred against the northerners to the extent of referring to them with derogatory Swahili names like 'Anyanya' and in the Luganda dialect as 'Ensolo', which means 'a fierce animal' one with animalistic tendencies. Due to the segregation, mistreatment and human rights violations that the southerners faced under the regimes of Obote I, Idi Amin, Obote II and Lutwa, there was strong resentment, animosity and hatred by those from the region towards the northerners. It is perhaps because of this south-north divide that has also led some politicians from the north to advocate for secession from the rest of Uganda and join South Sudan to form the Nile or Ledu (Luo/Sudanic) Republic since they felt left out of the government's development programmes.

<sup>53</sup> See C. Onyango - Obbo (2012: xii).

<sup>54</sup> Political power always ensures or guarantees that certain regions or ethnic groups that hold such power can provide jobs, business opportunities and appointments to their people.

<sup>55</sup> The northerners, just like the British colonialists, did not believe that the southerners were good warriors and thought that they would die from insect bites in the jungles.

<sup>56</sup> See Human Rights Watch (1997:63). Human Rights Watch states that the UPDA gave up rebellion after signing a peace agreement with the NRM government in 1988.

with the eventual demise of the UPDM/A, the conflict in northern Uganda continued and spread to other parts of the region after the emergence of the Holy Spirit Movement under the leadership of Alice Lakwena, and the Lord's Resistance Army of Joseph Kony.

#### 4.3.1.1 Alice Lakwena and the birth of the Holy Spirit Movement

Both the name 'Alice Auma Lakwena', and her military group, 'Holy Spirit Movement', have Biblical connections and at worst mystic origins. Lakwena, an Acholi from northern Uganda, was born in 1956 to Severino Lukoya<sup>57</sup> and Everina Ayaa, and named 'Alice Auma'. The name 'Lakwena'<sup>58</sup> was later added onto her.<sup>59</sup> Lakwena believed that she was blessed with spiritual powers that made her the anointed leader of the Acholi with a vision or claim that God had directed her to march to Kampala and wrest state power from the government of Museveni, which would in effect help her to prepare the people to meet Christ during his second coming.<sup>60</sup> Some of the spiritual powers she claimed had been given to her by God included the ability to bless stones as weapons and smear people with 'miracle' mud, shea-nut butter, water and oil so that when these two were used by her followers, they could evade bullets fired by the government soldiers.<sup>61</sup> She urged the Acholi

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<sup>57</sup> See C. Mukiibi and P. Aber (2014:7).

<sup>58</sup> See H. Onyalla (2014:6). Onyalla observes that the name 'Lakwena' in the Acholi language means 'messenger'. Quoting Saverino Lukoya, Onyalla stated that Alice Auma was renamed Alice Lakwena in 1986 after the spirit she was allegedly possessed with. Lukoya further stated that that at birth, Lakwena and her younger sister, Dorren Adokorach, were blessed with a divine calling 'to lead God's people in ways that would prepare them for the second coming of Christ so that they would become holy enough to meet him in the clouds.' See also C. Onyango - Obbo (2012: xii). Onyango-Obbo stressed that Alice Lakwena was initially an Acholi prostitute, who later became a 'spirit medium'.

<sup>59</sup> See H. Onyalla (2014:6); C. Mukiibi and P. Aber (2014:7).

<sup>60</sup> See H. Onyalla (2014:6). According to the author, Lukoya had stated in an interview with her that President Museveni was the biblical 'Moses' of sorts that had been chosen to lead the people from the bad governance of Milton Obote and Tito Okello to good governance.

<sup>61</sup> See C. Mukiibi and P. Aber (2014:7). See also H. Onyalla (2014:6); C. Onyango-Obbo (2012: xiii). According to Onyalla, Lukoya stated in an interview with her that the followers of Lakwena were not supposed to be engaged in a real war *per se* but that the government soldiers and Museveni himself 'were supposed to see that their bullets were not working against God's people and turn to follow his messenger. In addition,

to join her movement so that they, too, would become emboldened and also be called the Holy Spirit's soldiers, and that God would protect them against any evil forces with His greater divine powers

The ability with which Lakwena's HSM recruited followers and convinced them to take up arms against the southerner-led government, based on the above flimsy reasoning, points to the fears and discontent the northerners had against the new regime.<sup>62</sup> Lakwena anointed her fighters with the appellation 'Holy Spirit Mobile Forces' (hereafter 'HSMF') to signify that theirs was a cause given to them by God. She launched her march towards Kampala from Gulu in Acholi, through Lango, Teso, Tororo and finally reached Busoga in August 1986.<sup>63</sup> It is alleged by Lukoya, in his mystic narrative that the real war effectively started in northern Uganda as a sort of punishment by God of Lakwena's fighters when some of the latter sinned through killing two people among themselves.<sup>64</sup> Lukoya fought the government forces alongside her daughter and mainly led the fighters that operated in Kitgum (Acholi region).<sup>65</sup>

The violence against the Acholi, and the fear of the Acholi people of the NRA's revenge for their ill-treatment under the previous regimes resulted in the emergence of the UPDA, which was later called the Holy Spirit Mobile Forces (HSMF).<sup>66</sup> Lakwena as a messenger of the divine word from 'God' created the HSMF which was primarily comprised of mostly northerners of Acholi origin as a fighting group. The Holy Spirit Mobile Forces, also called

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Museveni was supposed to see that God's messenger was coming and prepare for her the seat of Moses. This is how it was supposed to be.'

<sup>62</sup> See C. Onyango - Obbo (2012: xiii). Onyango-Obbo states that the Acholi were facing at the time a deep crisis and significantly demoralised by their losses; and therefore used the 'spiritual message' as a rallying call or tool to mobilize the northerners against the southerners through appealing to the divine heavenly forces.

<sup>63</sup> See C. Mukiibi and P. Aber (2014: 7).

<sup>64</sup> See H. Onyalla (2014:6). According to Onyalla, Lukoya states that the sin reflected in the blood of those killed later cried before God, and it was for this reason that the protection of Lakwena's shield did not work.

<sup>65</sup> See C. Mukiibi and P. Aber (2014:7).

<sup>66</sup> See H. Behrend (1999:43); R. Gersony (1997:25); R. Schlendeker (1999:16); R.R. Atkinson (2010:284); Human Rights Watch (1997:64).

the Holy Spirit Movement, had four basic aims, namely, to remove bad leaders, to reconcile without meting out revenge, to promote national unity, and to restore democracy. The latter aim would be constituted in the government being elected by the people and not the HSMF. The HSM was not fighting for any particular individual or tribe or religion and was not associated with any of the past leaders of Uganda.<sup>67</sup>

The HSMF started to adopt a policy of violence and attacks against civilians and NRA soldiers. However, in November 1987, Lakwena's forces were defeated at Magamaga in Jinja (Busoga), 72 kilometres out of Kampala and she escaped with some of her fighters to exile as a refugee in Kenya.<sup>68</sup> Lakwena's forces had managed to fight their way through both northern and eastern Ugandan regions largely due to her ability to instil within her fighters a spirit that that feared neither death nor the dangerous weapons of the NRA.<sup>69</sup> The Holy Spirit Army had tried to storm Kampala with sticks, stones and voodoo figures. Lakwena had promised her followers initially that stones thrown at the enemy would explode like grenades and bullets would not tear them apart and that bullets shot at them would bounce off their bodies. Lukoya, his father, and the remnant of some of the fighters, surrendered, applied for amnesty and a presidential pardon.<sup>70</sup> Lakwena did not return to Uganda to resurrect her rebellion and eventually in January 2007, she died in Kenya at the age of 51.<sup>71</sup> Although Lakwena and her fighters under the Holy Spirit Movement lost the battle to the NRA, the war was carried on by a new rebel group created by Joseph Kony.

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<sup>67</sup> See P. Acirokop (2012: 3); Heike Behrend (1991: 162-171).

<sup>68</sup> See C. Mukiibi and P. Aber (2014: 7); C. Onyango-Obbo (2012: xii).

<sup>69</sup> See C. Onyango - Obbo (2012: xiii). Such attractive was Lakwena's message that it drew in even intellectuals such as Prof. Isaac Newton Ojok, who had been also a Minister of Education under the Obote II government.

<sup>70</sup> See C. Mukiibi and P. Aber (2014: 7).

<sup>71</sup> See R.R. Atkinson (2010: 284); C. Onyango-Obbo (2012: xiii); Human Rights Watch (1997: 69). See also Daily Nation of 19 January 2007 wherein it was reported that Lakwena lost hundreds of her fighters in the last battle in Jinja to the superior weapons of the NRA.

#### 4.3.1.2 Joseph Kony and the birth of the Lord's Resistance Army

After the demise of the HSM, the remnants of the force rallied to form a new rebel army, the Lord's Resistance Army, under the leadership of Joseph Kony.<sup>72</sup> Kony was a cousin of Lakwena and assumed the leadership of the HSM, claiming that he had inherited Lakwena's mystic 'spiritual powers'.<sup>73</sup> Kony was a former Catholic altar boy, who, like Lakwena, subscribed to Acholi traditional Catholic spiritual teachings.<sup>74</sup>

Kony had been raised in Lukoya's family home, the latter having been a brother of Kony's mother, Norah Oting.<sup>75</sup> These family ties could most likely have been the source of the unity between the HSF and LRA. In fact, after the defeat of the HSF, most of the rest of the group joined the LRA to continue with the struggle to regain their greatness.<sup>76</sup> Kony considered himself the messiah with a message from God to the Acholi people. It was, therefore, on this basis that he named the group of his followers 'Lord's Resistance Army, the primary goal of which was to restore and implement the biblical Ten Commandments in Uganda'.<sup>77</sup> The

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<sup>72</sup> Upon assuming the LRA leadership, Kony claimed that he was on a spiritual mission to cleanse northern Uganda and institute a governance system in Uganda based on the Ten Commandments. He was later to add onto this Biblical agenda, the goal of reversing the political and economic marginalisation of northern Uganda. See also, P. Busharizi (2014:7) who contends that Joseph Kony essentially hijacked a conflict started by northwards retreating UNLA soldiers and those of a defeated Lakwena, and later transformed it into another conflict that suited his goals.

<sup>73</sup> See P. Busharizi (2014:7); H. Behrend (1991:165). Behrend states that: "Lakwena appeared in Acholi because of the plan by Yoweri Museveni and his government to kill all the male youths in Acholi as a revenge for what happened many years back. So Lakwena was sent to save the male youth from that malicious plan. The good Lord who had sent Lakwena decided to change his work from that of a doctor to that of a military commander for one simple reason.

<sup>74</sup> See C. Onyango-Obbo (2012: xiii). See also <http://genprogress.org/voices/2008/04/14/14914/ending-ethnic-conflict-in-uganda/> (accessed on 11<sup>th</sup> May 2016).

<sup>75</sup> See H. Onyalla (2014:6).

<sup>76</sup> See C. Onyango-Obbo (2012: xiii); M. Schomerus (2007:10). However, as early as 1987, Joseph Kony and the LRA had started taking shape despite Alice Lakwena and her fighters being more prominent and profound in their activities at both the national and international level.

<sup>77</sup> See C. Onyango-Obbo (2012: xiii).

difference between him and Lakwena was that he embraced the use of basic military principles while the latter premised her struggle on beliefs in witchcraft.<sup>78</sup>

Lakwena's poor tactics led to the defeat of the HSM, which demoralised the Acholi, and when Kony emerged he targeted the civilian population of northern Uganda through killings and abductions. The LRA supported their actions of killing and abducting civilians, arguing that they were following the Holy Spirit's orders and that their acts were meant to eliminate the wrongdoers from the Acholi community and those who collaborated with the NRM government. Kony argued that the Acholi (through the HSM) had become 'impure', which led to their loss to the southerners and that the atrocities meted out to them were regarded as part of a punitivet process of cleansing and purifying them.<sup>79</sup> The LRA used strategies of 'terrorism' as a massive tool and weapons to control the northern Uganda population. By resorting to these methods the LRA was able to hold significant populations inhabiting northern Uganda, the West Nile, north-eastern and eastern Uganda in fear, which in effect deterred them from joining or collaborating with the government. The communities' refusal to co-operate with the government forces incensed the latter to the extent of torturing suspected LRA sympathisers for their presumed refusal to disclose the whereabouts of the LRA members. The communities in northern Uganda were between a soft and hard rock, as disclosing their whereabouts would attract reprisals from the LRA. On the other hand, the refusal by the communities to disclose LRA's locations was also counterproductive to the latter as their army would jail them in army facilities without trial, subjecting them at times to bouts of torture.<sup>80</sup>

The abductions, particularly of young boys, bolstered the numbers of the LRA forces since they could be easily brainwashed or indoctrinated and managed in comparison to adults.<sup>81</sup> In order to prevent the abductees from escaping and returning to their communities, Kony

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<sup>78</sup> See C. Onyango-Obbo (2012: xiii).

<sup>79</sup> See C. Onyango-Obbo (2012: xiii).

<sup>80</sup> See M. Schomerus (2007:10).

<sup>81</sup> See C. Onyango-Obbo (2012: xiii).

forced them to kill their relatives and community members.<sup>82</sup> This made them unwelcome to communities where they had committed atrocities, thus compelling them to remain with the LRA amongst whom they felt safe. As will be noted later in this thesis, this factor contributed to the continuation of the conflict as some LRA members could not denounce rebellion and return to their homes for the very reasons spelled out above.

#### **4.3.1.3 The current state of the LRA and their activities since 2006**

The LRA rebellion in northern Uganda continued for nearly two decades without any end in sight. As earlier noted, several armed groups sprung up immediately after NRM's ascendance to power and others in the later years. However, surprisingly, all the groups were neutralised, except the LRA which is still active to date although at low strength levels. While the northern Uganda region has enjoyed relative peace since 2006, this has not been the case in the CAR where the group has relocated its bases. One wonders how the LRA has been able to sustain a rebellion for over two decades despite missions to obliterate it altogether. In certain instances, the UPDF has allied itself with DRC, South Sudan and the CAR forces, with the support of the US, to address the LRA problem militarily. Some have argued that the lack of political will could have been a strong factor to support this chronicle of events since similar insurgencies have been crushed but the LRA one has persisted. Corruption is one problem that has partly contributed to the continued manifestation of the war. The army has been implicated in this vice of corruption since some members within the force benefit financially from the insurgency.<sup>83</sup> The army was implicated in the creation of 'ghost' (non-existent) soldiers to whose bank accounts funds would be remitted and then diverted to high-ranking military officers. In other instances, there was high-level collusion between the LRA leadership and key elements within the national army, which furnished the former with funds, intelligence information and logistical support in the form of medicines from the latter.<sup>84</sup> Therefore, the war was an

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<sup>82</sup> See C. Onyango-Obbo (2012: xiii).

<sup>83</sup> See C. Onyango - Obbo (2012:xiii). See also O.S. Angoma (2007:8).

<sup>84</sup> See C. Onyango-Obbo (2012:xiii); BBC News, "Why can't the army defeat the LRA?" 29 August 2006, <http://news.bbc.co.uk/2/hi/africa/3514473.stm> (accessed on 20th January 2016).



economic venture for the high-ranking officers who, in turn, fuelled its continuation as they profited from the recurrent war financially.

From 2005 to 2006, there were not any reported attacks by the LRA in northern Uganda.<sup>85</sup> In 2006, the LRA were pushed out of northern Uganda in consequence of the military pressure exerted by the UPDF. The group first relocated to South Sudan, then to the thick tropical Garamba Forest in the DRC, and finally settled in the CAR, where they presently dwell.<sup>86</sup> Since 2008, the LRA force has been significantly reduced from about 1,000 to just between 200 to 300 fighters.<sup>87</sup>

Although the LRA has been weakened very considerably, it still poses a security threat to the communities in the CAR, where it has continued to carry out abductions,<sup>88</sup> killings and destruction and looting of property.<sup>89</sup> There have also been reports that the LRA still receives 'masked' funding from the Sudan and that it has safe havens within its territory from which it is able to launch attacks in the neighbouring countries.<sup>90</sup>

The LRA's continued survival has been enabled by the conflicts that manifest in many parts of the Great Lakes region. The region has been riddled with conflicts in countries such as the DRC, South Sudan, Burundi, the CAR and in the neighbouring countries of Nigeria and

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<sup>85</sup> See M. Walubiri (2014:42).

<sup>86</sup> See M. Walubiri (2014:42); R. Kasasira (2014:16). The vast forests of in CAR for instance cover an area spanning approximately 1,300 kms from the UPDF's rear base in Nzara (South Sudan) to Mbii (in eastern CAR).

<sup>87</sup> See K.J. Kelley (2014:33); B. Kaija (2014:10); P. Ankunda (2014:15).

<sup>88</sup> This method helps it largely avoid infiltration since most of the abductees are young children from different ethnic groups stranding different five countries (Uganda, Central African Republic, the Sudan, D.R. Congo and South Sudan).

<sup>89</sup> See M. Walubiri (2014:42). The LRA is now largely a highly mobile group that does not seek to permanently control vast tracks of territory and therefore moves repeatedly on feet which would otherwise make vehicles easily identifiable or traceable. Their geographical area of operation is largely inhabited by two ethnic groups: the Zande and Sango who still live traditional lives of fishing, hunting and gathering fruits with little farming. The area too has little CAR government presence with roads largely impassable or non-existent.

<sup>90</sup> See B. Kaija (2014:10); K. J. Kelley (2014:33).

Somalia.<sup>91</sup> The LRA has taken advantage of the fragile situation in the above-mentioned countries to evade detection and crack-downs, as most of the countries have diverted their attention to tackling challenges that they themselves face in their respective nations.<sup>92</sup> The LRA has also exploited the fragile situation in some countries to build alliances with warring parties, which has contributed to their survival in the areas where they have bases. For example, the group has allied with the Seleka rebels to organise attacks in CAR<sup>93</sup> and Boko Haram has started to mimic them in the way they execute their activities.<sup>94</sup>

Although the LRA remains a potential threat to the peace and communities of northern Uganda, it remains unlikely under the current circumstances to resume attacks in northern Uganda. The region that was once a hothouse of the conflict has developed tremendously and the people seem to be hostile to any form of rebellion fermenting in their backyard. The Ugandan government has, through the PRDP Programme and NUSAF, extended services to the region to support and improve the livelihoods of the communities. Secondly, the UPDF strength has grown over the years and its efficiency enhanced, which makes it difficult for the LRA to stir any uprising in northern Uganda, more so where the population is still hostile to the group because of the abuses it perpetrated against innocent people. Financial constraints constitutes yet another impediment that has weakened the LRA as countries and individuals that backed the group withdrew their support out fear of being blacklisted and isolated by the international community. These factors make it extremely difficult for the LRA to resume war in northern Uganda.

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<sup>91</sup> See K.J. Kelley (2014:33).

<sup>92</sup> See K.J. Kelley (2014:33); P. Ankunda (2014:15). According to both Kelley and Ankunda, there were also suggestions emerging from intelligence reports that the forces of Riek Machar and Sudan have provided a safe haven to the LRA as Kony had been sighted in the Sudanese – South Sudanese border town of Kafia Kingi.

<sup>93</sup> See R. Kasasira (2014:16). The Seleka rebels seem to have welcomed the LRA but became hostile to the American and African forces. The Seleka rebels trade with the LRA and share the same lifestyle including the living environment. This partly explains why the LRA comfortably live in the forests of DRC and CAR.

<sup>94</sup> See K.J. Kelley (2014:33).

#### 4.3.1.4 Impact of the conflict

The LRA rebellion in northern Uganda has had far-reaching effects on the region, the population and the country's economy. Although the LRA has since 2007 been operating outside Uganda, its actions have had wide-ranging; in some instances, the conflict has been described in ethnic terms as an 'Acholi problem', making the Acholi to feel isolated politically.<sup>95</sup> This is premised on the fact that the rebel leader, Kony, is an Acholi, and it was felt that the other Ugandans do not share the plight of the Acholi since it is their son who was inflicting violence on his own people. The description of a regional problem as an ethnic one widens the north-south divide gap and exacerbates a state of animosity and hatred between people of the two regions.

Unlike the other armed rebellions that the NRA has managed to diffuse militarily,<sup>96</sup> the northern Uganda conflict has persisted for over two decades. These armed groups had bases in the other regions of the country and were neutralised and flushed out of their operational zones by the government forces. The persistence of the northern Uganda conflict has raised questions and created discomfort among the northerners as it has taken the government so long to address and yet similar uprisings in the other regions of the country were crushed with decisive military force.

The attacks of the LRA were carried out not only in the Acholi sub-region but also extended as far as Teso region which is predominantly Itesot. Therefore, the LRA incursions in Teso were construed to be an attack of the Acholi against the Itesots. This aroused anti-Acholi sentiments in Teso, which has bred hatred and animosity between the Acholi and the Itesot, with the latter calling for revenge against the former.<sup>97</sup> Such was the antipathy of this ethnic group against Kony's ethnic group, the Acholi.

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<sup>95</sup> See A. Branch (2010:63); M. Leopold (1999:223).

<sup>96</sup> See Refugee Law Project (2004:24); Keller (2007:211/214).

<sup>97</sup> See Refugee Law Project 'Statement on the outbreak of ethnic violence in northern Uganda' 27 February 2004, available at <http://www.rescue.org/sites/default/files/migrated/help/take-action/resources/RLP-20Position-20Statement-20on-20ethnic-20violence.pdf> (accessed on 12th November 2015).

The northern Uganda conflict, once described by Jan Egeland, the then UN Under Secretary General for Humanitarian Affairs and emergency relief co-ordinator, as the “biggest forgotten, neglected humanitarian emergency in the world”,<sup>98</sup> has been characterised by excessive violence and brutality towards the civilian population in the region. This was further compounded by abductions and killing of tens of thousands of civilians, as well as the displacement of millions of people into IDP camps.<sup>99</sup>

As northern Uganda undergoes the process of return, resettlement, reconstruction and rebuilding, it is also experiencing challenges of land-related conflicts. At the height of the conflict, the government forced the people into IDP camps in 1996 as a measure to protect them from the LRA attacks.<sup>100</sup> As the region was experiencing relative peace as a result of the 2006 Juba peace talks, it enabled IDPs to return to their original homes. However, surprisingly, upon return, the returnees found their lands occupied by encroachers, while in other cases the determining of boundaries has been difficult. There have also been cases where others have claimed multiple pieces of land different from the ones they originally possessed.<sup>101</sup> These disputes became observable at both the individual, family and clan level, while others have taken on an ethnic dimension. The land tenure system in Acholiland is predominantly customary, with over 90 per cent of the land in the region owned under customary law system while the rest is held under freehold and leasehold systems.<sup>102</sup> Land in this region is communally-owned, with access based on membership to a community, family or clan.

The land conflicts have further been fuelled by the death of the elders and community leaders over the period. These knew the boundaries of specific lands but had not passed on the information.<sup>103</sup> They presided over land disputes and greatly contributed to the

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<sup>98</sup> Quoted in (Human Rights Watch (2009:31). See also M. Kersten (2016:64).

<sup>99</sup> See Keller (2007:211/214).

<sup>100</sup> See R.R. Atkinson (2010:284).

<sup>101</sup> See Mercycorps (2011:5).

<sup>102</sup> See United Religions Initiative and Acholi Religious Leaders Peace Initiative (2012:9).

<sup>103</sup> See Mercycorps (2011:6).

resolution of land-related conflicts. Their demise left a vacuum for resolution of conflicts of such nature and this has paved way for people to take the law in their hands. In Gulu, for instance, land demarcation marks such as trees and stone markers were uprooted during the war and this gave an opportunity to land grabbers to take advantage of the absence of the markers to claim ownership of 'idle' land.<sup>104</sup>

The mistrust and suspicion of the Acholi towards the government has also been responsible for fuelling land conflicts in Acholiland.<sup>105</sup> In the recent past, there have been attempts by government to give away fallow land in Amuru district to the Madhavni Group of Company for the cultivation of sugar cane. However, this project had been met with stiff resistance on the part of the local population as many view it with suspicion and skepticism and suspect it to be riddled with sinister motives, especially with the involvement of the government.<sup>106</sup> This project best illustrates the rifts over land in the Acholi sub-region and the suspicion and mistrust of the people of northern Uganda towards the government. The land problem has further been worsened by reports of the discovery of oil in northern Uganda, especially in the Amuru district, where the government has given away large chunks of land to private investors.<sup>107</sup> There has been a perception among the people that the government is deliberately withholding information on the actual locations of the oil wells and they suspect the area where the intended project is to be carried out as one of those within the oil belt.

The conflict in northern Uganda deprived the people of the region their economic livelihood as a result of being uprooted from their original farmlands and placed in IDP camps. Before the conflict, the population utilised their fertile lands for crop growing, which would feed their families and also sale some produce to be able to meet their children's educational needs. However, as a result of the war, many people who sought refuge in IDP camps could no longer engage in any economic activity to support their

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<sup>104</sup> See S.B. Mabikke (2011:1).

<sup>105</sup> See Mercycorps (2011:6).

<sup>106</sup> See S. Arinaitwe (2013:5).

<sup>107</sup> See Mercycorps (2011:4).

livelihoods. Worse still, the crops that were cultivated by the families would be taken away by the rebels. This increased their reliance on relief aid from the government and humanitarian agencies, and many children dropped out of school because of insecurity in the area.

Eighty per cent of the population in the north was internally displaced. People were subjected to living under devastating conditions. Formerly abducted girls and women returned home with unwanted children, infections with fatal diseases such as HIV/AIDS. Others suffered disabilities and faced rejection from their own parents, relatives and friends.<sup>108</sup> The impact of the LRA war was also felt in north eastern Uganda, South Sudan, the Democratic Republic of the Congo (hereafter DRC), and the Central African Republic (hereafter CAR) as it claimed lives of people in these areas and others were abducted.<sup>109</sup> Over 600 000 children were abducted by the LRA rebels and forced into servitude, often as child soldiers, and were made to perpetrate atrocities against their own communities.<sup>110</sup> The abducted children were militarily trained and integrated into the rebel ranks to attack the communities in which they lived.

A number of atrocities have been committed in northern Uganda since the war started. For instance, on 10 October 1996, the LRA rebels abducted 139 secondary school female students from St. Mary's college in Aboke in the Apac district of Uganda.<sup>111</sup> This incident attracted international attention to the insurgency in northern Uganda. In late December 2008 and January 2009, the LRA brutally killed more than 865 civilians and abducted at

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<sup>108</sup> See Speech of Hon. Eng. Hillary Oniek, the then Minister of Internal Affairs, at the validation of a Report and Policy Proposals on the use of traditional justice and truth telling mechanisms in the promotion of justice, accountability, peace and reconciliation.

<sup>109</sup> See J. Spiegel and J. Predergast (2012:2).

<sup>110</sup> See Institute for War and Peace Reporting (2012); E. De Temmerman (2001:160); T. Allen (2005:ii); Human Rights Watch (2012:2).

<sup>111</sup> See E. De Temmerman (2001:160); Keller (2007:211/214).

least 160 children in the northern DRC.<sup>112</sup> According to the UN, an estimated 25 000 children were recruited or kidnapped by the LRA.<sup>113</sup> In addition, the LRA carried out mutilations on civilians in retaliation to the government's attempts to form local militias in northern Uganda.<sup>114</sup> Victims' hands, feet, noses, ears, lips and breasts were cut off, often as punishment for organising to fight against the rebels.<sup>115</sup>

However, the UPDF has also been implicated in some of the atrocities committed in northern Uganda. The government forces have been accused for carrying out killings, torture and mistreatment of civilians, rape, and arbitrary arrest and detention of civilians.<sup>116</sup> The Human Rights Watch observed that the UPDF was responsible for the forcible displacement of over one million civilians, and the recruitment of children under the age of 15 into government militias.<sup>117</sup> The UPDF committed these crimes with impunity and there were no remedies in place for the victims of the UPDF abuses.<sup>118</sup> Although there were established disciplinary committees in the camps, the victims rarely got to know whether disciplinary action had been taken against their abusers. This was due to the fear of intimidation by the UPDF that made it difficult to report abuses to the respective organs.<sup>119</sup> The Refugee Law Project has emphasised that any process that is to take into account the actions of only one side is likely to generate future grievances.<sup>120</sup> It is, therefore, prudent that accountability processes for all parties to the conflict are instituted to avoid future conflicts that might arise due to one party being disgruntled.

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<sup>112</sup> See Human Rights Watch (2009:29-39). Other abductions and killings were reported in the CAR. See also Human Rights Watch (2012:21-25).

<sup>113</sup> See UN Security Council Working Group on Children and Armed Conflict talks regarding children in war zones in Uganda and Somalia.

<sup>114</sup> See Human Rights Watch (2005:20).

<sup>115</sup> See Human Rights Watch (2005:20).

<sup>116</sup> See Human Rights Watch (2005: 24-36).

<sup>117</sup> See Quoted in P. Stoett (2010: 16). See also (Commentary) M. Mamdani (2013:12).

<sup>118</sup> See Human Rights Watch (2005:42). See also P. Pham, P. Vinck & E. Stover (2007:7).

<sup>119</sup> See Human Rights Watch (2005:45-48).

<sup>120</sup> See RLP (2005:15).

A report compiled by the Advisory Consortium on Conflict Sensitivity (ACCS), which is a consortium consisting of the Refugee Law Project, International Alert, and Saferworld, describes Northern Uganda as one of the many regions in Uganda that has suffered from persistent armed conflicts.<sup>121</sup> Some of the notable ones have included the LRA war and the Karimojong cattle raids, both of which retarded development in the regions and affected people's livelihoods. The impact of the armed conflict resulted in the displacement of over 1.8 million people into IDP camps, loss of lives, and abduction of estimated 30, 000 to 60, 000 children.<sup>122</sup>

The report highlights issues, prospects and challenges to post-conflict recovery in the northern region. These include resource-based conflict, social and physical insecurity, including conflicts in neighbouring Congo and South Sudan, border control/smuggling and immigration issues leading to forced migration, especially from Congo and South Sudan into Uganda.<sup>123</sup> Others include armed robbery (*"boo kec"*), mob justice, the killing of alleged witches (sorcerers), suspicion of infiltration and trafficking of small fire arms and population pressure, predominantly in the areas of Zou, Parombo, Erussi in West Nile and Gulu in Acholi.

During the first two decades of the conflict, the government of Uganda has resorted to two approaches in trying to resolve the conflict. One is military, while the other is a negotiated settlement on its own initiative or through persuasion by others. During the same period, there is hardly any evidence to the effect that any of the approaches were successful although it must be stated here that the former was not only costly to the economy of Uganda, but it left communities of northern Uganda also devastated.

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<sup>121</sup> See Refugee Law Project, International Alert & Saferworld (2012:1).

<sup>122</sup> See Refugee Law Project, International Alert & Saferworld (2012:1).

<sup>123</sup> See Refugee Law Project, International Alert & Saferworld (2012:2).



#### **4.4 SOME OF THE INITIATIVES TOWARDS A PEACEFUL END TO THE CONFLICT**

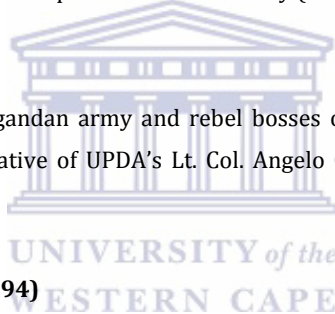
There have been a number of peace initiatives to end the conflict in northern Uganda over the years. Attempts at a peaceful settlement of the northern Uganda armed conflict started as early as 1986 up to 2008 but all these petered out without any positive results in ending the conflict. The following are some of the most significant peace efforts undertaken over the past 30 years.<sup>124</sup>

##### **4.4.1 The Goodwill Mission (1986 – 1987)**

This peace initiative was spearheaded by three Acholi Elders: Tiberio Okeny, Leander Komakech and Peter Odok, after seeking and obtaining the permission of President Yoweri Museveni to meet the rebel leaders of the Uganda People's Democratic Army (UPDA).

##### **4.4.2 The Pece Peace Agreement (1988)**

This was an agreement signed between the Ugandan army and rebel bosses of the then UPDA at Pece stadium in Gulu, under the initiative of UPDA's Lt. Col. Angelo Okello and NRA's Salim Saleh.



##### **4.4.3 The Betty Bigombe initiatives (1993-1994)**

Between October 1993 and February 1994, talks aimed at brokering a peaceful settlement to the conflict were held under the leadership of Betty Bigombe, who was the then Minister of Northern Uganda Pacification.<sup>125</sup> A temporary ceasefire was eventually declared which, however, collapsed when the army received reliable reports that the LRA was receiving full military support from the Sudanese-government. Although these talks succeeded in ensuring relative peace in the region, lack of political will on the government side to solve the conflict through dialogue undermined these efforts it preferred the military option to end the insurgency. This resulted in renewed fighting between the two groups.

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<sup>124</sup> The information is gleaned from an article by Father Carlos Rodriguez, "mixed reactions over the LRA peace talks" *New Vision*, 16 July 2006. See also E. De Temmerman (2001:159).

<sup>125</sup> See T. Allen (2005: iii); Human Rights Watch (1997:70).

#### **4.4.4 Gulu Elders initiative (1996)**

Two Gulu elders, Okot Ogori, who was the then Chairman of the Council of Elders Peace Committee, and Lagony, then a respected person from Gulu. and a brother of a then senior LRA commander, Oti Lagony, obtained permission from the government to meet the rebels in a bid to revive the efforts that had been commenced by Betty Bigombe. In July 1996, they left Gulu and headed to the meeting venue. However, they were murdered the very day they arrived at the venue on assumption that they had been persuaded by the government to betray the LRA leader.<sup>126</sup> This dealt a big blow to securing a peaceful solution to the conflict.

#### **4.4.5 Communities of Sant' Egidio end of January (1998)**

The Roman Catholic-based peace movement, Community of Sant' Egidio, organised two meetings in Rome between government officials, headed by Amama Mbabazi and the LRA representative, James Obita. Obita claimed to have Kony's mandate for the peace talks. It was discovered he did not have the mandate. He was subsequently arrested when he met Kony in Juba and sentenced to death. This led to the collapse of the talks and hence the continuation of the war.

#### **4.4.6 The Carter Center (2000-2002)**

In January 2002, Joyce Neu of the US-based Carter Centre held a lengthy meeting with Joseph Kony at the LRA Headquarters in Jebelein, south of Juba, in an effort to persuade the LRA to get involved in the signing of a Peace Accord between the governments of Uganda and Sudan. On 8 December 1999, the presidents of both countries signed a historical agreement in Nairobi, Kenya. The agreement provided for an end to the support of the rebel groups on both sides, the restoration of diplomatic relations and the return of abducted children. It was hoped that if either country withdrew support for the rebel groups fighting the respective regimes of Kampala and Khartoum, they would find it difficult to sustain their rebellions and this would ultimately result in their demise. However, the LRA demonstrated unwillingness to abandon rebellion as it continued

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<sup>126</sup> See R. Gersony (1997:54).

carrying out attacks and abducting civilians. As relations between the governments of Sudan and Uganda improved, the latter was granted permission by the former and the Sudan People's Liberation Army (hereafter 'SPLA') to pursue the LRA militarily in Sudan.<sup>127</sup> However, this operation, code-named 'Operation Iron Fist', turned out to be unsuccessful as it did not end the armed rebellion despite the LRA suffering heavy losses.

#### **4.4.7 Marketing amnesty to the LRA (2001)**

In 2000, the Ugandan parliament passed the Amnesty Bill, which was aimed at motivating the members of the LRA to abandon rebellion. The gesture of amnesty to the rebels effectively led to a number of LRA rebels abandoning the rebellion.<sup>128</sup> In October 2001, Oywaki, Lingai and the cleric Carlos met a rebel group led by Major Onekomon and succeeded in bringing them out of the bush peacefully in Pajule. Although the amnesty window contributed to defections within the rebel ranks, however, others remained active in the force and continued with the war.

#### **4.4.8 Religious leaders' mediation (2002-2003)**

In early July, the Catholic Archbishop of Gulu, John Baptist Odama, and the retired Anglican Bishop of Kitgum, Baker Ochola, were given permission by President Museveni to meet the rebel leaders in the bush in a bid to mediate the conflict. Although violence continued, the President exchanged letters with the LRA in which he proposed safe assembly zones and ceasefire arrangements. At the end of August, the President appointed a Presidential Peace Team (PPT) to further the discussions.

#### **4.4.9 Presidential Peace Team (March-April 2003)**

Members of the PPT went to Gulu and initiated peace overtures. A ceasefire was declared in Lapul, a sub-county of Pader district, to facilitate contacts. A number of junior LRA officers came out of the bush when encouraged by pledges from the PPT. However, the talks

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<sup>127</sup> See R.R. Atkinson (2010:284).

<sup>128</sup> See R.R. Atkinson (2010:284); E. De Temmerman (2001:157).

collapsed after the LRA violated the terms of the ceasefire and killed the PPT emissary, which act forced the government to resume military warfare against the rebels.

#### **4.4.10 Sant'Egidio's second attempt (2003-2004)**

Two members of the Community of Sant'Egidio came to Gulu with the permission of President Museveni to persuade the LRA to go to Rome for serious negotiations with government representatives. The rebels refused to name their delegations to the talks, with peace talks actually not taking off at all. The non-action of the LRA to utilize the opportunity to resolve the conflict meant that the group was unwilling to engage in any talks but rather to push on with the war.

#### **4.4.11 Betty Bigombe's second attempt (2004-2005)**

In March 2004, Betty Bigombe made another attempt to revive the talks that she had earlier initiated with some LRA leaders. She arranged a meeting between government representatives and some of the top echelons of the LRA on 29 December 2004. However, the peace negotiations were undermined after the surrender to the UPDF of the ceasefire negotiator, Sam Kolo, in mid-February 2005. The hopes for the talks were further dashed after the unsealing of the arrest warrants by the ICC for Kony and four of his men<sup>129</sup>. The unsealing of the arrest warrants pushed away the LRA from engaging in further talks as they felt insecure and unsafe in taking part in any negotiations.

#### **4.4.12 LRA / Government of Uganda Peace-Talks in Juba, South Sudan (2006)**

The persistence of the war in northern Uganda, with no end in sight, and the violence orchestrated by the LRA against the population, aroused both local and international concerns and calls for a peaceful solution to the conflict. The humanitarian crisis arising from the conflict provided a rethink in approach to address the volatile situation through peaceful means after previous attempts had failed. After intense pressure from both the domestic and international community, both parties to the conflict were able to return to

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<sup>129</sup> See <http://genprogress.org/voices/2008/04/14/14914/ending-ethnic-conflict-in-uganda/> (accessed on 11 May 2016).

the negotiating table, with Juba being host to the talks. These talks were mediated by Riek Machar, then Vice President of South Sudan.<sup>130</sup> The talks were organised after Kony had released a video recording in May 2006, in which he called for an end to the hostilities. This was in response to President Museveni's pledge to guarantee the safety of Kony if he accepted a peaceful end to the conflict by July 2006. President Museveni had also pledged to grant Kony total amnesty if he gave up terrorism. However, the then LRA legal adviser, Odongo, rejected the offer on the grounds that accepting amnesty presupposed surrender and would mean that the LRA was no longer available for discussions.<sup>131</sup> However, as discussions on the modalities of the peace talks were underway, the ICC warned that any offer of amnesty to the LRA would contravene the Rome Statute of which Uganda is a signatory.<sup>132</sup> The ICC reminded Uganda of her obligations under the Rome Statute and instead advised Uganda to arrest and hand over the rebel fugitive and his four indicted officers to the ICC for prosecution. This further derailed efforts for the LRA to participate in the talks out of fear of arrest. Nonetheless, the LRA agreed to take part in the talks.

After protracted negotiations, the talks yielded results although implementation of the agreements on both sides was rather slow and somewhat lukewarm. A number of agreements were signed. These were: Agenda Item 1 on Cessation of Hostilities;<sup>133</sup> Agenda

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<sup>130</sup> See Inside Kony's base, *Sunday Monitor*, January 11, 2015, 14. At the Juba peace talks, the Government of Uganda was headed by Hon. Ruhakana Rugunda, as its leader, Hon. Okello Oryem, Dr. Amos Makumbi, the Chief of the Internal Security Organisation, Makkulga, the Chief of the External Security Organisation, Col. Leo Kyanda, the Director of the Chieftaincy of Military Intelligence, Col. Eric Otema, the commander of the 4<sup>th</sup> Division of the UPDF, Dr. Stephen Kagoda, the Permanent Secretary of the Ministry of Internal Affairs, and Gakirabake, a Principal State Attorney. The LRA side was headed by Martin Ojul, Rock Okidi, Peter Ongom, Otim Okullo, Chris Ayena see Odongo, Obonyo Olweny, Justin Labeja, Joshua Otukene, Yusuf Okongo, Wilson Owiny, Rei Achama, Dennis Okiro, Col. Leonard Bwone, Lt. Col. Santo Alit and Sunday Achaya.

<sup>131</sup> See Uganda LRA rebels reject amnesty, BBC News, Friday, 7 July 2006, available at <http://news.bbc.co.uk/2/hi/africa/5157220.stm> (accessed on 20th November 2012). See also Florence A. Odora (2011:17).

<sup>132</sup> See F. Nyakairu (2006:1).

<sup>133</sup> This was signed on 26 August 2006. It provided for the assembling of all LRA fighters at Ri-Kwangba and Owiny Ki-Bul.

Item 2 on Comprehensive Solutions to the Conflict;<sup>134</sup> Agenda Item 3 on Accountability and Reconciliation;<sup>135</sup> (and its Annexure) which set out a broad framework for a transitional justice policy. However, the rebel leader refused to sign the Final Peace Agreement<sup>136</sup> on grounds that he needed more information about the punishments he could face for the atrocities committed, how the *mato oput*<sup>137</sup> would be applied, and how the Special War Crimes Court would operate.<sup>138</sup> However, in what could rather be described as a delaying tactic and the desire to fail the talks, Kony suspended the talks and appointed a new negotiating team under the leadership of James Obita.<sup>139</sup> On 8 June 2008, the government of South Sudan withdrew its mediation role because of continued LRA attacks in South Sudan and the lack of interest in the peace process on the part of the government of Uganda.<sup>140</sup> This seemed to undermine a process that had been reached thus far and had ensured relative peace in the region. Although the talks collapsed, they marked a historical turning point in the development of the military conflict in northern Uganda. The Sudanese

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<sup>134</sup> This was signed on 2 May 2007. Under this Agreement, both parties committed themselves to pursuing constitutional means to participate in national politics and institutions; the return, resettlement and rehabilitation of internally displaced persons; economic and social development of the north and north eastern Uganda.

<sup>135</sup> This was signed on 29 June 2007. Under the Agreement, both parties committed themselves to preventing impunity and promoting redress in accordance with the Constitution; promoting national legal arrangements, consisting of formal and non-formal institutions and measures for ensuring justice and reconciliation; widely consult on mechanisms, procedures and processes to be adopted in accountability; promote, with necessary modifications, traditional justice mechanisms such as Culo Kwor, Mato Oput, Kayo Cuk, Ailuc, etc. Additionally, Government undertook to remove the LRA from the list of terrorist organisations on condition that the LRA abandons rebellion, ceases fire and submits its members to the process of disarmament, demobilisation and reintegration; makes representations to any state or institution which has proscribed the LRA/M to take steps to remove the LRA from such list.

<sup>136</sup> The Final Peace Agreement was scheduled for signing on 10<sup>th</sup> April 2008. For a discussion on the Juba Peace talks, see R.R. Atkinson (2010:284).

<sup>137</sup> *Mato Oput* is an Acholi traditional conflict resolution process and ritual ceremony that aims at reconciling and restoring relationships between clans or conflicting clan members.

<sup>138</sup> See M. Olupot (2008:1).

<sup>139</sup> See Ugandan rebels suspend peace talks; appoint new team, *Sudan Tribune*, 11 April 2008.

<sup>140</sup> See GoSS suspends talks over LRA attacks, *The Daily Monitor*, 8 June 2008.

and Luo people of wider northern Uganda and South Sudan are related to each other.

The talks differed from all the previous ones in two respects: (a) They took place outside of Uganda, and (b) they involved a significant third party, namely, the UN, as well as representatives from the governments of Kenya, Tanzania, and South Africa. A major hurdle to the talks was that they lacked a powerful and neutral party to oversee the process. There was a high possibility that any of the sides could choose to walk away from the talks without fear of any serious consequences. Therefore, in the absence of a strong neutral party, it was important that the warring parties came up with a more concrete peace accord that could not leave everything in the hands of the two opposing parties. The exclusion or absence of the Sudan from the talks, which for several years was the major backer of the LRA, was a missed opportunity as this would have given the rebel group confidence and added impetus to pursue the negotiations. The LRA would have felt more secure in the presence of the Sudan rather than associate with parties that it viewed with suspicion. The absence of civil society representatives, opposition political parties, the western powers and the African Union from the talks further dampened the hopes of the talks realising their goals as these bodies would have played a crucial role in confidence-building and in monitoring the implementation of the provisions of the agreement by both parties.

#### **4.5 THE UN STANDBY MILITARY FORCE**

Although the LRA conflict was an internal issue pertaining to Uganda as a country, however, it assumed an international character because of the indirect involvement of other international players who had also suffered the brunt of the conflict.<sup>141</sup> The refusal of Joseph Kony to sign the final peace agreement resulted in policy shifts by the UN, the AU and international partners to address the threat posed by the LRA in the DRC, South Sudan and the CAR. The AU launched a Regional Cooperation Initiative dubbed the AU-led Regional Cooperation Initiative for the Elimination of the LRA (RCI – LRA), on 24 March 2012, whose aim was to eliminate the LRA. This initiative included the establishment of a

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<sup>141</sup> See S. Finnstrom (2005:98).

Joint Coordination Mechanism to co-ordinate the efforts of the AU and the affected countries. It was supported by the international partners, a Regional Task Force consisting of 5,000 troops, and a Joint Operations Centre. The RTF was launched on 24 March 2012 in Juba.

On 27 June 2012, the UN Security Council approved the UN Regional Strategy to Address the Threat and Impact of the Activities of the LRA, which was primarily to co-ordinate and improve international responses to LRA violence, to build on the existing efforts led by governments affected by the LRA rebel activities, the AU and donors, to protect civilians and mitigate the impact of LRA attacks on civilian populations.<sup>142</sup> The strategy focused on five key objectives: (i) implementation of the African Union-led Regional Cooperation Initiative against the LRA; (ii) enhancement of efforts to promote the protection of civilians; (iii) expansion of current disarmament, demobilisation, repatriation, resettlement and reintegration activities to cover all LRA-affected areas; (iv) promotion of a co-ordinated humanitarian and child protection responses in all LRA-affected areas; and (v) provision of support to LRA-affected governments in the fields of peace-building, human rights, rule of law and development, so as to enable them to establish state authority throughout their territory.

The United Nations Organisation Stabilisation Mission in the DR Congo (MONUSCO) has established operation cells in Dungu, Haut-Uélé, to monitor and analyse information regarding LRA attacks and co-ordinate operations in liaison with UN missions in the CAR and South Sudan and with the national militaries from the affected countries.<sup>143</sup> It has also encouraged LRA combatants to defect and enter the Mission's disarmament, demobilisation, repatriation, resettlement and reintegration programme. This includes producing leaflets in local languages, which the armies operating in the affected areas in the Central African Republic, the Democratic Republic of the Congo and South Sudan are

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<sup>142</sup> See UN News Centre 'Security Council endorses UN regional strategy to combat LRA threat' 29 June 2012, available at

<http://www.un.org/apps/news/story.asp?NewsID=42363&Cr=LRA&Cr1=> (accessed on 12<sup>th</sup> January 2015).

<sup>143</sup> See H. Mukasa (2012:3).



involved in distributing. At the time of writing, the governments of Uganda, South Sudan, the DRC and the U.S, which had contributed troops to hunt down the LRA in the CAR, had announced intentions to withdraw their troops.<sup>144</sup> In fact, the UPDF has started pulling out troops from the CAR.<sup>145</sup> The withdrawal of the troops is likely to create a vacuum that would be exploited by the LRA to regroup and reignite rebellion in the region. The allied forces has managed to keep the LRA at bay and ensured the prevalence of relative peace in the region. Therefore, measures ought to be taken to ensure that the LRA is completely neutralized to end the LRA conflict once-and-for-all.

#### 4.6 CONCLUSION

Although the peace talks would seem to have been unpopular with the Kampala government, they appear to have been the most viable option to end the conflict in northern Uganda. Most of the previous efforts were locally driven initiatives. The fact that the initiative emerged from and was spearheaded by an external player, the South Sudanese government, is a reason why they have been taken more seriously by the Ugandan government. Involvement of the other parties such as the AU, civil society, and the Sudan would have been a key factor in further providing impetus and confidence to the parties to the talks. In most cases, agreements made in such situations require a clear monitoring framework for overseeing the implementation of the agreements. This role lies mainly with neutral players such as international institutions and other monitors. However, as noted in the discussion above, the Juba peace talks lacked the involvement of the parties that would monitor implementation of the agreement by both parties.

The emergence of an autonomous South Sudan marked a sigh of relief and paints a positive picture towards ending the two-decade-long conflict. The LRA rebels had established bases and training camps in southern Sudan. The South Sudanese government, therefore, has the

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<sup>144</sup> <https://www.independent.co.ug/un-withdrawal-updf-left-vacuum-central-africa/> Michelle Nichols, U.N. says Congo withdrawing troops from Central African Republic mission , *Reuters*, June 21, 2017, retrieved from <http://www.reuters.com/article/us-centralafrica-violence-un-idUSKBN19C2UG>. See also, Interview of the U.S Ambassador to the CAR,

<sup>145</sup> Julius Ocungi, *UPDF withdraws from Central African Republic*, *Daily Monitor*, Wednesday, April 19 2017.

responsibility to ensure that it forbids the LRA from operating from the country and using it as a base from which to carry out attacks in northern Uganda.

It is submitted that the various mechanisms provided by transitional justice, with the exception of the ICC trials, are most suited to resolving the northern Uganda conflict effectively. In addition, traditional justice procedures could complement the judicial proceedings in holding the perpetrators of egregious human rights violations to account. However, it is submitted that such indigenous accountability mechanisms should be acceptable to the victims of the abuses and should meet international benchmarks. In view of the fact that the victims of the abuses are from other regions, the formal justice system should be applied since it is the only option to address the issue of contention that arises when the victim and the perpetrator have differing cultures.

Furthermore, since the northern Uganda conflict is closely related to the conflicts that have bedeviled the country, establishing a truth commission would be the ideal option at this point. However, unlike the truth commission under Amin's regime which was put in place without political will and commitment to cultivating a culture of respect for human rights in the country, it is submitted that one should be established with clearly defined terms and independence. Implementation of its recommendations would need to be backed by law to ensure the responsible entities take them seriously. This would provide avenues for disgruntled communities to reveal the issues of concern and ensure that they are addressed in a clearly laid down framework.

## CHAPTER FIVE

### EXAMINING THE APPLICATION OF INTERNATIONAL CRIMINAL JUSTICE MECHANISMS IN UGANDA

#### 5.1 INTRODUCTION

Uganda signed the Rome Statute on 17 March 1999 and ratified the treaty on 14 June 2002, which was a clear indication of the country's commitment to strengthen the Rule of Law and to end impunity for perpetrators of international crimes. One of the effects of Uganda's ratification of the Rome Statute is that it grants the ICC jurisdiction over international crimes committed on the country's territory by either its citizens or citizens of another state. The ICC has the jurisdiction to prosecute individuals for the crimes of genocide,<sup>1</sup> crimes against humanity,<sup>2</sup> and war crimes.<sup>3</sup> The government of Uganda referred the northern Uganda situation to the ICC on 16 December 2003.<sup>4</sup> This was the first case to be referred to the ICC, which, according to a Ugandan scholar, Kasaija Phillip Apuuli, was 'a litmus test for the much celebrated promise of global justice'.<sup>5</sup>

Odora points out that Uganda's referral facilitated the ICC to circumvent a difficult process that would have required the Court to seek a referral through the unpredictable process in the UN Security Council.<sup>6</sup> The then acting Solicitor General of Uganda, Kiggundu, notes that

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<sup>1</sup> Art 6 of the ICC Statute.

<sup>2</sup> Art 7 of the ICC Statute.

<sup>3</sup> Art 8 of the ICC Statute.

<sup>4</sup> See President of Uganda refers situation concerning the Lord's Resistance Army (LRA) to the ICC, Press Release, ICC-20040129-44, available at [http://www2.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/2004/president%20of%20uganda%20refers%20situation%20concerning%20the%20lord\\_s%20resistance%20army%20\\_lra\\_%20to%20the%20icc?lan=en-GB](http://www2.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/2004/president%20of%20uganda%20refers%20situation%20concerning%20the%20lord_s%20resistance%20army%20_lra_%20to%20the%20icc?lan=en-GB). (accessed on 12<sup>th</sup> January 2015).

<sup>5</sup> Quoted in M. Kersten (2011).

<sup>6</sup> See Obote Odora, The ICC and the Situation in Northern Uganda, *Acholi Times*, Monday 16 April 2012, available at

the referral was inevitable since the LRA leadership was operating outside Uganda's borders and the international community was not responsive in supporting efforts to apprehend the culprits.<sup>7</sup> In addition, several attempts to end the conflict both through military means and dialogue had failed to produce tangible results and the ICC was deemed as another viable option to explore. On 29 January 2004, the then ICC prosecutor, Moreno Ocampo, in a joint press conference in London attended by President Museveni, announced the referral of the LRA situation to the ICC. On 27 February 2004, the Government of Uganda lodged a declaration of acceptance of the jurisdiction of the ICC dating back to 1 July 2002.

In its first official Policy Paper, the ICC encouraged states to initiate their own proceedings,<sup>8</sup> but in a surprising turn of events, one wonders why less than three months later the court had deviated from its original position and accepted a voluntary referral from Uganda. Uganda's referral of the situation on its territory to the ICC presented important opportunities for both the Ugandan government as well as the ICC. Akhavan states that the referral was an attempt to engage an otherwise aloof international community, whereas for the ICC, the voluntary referral of a compelling case by a state party represented both an early expression of confidence in the nascent institution's mandate and a welcome opportunity to demonstrate its viability in ending impunity for perpetrators of gross human rights violations.<sup>9</sup> In addition, it has been argued that the limited capacity of Uganda's judicial system at the time made it ideal for the ICC to intervene and close the gaps within the domestic judicial system. The weakness of the domestic judicial system makes it difficult to effectively investigate and prosecute perpetrators of international crimes, which further promotes impunity. The ICC, therefore, comes in handy to fill the gaps existing in domestic judicial systems and prosecute individuals who bear the greatest

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<http://acholimes.com/index.php/perspectives/opinion/160-the-icc-and-the-situation-in-northern-uganda-the-big-picture> (accessed on 12th January 2015).

<sup>7</sup> See Letter from the Republic of Uganda on the status of execution of the warrants of arrest, 27 March 2008, available at <http://www.icc-cpi.int/iccdocs/doc/doc461285.pdf> (accessed on 12th January 2015).

<sup>8</sup> Office of the Prosecutor (OTP) Policy Paper (2003:2).

<sup>9</sup> See D. Lanz (2007:7).

responsibility for gross human rights violations. In most conflicts, violations occur on a large scale and this makes the ICC unable to address all situations in which national courts are unwilling or unable to prosecute perpetrators. In order to bring all the perpetrators to account, other accountability mechanisms need to be explored to ensure the investigation and prosecution of individuals who commit international crimes.

Following Uganda's referral of the LRA situation to the ICC, in July 2004, the ICC prosecutor formally opened investigations in northern Uganda into alleged war crimes and crimes against humanity.<sup>10</sup> After several months of investigations, Ocampo filed an application for warrants of arrest against five LRA senior commanders: the LRA's leader, Joseph Kony, his deputy, Vincent Otti, and senior commanders, Okot Odhiambo, Dominic Ongwen and Raska Lukwiya. On 13 October 2005, Pre-Trial Chamber II of the ICC unsealed the arrest warrants for the five LRA leaders. However, at the time of writing this thesis, Otti, Lukwiya and Odhiambo had been confirmed dead and their proceedings terminated by the ICC,<sup>11</sup> while Ongwen is currently undergoing trial at the ICC. Kony has been elusive and his whereabouts unknown.

Surprisingly, the ICC prosecutor, in what could have been an intentioned move, did not include any members of the UPDF and yet they had also been accused of committing crimes during the course of the conflict, and which crimes fell under the jurisdiction of the ICC. The ICC prosecutor's selective prosecutorial policy was widely criticised and regarded as a move to shield individuals within the government forces from prosecution. In justifying his decision to prosecute only members of the LRA, Ocampo emphasised that the atrocities

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<sup>10</sup> See Prosecutor of the International Criminal Court opens an investigation into Northern Uganda, Press Release, 29 July 2004, available at [http://www.icc-cpi.int/en\\_menus/icc/situations%20and%20cases/situations/situation%20icc%200204/press%20releases/Pages/prosecutor%20of%20the%20international%20criminal%20court%20opens%20an%20investigation%20into%20northern%20uganda.aspx](http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200204/press%20releases/Pages/prosecutor%20of%20the%20international%20criminal%20court%20opens%20an%20investigation%20into%20northern%20uganda.aspx) (accessed on 20<sup>th</sup> January 2015).

<sup>11</sup> See Tabu Butagira, LRA commander Okot feared dead, *Daily Monitor*, February 14, 2014; Wanted top LRA rebel 'may be dead', *New Vision Newspaper*, February 14, 2014.

committed by the LRA were more grave than those of the UPDF.<sup>12</sup> The gravity threshold as applied by the Prosecutor in this case, goes against the spirit and the purpose for which the court was created (which is to end impunity), since the court had to rely on basically two factors to inform his decision to exclude the UPDF from prosecution. Firstly, the Prosecutor had to determine whether the crimes allegedly committed by the UPDF actually fell under the jurisdiction of the court. Secondly, it was also important for the prosecutor to find out whether there were any efforts by government to bring the perpetrators of international crimes to account. Clark observes that Uganda has one of the most proficient, robust and effective criminal justice system on the African continent and unquestionably willing to prosecute cases of such magnitude as committed during the northern Uganda conflict.<sup>13</sup>

Odora observes that the failure of the ICC to investigate the UPDF was a return gesture to Museveni for having triggered the court to act. The Court at the time had had no case filed before it and this raised concerns from its funders as to whether it was worth being in place, considering the resources that had been provided during its establishment and to support its functioning. Odora further brings into perspective the biased nature of the investigations which could have resulted in the exclusion of the UPDF from prosecution. He asserts that the ICC investigations team heavily relied on the government for security and escort services, protection of witnesses, interpretation services, identification of witnesses, particularly those to corroborate government narratives and not to implicate the UPDF officers in the commission of crimes.<sup>14</sup>

Another complex issue in addressing the northern Uganda conflict has been how to deal with the victims, who later turned into perpetrators as a result of indoctrination after being

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<sup>12</sup> See Statement by the Chief Prosecutor on the Uganda Arrest Warrants, The Hague, 14 October 2005, available at [http://www.icc-cpi.int/NR/rdonlyres/3255817D-FD00-4072-9F58FDB869F9B7CF/143834/LMO\\_20051014\\_English1.pdf](http://www.icc-cpi.int/NR/rdonlyres/3255817D-FD00-4072-9F58FDB869F9B7CF/143834/LMO_20051014_English1.pdf) (accessed on 12<sup>th</sup> January 2015).

<sup>13</sup> P. Clark (2011).

<sup>14</sup> See Statement by the Chief Prosecutor on the Uganda Arrest Warrants, The Hague, 14 October 2005, available at [http://www.icc-cpi.int/NR/rdonlyres/3255817D-FD00-4072-9F58FDB869F9B7CF/143834/LMO\\_20051014\\_English1.pdf](http://www.icc-cpi.int/NR/rdonlyres/3255817D-FD00-4072-9F58FDB869F9B7CF/143834/LMO_20051014_English1.pdf) (accessed 12<sup>th</sup> January 2015).

abducted by the LRA at a tender age. While investigating the atrocities committed by the LRA during the conflict, the ICC prosecutor ignored the factor of victims-turned-perpetrators, yet some of the perpetrators were conscripted into the rebel forces after being abducted by the LRA. The LRA is largely comprised of children and adults who were abducted as children and forcibly trained to become soldiers. These children are forced to commit crimes, with many of them designed to alienate them from their communities. A glaring example is that of Dominc Ongwen, who was abducted by the LRA while on his way to school. At the time of abduction, he was about 10 years. Ongwen was trained as a soldier to fight against UPDF and, like all other LRA child abductees, had two options: to either kill or be killed. Ongwen's case illustrates the precarious situation that children that were taken as captives faced during the insurgency. The acts they carried out were not done on their own volition but rather to spare themselves from the wrath of the LRA commanders.

By the time the ICC issued warrants of arrest for the five senior LRA leaders on 8 July 2005, preparations for talks aimed at peacefully resolving the conflict were underway in Juba. When the talks eventually started on 6 July 2006, one of the sticky issues that threatened to derail the talks was the demand by the LRA that the ICC withdraws the arrest warrants. The indictments posed a hindrance to the negotiations and threatened to scuttle the talks, which at the time looked promising. In fact, on 28 February 2008, the LRA set a condition for withdrawal of the indictments before it would sign any agreement and even requested for a meeting with the ICC Prosecutor. Ocampo rejected the rebels' demands for a meeting, stating that the arrest warrants issued by the ICC remain in effect and have to be executed.<sup>15</sup>

Ocampo pointed out that the ICC operates on the principle of complementarity, which means that states have the primary responsibility for prosecuting crimes, provided they are willing and able to do so. If Uganda demonstrated that it was instituting prosecutions domestically, it could challenge the admissibility of the case, based on Article 17 of the

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<sup>15</sup> See Museveni rejects Hague LRA trial, *BBC News*, Wednesday 12 March 2008, available at <http://news.bbc.co.uk/2/hi/africa/7291274.stm> (accessed on 22nd February 2013).

Rome Statute, which permits states parties to prosecute individuals for whom the ICC has issued warrants where the national alternatives meet international standards.<sup>16</sup>

The ICC investigations into the LRA conflict amplified and elicited support from a sections of society for the application of traditional justice as opposed to the formal criminal justice process. The communities, victims and the leaders in the war ravaged areas, as well as the LRA, have voiced support for traditional justice procedures as a means to bring the perpetrators to account. The Rome Statute, under Article 53(1)(c), directs the ICC to act 'in the interests of justice' and 'in the interest of victims'. Therefore, reference to traditional justice as opposed to the criminal process, will be directly in line with serving the interests and aspirations of the victims while it will at the same time be serving justice to them.

The Uganda government has also suggested the application of traditional justice mechanisms and reconciliation rituals to ensure accountability. The head of the government peace team during the Juba peace talks, Ruhakana Rugunda, pointed out that traditional customary law approaches had resolved conflicts in the past and that it was important to stick with them. He urged the international community to support traditional clan-based justice systems as an alternative to jail sentences for dealing with war crimes committed by the rebels. Museveni highlighted the compensatory nature of traditional justice procedures which contrasted with the retributive system, pointing out that the latter was the community's preferred system which had been agreed upon by all parties.<sup>17</sup> The application of traditional justice mechanisms by states in dealing with international crimes can only be lawful if it is not inconsistent with their obligations under international law.<sup>18</sup> Traditional justice is based on traditional or customary law and forms part of the legal system of many countries especially in Africa, where it co-exists side by side with the western legal system.<sup>19</sup>

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<sup>16</sup> See Article 17(1)(a) of the ICC Statute. See also FHRI (2007:77).

<sup>17</sup> See <http://news.bbc.co.uk/2/hi/africa/7921274.stm> (accessed on 1<sup>st</sup> December 2014).

<sup>18</sup> See G. Chembezi (2010:10).

<sup>19</sup> See G. Chembezi (2010:10).



*mato oput*, which is an Acholi traditional justice system, aims at restoring relationships between two clans that would have been affected by either intentional murder or accidental killing of a person. The ritual was traditionally not applied to killings that occurred during the LRA conflict but rather those arising out of disputes between clans, which had for long maintained friendly relationships. Common characteristics of the ceremony include the slaughter of two sheep into two halves, which are exchanged between the two clans and the drinking of *oput* by both clans to wash away bitterness.<sup>20</sup>

This, however, did not dissuade the ICC from continuing with its investigations, even after some members of the ARLPI held a meeting with the ICC Chief Prosecutor in 2005. The indictments against the five LRA leaders ignited debate, both domestically and internationally, on the challenges of criminal justice in fostering peace, especially in such a fragile situation. The indictments tended to draw the LRA away from the negotiating table, much as it had forced them to seek peace with the government of Uganda. As an incentive to encourage defections from the rebel ranks and to persuade the group to abandon rebellion, the government withstood all condemnations by human rights groups to outlaw the Amnesty Act. Over 20 000 individuals took advantage of the amnesty granted by the government and denounced rebel war.<sup>21</sup> Rebel leaders, under the Act, were not eligible for the amnesty. It is important to note that amnesty was not only applicable to the LRA but to all armed groups in the country. It was intended to pacify the whole country, and to forestall insurgencies in the various parts of the country. It could be argued that the purpose of the amnesty was primarily to deplete the numbers within the rebel ranks as a way of reducing its strength, which would advantage the government forces to end the war militarily.

In February 2014, through a letter to Ugandans, the LRA leader, Kony, asked for pardon for the violence the group had inflicted on the population and sought for a resumption of the

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<sup>20</sup> See B. Afako (2002:1).

<sup>21</sup> See B. Afako (2002:95-6).

talks.<sup>22</sup> The LRA leader's request was outrightly rejected and he was advised to either to surrender or take advantage of the amnesty window. The government's decision would be understandable, considering that Kony once used the same excuse and used the opportunity to amass weapons and reorganise his forces, which resulted in increased violence in the region.<sup>23</sup> In another instance, he used the same excuse to acquire food supplies for his starving forces.<sup>24</sup>

## 5.2 HISTORY OF USING ICJ MECHANISMS IN UGANDA

Uganda obtained independence from Britain on 9 October 1962. Since then, the country has had endless conflicts, with each successive government facing armed resistance from different groups. It is also worth noting that the seeds of hatred and violence that had been sowed over the colonial period manifested in the aftermath of independence, after the departure of the British colonial masters. As was the case during the colonialism, the culture of impunity continued rearing out its ugly head, as perpetrators of heinous crimes were rarely brought to account.<sup>25</sup> Despite the violence experienced in Uganda over the time, there have not been any recorded criminal prosecutions for perpetrators of international crimes in the country's history, even when the 1948 Geneva Conventions has been part of its statute books since 1954.<sup>26</sup>

Uganda is a state party to several international instruments. Some of these instruments include: the International Covenant on Civil and Political Rights (1966) and its 1<sup>st</sup> Optional Protocol, the UN Convention Against Torture, Inhuman and Degrading Treatment or Punishment (1984), the Convention on the Elimination of All Forms of Discrimination against Women (1979), the International Covenant on Economic, Social and Cultural Rights

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<sup>22</sup> See A. Wekesa (2014:6).

<sup>23</sup> See also T. Butagira (2013:38).

<sup>24</sup> See C. Natukunda (2013:7).

<sup>25</sup> See, The word 'impunity' comes from a latin word 'impunitas' that literally means 'lack of punishment'.

<sup>26</sup> See B. Afako (2008:95). Uganda enacted the Geneva Conventions Act to incorporate the Geneva Conventions of 1948 and subsequently signed and ratified the Addition Protocol relating to attacks on civilians, which would criminalize violations of Common Article 3.

(1966), the Convention on the Prevention and Punishment of the Crime of Genocide (1948), the Convention on the Rights of Child (1978), the 1949 Geneva Conventions and 1977 Additional Protocols, the African Charter on Human and Peoples' Rights (1981). Uganda as a state party to these treaties has an obligation to ensure that it protects, promotes and fulfil the provisions enshrined in these instruments. In order to give effect to the provisions of the treaties, the state is required to domestic them into national laws. Of the instruments cited above, it is only the Geneva Conventions that have been formally domesticated through the passing of the Geneva Conventions Act. The effective prosecution of international crimes requires a strong judicial system, political will from the government and a strong and robust investigative and prosecutorial body with the skills to piece together credible evidence to secure convictions for individuals alleged to have committed gross human rights violations. This creates the need to enact laws to cover international crimes and to provide adequate resources to facilitate the courts and the prosecution teams, including the investigators to conduct trials, and to investigate international crimes respectively. Since the practice of handling of international crimes is a new phenomenon in Uganda, training of the players in the criminal justice systems such as the investigators, prosecutors and court officials is key in supporting the effective administration of crimes of such a nature. Whether such laws could be enacted lawfully would be subject to several factors such as the previous granting of amnesties, prescription, and concerns about retroactivity and potential violations of the principle of legality.<sup>27</sup>

### **5.3 UGANDA'S TREATY OBLIGATIONS PERTAINING TO PUNISHING INTERNATIONAL CRIMES**

Uganda is signatory to several instruments that provide for a duty to investigate and prosecute international crimes. The state, therefore, is under obligation to prosecute and punish persons responsible for committing crimes defined in the treaty.<sup>28</sup> Customary international law also imposes onto states a duty to prosecute and punish crimes ranging

<sup>27</sup> See N. Roht-Arriaza (2006:538/539).

<sup>28</sup> See Article 2 (1) (a) of the Vienna Convention on the Law of Treaties, 23 May 1969, UN Doc A/CONF39/27. Article 27 provides: '[a] party may not invoke the provisions of its internal law as justification for failure to perform a treaty'.

from war crimes, torture, disappearances, extrajudicial executions, crimes against humanity, slavery, to piracy and genocide.

In Uganda, the power to institute criminal proceedings against any person or authority lies with the Director of Public Prosecutions (DPP).<sup>29</sup> As has been noted above, international law imposes upon states the duty to investigate, prosecute and punish international crimes.

### **5.3.1 The Convention against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT)**

The UNCAT is an international human rights instrument that aims to combat torture around the world. The treaty defines torture as:

“any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.”<sup>30</sup>

Uganda ratified the UNCAT on 3 November 1986, which was a demonstration of the country’s commitment to eradicate torture. The UNCAT imposes an unequivocal duty on states parties to criminalise acts of torture committed on their territories.<sup>31</sup> Article 5(2) of UNCAT provides for a form of universal jurisdiction to ensure punishment in the event a state party fails to prosecute torture. It urges states parties to establish jurisdiction over acts of torture in cases when the offences are committed on a territory under their jurisdiction or on board a ship or aircraft registered in that state; when the alleged offender is a national of that state; or when the victim is a national of that state. This provision was

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<sup>29</sup> See Constitution of Uganda (1995), article 3(b).

<sup>30</sup> See UNCAT, Article 1.

<sup>31</sup> See UNCAT, Article 1.

specifically intended to address situations where a complicit government is unwilling to prosecute its officials and to ensure that no one suspected of committing the crime of torture escapes prosecution.<sup>32</sup>

In order to give effect to the UNCAT, the Parliament of Uganda enacted the Prohibition and Prevention of Torture (hereafter 'Anti-torture Act') law on 26 April 2012. This marked a close of more than eight years' of struggle to have this law in place since 2005. The enactment of this law fulfils Uganda's international, regional and constitutional obligations to ending torture, as highlighted in the country's Constitution,<sup>33</sup> and in the human rights instruments prohibiting the act.<sup>34</sup> Uganda's Anti-torture Act provides a much more comprehensive definition of torture than the one in the UNCAT. The Anti-torture Act criminalises acts of torture committed by a private individual against a fellow civilian.<sup>35</sup> The acts that amount to torture are grouped into three: physical; mental or psychological; and pharmacological.<sup>36</sup> The Anti-torture Act provides for individual responsibility for the crime of torture and the resultant penalties, reparations and rehabilitation of the victim/survivors. Initially, before the enactment of the Act, for acts of torture perpetrated by the state actors one had to sue the Attorney-General at civil law. Therefore, perpetrators (state actors) would hide behind the Attorney-General to commit such acts with impunity. This law therefore prohibits the commission, aiding, abetting or being accessories to the crime of torture. In effect, superior orders are not a defence to a charge of torture. Similarly, the Act shields subordinate state officials from prosecution in instances where they refuse to implement an order of torture issued by their superior.<sup>37</sup>

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<sup>32</sup> See K. Obura (2011:19).

<sup>33</sup> See Constitution of Uganda (1995), Articles 24 and 44.

<sup>34</sup> These include the UN CAT, the ICCPR and the African Charter.

<sup>35</sup> See Prohibition and Prevention of Torture Act (2012), article 2.

<sup>36</sup> For an elaboration of the acts that amount to torture, see Schedule Two of the Anti-torture Act.

<sup>37</sup> See Anti-torture Act, section 4(2).

### 5.3.2 The International Covenant on Civil and Political Rights and the African Charter on Human and Peoples' Rights

The International Covenant on Civil and Political Rights (hereafter 'ICCPR') and the African Charter on Human and Peoples' Rights (hereafter 'African Charter'),<sup>38</sup> both of which Uganda is signatory to, do not explicitly point out a duty to prosecute and punish perpetrators of human rights violations. However, some commentators have argued that the duty to protect human rights, by extension implies a duty to prosecute violators.<sup>39</sup> The Human Rights Committee<sup>40</sup> has equivocally stated that state parties must investigate, prosecute and punish those responsible for summary executions, torture and unresolved disappearances.<sup>41</sup> This clearly illustrates the duty of states parties in bringing perpetrators of crimes of such nature to account.

In interpreting the African Charter, the African Commission on Human and Peoples' Rights (hereafter 'African Commission')<sup>42</sup> has held that states parties have a duty to prosecute and punish serious violations of rights under the Charter.<sup>43</sup> These serious violations attracting the duty to prosecute and punish include extrajudicial executions, torture, slavery, and disappearances.<sup>44</sup>

### 5.3.3 The Rome Statute of the ICC

The Rome Statute of the International Criminal Court (hereafter 'Rome Statute') is the treaty that establishes the ICC. The ICC was the first international court in history to have been established with careful attention to its relationship with states.<sup>45</sup> The Statute

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<sup>38</sup> Adopted 26 June 1981, OAU Doc CAB/LEG/67/3 Rev 5, entered into force 21 October 1998.

<sup>39</sup> See K. Obura (2011:21).

<sup>40</sup> This is a body established to monitor states parties' compliance with the ICCPR.

<sup>41</sup> See K. Obura (2011:21).

<sup>42</sup> This is a body established to monitor states parties' compliance with the African Charter.

<sup>43</sup> See K. Obura (2011:24).

<sup>44</sup> See K. Obura (2011:24).

<sup>45</sup> See P. Kirsch (2008:1).

established four core international crimes: war crimes, crimes against humanity, crimes of genocide, and the crime of aggression.<sup>46</sup> The ICC is yet to have jurisdiction over the crime of aggression, as it requires 30 ratifications to take effect. The Statute refers to these crimes as the most serious crimes of concern to the international community as a whole.<sup>47</sup> The establishment of the ICC in July 2002 was a milestone in the architectural edification of international criminal law, symbolising the international community's resolve to prosecute individuals for the most serious crimes of international concern.<sup>48</sup> The then UN Secretary General, Kofi Annan, observed that the purpose of the ICC is to intervene only where the state was unwilling or unable genuinely to investigate and prosecute perpetrators. This therefore means that states can no longer shield perpetrators of heinous crimes from prosecution, as this responsibility would inevitably fall under the ICC's jurisdiction in situations of inaction from the concerned state or in case of sham investigations or prosecutions.

Uganda ratified the Rome Statute on 14 June 2002. The statute imposes a duty on states parties to exercise criminal jurisdiction over war crimes, crimes against humanity, crimes of genocide and the crime of aggression.. It further enjoins states parties with a duty either to prosecute and punish international crimes, or handover the suspects to the ICC for prosecution.<sup>49</sup> Ratification of the Rome Statute therefore signifies that states parties commit to undertake their obligations in prosecuting and punishing the crimes enshrined in the Statute.

The ICC seeks to bring or guarantee justice for victims of international crimes. Unlike the previous international criminal courts that did not provide for victims participation, under

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<sup>46</sup> See Rome Statute, Article 5.

<sup>47</sup> See Preamble of the Rome statute.

<sup>48</sup> See L.S. Sunga (2009:1092); Y. Simbeye (2004:1); G. Schwarzenberger (1996:3); M.C. Bassiouni (2005:3); G. Musila (2010:11); K.A.A. Khan and R. Dixon (2009:6) A. Zahar and G. Sluiter (2008:4).

<sup>49</sup> See Rome Statute, article 17(1)(b).

the ICC, the victims are central to the proceedings through their active participation.<sup>50</sup> Under the Rome Statute, victims may, at all stages of the proceedings, express their views and concerns and have them considered in instances where their personal interests are affected.<sup>51</sup> The participation of the victims can be at different stages, ranging from investigations, court trials, to determination of a legal representative and reparations.

The ICC plays the function of punishing perpetrators of international crimes with a particular goal of ending impunity for individuals who commit such crimes<sup>52</sup>. It is to be noted that the ICC is meant to investigate perpetrators who are most responsible for the most serious of human rights violations and to this end operates at the pinnacle of an interlocking complementary international criminal justice system that brings it together with the national courts to work in harmony in preventing impunity for international crimes.<sup>53</sup>

#### **5.3.4 The LRA cases at the ICC**

As already highlighted in this study, the northern Uganda conflict has had serious ramifications on the lives and livelihoods of the people in the region and in neighbouring countries of the DRC, CAR and South Sudan. Of the five LRA commanders indicted by the ICC, only one person—Dominic Ongwen, has been arrested and is currently facing trial at the Hague-based court. Joseph Kony is still elusive, while Vincent Otti, Okot Odhiambo, and Raska Lukwiya have been confirmed dead and their proceedings terminated.

#### **5.3.5 The case of Dominic Ongwen before the ICC**

Born in 1975, Dominic Ongwen is an Acholi and a former LRA rebel commander. He was abducted in 1988 at the age of fourteen while on his way to school and later forcefully

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<sup>50</sup> See C.M. De Vos; S. Kendall and C. Stahn (2015:4). Also see ICC (2005:12) at <https://www.icc-cpi.int/NR/rdonlyres/F8EA1B2D-91CC-4D59-A33B-3ED701662284/282477/160910VPRSBookletEnglish3.pdf> (accessed on 13<sup>th</sup> May 2016).

<sup>51</sup> See Rome Statute, article 68 (3).

<sup>52</sup> See P.J. Campbell (2000:55).

<sup>53</sup> See Articles 1, 12-19 of the Rome Statute. See also M. Newton (2011:10); M. Newton (2015:122).



conscripted into the LRA ranks.<sup>54</sup> He rose through the rebel ranks into one of the LRA's most feared commanders. He was the second-in-command to Joseph Kony and commander of the Sinia Brigade.<sup>55</sup> On 6 January 2015, after spending over 20 years as part of the LRA leadership, he surrendered to the Seleka rebels in the Central African Republic, who later handed him over to the American and Ugandan military forces operating in the same country.<sup>56</sup>

Ongwen was handed over to the ICC on 15 January 2015,<sup>57</sup> and he appeared before Court the following day to verify his identity, and to be informed of his rights and the charges brought against him.<sup>58</sup> Ongwen had initially been charged with seven counts relating to committing both war crimes (murder, cruel treatment of civilians, intentionally directing an attack against a civilian population and pillaging) and crimes against humanity

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<sup>54</sup> See <https://www.jlos.ug:442/index.php/component/k2/item/523-dominic-ongwen-trial-fact-sheet> (accessed on 20<sup>th</sup> March 2016). See also Refugee Law Project (2016:2).

<sup>55</sup> See Office of the ICC Prosecutor (2016:1) at [https://www.icc-cpi.int/en\\_menus/icc/press%20and%20media/press%20releases/Pages/pr1202.aspx](https://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1202.aspx) (accessed on 30<sup>th</sup> March 2016), <https://www.jlos.ug:442/index.php/component/k2/item/523-dominic-ongwen-trial-fact-sheet> (accessed on 20<sup>th</sup> March 2016) and URN (2016:1) at <http://www.observer.ug/news-headlines/42203-ongwen-to-icc-i-don-t-mind-the-charges> (accessed on 22<sup>nd</sup> January 2016). See also Refugee Law Project (2016:2).

<sup>56</sup> See AFP (2015:16). See also Refugee Law Project (2016:2).

<sup>57</sup> See F. Bensouda (2016:1) at [https://www.icc-cpi.int/en\\_menus/icc/press%20and%20media/press%20releases/Pages/160401-otp-stat.aspx](https://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/160401-otp-stat.aspx) (accessed on 2<sup>nd</sup> April 2016) and Refugee Law Project (2016:2).

<sup>58</sup> See also Refugee Law Project (2016:2). Present also was the Prosecutor and his then Defence (Duty) Counsel, Helene Cisse. A series of court procedural events followed after. On 29<sup>th</sup> January 2015, the non-redacted warrant of arrest for Ongwen and its translations was reclassified as public as per instructions of the Pre-Trial Chamber II. Then on 6<sup>th</sup> February 2015, Pre-Trial Chamber II severed proceedings of Ongwen from those of other four LRA commanders that were indicted with him. While on 24<sup>th</sup> February 2015, Krispus Ayena Odongo was appointed as substantive Defence Counsel for Ongwen. On 19<sup>th</sup> May 2015, a status conference was held before Pre-Trial Judge Cuno Tarfusser to discuss issues connected with the confirmation of charges hearing for Ongwen. Then subsequently on 27<sup>th</sup> September 2015, the Prosecutor filed a notice of amended charges against Ongwen following consultations with the victims.

(enslavement, inhuman acts of inflicting serious bodily injury and suffering),<sup>59</sup> but these were later amended to include 56 new accounts.<sup>60</sup>

The repatriation of Ongwen to the ICC was shrouded in controversy in regard to where to try him. A cross section of people emphasized that the ICC was the best placed institution to try him while others, especially in Uganda were of the view that his trial be conducted by the Ugandan judiciary. In other instances, some people in northern Uganda were of the opinion that Ongwen be let free since he fell under the victim-turned-perpetrator category. The trial of Ongwen at the ICC raises questions about Uganda's willingness and ability to prosecute cases of war crimes and crimes against humanity. If indeed Uganda was willing and able to prosecute the above crimes of which Ongwen is charged with, it had to exercise jurisdiction over his case under the principle of complementarity. The only circumstances that would warrant the ICC to take over such jurisdiction, according to the Rome Statute, are when the state is unwilling or unable to prosecute perpetrators of international crimes. Even then, Uganda enacted the International Crimes Act in 2010, and he would, therefore, have been tried under this law. The Act covers crimes as those stipulated under the Rome Statute, and of which Ongwen is charged with.

All the 70 charges, including the new accounts that had been incorporated in the amended charge sheet, were confirmed by the Pre-Trial Chamber of the ICC on 23<sup>rd</sup> March 2016.<sup>61</sup> Ongwen appealed against the decision of the Pre-Trial Chamber but lost the appeal.<sup>62</sup>

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<sup>59</sup> All these crimes were alleged to have been committed in Lukodi IDP camp found in Gulu District on or about 20<sup>th</sup> May 2004.

<sup>60</sup> See also Refugee Law Project (2016:2).

<sup>61</sup> See URN (2016:1) at <http://www.observer.ug/news-headlines/42203-ongwen-to-icc-i-don-t-mind-the-charges> (accessed on 22nd January 2016). Interestingly, when at the start of the proceedings, the Judge made a suggestion that not all the 70 charges needed to be read out, Ongwen replied passively through a Luo interpreter as follows: 'Whether the charges are true or not, it's a waste of time to read them...'. The effect of a confirmation of charges hearing is that in this case, Ongwen has a case to answer or must defend himself in a full trial process of the ICC. As already noted Ongwen is represented by a Ugandan Advocate / lawyer known as Krispus Ondongo Ayena. The Pre-Trial Chamber was composed of Judges Cuno Tarfusser of Italy (also the Presiding Judge), Chang-ho Chung of Republic of Korea and Marc Perrin de Brichambaut of France.

The case of Ongwen is a unique and complex one, for he carries a dual or double identity of 'victim-turned-perpetrator'.<sup>63</sup> Whereas many from his community would regard him as a victim (from childhood into his adulthood), his victims and proponents of international criminal justice would argue otherwise, and view him as a perpetrator of international crimes. Under article 26 of the Rome Statute, the minimum age for individual criminal responsibility is eighteen.

It has been argued that many are curiously and anxiously waiting to see how the court will treat this unique identity and at the same time deliver justice to the victims.<sup>64</sup> Perhaps, the crafters of the Rome Statute never envisaged a situation where a formerly abducted child soldier would turn out to be a perpetrator. Therefore, Ongwen's case will set a precedent on issues relating to how to deal with crimes committed by victims who later turned into perpetrators, how to determine acts committed with one's intentional conscience in situations of coercion; and how to define a thin line between acts committed as a child and those after one has attained the age of criminal responsibility. As some have argued and rightly so, the ICC prosecutor has only brought charges against him when he was an adult but what yardstick will be used by the court to determine the stage at which Ongwen ceased being a victim and became effectively for all intents a perpetrator, and more importantly what was his state of mind at the time.<sup>65</sup> It has been argued that the Ongwen trial would consider crimes he committed after attaining the age of 18. However, it is

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<sup>62</sup> In his appeal, Ongwen argued that Chamber erred when it refused to exclude non translated statements and transcripts disclosed on 21<sup>st</sup> December 2015, when it failed to consider evidence presented by the Defence regarding the age of Dominic Ongwen, when it failed issue a reasoned decision, when it decided that article 25(3)(c) did not require a substantial contribution to the crime and the decision that forced marriage was not subsumed by the crime of sexual slavery. See in this regard, A. Wesaka (2016:7) and S. Kayitare (2016:1) at <http://www.afrikareporter.com/uganda-dominic-ongwen-to-appeal-icc-charges/> (accessed on 5<sup>th</sup> April 2016).

<sup>63</sup> See H.J. Steiner and P. Alston (2000:136).

<sup>64</sup> See P.M. Atuhaire, The Monitor Newspaper, 27 January 2016 at <http://allafrica.com/stories/201601270143.html> (accessed on 3rd March 2016).

<sup>65</sup> P.M. Atuhaire (2016:4).

important to put also into perspective the circumstances leading to his joining of the LRA and the options available to him at the time.

### **5.3.6 Impact of the ICC's intervention in Uganda**

It is undisputed that the LRA shoulder the greatest responsibility for the egregious abuses committed in northern Uganda. Most of the victims of the conflict are interested in some form of justice or accountability for gross human rights violations committed during the insurgency. The ICC, therefore, presents an option for ensuring accountability and justice to victims.

The intervention of the ICC in the situation in northern Uganda has given the conflict a new perspective, with the international community taking a more increased role in ending the insurgency. Before the ICC's intervention, the responsibility to end the conflict solely lay in the hands of the government of Uganda with very limited role from the international community.

The ICC investigations have been lauded for pushing the LRA to the negotiating table with the government of Uganda, while others have castigated the body for being a stumbling block to efforts to bring peace to the region. The ICC indictments against five LRA commanders were a thorny issue in the talks as the LRA used it as an excuse not to sign the final peace agreement. As noted earlier in this thesis, the LRA demanded the withdrawal of the arrest warrants as a condition to engage in further talks and to sign the agreement. However, as a result of the ICC's involvement in the situation in northern Uganda, the region experienced relative peace and limited attacks since the insurgency had been placed under the radar of the international community. This signified the beginning of the return of normalcy in the region as the LRA started operating outside Uganda's borders.

The conflict of northern Uganda, before the ICC had been seized of it, did not feature prominently in the international arena. In fact, the then chief of the UN Office for Humanitarian Affairs referred to the conflict as a forgotten crisis that required urgent intervention from the international community. The intervention of the ICC raised the

profile of conflict globally, as it gave visibility to the war ravaged region and instilled fear among the LRA sympathisers who supported the group.<sup>66</sup> It now became difficult for LRA backers, such as Sudan, to continue associating with a force which had been accused for committing such heinous crimes.

The involvement of the ICC in the northern Uganda conflict also brought the issue of criminal accountability on the international agenda as it ignited discussions within the international community on the peace vis-a-vis justice debate. In fact during the Juba peace talks, the issue of accountability, as a result of the ICC's insistence on the same, was very central in the negotiations. The ICC stood its ground and insisted on accountability for the LRA even when it had come under a barrage of condemnations from peace activists, the LRA and some victims to withdraw the indictments it had issued against the rebel commanders. Uganda's experience with international crimes, which crimes had never been committed in the country, led to the enactment of law and the creation of a specialised court to deal with crimes of such nature.

### 5.3.7 Criticisms levelled against the ICC in Uganda

There is no doubt that both peace and justice can be complementary to each other in the search for sustainable peace. However, the challenge with pursuing accountability or justice simultaneously with peace is a controversial issue that requires balancing the interests of both peace and justice. With regard to Uganda, the indictments against the leaders of the LRA are a bar to the signing of the final peace agreement between the Ugandan government and the LRA. The indictments, in effect, perpetuated the conflict rather than prevent its recurrence as the prosecutions indirectly undermined the fragile peace talks and obliterated the LRA's initiative or motivation to negotiate peace.<sup>67</sup> For

<sup>66</sup> See N. Grono and A. O'Brien (2008:16).

<sup>67</sup> See J. Volqvartz (2005:2); K. Southwick (2005:1); Refugee Law Center and Human Rights Focus (2006:1); H. Cobban (2006:2); Z. Lomo (2006:1); T. Allen (2005:4). In fact, a statement released on 12 November 2004 by the Acholi Paramount Chief and Chairman of the Acholi Religious Leaders Peace Initiative is illustrative of the challenges that were posed by the ICC intervention: 'The recent public announcement concerning issuing of the Arrest warrants of Joseph Kony, the leader of the LRA by the ICC is already having an adverse effect on the

instance, one writer, Schomerus, observed that although the northern Uganda set a precedent by being the first case to be investigated by the ICC, and the first case in which the ICC issued warrants, at the same time it kindled a debate about the court's role in peace building efforts.<sup>68</sup> The court's intervention proved to be an obstacle to the peace process as the LRA felt insecure in participating in the talks, while at the same time there was unclear information on where the LRA would be prosecuted and by what kind of mechanisms. The ICC prosecutor had insisted on prosecuting the group at the ICC, while the agreements provided for trials under the domestic judicial system and traditional mechanisms.

The ICC emphasises retributive justice and this contradicts the interests and values fronted under African traditional justice mechanisms, which emphasise restorative justice. The jurisdiction of the ICC is limited to crimes committed from the year 2002 and beyond, and this poses a challenge to end impunity for perpetrators of gross human rights violations in northern Uganda. As noted above, the war started in 1986 when the NRM government had just come into power. The war was most brutal during the mid-and late 1990s, which periods are outside the scope of the ICC investigations. Therefore, questions linger on how the ICC would address atrocities committed during the above-mentioned period. It bears noting that the decision of the period of the ICC's jurisdiction was made by the government, with the intention to shield its officers from prosecution since it is during the 1990s that the army was implicated in the commission of atrocities.

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on-going peace process. This announcement is greatly undermining and jeopardizing the confidence building measures for dialogue. The leaders would therefore propose that the ICC issue a strong public statement recognizing and supporting the on-going peace process. ...We also strongly suggest to you to consider a temporal withdrawal of your presence from the conflict area as you watch on what is going on in the peace process. The ICC should write to both the LRA and government of Uganda stating clearly its intention to halt any further investigation and prosecution and express its commitments to support the on-going peace process.'

<sup>68</sup> See M. Schomerus (2007:10/11).

#### 5.4 THE INTERNATIONAL CRIMES DIVISION OF THE HIGH COURT OF UGANDA

The idea for the creation of the War Crimes Division (now known as the International Crimes Division of the High Court) was born out of the Juba peace talks.<sup>69</sup> Through the Agreement on Accountability and Reconciliation<sup>70</sup> reached between the government of Uganda and the LRA, a special division of the High Court of Uganda was to be created to hold national trials of the perpetrators of serious crimes committed during the northern Uganda conflict.<sup>71</sup> In July 2008, pursuant to Article 141 of the Constitution of Uganda (1995), the War Crimes Division within the High Court of Uganda was created. Subsequently in May 2011, the court was renamed the International Crimes Division (hereafter ICD) and formally established as a Division of the High Court of Uganda.<sup>72</sup> The creation of the ICD is a manifestation of Uganda's judicial attempts to ensure justice for victims of the LRA conflict and to hold the perpetrators accountable.

The ICD has jurisdiction over offences genocide, crimes against humanity, war crimes and trans-boundary international terrorism, human trafficking, piracy. Other crimes the ICD is mandated to try include crimes under international law as may be provided under the Penal Code Act of Uganda, the Geneva Conventions Act of 1964, and the International Criminal Court Act of 2010, as well as international customary law.<sup>73</sup> According to the

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<sup>69</sup> See Redress (2014:1) at: <http://redress.org/downloads/factsheet-on-icd-in-uganda-final.pdf> (accessed on 15<sup>th</sup> December 2014). See also Human Rights Watch (2012:5).

<sup>70</sup> See Annex to the June 29<sup>th</sup> 2007 Agreement on accountability and Reconciliation.

<sup>71</sup> In theory, this framework could be used to try perpetrators on both sides of the conflict; the government of Uganda and the LRA and / or other rebel groups.

<sup>72</sup> See Legal Notice No. 10 of 2011, The High Court (International Crimes Division) Practice Directions of 2011.

<sup>73</sup> It was agreed during the Juba negotiations that this court would concentrate on trying those alleged to have been involved in the planning or involved in widespread, systematic or serious attacks that were directed towards civilians or those that directly affected. This court would concentrate on trying those alleged to have been involved in the planning or involved in widespread, systematic or serious attacks that were directed towards civilians or those that were directly involved in criminal acts that contravened the Geneva Conventions.

Agreement on Accountability, perpetrators of crimes of much lesser gravity were to be handled through the use of local traditional justice mechanisms.<sup>74</sup>

The Geneva Conventions Act criminalizes grave breaches of the Geneva Conventions regardless of one's nationality and place where the offence was committed.<sup>75</sup> However, to date, the 1977 Additional Protocols to the Geneva Conventions have not been incorporated into domestic law.<sup>76</sup> Whereas the ICD was originally meant to be part of a comprehensive peace agreement, it has now come to be viewed as a court of "complementarity" with respect to the ICC.

#### **5.4.1 The case of Thomas Kwoyelo: the Achilles Heel of the ICD?**

Since the creation of the ICD, the institution has so far received only one case of a former LRA commander, Thomas Kwoyelo. Kwoyelo was abducted by the LRA at a tender age and forced to join the rebel ranks.<sup>77</sup> He went through the ranks to become a senior commander at the rank of 'colonel'.<sup>78</sup> Kwoyelo was captured in 2005 by the UPDF in the Garamba (forests) National Park of the DRC. On 12 January 2010, while in Prison, Kwoyelo made a declaration renouncing armed rebellion and sought amnesty. On 19 March 2010, Kwoyelo's application for amnesty was submitted to the Uganda Amnesty Commission that also subsequently transmitted it to the Director Public Prosecutions (hereafter 'DPP') for processing in line with the Amnesty Act. The Commission had expressed the opinion that

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<sup>74</sup> See Redress (2014:1) at: <http://redress.org/downloads/factsheet-on-icd-in-uganda-final.pdf> (accessed on 15<sup>th</sup> December 2014).

<sup>75</sup> See Geneva Conventions Act (1964), Section 1.

<sup>76</sup> See H. Kathleen (2012:34).

<sup>77</sup> The mother of Kwoyelo stated that at that point in time, he had just returned home as a student on holiday. That once he was captured, he had initially escaped but the rebels returned and re-abducted him with a stern warning that if he ever escaped again, they would return to kill his entire family. This threat allegedly kept him in captivity with the LRA. See in this regard, E. Anyoti and A. Okanya (2016:10).

<sup>78</sup> See Lino Owor Ogora (2016:1) See at: <http://www.ijmonitor.org/2016/04/views-on-the-trial-of-thomas-kwoyelo-and-the-need-for-community-outreach/> (accessed on: 16<sup>th</sup> April 2016).



Kwoyelo qualified to be granted amnesty. The DPP did not respond to the application before it and refused to sanction Kwoyelo's application for amnesty.

On 6 September 2010, Kwoyelo was subsequently charged in a magistrates' court in Kampala with various offences under the Geneva Conventions Act that constituted grave breaches of the Geneva Conventions on 12 counts, ranging from willful killing of civilians, causing serious injury to body, inhumane treatment and taking of hostages to extensive destruction of property brought under Article 147 of the Fourth Geneva Convention.

On 11 July 2011, the magistrates' court committed Kwoyelo for trial to the ICD. On his appearance, the prosecution submitted an amended indictment with 53 counts of grave breaches of the fourth Geneva Convention and alternative charges, including murder, attempted murder, kidnapping with intent to murder, and robbery with aggravation, based on Uganda's Penal Code Act.<sup>79</sup> A legal observer suggested that the prosecution "piled on" the charges against Kwoyelo in order to guarantee he is convicted on at least some counts, given that it would be difficult to prove many of the charges.

In 2011, Kwoyelo petitioned the Constitutional Court to decide on whether the failure of the DPP and the Amnesty Commission to grant him a certificate of amnesty, just like it did to other senior LRA commanders in circumstances similar to his, was in contravention of,

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<sup>79</sup> See Transitional Justice Team – JLOS Secretariat, Frequently Asked Questions on the Trial of Thomas Kwoyelo and Uganda Coalition on the International Criminal Court, the case of Thomas Kwoyelo, 30 May 2012 at [www.ucicc.org/index.php/icdabout-kwoyelo](http://www.ucicc.org/index.php/icdabout-kwoyelo) (accessed on 21<sup>st</sup> February 2016). See also J. Ellis and D. Kawuli (2012:2); H. Kathleen (2012:41). According to Kathleen, it would appear that the amendment of the indictment to include offences falling under the Penal Code Act came against a backdrop of the complexities involved in charging Kwoyelo under the Geneva Conventions Act which deals with international armed conflicts, to which category the northern Uganda conflict cannot be said to belong. Although in the initial stages the LRA was receiving financial and logistical support from the Sudanese government in Khartoum, this, however, does not make the conflict reach the threshold required for internationalisation of a conflict.

or inconsistent with the 1995 Constitution of the Republic of Uganda.<sup>80</sup> Kwoyelo further contended in his petition that the refusal of the DPP to grant amnesty and instead charge him with specific criminal offences was a discriminatory act as it denied him equal protection prescribed under Article 21 of Uganda's Constitution. The State requested the Constitutional Court to determine whether certain provisions of the Amnesty Act were inconsistent (unconstitutional or illegal) with the Constitution and therefore invalid. This argument was based on Article 187 of the Constitution which provides for the recognition of the validity of the treaties ratified by Uganda. This would, therefore, render the granting of a blanket amnesty null and void, since this would be in contravention of its international obligations.

The Constitutional Court was invited to adjudicate over two issues: whether the Amnesty Act was unconstitutional, and if not, whether Kwoyelo was entitled to amnesty under the Act. On 22 September 2011, the Constitutional Court upheld the constitutional reference brought by Kwoyelo and found that the Amnesty Act neither contravened Uganda's international treaty obligations nor took away the prosecutorial powers of the DPP given under the Constitution. The court held that the purpose for the enactment of the Amnesty Act was to end rebellion in Uganda through the granting of amnesty and there was nothing unconstitutional with that.<sup>81</sup> The court further held that the Amnesty Act had been enacted under valid constitutional power. It thus stated as follows:

“There is nothing unconstitutional in our view in the purpose of the Act. The mischief which is supposed to cure was within the framework of the constitution. The Act is also in line with the national objectives and principles of State Policy and our historical past which was characterised by political and constitutional instability.”

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<sup>80</sup> See Thomas Kwoyelo, Constitutional (Reference) Petition No. 36 of 2011. It is to be noted that both Brigadier Kenneth Banya and Brigadier Sam Kolo who were senior LRA commanders were abducted in 2005 by the UPDF while fighting the Ugandan government. See also E. Anyoti and A.Okanya (2016:10).

<sup>81</sup> See the Judgement of Thomas Kwoyelo versus Uganda, Constitutional (Reference) Petition No. 36 of 2011. See also [www.ulii.org/ug/legislation/consolidated-act/294](http://www.ulii.org/ug/legislation/consolidated-act/294) (accessed on 23rd February 2016).

The Court held that Uganda's obligations not to grant blanket amnesty for war crimes and international crimes was cured by the provision in the law that allows the Minister of Internal Affairs to declare persons ineligible for amnesty. The Court found Kwoyelo's right to equality and freedom from discrimination as provided for under Article 21(1)(2) had been violated, and the actions of the DPP and the Amnesty Commission inconsistent with the Constitution and therefore null and void. The court was of the view that the Amnesty Act neither interfered with the powers of the DPP granted by the constitution (since it still had powers to prosecute anyone declared ineligible for amnesty by the government) nor with the independence of the judiciary, since the latter's powers were already limited by the constitution in respect of amnesties, as it was defined as a pardon. The court also observed that international law contained no prohibition against the granting of amnesties against domestic prosecutions.

In conclusion, the Court further noted that Kwoyelo was indeed entitled to amnesty in line with the Amnesty Act of 2000, and thus ordered the halting of his prosecution. In January 2012, the High Court in Kampala ceased criminal proceedings and ordered the DPP and the Amnesty Commission to issue Kwoyelo with an amnesty certificate.<sup>82</sup> The DPP refused to comply with the order, arguing that Kwoyelo still had pending charges and was, therefore, ineligible for amnesty. The DPP maintained that under international law, no amnesty can be granted to persons accused of committing war crimes under the Geneva Convention.<sup>83</sup> In addition, the DPP argued that he had appealed against the Constitutional Court decision and therefore the orders had to be stayed pending the outcome of the appeal.

The Supreme Court was called to adjudicate three issues, namely, the constitutionality of the Amnesty Act, whether the respondent (Kwoyelo) was entitled to amnesty under the

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<sup>82</sup> See E.A. Otwilli (2012:1) at [www.justiceandreconciliation.com/wp-content/uploads/2012/01/JRP-Updates-on-Kwoyelo-27Jan2012.pdf](http://www.justiceandreconciliation.com/wp-content/uploads/2012/01/JRP-Updates-on-Kwoyelo-27Jan2012.pdf) (accessed on 14<sup>th</sup> April 2016). See also Lino Owor Ogora (2016:1) at: <http://www.ijmonitor.org/2016/04/views-on-the-trial-of-thomas-kwoyelo-and-the-need-for-community-outreach/> (accessed on 16<sup>th</sup> April 2016).

<sup>83</sup> Lino Owor Ogora (2016:1) at: <http://www.ijmonitor.org/2016/04/views-on-the-trial-of-thomas-kwoyelo-and-the-need-for-community-outreach/> (accessed on 16<sup>th</sup> April 2016).

said Act, and lastly, whether Kwoyelo had suffered discrimination in the course of implementing the Act.

On 8 April 2015, the Supreme Court overturned the Constitutional Court's decision and ruled that Kwoyelo's criminal prosecution and proceedings brought against him before the ICD were constitutional and did not violate any law. The Supreme Court held that the fact that government had enacted a law that granted pardon or amnesty for certain offences did not in itself violate the prosecutorial powers of the DPP as provided for under Article 120 of the 1995 Constitution. The court was of the view that when the DPP executed its role under the Amnesty Act, it had to look at all the relevant laws to satisfy itself that the applicant for an amnesty does qualify, not only under the Amnesty Act, but even under other laws of Uganda, including, but not limited to the Geneva Conventions Act.

The court also noted that the kind of amnesty envisaged under the Amnesty Act of Uganda includes granting amnesty for grave crimes committed by an individual or group for purposes other than to further or cause war or rebellion. Therefore, in order for one to qualify for amnesty, the DPP must examine the applicant's alleged or attributed offences or acts of criminality to ascertain whether they were undertaken by the perpetrator to further war or rebellion or must be in the cause of war or rebellion. Where the DPP was not satisfied that any act or offence was not committed in furtherance or in the cause of the war or rebellion, then it could use its constitutionally granted powers to charge such an individual with any offence as provided for under Ugandan laws. This examination must be undertaken by the DPP even when a reporter is charged with or held under lawful custody for an offence which falls under the jurisdiction of the Amnesty Act. Therefore, the Amnesty Act does not recognise and provide for blanket amnesties since it grants the DPP powers to certify applicants seeking for amnesty. The DPP has a right to conduct an examination and be satisfied of the applicant's qualification. The Act also granted the Minister special powers to declare certain persons ineligible for the grant of amnesty.

The court came to the conclusion that the Amnesty Act, in its purpose or effect is not inconsistent with the Constitution of Uganda and that Kwoyelo was not discriminated

against or did not suffer unequal treatment since the law does not provide for full disclosure but instead restricts the type of offences that qualify for amnesty. The DPP therefore acted within its powers not to certify Kwoyelo with regard to his application for amnesty. The court ordered the trial of Kwoyelo to resume.

Currently, Kwoyelo is facing trial at the High Court at Gulu. In February 2017, the DPP slapped on him 93 new charges. The new charges include taking of hostages, willful killings, causing serious injuries to body and extensive destruction of properties in Amuru and Gulu districts all in northern Uganda between 1993 -2005. Civil society groups such as Avocats Sans Frontiers (ASF) have facilitated the communities, victims, elders and opinion leaders from the Acholi sub-region to attend some of the hearing.<sup>84</sup> The attendance of the proceedings, especially by the affected communities, is crucial for ensuring that justice is dispensed.

#### **5.4.2 Criticisms raised against the ICD**

Concerns have been raised about the limited jurisdiction of the ICD, which could exclude offences committed prior to 25 June 2010. Since the ICC Act came into effect on the aforementioned date, the ICD has no jurisdiction over crimes committed prior to this date as the law does not apply retrospectively.<sup>85</sup> As has been noted above, most of the brutal acts occurred during the 1990s and it's during this period that the NRA was particularly implicated in the commission of grave human rights violations. The court thus has no jurisdiction over crimes committed between 1987 and 2001. This, in essence, means that victims of acts committed during that period will never obtain justice and, most likely any form of redress for the injuries they suffered.

Another important criticism raised against the ICD is that the ICC Act does not provide for victim participation in the proceedings that are conducted before it. Yet, if one considers

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<sup>84</sup> Victims' lawyers: Henry Kunya, Amooti Jane Magdalene (appointed through ULS).

<sup>85</sup> See Redress (2014:1) at: <http://redress.org/downloads/factsheet-on-icd-in-uganda-final.pdf> (accessed on 15<sup>th</sup> December 2014).

the ICC on which the ICD was modelled, the Rome Statute does recognise and provide for the rights of victims to participate in their own right. It is submitted that this is a very fundamental omission in the legal framework since victims are central to all processes, in both the sphere of transitional justice and international criminal justice. One of the primary intertwined goals of both disciplines is to promote accountability for gross violations of human rights of victims and in effect prevent impunity.

The ICD regulatory framework also does not provide for adequate witness and victim protection mechanisms. This deficiency compromises the security and safety of these two key groups of people. Fear of reprisals is one of the factors that could affect the effective participation of witnesses and victims. It is, therefore, necessary that they be afforded full protection.

Under Uganda's criminal justice framework, victims can participate actively in proceedings only as witnesses. This somewhat undermines the importance of victims in criminal justice systems such as the one of Uganda where retributive punishment of the accused who is found guilty takes precedence over the interests of the victim. Yet, in some instances, the government has been implicated in the commission of human rights violations. Another important innovation of the Rome Statute was the introduction and recognition of the right to reparations for victims. The Rome Statute provides for two forms of reparations, namely, victim participation in the court proceedings and victim compensation under the Trust Fund for Victims. The ICD legal framework lacks both these reparations provisions. This means that the interests of the victims are ignored completely.

The ICD cannot try any perpetrator who has been awarded an amnesty certificate, as this would run contrary to the spirit of both the 1995 Constitution and Amnesty Act. Therefore, perpetrators who hold amnesty certificates will not be prosecuted for the crimes they committed during the insurgency. Victims thus have no hope of ever seeing that justice is done.

Under Uganda's laws, the jurisdiction of the ICD is not limited to which kind of person(s) it can try for alleged perpetration of international crimes. Despite this competence, it has not exercised its capacity to try state agents, soldiers or officers that might have been involved in the perpetration of the crimes during the conflict. It has been argued that since the mandate or powers to investigate and prosecute lay with the Criminal Investigations Department of the Uganda Police Force and the Directorate of Public Prosecutions, who are wholly under the control and direction of the state or government, there are concerns of impartiality and bias about the two institutions, which are very crucial in the criminal justice systems.<sup>86</sup>

Only few cases have been brought before the ICD despite the fact that there are countless instances of human rights violations that have been documented by various actors in the northern Uganda conflict.<sup>87</sup>

### **5.5 THE INTERNATIONAL CRIMINAL COURT ACT**

In order to give effect to the Rome Statute, the Parliament of Uganda enacted the International Criminal Court (ICC) Act in 2010.<sup>88</sup> The Act regulates the prosecution of persons accused of committing international crimes in Uganda, as well as matters bearing on co-operation between Uganda and the ICC. It defines international crimes as 'a crime in respect of which the ICC has jurisdiction'.<sup>89</sup> Therefore, any person who commits the crimes as those covered under the Rome Statute, is liable for prosecution under the Act. The international crimes are crimes against humanity, war crimes and genocide.<sup>90</sup> Drawing

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<sup>86</sup> See Redress (2014:1) at: <http://redress.org/downloads/factsheet-on-icd-in-uganda-final.pdf> (accessed on 15<sup>th</sup> December 2014)

<sup>87</sup> See Redress (2014:1) at: <http://redress.org/downloads/factsheet-on-icd-in-uganda-final.pdf> (accessed on 15<sup>th</sup> December 2014)

<sup>88</sup> See International Criminal Court Act No.11 of 2010.

<sup>89</sup> See ICC Act of 2010, section 3.

<sup>90</sup> See ICC Act, 2010, sections 7-9. This is in line with the provisions of Articles 8 and 9 of the Rome Statute. In addition to this, under the Chapter 4 of Uganda's Constitution recognises and seeks to protect a number of human rights (right to life, right to protection from torture, inhumane and degrading treatment, right to liberty and to property).

from the jurisprudence at the ICTR, ICTY and the Rome Statute, the ICC Act also incorporates modes of liability, notably command responsibility.<sup>91</sup>

The ICC Act emphasises the principle of universal jurisdiction. It grants Ugandan courts jurisdiction over crimes committed by a citizen or a permanent resident of Uganda against another person, either in or outside Uganda.<sup>92</sup> This provision is a very important component in eradicating impunity for perpetrators of international crimes, who commit international crimes and then seek shelter in Uganda.

The Act also provides for the protection of witnesses and facilitation of their appearance.<sup>93</sup> The participation of witnesses is central to the successful prosecution of crimes and human rights violations. Therefore, witnesses need to be protected from intimidation, threats and harm that can deter them from testifying against perpetrators of human rights violations.

Finally, the Act adopts both the Rome Statute and Ugandan law as applicable sources of law. It specifies that any inconsistency between these two is to be resolved in favour of the Rome Statute.

There are, however, notable omissions in the Act. There is no prohibition of criminal responsibility where the conduct was not a crime at the time of its commission. There is no prohibition of retroactivity. The Act makes official capacity irrelevant. It does not designate treaties and the principles and rules of international law explicitly as sources of law, and it does not require that sources of law be interpreted in accordance with internationally recognised human rights treaties and conventions. The absence of these provisions might give rise to concerns about fair trial standards in proceedings instituted under the Act before the International Crimes Division.

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<sup>91</sup> See ICC Act, 2010, section 19(iv).

<sup>92</sup> See ICC Act, 2010, section 18.

<sup>93</sup> See ICC Act, 2010, sections 46-51.



As to co-operation between Uganda and the ICC, the Act provides for requests of assistance, arrest, surrender, collecting of evidence, witnesses, enforcement of penalties, investigations and sittings of the ICC in Uganda. There are also provisions for offences against the administration of justice, including corruption, bribery and false evidence. However, these appear to apply only to proceedings before the ICC and not before the International Crimes Division. Therefore, bringing the ICC Act in conformity with the ICC is crucial in ensuring the uniform procedural standards, which strengthens the complementarity role of the two courts.

International criminal proceedings, like national criminal processes, rely on the availability of witnesses, especially key witnesses. States have a responsibility to respect the fundamental rights of victims, assist them in accordance with their special needs, and protect them from further harm. Several international documents provide for witness and victim protection.<sup>94</sup> A 2009 report by REDRESS stated that witness protection is a necessary condition for breaking the cycle of impunity.<sup>95</sup> Currently, Uganda has no law providing for a witness protection scheme. This is a challenge for Ugandan prosecutors. Uganda's Justice, Law and Order Sector (JLOS), an agency which advises the government on judicial matters, conducted research on the efficacy of the witness protection scheme and how such a mechanism would operate. Although the draft Bill on witness protection was tabled in Parliament in 2012, it has never been enacted into law. The Bill is intended to put in place ways and means of providing actual and potential witnesses with physical, emotional, economic and moral protection so as to create for them an enabling environment to facilitate their appearing and testifying in courts of law. It is also intended to give them security against possible reprisals after they have testified in courts.

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<sup>94</sup> These include: the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, the Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, the Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, and the Principles on the effective Investigation and Documentation of Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment.

<sup>95</sup> See REDRESS (2009:22).

The Act has only two main provisions relating to victims. One of them provides for the protection of witnesses who are before the courts, while the other deals with the enforcement of orders for reparations made by the ICC. These provisions in themselves, however, do not offer victims much access to redress before Ugandan courts, either through participation in the proceedings or reparations. The ICC Act is silent on the issue of participation or reparations for victims or access to a victims trust fund. Participation of victims is a very important component in the criminal justice process, as it gives them an opportunity to air out their views and concerns and be part of the process. Victim participation in the proceedings should be differentiated from instances where the victim appears to testify as a witness. In the case where the victim participates in the proceedings, this gives one an opportunity to pursue their respective interests, while in situations where the victim appears as witness he acts on behalf of a particular party where his or her interests are not necessarily prioritised.<sup>96</sup> Unlike the Rome Statute, the ICC Act does not provide for a specialised unit for victims and witnesses, which would be responsible for supporting victims' needs, especially physical or psychosocial protection or material support. The rehabilitation of the victims is one of the processes of supporting their recovery after conflict.

In interpreting Article 14 of the ICCPR that provides for the right to a fair hearing, Article 21 of the Statute of the International Criminal Tribunal for the Former Yugoslavia (hereafter ICTY)<sup>97</sup> and Article 22 of Statute of the International Criminal Tribunal for Rwanda (hereafter ICTR)<sup>98</sup> state that the scope of the right not only applies to an accused person, but also extends to the witnesses and victims.<sup>99</sup> In the *Tadic* case, the ICTY established five basic categories of rights and protection for witnesses. These were in respect of the following circumstances: witnesses seeking confidentiality from being identified by the public and the media; witnesses seeking psychological protection from

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<sup>96</sup> See F. McKay (2008:2).

<sup>97</sup> Established by UN Security Council Resolution 827, 25 May 1993.

<sup>98</sup> See Established by UN Security Council Resolution 955, 8 November 1994.

<sup>99</sup> See Masha Fedorova, Sten Verhoeven & Jan Wouters (2009:7).

confrontation with the accused in court; witnesses seeking anonymity from being identified by the accused and defence counsel; miscellaneous measures for certain victims and witnesses, including their address and whereabouts; and general measures for all victims and witnesses who may testify before the tribunal in the future, which include protection from being photographed, video recorded, and sketched by the public or media on entering or leaving the court.<sup>100</sup>

### **5.6 INTERNATIONAL CRIMES AND THE QUESTION OF AMNESTY**

The question relating to the granting of amnesty for perpetrators of international crimes has always been contentious issue in the realm of international criminal law.<sup>101</sup> Amnesty has been applied as a tool, especially in conflict situations, to motivate perpetrators to abandon rebellion and ensure the return of peace. Amnesty has sparked a debate between peace advocates and human rights proponents whether or not amnesty is an effective tool for ensuring a return of peace and in ensuring justice. However, there is growing consensus that a state's discretion to adopt amnesty legislation is subject to certain limitations that are necessary to combat impunity.

The Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity urges states to adopt and enforce safeguards against any abuse of rules such as those pertaining to amnesty.<sup>102</sup> The United Nations' policy concerning amnesties is grounded in the core principles that have been endorsed by the UN system as a whole, according to which states must ensure that those responsible for serious violations of human rights and humanitarian law are brought to justice, and that victims

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<sup>100</sup> See Prijedor, Prosecutor v Tadić (Dusko), Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, Case No IT-94-1-T, ICL 38 (ICTY 1995), 10th August 1995, International Criminal Tribunal for the Former Yugoslavia [ICTY].

<sup>101</sup> See C. Murungu (2011:106).

<sup>102</sup> See Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, Principle 2.

have an effective right to a remedy, including reparation.<sup>103</sup> This obligation is based on the duty to prosecute and punish persons who commit international crimes.<sup>104</sup>

The Human Rights Committee has held that amnesties for serious violations of human rights are incompatible with the duties of states under the ICCPR.<sup>105</sup> The African Commission on Human and People's Rights has also held that amnesties covering serious violations of human rights are incompatible with the duty of states to prosecute and punish these violations under the African Charter.<sup>106</sup> The conflict between amnesty and punishment is based on the idea that amnesty constitutes 'immunity' in law from criminal or civil responsibility for past crimes committed in a political context.<sup>107</sup> Amnesty functions as a transitional justice mechanism, especially in post-conflict societies, and as such is in constant conflict with the demands for justice for the victims of armed conflicts.<sup>108</sup>

Under the Rome Statute, determining how the court would deal with truth commissions and amnesties was left largely undefined. In practice, therefore, this loophole and the complementarity regimes do leave the door open for the court to respect a truth commission as a genuine investigation, and thus render a case inadmissible under the court's jurisdiction, and to respect domestic amnesties in certain circumstances,

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<sup>103</sup> See The Universal Declaration of Human Rights proclaims: "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law" (Art. 8). Other relevant United Nations principles are cited in the Basic Principles and Guidelines on the Right to a Remedy and Reparation. See, OHCHR; Rule of Law Tools for Post Conflict States: Amnesties.

<sup>104</sup> These include: UNCAT, the Genocide Convention, the Rome Statute of the ICC, the African Charter on Human and People's Rights, the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, the African Charter on the Rights and Welfare of the Child, the Paris Principles and Commitments of 2007 on the Role of Children in Armed Forces or Groups.

<sup>105</sup> See K. Obura (2011:22).

<sup>106</sup> See K. Obura (2011:24).

<sup>107</sup> See C. Murungu (2011:107).

<sup>108</sup> See C. Murungu (2011:108).

particularly if it is considered in the interests of justice and peace.<sup>109</sup> Complementarity requires the court to assess the legality and appropriateness of amnesties and truth commission, as genuine accountability mechanisms.

The Rome Statute permits both the Prosecutor and the UN Security Council to discontinue an investigation and propose a truth commission or some kind of amnesty as a substitute. Article 53(1)(c) of the Rome Statute permits the Prosecutor to discontinue an investigation if it is not “in the interests of justice”. Similarly, Article 16 allows the Security Council to defer an investigation with a Chapter VII Resolution, which is in the interests of international peace and security. This provision would allow the Council to “facilitate the negotiation of an amnesty-for-peace deal or a process of national reconciliation.”<sup>110</sup>

In a 2007 paper by the Office of the Prosecutor on the Article 53 on the ‘interests of justice’ exemption, the then ICC prosecutor, Moreno-Ocampo, acknowledged that the Rome Statute contemplates a deferral of prosecution based on justice interests other than those of traditional criminal justice, which will be explained later in this thesis.<sup>111</sup> He, however, emphasised that there must be a presumption in favour of investigation or prosecution with respect to otherwise admissible cases. The criteria for the exemption will naturally be guided by the objects and purposes of the Statute, namely, the prevention of serious crimes of concern to the international community through ending impunity, and that ‘there is a difference between the concepts of the interests of justice and the interests of peace.’<sup>112</sup>

Uganda enacted the Amnesty Law in 2000<sup>113</sup> with the intention of fostering peace and encouraging negotiations between the parties to the conflict in Northern Uganda. Amnesty was declared in respect of groups that had engaged or were engaging in armed rebellion against the government of Uganda from the time it assumed power on 26 January 1986. It

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<sup>109</sup> See A. Tiemessen (2010:12).

<sup>110</sup> See A. Tiemessen (2010:13).

<sup>111</sup> See K.A. Greenawalt (2009: 144)

<sup>112</sup> See K.A. Greenawalt (2009: 145).

<sup>113</sup> See Amnesty Act, Cap. 294.

covered those persons who had actually participated in combat, collaborated with the perpetrators, committed crimes during the armed rebellion, or assisted or aided in the conflict.<sup>114</sup> The amnesty window enabled key LRA rebels to abandon the rebellion and return to their homes. Some of the key LRA members who took up the opportunity and applied for amnesty included Brigadiers Sam Kolo and Kenneth Banya.

The Act also provides for the establishment of an Amnesty Commission for promoting reconciliation in pursuit of peace, security and tranquillity in Uganda.<sup>115</sup> The Commission is responsible for promoting dialogue and reconciliation, demobilising, re-integration support, including providing resettlement package for persons given amnesty, and longer term social and economic reintegration.<sup>116</sup> Previously, the Amnesty Commission had been involved in the granting of amnesty and the creation of awareness on the Amnesty law.

In 2001, the Act was amended with a provision that prohibited the granting of amnesty to persons who re-joined rebellion after being granted amnesty. This was because persons who had been granted amnesty were re-joining the rebellion to wage war against the government. In 2006, the Act was amended to allow the Minister of Internal Affairs to declare certain individuals ineligible for amnesty through a statutory instrument and approval by Parliament.

Under Agenda item 3 of the Juba Peace Agreement on Accountability and Reconciliation, the parties committed themselves to preventing impunity and promoting redress in accordance with the Constitution. This would be achieved through promoting national legal arrangements, consisting of formal and non-formal institutions and measures for ensuring justice and reconciliation, conducting wide consultations on the mechanisms, procedures and processes to be adopted in accountability, and promoting, with necessary

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<sup>114</sup> See Amnesty Act, part 2.

<sup>115</sup> See Amnesty Act, s.6.

<sup>116</sup> See Amnesty Act, s.8.

modifications, traditional justice mechanisms such as *Culo Kwor*, *Mato Oput*, *Kayo Cuk*, *Ailuc*, among others.

The government of Uganda committed itself to introducing amendments to the Amnesty Act in order to bring it in conformity with the principles of the Agreement. The introduction of a provision to allow the Minister of Internal Affairs to declare certain individuals ineligible for amnesty was an attempt to address some of the inconsistencies between the Amnesty Act and the country's international obligations, especially the Rome Statute. This resulted in the signing of the Agreement on Accountability and Reconciliation. Amnesty laws which prohibit the prosecution of human rights violations have been found to be invalid and incompatible with a state's international obligations.<sup>117</sup> It is noted that such laws promote impunity for crimes and prevent the victims from seeking a remedy for the violations. However, under international law, amnesties are permissible but within certain limits. For example, under international humanitarian law, amnesties for legitimate acts of war in non-international armed conflicts are encouraged at the end of hostilities to permit combatants to return home and reintegrate into society.<sup>118</sup> There can be no amnesty for crimes of genocide<sup>119</sup> and grave breaches of the laws of war.<sup>120</sup>

On 23 May 2012, the then Minister of Internal Affairs, Hillary Onek, announced the extension of the period of operation of the Amnesty Commission for a period of 12 months.<sup>121</sup> The Minister had declared the lapse of operation of Part II of the Amnesty Act that related to the procedures for granting amnesty.<sup>122</sup> This meant that any person who engaged in war or armed rebellion against the government of Uganda would be investigated, prosecuted and punished for such a crime if found guilty. However, in May

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<sup>117</sup> See JLOS (2012:9).

<sup>118</sup> See OHCHR (2012:4).

<sup>119</sup> See OHCHR (2009: 14); F. Z. Ntoubandi (2007:119).

<sup>120</sup> See F. Z. Ntoubandi (2007: 115); OHCHR (2009:12).

<sup>121</sup> See Statutory Instrument No. 35 of 2012.

<sup>122</sup> See Statutory Instrument No. 34 of 2012. Under section 16(3) of the Amnesty Act (as amended in 2006), the Minister of Internal Affairs may declare the lapse of the operation of part II of the Act.

2013, due to pressure from human rights groups and civil society,<sup>123</sup> backed by the report of the Legal and Parliamentary Committee of the Ugandan Parliament,<sup>124</sup> the legislation which grants blanket amnesty to members of armed groups who surrender was reinstated.<sup>125</sup> Currently, the top LRA commanders are the only individuals ineligible for amnesty. The amnesty law has provided an opportunity for members of the LRA who wanted to abandon the rebellion to do so without fear of prosecution. In fact, it has contributed to the high number of defections within the rebel ranks, as many have denounced and abandoned rebellion.

### **5.7 INTERNATIONAL CRIMES VIS-A VIS UGANDAN CRIMINAL LAWS**

There have not been any recorded prosecutions for international crimes in Uganda's legal history.<sup>126</sup> Although the Geneva Conventions of 1948 were domesticated in Uganda in the late 1950s, no prosecutions have been brought under the Act. In addition, Uganda has ratified but not implemented the Additional Protocol relating to attacks on civilians, which would criminalise violations of Common Article 3. As a political and legal response to the various insurgencies that the government has faced since its seizure of power in 1986, it has periodically offered formal and ad hoc amnesties as incentives to rebels to lay down arms.

Uganda is a state party to several international treaties that criminalise the perpetrators of international crimes. As such, it is obliged to comply with the treaty provisions. In order to give effect to the treaties and conventions to which it is a party, it has enacted legislations that criminalise international crimes. These include the Penal Code Act, the Geneva Conventions Act, the Anti-torture Act and the ICC Act.<sup>127</sup> However, the punishments prescribed in the laws of Uganda for individuals who commit international crimes differ

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<sup>123</sup> See Communiqué of Traditional and Religious Leaders, Civil Society and other Organizations Concerning the decision of the Minister of Internal Affairs of Uganda to declare, on 23rd May, 2012, the lapse of the amnesty provisions of the Amnesty Act of Uganda (The Amnesty Act (Declaration of Lapse of the Operation of Part II) Instrument, 2012).

<sup>124</sup> See Y. Mugerwa (2013:10).

<sup>125</sup> See IRIN (2013:13).

<sup>126</sup> See B. Afako (2002:95).

<sup>127</sup> See Geneva Convention Act, 1964, section 2(1).



from those stipulated in international instruments for the same offences. For example, in the Geneva Conventions Act<sup>128</sup> and the ICC Act, the maximum penalty applicable to those convicted for grave breaches or any of the international crimes is life imprisonment. In the Penal Code Act, crimes such as murder and rape carry the death penalty.<sup>129</sup> Moreover, the crimes of murder and rape are part of the crimes covered under the Geneva Conventions Act and the ICC Act. In the Rome Statute, the maximum penalty for a person convicted for the commission of a war crime, genocide or a crime against humanity is life imprisonment.<sup>130</sup>

In 2010, a concerned citizen, Kezaala, petitioned the Constitutional Court, seeking declarations to the effect that several provisions of the ICC Act were inconsistent with the Constitution.<sup>131</sup> The petitioner argued that the offences prescribed in the Penal Code Act in regard to wilful killing differed from those provided under the ICC Act. To the petitioner this was discriminatory, and thus inconsistent with Article 21(1) of the Constitution of Uganda which provides for equality of all people before and under the law in all spheres of political, economic, social and cultural life. It further provides for the enjoyment of equal protection under the law regardless of sex, race, colour, ethnic origin, tribe, birth, creed or religion, social or economic standing, political opinion or disability.

The petitioner also contested the immunity for state officials, which excludes them from court proceedings. He argued that Articles 98(4) and (5) and 128 of the Constitution confer immunity on the President from criminal proceedings in any court while holding office. Similarly, Article 128(4) provides that a person exercising judicial power is not subject to any act or omission in the exercise of judicial power. The Constitutional Court declared section 25 of the Act unconstitutional and therefore null and void, and ruled that the operations of the ICC in Uganda must be subject to the immunity enjoyed by the

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<sup>128</sup> See ICC Act, 2012, sections 79(3), 8(3), and 9(3).

<sup>129</sup> See Penal Code Act, sections 124 and 189.

<sup>130</sup> See Rome Statute, Article 77(b).

<sup>131</sup> See *Jowad Kezaala v Attorney General*, Constitutional Petition 24 of 2010.

President, Parliament and Judiciary under the Constitution.<sup>132</sup> This decision, therefore, goes against the spirit and purpose of the Rome Statute, the primary goal of which is to eradicate impunity. The cover of immunity can be used to shield the perpetrators from prosecution, which blocks victims from pursuing justice.

## **5.8 UGANDA'S THREAT TO WITHDRAW FROM THE ICC**

Since Uganda's referral of the LRA situation to the ICC, the government, and more particularly its leader, President Museveni, has become one of the fiercest critics of the court. The President is quoted during Kenya's 51<sup>st</sup> Jamhuri (Independence) Day celebration at the Nyayo Stadium in Nairobi in 2013, to have stated as follows: 'I will bring a motion to the next sitting of the African Union to have all African states withdraw from the Court and then, they can be left alone with their own court.'<sup>133</sup> President Museveni's fear, like that of many of his African counterparts, is the court's power to hold incumbent or sitting (and previous) heads of state and other government leaders accountable for gross violations of human rights.<sup>134</sup> Many African leaders regard the ICC as a threat to national sovereignty and, more particularly, to their personal political interests. It bears noting that most of the cases currently before the ICC were lodged with the Court by the African governments themselves. This creates the impression that African leaders regard the ICC to be essential while dealing with their political opponents, but as a worthless institution in cases where they themselves are implicated in international crimes. Their fear is that they could later become the accused in ICC prosecutions. The indictment against the Sudanese President, Bashir, and the Kenyan leaders is a case in point.

### **5.8.1 The African Court of Justice and Human Rights: Expansion of its jurisdiction to cover international crimes**

During the Assembly of Heads of State and Government meeting held June 2014 in Addis Ababa (Ethiopia), it was proposed that the jurisdiction of the African Court on Human and

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<sup>132</sup> See R. Kasule (2012:8).

<sup>133</sup> See *Daily Monitor* Newspaper, Wednesday, December 17, 2014, 16.

<sup>134</sup> See Africa has 34 of the 124 state parties to the Rome Statute.

Peoples' rights be reviewed to include international crimes. In order to reduce on the increasing number of the institutions under the African Union, the body decided to merge the African Court on Human and Peoples' Rights (ACfHPR)<sup>135</sup> with the the Court of Justice of the African Union<sup>136</sup> to form the African Court of Justice and Human Rights (ACJHR).<sup>137</sup> The ACfPHR has jurisdiction over all cases and disputes submitted to it concerning the interpretation and application of the African Charter on Human and Peoples' Rights, the Protocol and any other relevant human rights instrument ratified by the States concerned, while the ACJHR was created to rule on disputes concerning the interpretation of AU treaties. While the AfCHPR has been operational since 2006, the Court of Justice of the African Union was yet to start functioning.

The created for a body to create an African institution to try cases as those before the ICC emerged due to fears that the ICC would be used by the UN Security Council as an instrument to witch hunt African leaders and politicians.<sup>138</sup> The Rome Statute, under Article 16, grants the UN Security Council power to refer a situation to the ICC. The Statute also grants both states parties and non-states parties to the Rome Statute to make referrals to the ICC. In fact, part of the African narrative has been that the ICC is increasingly becoming a tool for exploiting weaker and poorer states, to re-colonise African states and make them lose their sovereignty.

The ACJHR will have 3 sections: The General Affairs section; the Human and Peoples' Rights section; and the International Criminal Law section.<sup>139</sup> The General Affairs section will have jurisdiction over matters, including but not limited to, the interpretation and application of the Constitutive Act, and the interpretation, application or validity of other Union Treaties

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<sup>135</sup> Article 1 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights.

<sup>136</sup> Protocol of the Court of Justice of the African Union, adopted July 01, 2003, Entered into Force February 11, 2009

<sup>137</sup> Protocol on the Statute of the African Court of Justice and Human Rights, adopted by the 11<sup>th</sup> Ordinary Session of the Assembly of the Union, Sharm El-Sheikh, Egypt, 01 July 2008.

<sup>138</sup> See L.M. Wanyeki (2014:16).

<sup>139</sup> Article 19.

and all subsidiary legal instruments adopted within the framework of the Union or the Organization of African Unity.<sup>140</sup> The Human and Peoples' Rights section will hear cases related to human and Peoples' rights.<sup>141</sup> The International Criminal Law section will have jurisdiction over genocide, war crimes, crimes against humanity, among others.<sup>142</sup> The granting of the Court jurisdiction to try perpetrators of gross human rights violations is a unique innovation and a step in the right direction by the court to eradicate impunity and to ensure individual accountability. This is a welcome development in as far the protection of human rights is concerned, especially in granting the Court the latitude to handle international crimes, which have not been in the purview of any regional court before.

However, like the African Court on Human and Peoples' rights, the Protocol to the ACJHR seems to draw back the efforts to protect human rights by limiting individuals from accessing the Court with complaints of human rights violations. The Protocol requires States Parties to have first accepted the competence of the Court to receive and consider individual complaints.<sup>143</sup> In fact, this same principle has been a bar in the protection of human rights even under the UN human rights treaty monitoring system, where the consent of the States Parties to receive individual complaints is required.<sup>144</sup> As could be seen from the AfCHPR, a limited number of States Parties actually make a declaration accepting the competence of the Court to receive and consider individual petitions.<sup>145</sup> This is likely to be the case with the ACJHR, as most States Parties prefer to handle complaints of human rights violations domestically, rather than allowing citizens to petition international or regional mechanisms such as treaty bodies.

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<sup>140</sup> Article 17.

<sup>141</sup> Article 17.

<sup>142</sup> See Articles 28A-28M.

<sup>143</sup> Article 9(3).

<sup>144</sup> See for example, Article 1 of the Optional Protocol to the ICCPR, adopted 16 December 1966, Entered into Force 23 March 1976; Article 1 of the Optional Protocol to the CEDAW; Article 1 of the ICESCR.

<sup>145</sup> As at July 2017, only 8 of the thirty States Parties to the Protocol to the African Court on Human and Peoples' Rights had made the declaration recognizing the competence of the Court to receive cases from NGOs and individuals. The 8 States are; Benin, Burkina Faso, Côte d'Ivoire, Ghana, Mali, Malawi, Tanzania and Rep. of Tunisia.

The creation of the Court with an expanded jurisdiction would seem to auger well with the aspiration of the African States that have overtime accused the ICC for being biased and targeting only Africans. While one would have expected the ACJHR to develop a framework that aims to eliminate impunity for perpetrators of human rights violations, however, the provision of guaranteeing immunity to sitting Heads of States under the ACJHR<sup>146</sup> seems to be a complete departure from the desire to build an accountability system on the African continent. At the time the ICC issued a warrant of arrest for President Al-Bashir of Sudan and when President Kenyatta of Kenya was facing trial at the ICC, the African Union mooted the proposal of creating an African Criminal Court to handle cases such as those under the ICC. However, the immunity clause for Heads of States under the ACJHR shields such category of people from the accountability processes, and yet the principle aim of the ICC is to eliminate impunity. Therefore, the lack of political will to address impunity will continue to offer the ICC to intervene on the African continent in ensuring accountability by perpetrators of human rights abuses. The ACJHR is expected to enter into force after attaining the required number of state ratifications.<sup>147</sup>

It is also debatable whether Africa, a continent with some of the poorest countries in the world, can facilitate the effective running of an institution of such magnitude as the ICC, with the key elements of prosecution, investigation, witness protection, defence facilitation, reparation awards and victim participation. The functions of the ACJHR will be borne by the African Union, which body has also been struggling to fund the activities of the different bodies established under the Union. In fact, 72 per cent of the AU's budget is largely funded by the European Union and the United States.<sup>148</sup> Whereas the creation of institutions to hold perpetrators of gross human rights violations to account is an important element in

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<sup>146</sup> Article 46A.

<sup>147</sup> As of 15 June 2017, only 6 states, out of the required number of 15 had ratified the Protocol. The six are: Benin (which ratified on 28 June 2012); Burkina Faso (ratified on 23 June 2010); Djibouti (ratified on 14 December 2011); Libya (ratified on 06 May 2009); Liberia (ratified on 23 February 2014); and Mali (ratified 13 August 2009).

<sup>148</sup><http://www.dailymail.co.uk/wires/afp/article-2935107/No-strings-attached-African-Union-seeks-financial-independence.html>

enhancing justice for victims, the spirit and purpose for their establishment should not be to shield the culprits but to offer justice to victims.

## 5.9 CONCLUSION

The referral of the situation in Uganda to the ICC by the Ugandan government demonstrates the country's desire to seek the help of the international community in combating international criminality. Because of the failed military campaigns and dialogues to resolve the conflicts, engaging the international community would be the viable option to take in pursuit of a peaceful end to the conflict. The ICC has been accused of pursuing only the LRA and leaving out the government forces. This has portrayed the ICC prosecutor in a bad light, and yet both parties to the conflict committed crimes during the conflict. This undermines the effective realization of justice for victims, which is their desired goal.

Although the work of the ICC was buttressed by Uganda's referral of the situation in northern Uganda, it is necessary that it discharges its mandate impartially and in a fair manner. By acting impartially, the ICC would instil hope among the victims of gross human rights violations that impunity is no longer tolerable in the present times. Uganda's ratification of the Rome Statute, the enactment of the ICC Act, the establishment of the ICD and the crimes division under the Directorate of Public Prosecutions are positive steps tailored towards eradicating impunity and prosecuting perpetrators of international crimes. As has been discussed above, the differences in the laws pertaining to the penalties for the crime of genocide, war crimes and crimes against humanity creates conflicts in determining the law applicable in particular situations. There is, therefore, a need to amend the laws so as to bring them in conformity with the Geneva conventions and the Rome statute.

## **CHAPTER SIX**

### **EXAMINING UGANDA'S INTERFACE WITH TRANSITIONAL JUSTICE MECHANISMS**

#### **6.1 INTRODUCTION**

Since attaining independence from the British in 1962, Uganda has experienced violence and civil unrest during times that the successive governments have been in power.<sup>1</sup> Of the several conflicts the country has experienced, the longest and perhaps the most destructive has been that of the LRA in northern Uganda. This conflict has raged for over 30 years and it has been characterised by wanton killings of the civilian populations in Uganda, the DRC, CAR and South Sudan, and displacement of people from their homes. States emerging out of a violent conflict are usually confronted with challenges of how to address the underlying factors for its causes, and the gross human rights violations committed on a large scale. Addressing the legacy of conflicts for countries such as Uganda is important in ensuring a stable society free from violence since most of the conflicts that the country has experienced emanate from long-standing colonial-induced factors.

This chapter analyses the development of transitional justice processes in Uganda and the different proposals related to them. The chapter further examines the different indigenous traditional justice systems proposed under the transitional justice framework and their viability in contributing to the accountability processes in northern Uganda.

#### **6.2 PREVIOUS ATTEMPTS AT USING TRANSITIONAL JUSTICE MECHANISMS IN UGANDA**

Uganda, like other countries emerging from violent conflicts, faces challenges in ensuring justice for victims of gross human rights violations and accountability for the perpetrators. Accountability for human rights violations is a very critical component in breaking the

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<sup>1</sup> See Press Release of Refugee Law Project (RLP) and Democratic Governance Facility (DGF), Daily Monitor, 10 July 2013.

cycle of impunity and an indispensable tool in healing the wounds of the victims. It is the foundation for post-conflict reconstruction based on the rule of law and respect of human rights.

Uganda's experience with TJ processes dates back to 1974, when then President Idi Amin established a Commission of Inquiry into the Disappearance of People in Uganda since 25 January 1971.<sup>2</sup> This was in response to the sustained pressure from the international community on the high rates of disappearances of people, especially political opponents, and Amin's ambition to become head of the OAU.<sup>3</sup> The commission's remit was to investigate cases of enforced disappearances perpetrated by the security forces in the early years of Amin's regime. It was headed by an expatriate Pakistani Judge, Justice Mohamed Saied. The other members were Kyefulumya and Esar, who were Ugandan police superintendents, and Haruna, a Ugandan army officer.<sup>4</sup> The Commission heard 545 witnesses, and documented 308 cases of disappearances. It implicated the Public Safety Unit and the State Research Bureau, which were special security bodies set up by Amin, in the disappearances.<sup>5</sup> The commission recommended reform of the police and security forces, and civic rights training for law enforcement officials. It also recommended that the persons implicated in the disappearances be prosecuted and others be dismissed summarily. It urged the government to support the families of the victims.

Although the hearings of the Commission were public, Amin neither published the Commission's report nor was he required to do so under the commission's terms of references. In addition, the recommendations of the commission were never implemented.<sup>6</sup> After the submission of the report, the four commissioners were targeted by the state in

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<sup>2</sup> See The Commission of Inquiry (Cap. 56), Legal Notice No. 2 of 1974 establishing the Commission of Inquiry into the Disappearances of People in Uganda since 25 January, 1971.

<sup>3</sup> See Report on Training on Transitional Justice for Parliamentarians of the Greater North Parliamentary Forum, 2009.

<sup>4</sup> See Legal Notice No. 2 of 1974.

<sup>5</sup> See P.B. Hayner (1994:612).

<sup>6</sup> See P.B. Hayner (1994:612).



apparent acts of reprisal. The Pakistani judge lost his employment with the government, and one commissioner was charged with murder, found guilty and sentenced to death. One other commissioner fled the country to avoid arrest.<sup>7</sup> The events in the aftermath of the inquiry and the failure to publicise and implement the recommendations depicts the lack of political will to address the human rights violations meted out to the political opponents of Amin's regime and ensure justice for the families of the victims. The establishment of the Commission of Inquiry seemed to have been a veiled attempt by Amin to demonstrate to the international community his government's determination to observe of the Rule of Law and uphold human rights. It was also a calculated political move by the regime, which had assumed power through a coup, to make itself legitimate internationally. The challenges faced by this commission of inquiry show the complexities that commissions established for purposes of unveiling the truth about the past face, especially if the acts under investigations implicate officials of the sitting government.

Uganda's attempt to implement TJ mechanisms was in 1987 when the NRA government established a Commission of Inquiry into Human Rights Violations (CIHRV).<sup>8</sup> The CIHRV was mandated to investigate human rights abuses committed under the previous governments from the time Uganda attained independence on October 9, 1962 to 25 January 25, 1986, a day before Museveni's seizure of power. It focused on cases of arbitrary arrests, detentions and killings. It was charged with making recommendations to prevent future human rights abuses. The commission was empowered to grant amnesty for certain crimes, excluding rape or crimes against humanity. It investigated 50 000 cases and produced a 720-page report in 2004. One of the fundamental recommendations of the Commission was the need to create a human rights body to promote and promote human rights in the country.<sup>9</sup> The limiting of the Commission's mandate to investigating abuses committed from independence to 25 January 1986 as the cut-off date meant that the body would not inquire into abuses committed by the NRA in the early years after seizing power.

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<sup>7</sup> See P.B. Hayner (1994:612).

<sup>8</sup> See Commission of Inquiry Act, Legal Notice No. 5 (May 16, 1986).

<sup>9</sup> See HRW (2001:357).

In fact, at the time, the NRA had been implicated in the commission of atrocities, especially in the early years assuming power. It is no wonder that the investigations focused on abuses perpetrated by the opposition members and several of them were prosecuted in courts of law.<sup>10</sup> Like its predecessor, the CIVHR also faced challenges of inadequate funding, low staffing levels, and limited office space.<sup>11</sup> These factors, coupled with the lack of political will, undermined the commission's capacity to effectively execute its mandate.

Like was the case with Amin's commission, the CIHRV seemed to have been established to appease the international community that the 'new' regime, which had just assumed power through a military coup, was committed to the rule of law and observance of human rights, and to eradicate impunity. But again, the ulterior motive was to win international recognition as a legitimate government.

It is questionable whether either of the above-mentioned commissions met the international standards that characterise the composition and work of a truth commission. The fact that the 1987 commission did not investigate allegations of human rights abuses committed by the NRA is one such feature which undermined its credibility. What differentiates both commissions from truth commissions is that the former were not established in a process of political transition. It would, therefore, be inappropriate to regard both commissions as representing tentative experiments in transitional justice accountability mechanisms. The discussion now turns to look into more recent attempts to implement transitional justice mechanisms in Uganda.

### **6.3 CURRENT ATTEMPTS TO ENGAGE TRANSITIONAL JUSTICE PROCESSES IN UGANDA**

The current transitional justice process in Uganda draws on the 2007 Juba Peace Agreement on Accountability and Reconciliation that advocated for the adoption of appropriate justice mechanisms to resolve the two-decade war in northern Uganda and to

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<sup>10</sup> See BJP/IJR Parliamentary Training Report (2009:11).

<sup>11</sup> See J.R. Quinn (2005:17-18).

promote accountability and reconciliation. The Agreement imposed a duty on the Uganda government to adopt an appropriate policy framework for the implementation of the terms of the agreement and to amend the amnesty law to bring it in conformity with the Agreement. Amendments to the amnesty laws have since been made, including the introduction of a clause that makes reference to persons who may be found to be ineligible for amnesty. Although the law grants power to the minister to declare persons ineligible for amnesty, there has not been any statutory instrument put in place to facilitate this process. In addition, the law does not set out the criteria to be applied in determining who is ineligible for amnesty. This is a decision made at the discretion of the minister. In order to fulfil its commitment to the Agreement, the government mandated the Justice, Law and Order Sector (JLOS) to establish a Transitional Justice Working Group (hereafter TJWG) for purposes of investigating, preparing and recommending a framework for investigations, prosecutions, trials before the ordinary courts, reparations and alternative legal processes. In 2008, the TJWG was established to generate the practical issues that needed to be addressed before implementing the transitional justice mechanisms on accountability and reconciliation.<sup>12</sup> After signing of the Annexure to the 2007 Juba Peace Agreement on Accountability and Reconciliation, the government established a 50-member working group drawn from the core JLOS institutions. Some of the institutions with representation in the TJWG include: the Ministry of Justice and Constitutional Affairs, the Ministry of Internal Affairs, the Uganda Human Rights Commission, and the Directorate of Public Prosecutions. These institutions were selected on the basis of their respective roles in implementing the commitments made in the Juba Peace Agreement.

The TJWG is divided into 5 Sub-committees.<sup>13</sup> These are: the Formal Criminal Jurisdiction Mechanisms Sub-committee; the Traditional Justice Mechanisms Sub-committee; Truth

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<sup>12</sup> See JLOS, Transitional justice in Uganda, available at <http://www.jlos.go.ug/index.php/2012-09-25-13-11-16/2012-09-28-06-56-14/transitional-justice> (accessed on 30th October 2015).

<sup>13</sup> See Paper presented by Rachel Odoi-Musoke, then Technical Advisor, Justice Law and Order Sector titled: 'Implementing the Transitional Justice Programme' at the Women's Land Rights Conference, 4-6 October, 2010.

Telling and National Reconciliation Sub-committee; the Sustainable Funding Sub-committee; and the Integrated Systems Sub-committee.

The Formal Criminal Jurisdiction Mechanisms Sub-committee is responsible for clarifying the jurisdiction of the courts over war crimes and examining whether existing law is adequate to allow for the prosecution of war crimes. It is also charged with the role of suggesting legal reforms and effective institutional frameworks to facilitate the prosecution of war crimes, as well as making recommendations as to capacity building.<sup>14</sup>

The Traditional Justice Mechanisms Sub-committee has the function of clarifying and defining the role and scope of traditional justice mechanisms in promoting accountability and reconciliation. This Sub-committee is also responsible for identifying the categories of crimes and human rights violations to be subjected to traditional justice mechanisms. The Sub-committee is also required to examine the possibility of incorporating traditional justice mechanisms in Uganda's laws.<sup>15</sup>

The Truth Telling and National Reconciliation Sub-committee is responsible for assessing the relevance of truth telling and national reconciliatory mechanisms for promoting reconciliation and accountability. The Integrated Systems Sub-committee is mandated to consider the reports of all the other sub-committees and compile a comprehensive report.<sup>16</sup>

The Sustainable Funding Sub-committee has the duty of identifying sources of funding for implementing transitional justice mechanisms and ensuring their sustainability. It is required also to develop work plans and budgets to support the TJ framework in Uganda.<sup>17</sup>

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<sup>14</sup> See BJP/IJR Parliamentary Training Report (2009:8).

<sup>15</sup> See BJP/IJR Parliamentary Training Report (2009:8).

<sup>16</sup> See BJP/IJR Parliamentary Training Report (2009:9).

<sup>17</sup> See BJP/IJR Parliamentary Training Report (2009:9).

At the time of writing, the process of the development of the TJ policy in Uganda has since stalled. This has been due to lack of funding from the government and donors towards the process. The failure to provide funding towards the TJ process by the government demonstrates the lack of political will to ensure the implementation of TJ in the country and to unravel the truth about the past.

Since 2016, there has been a civil-society-led effort, spearheaded by the Inter-Religious Council of Uganda (IRCU), which is an umbrella organization of different religious faiths in Uganda, and the Elders Forum Uganda (TEFU), to promote, among other things, reconciliation in the country. This has been in view of the governance challenges that Uganda has faced since it attained Independence in 1962, and the civil unrest the country has experienced over time, which have been instigated on grounds of ethnicity. Under this initiative, a national dialogue process is envisaged as “the most acceptable and meaningful pathway to achieving the desired political, constitutional and electoral reforms, generating a consensus on modalities for truth-telling and national reconciliation, and realizing the promise of “power belongs to the people” as declared in the 1995 Constitution.”<sup>18</sup> The process envisages the creation of a truth and reconciliation commission to facilitate the truth telling process, which would contribute to a healing process and to national cohesion. However, this process has been affected by inadequate funding and limited government interest in the process.<sup>19</sup> Whereas government has been represented at the highest level in the planning process, it remains skeptical whether they will positively support the initiative. As noted previously, government’s political will towards the truth commissions is a very critical element in ensuring its effectiveness. For example, it would provide resources to facilitate the commission to do its work, and also ensure a conducive working environment that allows it to carry out its activities. However, as seen from the Truth Commission established under the Amin era in Uganda, such a commission ought to be independent, with clearly defined terms of reference, which allows for accountability for

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<sup>18</sup> See Civil Society Annual Leaders’ Annual Statement 2017, January 2017, retrieved from <http://ngoforum.or.ug/wp-content/uploads/downloads/2017/01/CSO-New-Year-Statement-2017.pdf>

<sup>19</sup> Interview with one of the members involved in the processes, 20<sup>th</sup> July 2017.

all perpetrators of human rights violations. This was more so the case during the CIHRV, where the terms of reference clearly shielded the Commission from inquiring into the conduct of the members of the current regime and heavily focused on the opposition.

#### **6.4 NATIONAL POLICY DEVELOPMENT AS TRANSITIONAL JUSTICE TOOL: THE PROSPECTS IN UGANDA'S PROPOSED TRANSITIONAL JUSTICE POLICY**

Despite the legacy of conflicts in Uganda and the attendant gross human rights violations arising from them, the Uganda government has been reluctant to implement TJ measures that would address the root causes of the wars, as well as remedying those violations. Justice for the victims and accountability for perpetrators are key components in TJ mechanisms. Although Uganda recognises the central role transitional justice mechanisms would play in redressing the ills of the conflict in northern Uganda, there is no national transitional justice policy, which undermines this effort. The TJ policy would guide and set out a comprehensive framework through which the underlying causes of conflicts in Uganda would be addressed. The policy would also spell out the mechanisms that could be used to remedy the human rights abuses and to prevent future occurrences. The development of the TJ policy would be tailored not only to the northern Uganda conflicts but to all insurgencies that the country had faced because of their close connections. As has been discussed in the previous chapters, the occurrence of conflicts in Uganda has closely related factors. Therefore, in order to address the root cause of conflicts, there is a need to address the underlying factors during the pre-colonial, colonial and post-independent periods.

The development of a TJ policy and legislation would be part of the government's commitment towards implementing the Agreement on Accountability and Reconciliation, and that of Comprehensive Solutions to the Conflicts, which were both agreed upon during the Juba Peace Talks. The proposed policy would spell out victims' rights and their

participation,<sup>20</sup> with a focus on the situation of women<sup>21</sup> and children<sup>22</sup> affected by the conflict. The policy is envisaged to promote justice and reconciliation through a number of mechanisms, including traditional justice mechanisms, reparations and social reintegration of conflict-affected communities.

The government of Uganda created the TJWG under the JLOS to spearhead the implementation of what had been agreed upon during the Juba Peace talks.<sup>23</sup> The main priority, as part of the implementation process, was the development of a TJ policy.<sup>24</sup> The policy proposes to address the discrepancies that exist between the Amnesty Act and international law practice regarding the kind of amnesty granted by the state of Uganda to perpetrators of international crimes.

It also seeks to recognise the use of traditional justice measures as part of Uganda's conflict resolution mechanism, as well as to define their parameters, and the needs and interests of

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<sup>20</sup> See Agreement on Accountability and Reconciliation, clause 8. See also the Joint Press Release of the International Centre for Transitional Justice (ICTJ) and Democratic Governance Facility (DGF), Daily Monitor, 17 June 2015, 18.

<sup>21</sup> See Agreement on Accountability and Reconciliation, clause 11. See also Press Release of Refugee Law Project (RLP) and Democratic Governance Facility (DGF), Daily Monitor, 10 July 2013, 32.

<sup>22</sup> See Agreement on Accountability and Reconciliation, clause 12.

<sup>23</sup> Joint Press Release of the International Centre for Transitional Justice (ICTJ) and Democratic Governance Facility (DGF), Daily Monitor, 17 June 2015, 18. Although the initial discussions focused on finding a transitional justice policy and mechanisms for the northern Uganda conflict, it soon dawned on the stakeholders that discussion and drafting of the TJ policy should be broadened to become a national policy since the entire country had suffered from conflict at some point.

<sup>24</sup> Joint Press Release of the International Centre for Transitional Justice (ICTJ) and Democratic Governance Facility (DGF), Daily Monitor, 17 June 2015, 18. An initial draft was shared with members of the civil society under their coalition known as the Civil Society Platform on Transitional Justice on 21 May 2013 and they later released a statement on 12 June 2013 wherein they observed that the civil society considered the draft transitional justice policy a milestone in Uganda's search for appropriate mechanisms with which legacies of past and ongoing armed conflicts could be addressed. However, it is important to note also that nationwide consultations were under taken throughout the country, where Ugandans were asked how they thought justice and peace could be attained after conflict in Uganda.

the victims. The policy recognises the central role of reparations in transitional justice as it focuses on the victims' situation and seeks to address the harms suffered and the rights violated during the conflict.

The International Refugee Rights Initiative (IRRI) observes that transitional justice in Uganda focuses more on men as perpetrators, ignoring their experiences as victims.<sup>25</sup> A study conducted in northern Uganda on the top priorities of the people in the region, ranked health care, peace, education for the children, livelihood concerns, and justice as their preferred choices in that order.<sup>26</sup> Surprisingly, justice is ranked low among the most preferred priorities. Social services and livelihoods are essentially fundamental to the improvement of the lives of the victims and to the general welfare of communities. The main priorities identified by the respondents show the need of instituting a reparations programme through a clearly defined framework.

Similarly, a study conducted between 2007 and 2011 by the UN Office of the High Commissioner for Human Rights (OHCHR) and the Uganda Human Rights Commission (UHRC) in northern Uganda identified the provision of physical and mental health services, education, housing, land and inheritance, rebuilding livelihoods, empowering the youth, public acknowledgement of harm and apologies, information on the disappeared and proper treatment of the dead among the necessary forms of reparations.<sup>27</sup> However, the report observes that reparations programmes are unlikely to succeed unless they are linked to other transitional justice measures, particularly criminal prosecutions, truth-telling, and institutional reform. While a remedy might sometimes be enough to fulfil a victim's right to reparation, the right to a remedy and reparation are interlinked and the latter alone will not fulfil the victims' right to a remedy. A study by the Human Rights Centre conducted in northern Uganda revealed that 70% of the respondents felt that it was important to hold accountable those responsible for both human rights violations and

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<sup>25</sup> See IRRI (2008:28).

<sup>26</sup> See HRC et al (2007:3).

<sup>27</sup> See OHCHR and UHRC (2011: XVIII).



breaches of international humanitarian law in northern Uganda.<sup>28</sup> The above analysis shows that an effective TJ process requires a holistic approach that involves implementation of a combination of TJ measures so as to meaningfully impact on the lives of the victims. As noted above, a single TJ measure cannot holistically address or meet the aspirations and interests of all the victims.

#### **6.4.1 The use of amnesty mechanism of TJ in Uganda**

The notion of amnesty is coupled with contradictions that undermine its very goals and basic tenets of promoting peace and justice. On the one hand, the framework embodies peace, benevolence and reconciliation as some of its goals, while on the other it seems to contradict the values of accountability and justice.

Amnesties were seen as a pragmatic or mercy-enforcing tool to bury the memory of certain past painful events committed by an individual in order to make it possible for former enemies to make a fresh start.<sup>29</sup> In so doing, amnesties also served the purpose of rupturing the perpetrator's past, permitted social reconstruction and healing of broken relationships. The impact of amnesties on long-term reconciliation is often subject to debate. Amnesty is frequently justified by politicians as a means of promoting reconciliation. The shift from blanket amnesties towards the obligation to prosecute was already gaining ground at the time of the working of the South African Truth and Reconciliation Commission, which sought to forge a middle path between prosecution and blanket amnesty.<sup>30</sup> It has been argued that if, after a war, the victors impose conditions that 'involve crushing the dignity of the vanquished the peace will not last'.<sup>31</sup> The case of Germany after the First World War illustrates the challenges of ensuring sustainable peace through the imposition of unrealistic conditions that favoured the victors against the losers.

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<sup>28</sup> See HRC et al (2007:3); RLP (2012:13).

<sup>29</sup> See N. Twinomugisha (2014:11).

<sup>30</sup> See C. Villa – Vicencio (2009:11).

<sup>31</sup> See L. Mallinder (2008:16).

Ancient and traditional cultures and societies, and the world's major religions share a deep concern about human nature, ethics and justice. African societies are no exception, for they too have elaborate principles and rules that regulate the rights and duties of their members.<sup>32</sup>

Uganda's amnesty law appears to have emerged from calls made by religious, traditional and civil society groups to the Uganda government to grant a blanket amnesty to the LRA as part of the process to promote peace in northern Uganda.<sup>33</sup> Amnesty is also closely linked with the values in the African traditional justice systems that, among others, emphasise forgiveness. In line with this argument, Lomo and Hovil<sup>34</sup> have described the relationship between amnesty and the Acholi dispute resolution as follows:

'Culturally, people's ideas of forgiveness are entrenched. They don't kill people; they believe the bitterness of revenge does not solve the problem. So it was easy for people to accept the idea of amnesty. The culture is for compensation.'

Therefore, amnesty must be applied in line with compatible values of the communities. The long title of Uganda's Amnesty Act spells out what could reasonably be inferred as the purpose of the legislation: *An Act to provide for an Amnesty for Ugandans involved in acts of war-like nature in various parts of the Country and for other connected purposes*. To this end, one can argue that the intention of the drafters and indeed, of the Parliament of Uganda, was to create a mechanism of granting or providing amnesty to Ugandan citizens involved in acts of rebellion or war within the borders of the country. Ordinarily, such a person would have been regarded to have committed the offence of treason where evidence pointed to participation in acts of war or rebellion against the state of Uganda.

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<sup>32</sup> See I. Bantekas and L. Oette (2013:12).

<sup>33</sup> See M. Otim (2012:2). Otim notes that in the mid 1990s, leaders of various the religious, traditional and community groups from northern Uganda tried to bring the government of Uganda and the LRA to negotiate peace.

<sup>34</sup> See Z. Lomo and L. Hovil (2004:45).

Under the Amnesty Act, the term 'amnesty' means any of the following: a pardon, forgiveness, exemption or criminal discharge from criminal prosecution or any other form punishment by the State. This, in effect, means that once an individual participated in a conflict and perpetrated any form of criminality, they cannot be prosecuted under Uganda's criminal justice system, in line with country's supreme law, the constitution. In this regard, article 28(10) states that, 'No person shall be tried for a criminal offence if the person shows that he or she has been pardoned in respect of that offence.' Therefore, persons pardoned of crimes committed in the northern conflict were not liable for prosecution of the crimes they committed.

Uganda's Amnesty Act of 2000 applies to any Ugandan who had engaged in rebellion against the government by actual participation in combat; collaborating with the perpetrators of the war or armed rebellion; or committing any other crime in the furtherance of the war or armed rebellion since the year 1986.<sup>35</sup> As a result, many ex-combatants were able to secure amnesty despite having committed atrocities against their respective communities. The Amnesty Act establishes the Amnesty Commission,<sup>36</sup> whose functions are: 1) to monitor programmes of demobilization; reintegration; and resettlement of reporters; and 2) to sensitize the public on the amnesty law; and promote reconciliation and dialogue.<sup>37</sup>

Over 14 000 combatants have so far been granted amnesty, including about 8000 from the LRA.<sup>38</sup> The Amnesty Act has in fact encouraged and increased defections from the LRA. However, there are concerns on the viability of the Amnesty Act in regard to critical issues of accountability for international crimes committed, justice and reparations for victims of the atrocities.

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<sup>35</sup> See Uganda Amnesty Act of 2000, Part II(1). See also Clark (2009:234-236).

<sup>36</sup> See Amnesty Act, section 7.

<sup>37</sup> See Amnesty Act, section 9.

<sup>38</sup> See M. Otim and M. Weirda (2008:22). See also L. Hovil and Z. Lomo (2005:1).

The Amnesty Act lapsed in 2012 but it was reinstated in 2013 following an outcry by Ugandan civil society organisations that its absence would discourage the return of the LRA rebels from the bush.<sup>39</sup> It is submitted that under international law there are no uniform international standards or practice that prohibit states from recognising, promoting the use and granting of amnesties as part of their national policy and practice. A number of countries in South America, and South Africa in particular, have embraced the use of amnesties when transiting from conflict. In fact, in the South African case of Azanian People's Organisation and 7 others,<sup>40</sup> the court noted the following concerning the use of amnesties generally and South Africa in particular:

'South Africa is not alone in being confronted with the historical situation which required amnesty for criminal acts to be accorded for the purposes of facilitating the transition to and consolidation of an overtaking democratic order. Chile, Argentina and El Salvador are among the countries that have in modern time been confronted with a similar need. Although the mechanism adopted to facilitate that process has differed from country to country and from time to time, the principle that the amnesty should in appropriate circumstances be accorded to violators of human rights in order to facilitate the consolidation of new democracies was accepted in all these countries and truth commissions were also established in such countries.'

Objective 3 of the National Objectives and Directive principles of State Policy provides that, 'All organs of the state and people shall work towards.....there shall be established institutions and procedures for the resolution of conflicts fairly and peacefully.' The enactment of the Amnesty Act and the establishment of the Uganda Amnesty Commission was, therefore, in fulfillment of this constitutional provision. In essence, therefore, the amnesty legislation is a tool to contribute to conflict resolution in Uganda and more

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<sup>39</sup> See Justice and Reconciliation Project (JRP) (2011:1). A study conducted by JRP between 28 November and 6 November 2011 noted an overwhelming support for amnesty and considered it as vitally important for sustainable peace to prevail.

<sup>40</sup> CCT 17/96 (1996) ZACC 16. In this case, a group of South Africans brought this case to challenge the constitutionality of establishing and using the Truth and Reconciliation Commission Act as part of their country's transitional justice processes.

specifically, the northern Uganda conflict. As noted earlier, Uganda is a state party to several international treaties and therefore duty bound to respect the provisions in the instruments. The Constitution of Uganda also enjoins the state to respect international law and treaty obligations to which it is a party. Therefore, as Uganda develops procedures and puts in place institutions for conflict resolution, it ought to be mindful of its treaty obligations under the various treaties it is a party and to ensure that it adheres to them.

#### **6.4.2 Positive contributions of the use of amnesties in Uganda**

Since its creation, the Amnesty Commission has been able to receive and re-integrate the rebels back to their communities and to convince them to renounce and abandon armed rebellion.<sup>41</sup> With regard to northern Uganda, the introduction of the amnesties encouraged the return of thousands of ex-combatants and abductees.<sup>42</sup> The use of amnesties in the northern Uganda situation is regarded as one of the ways of resolving the conflict peacefully. In fact, the prevailing relative peace in the region has been attributed to the introduction of the amnesty legislation which has resulted in several LRA rebels abandoning rebellion.<sup>43</sup>

The Amnesty Act in a way complements the international criminal justice in the fight against impunity. The Act outlaws re-offending or recidivism (a return of a rebel to armed rebellion) as it prohibits the granting of amnesty to a person more than once. It also bars

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<sup>41</sup> For instance, the ex-rebels are required to surrender all weapons in their possession as part of the commitment to their renunciation and abandonment of armed rebellion.

<sup>42</sup> See N. Twinomugisha (2014:11). Twinomugisha observes that by 2014, the Uganda Amnesty Commission had received up to 26,000 LRA ex-combatants seeking amnesty. See also Justice and Reconciliation Project (2011:1). The Justice and Reconciliation Project survey revealed that as of 22 August 2008, approximately 22,520 former rebels had been granted amnesty since 2000, 48 % of whom had been former LRA combatants. See also ICRS Database available at: <http://reliefweb.int/sites/reliefweb.int/files/resources/DB6D36C252A6579C4> (accessed 15th December 2015).

<sup>43</sup> See Justice and Reconciliation Project (2011:2). The amnesty law is lauded for creating awareness among community members of northern Uganda of the critical contextual issues that surrounded the LRA ex-combatants, which helped reduce stigmatisation, harassment and to promote reintegration and acceptability.

the granting of amnesty to certain categories of individuals: a). those convicted under the formal courts of law; b). persons indicted by the ICC; c). children under the age of twelve and below. Others outside the scope of amnesty include non-citizens, and individuals excluded by the Minister of Internal Affairs.<sup>44</sup> Since the law provides categories of people excluded from grant of amnesty, it cannot be labelled to be granting 'blanket amnesty'.<sup>45</sup>

#### **6.4.3 Criticisms that have been raised against the use of amnesties in Uganda**

Since the enactment of the amnesty legislation in Uganda, it has generated mixed opinions from academics, legal practitioners and civil society activists on its purpose, implementation and impact. The purpose of the Amnesty Act is to restore peace and reconciliation. However, the law is silent on whether, in pursuance of its purpose, it could grant blanket amnesties for all crimes, including international crimes. Many have criticised Uganda's amnesty law for granting 'blanket amnesties', which contradict the goals of international criminal justice. The use of amnesties, especially in Uganda's case, sits at the crux of a potential clash between the interests of justice vis-a-viz the interests of peace. It is undisputable that international crimes were committed in the course of the northern Uganda conflict. It was not until the Supreme Court clarified the position of the law in Kwoyelo's case, that the DPP could prosecute perpetrators of international crimes. Countries that grant blanket amnesties are said to be going against the dictates of international human rights law. For instance, in the case of Valasquez Rodriguez, the Inter-American Court of Human Rights held that where an illegal act violates human rights, the State has a duty to prevent such violation by investigating, prosecuting and punishing the perpetrator.<sup>46</sup>

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<sup>44</sup> See section 2 (A) of the Amnesty Amendment Act.

<sup>45</sup> See N. Twinomugisha (2014:11).

<sup>46</sup> Valasquez Rodriguez, the Inter-American Court of Human Rights. See also the cases of Almonacid-Gomez versus Chile and Barrios Altos versus Peru. In the latter case, it was stated by the Inter-American Court of Human Rights that where states design amnesty laws in order to eliminate responsibility for perpetrators, then such laws are considered inadmissible and prohibited since their objective is ultimately to prevent accountability for serious violations of human rights. Court further noted that self-amnesty legislations have

However, Grono and O'Brien have contended that in order to prevent further conflict and suffering for the people in a conflict, even when it seems morally repugnant, inhuman and wrong, it might turn out that doing a deal with perpetrators becomes unavoidable and necessary.<sup>47</sup>

#### **6.4.4 The proposed truth and reconciliation commission in Uganda**

The turbulent periods that Uganda has undergone since independence have revived calls for the establishment of a Truth and Reconciliation Commission (TRC) to deal with the legacy of conflicts the country has experienced. While there is no universal definition of a truth Commission, in practice, TRCs are distinguished in the form of their set-up and mandate.<sup>48</sup> A truth commission can be defined on the basis of three components. It is: (a) a non-judicial investigatory body established by the state or by a dominant faction within the state; (b) to determine the truth about widespread gross human rights violations that occurred in the past; and (c) to discover which parties may be blamed for their participation in perpetrating such violations over a specified period of time.<sup>49</sup> They are usually set up by states emerging from periods of internal unrest, civil war or dictatorship. Examples of countries that have established TRCs include South Africa,<sup>50</sup> Liberia,<sup>51</sup> Kenya,<sup>52</sup>

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the effect of making victims defenceless, prevent identification of perpetrators, prevents investigation and revelation of the truth, prevents access to justice and promotes impunity which is against international law.

<sup>47</sup> See N. Grono and A. O'Brien (2008:13).

<sup>48</sup> See R.J. Quinn (2007:394).

<sup>49</sup> See R.J. Quinn (2007:394).

<sup>50</sup> The TRC in South Africa was established by the Promotion of National Unity and Reconciliation Act, No. 34 of 1995, with the mandate to bear witness to, record and in some cases grant amnesty to the perpetrators of crimes relating to human rights violations. It had the power to make recommendations on reparations and rehabilitation. It was chaired by the former Archbishop Desmond Tutu and it published its final report on 20 October 1998.

<sup>51</sup> The Liberian Truth and Reconciliation Commission (TRC) was created in May 2005 under the Transitional Government with the mandate to promote national peace, security, unity and reconciliation, by investigating more than 20 years of civil conflict in the country and to report on gross human rights violations that occurred in Liberia between January 1979 and 14 October 2003. It released its report on 1 July 2009.

and Sierra Leone,<sup>53</sup> among others. At the time of writing, a total of 43 TRCs have been set up around the world, with the first established in the 1970s.

Uganda was the first African country to institute a semblance of a truth commission.<sup>54</sup> As pointed out at the beginning of this chapter, Uganda put into place two commissions—the Commission of inquiry into disappearances in Uganda, and a Commission of Inquiry into human rights violations committed from 9 October 1962 to 25 January 1986.

Given Uganda's ugly history, characterised by violent conflicts, the prosecution of perpetrators would not be the panacea for resolving their occurrences. In fact, it has been observed that for as long as Uganda's different histories of conflict remain unaddressed, the hope for realising sustainable peace will remain elusive.<sup>55</sup> Ogoola avers that establishing a

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However, surprisingly, the report implicated the current President, Johnsson Sirleaf, in the violations and she was part of the 49 people the report recommended to be barred from holding public offices for a period of thirty (30) years. On 26 July 2009, Sirleaf apologized to Liberia for having supported Charles Taylor, under whose regime gross human rights violations occurred. On 28 August 2009, in a bid to save Sirleaf and the other members, the Liberian parliament used the excuse of consulting their constituents before making a decision on the Commission's recommendations. In *Williams v. Tah* (2011), the Supreme Court ruled that TRC's recommendation was an unconstitutional violation of the listed individuals' right to procedural due process, and that it would be unconstitutional for the government to implement the proposed bans.

<sup>52</sup> The Truth, Justice and Reconciliation Commission of Kenya was set up in 2008 to investigate, analyze, and report on occurrences of gross human rights violations, economic crimes, illegal acquisition of public land, marginalization of communities, ethnic violence between 1963 and 2008 and the context in which the crimes occurred.

<sup>53</sup> The Sierra Leone Truth and Reconciliation Commission was established on 7 July 1999 to create an impartial historical record of violations and abuses of human rights and international humanitarian law related to the armed conflict in Sierra Leone, from the beginning of the Conflict in 1991 to the signing of the Lome Peace Agreement; to address impunity, to respond to the needs of the victims, to promote healing and reconciliation and to prevent a repetition of the violations and abuses suffered. It made its final report to both the Sierra Leonean government and the UN Security Council in 2004.

<sup>54</sup> See D.B. Ntsebeza (2009:375).

<sup>55</sup> See RLP (2007:28).



national peace and reconciliation commission would address the past and shape the future of the country.<sup>56</sup>

Truth-telling is an essential component of transitional justice processes. There have been calls by political and religious leaders, and civil society activists for a truth and reconciliation commission to address the legacy of conflicts that Uganda has faced. Mao, the President of the Ugandan Democratic Party and former Chairperson of Gulu District, which is one of the districts that was greatly affected by the northern Uganda conflict, regards the setting up of a truth and reconciliation commission as an approach to address the abuse of human rights committed during the northern Uganda conflict and an opportunity for Ugandans to tell the truth.<sup>57</sup> He states that the ICC is very expensive for many victims of the northern Uganda conflict, who make up the majority, compared to the reconciliation process that is easily accessible to the victims.<sup>58</sup> The clergy in Uganda have stressed that discovering and revealing the past mistakes by the state actors, non-state actors alongside the former rebels, will diffuse the volatile social environment where some people feel that perpetrators of human rights violations do not face justice. According to the clergy, perpetrators openly confessing their wrongs would pave the way for reconciliation.<sup>59</sup>

Makau Wa Mutua emphasises that national truth and reconciliation processes can act as a psychological and emotional purification after undergoing a deep and penetrating process of cleansing the past.<sup>60</sup> Domestic truth and reconciliation processes, however, run the risk of being used to sanction the perpetrators of human rights violations. Mutua, therefore, advocates for a process that combines truth telling with justice and national reconciliation

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<sup>56</sup> See Stephen Wandera, Ogoola calls for confession and unity, *The Daily Monitor Newspaper*, 3 October 2010, Kampala: Uganda.

<sup>57</sup> See Call for a truth and reconciliation commission in Uganda, *Radio Netherlands Worldwide*, 17 November 2010, available at <http://www.rnw.nl/africa/article/call-a-truth-and-reconciliation-commission-uganda> (accessed on 12th January 2015).

<sup>58</sup> See Call for a truth and reconciliation commission in Uganda, *Radio Netherlands Worldwide*, 17 November 2010, available at <http://www.rnw.nl/africa/article/call-a-truth-and-reconciliation-commission-uganda> (accessed on 12th January 2015).

<sup>59</sup> See C. Makumbi and J. Eriku (2011:3).

<sup>60</sup> See M. Mutua (2007:411).

that is guided by a truth commission, but with a wide mandate to reconstruct the state.<sup>61</sup> This, he argues, would be the only route by which the current abominations, such as the ethnicisation of politics and the northern Uganda conflict would be permanently terminated.<sup>62</sup> Mutua's proposal seems to call for the adoption of a model similar to that of South Africa, which combined both amnesty and prosecution. Under the South African TRC, Amnesty was based on one telling the truth, and the TRC had the discretion to decide on who to recommend for prosecution, depending on a set of criteria set out in the enabling law.

Focusing on the underlying causes of conflict and on human rights abuses rather than on the individual perpetrators, restorative justice approaches like truth commissions may be better suited process for transforming anger, resentment, and vengeance into community building, particularly by emphasising reconciliation. In addition, truth commissions, compared to trials, would facilitate political and cultural change and focus on the needs of the victims.<sup>63</sup> Emerging international criminal law principles support the contention that states have at least a general obligation to investigate and prosecute those responsible for human rights violations.<sup>64</sup> Although truth commissions do not directly do this, in contrast to much of the international law jurisprudence developed since World War II, recent innovations have focused on a more victim-centred approach.<sup>65</sup>

At the time of writing, a National Reconciliation Bill, 2009 to facilitate the process of truth telling and reconciliation had been drafted. The Bill is intended to provide for the

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<sup>61</sup> See M. Mutua (2007:412).

<sup>62</sup> See E. Brahm (2007:19).

<sup>63</sup> See M. Mahmood (2001:1) quoted in E. Brahm (2007:409).

<sup>64</sup> Instruments such as the UNCAT, ICCPR, and the African Charter on Human and Peoples' Rights impose upon states participate the duty to investigate and punish violations of the rights enshrined therein.

<sup>65</sup> For example, Article 68(3) of the Rome Statute of the ICC sets out the general framework on victims' participation by providing victims the opportunity to air out their views or be represented by legal counsel. For a detailed discussion on victim participation under the ICC, the ICTY, the ICTR, see L. Carter and F. Pocar (2013:170-191).

establishment of a National Reconciliation Forum (hereafter: 'NRF') that will steer an independent national reconciliation process in Uganda.<sup>66</sup> The NRF will, among others, facilitate, initiate or co-ordinate inquiries into the history of conflicts and document gross violations and abuses of human rights, giving particular attention to the experiences of women, children and vulnerable groups.<sup>67</sup>

The NRF will also identify, where possible, the perpetrators of the abuses.<sup>68</sup> Most importantly, the NRF is expected to help restore the human dignity of victims and promote reconciliation. It will receive testimonies from victims, witnesses, and other community members on the violations and abuses suffered, and for perpetrators to relate their experiences in an environment conducive to constructive interchange between victims and perpetrators.<sup>69</sup>

The NRF is expected to coordinate with the Amnesty Commission in regard to the granting of amnesty. Any person seeking amnesty will have to be referred by the NRF to the Amnesty Commission to determine his eligibility for the same before his testimony is given.<sup>70</sup> Specific or general matters that arise in the course of this process would be referred to other institutions such as the regional forum, the Amnesty Commission, the Equal Opportunities Commission, traditional cultural courts, or other alternative justice mechanisms, depending on the issue. Referrals to the traditional courts or alternative justice mechanisms will be done with the consent of the person being referred. The NRF is expected to promote and encourage the preservation of the memory of the events and victims of the conflict through memorials, archives, commemorations and other forms of preservation.

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<sup>66</sup> See Draft of the National Reconciliation Bill, 2009, section 1.

<sup>67</sup> See Part III (B) (3), the Draft National Reconciliation Bill, 2009.

<sup>68</sup> See Part III (B) (3), the Draft National Reconciliation Bill, 2009.

<sup>69</sup> See Part III (B) (8), the Draft National Reconciliation Bill, 2009.

<sup>70</sup> See Preamble to the Draft National Reconciliation Bill, 2009.

The NRF is expected to publish a comprehensive and final report, which will be made public.

Limiting the NRF to issues dating back to 1 January 1986 would leave out conflicts such as the Kabaka crisis that occurred in 1966 when the then Prime Minister, Apollo Milton Obote, attacked the *Lubiri*,<sup>71</sup> the period between 1971 to 1979, which was characterised by the most brutal era experienced in Uganda history, the Luweero triangle war of 1981-86, and the northern Uganda conflict, among others. All the cited incidents are closely related and leaving out any of them would not address the root causes of conflicts in the country. Whereas the Bill envisages reconciliation as its major goal, however, it does not specify define the meaning of reconciliation and the yardstick upon which its realisation is to be measured. This calls for critical thinking on the issue since it is one of the core objectives for the establishment of the NRF.

The draft Bill defines a victim as a person or group affected directly or indirectly as a result of a grave human rights violations or abuses, leading to either physical or mental injury, emotional affliction, or pecuniary loss.<sup>72</sup> The definition is not sufficient in light of the internationally recognised legal standards. The Declaration on the Basic Principles of Justice for Victims of Crimes and Abuse of power defines a victim as a person who, individually or collectively, has suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within a state.<sup>73</sup> The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law extends the definition of a victim to include the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to

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<sup>71</sup> This is the official palace of the traditional leader of the Baganda ethnic group.

<sup>72</sup> See Section on interpretation, draft of the National Reconciliation Bill, 2009.

<sup>73</sup> See Section 1, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 29 November 1985, A/RES/40/34.

assist victims in distress or to prevent victimization.<sup>74</sup> Therefore, the definition of a victim in the draft Bill needs to be harmonised with that set in the Guidelines on the Right to Remedy and the Basic Principles of Justice for Victims of Crimes and Abuse of power. It should cover family members who might have indirectly suffered harm due to the abuses inflicted on the primary victim.

The Bill does not also specify the source of funding for the reparation of victims, yet one of NRF's cardinal roles is to restore human dignity to the victims of abuse. It is important to note that the availability of financial resources is a critical element in ensuring an effective reparations program that will facilitate and address the needs of the victims to enable them realize basic standards of living. At the time of writing, JLOS was collecting public views on the draft Bill before it is tabled before parliament for further debate.

Many of the victims of the northern Uganda conflict have lost faith and trust in the government of Uganda's commitment to provide any form of redress to them due to continued delays in providing the same.<sup>75</sup> The Bill therefore presents a ray of hope to the victims who have suffered gross human rights violations from conflicts.

## **6.5 CONCLUDING REMARKS ON THE PROPOSED TJ MECHANISMS**

### **6.5.1 TRADITIONAL JUSTICE SYSTEMS IN NORTHERN UGANDA**

Throughout Africa, societies and communities have developed and continue to use a range of traditional mechanisms to resolve conflicts and heal rifts that have emerged. Traditional justice systems have been applied in countries such as Mozambique and Angola, where internally displaced and war-affected people utilize a traditional psychological healing procedure known as *conselho*, which means "advice" in English. *Conselho* is based on the general encouragement given to people to abandon the thoughts and memories of war and

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<sup>74</sup> See Basic Principles and Guidelines.

<sup>75</sup> See <https://www.ictj.org/news.uganda-war-victims-emphasize-urgent-need-reparations> (accessed on 10th May 2016).

losses. The same approach is also applied in Sierra Leone, South Africa and Western Kenya, among the Pokot, Turkana, Samburu, and Marakwet tribes.<sup>76</sup>

Uganda has a vibrant history of using traditional mechanisms among the 56 different ethnic groups within the country.<sup>77</sup> Different sections of people, including religious leaders and civil society activists, have urged for the application of traditional justice systems in resolving the northern Uganda conflict. Traditional leaders of communities in northern Uganda have also strongly advocated the use of traditional conflict resolution through reconciliation ceremonies as mechanisms for reintegration in the post-conflict context.<sup>78</sup> This is premised on the limited responsiveness of the existing national and international formal justice mechanisms to address Uganda's numerous legacies of conflicts. The elements of conflict resolution such as adjudication, mediation, reconciliation, and compensation are each utilised in different situations.

Agenda Item No. 3 and the Annexure to the Juba Peace Agreement provide for a framework for accountability and reconciliation with specific emphasis on the role of traditional justice mechanisms. Clause 3.1 of Agenda Item 3 urges for the promotion of traditional justice mechanisms such as *Culo Kwor*, *mato oput*, *kayo cuk*, *ailuc*, *Tonu ci Koka* and others, as practised in the communities affected by the conflict but with necessary modifications. The Peace, Recovery, and Development Plan (hereafter PRDP)<sup>79</sup> of 2011/15 recognises the need to build informal leadership among men and women to engage with local authorities and civilians in the reconciliation process, through localised conflict management mechanisms.<sup>80</sup> However, during the Juba Peace talks, traditional justice mechanisms, as possible accountability measures, were largely well-received by donors, NGOs, development agencies and the government of Uganda, but the focus was only on mato

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<sup>76</sup> See J.R. Quinn (2007:397).

<sup>77</sup> See J.R. Quinn (2007:8).

<sup>78</sup> See F.M. Ssekandi and R. Cecily (2007:107).

<sup>79</sup> See PRDP is a comprehensive development framework by the Government of Uganda, with support from donors geared at the development of the war ravaged northern Uganda.

<sup>80</sup> See Peace, Recovery, and Development Plan (PRDP), Strategic Objective 4.

oput.<sup>81</sup> This, unfortunately, reinforced the sentiment that the LRA conflict is an Acholi conflict, requiring an Acholi solution, which is not the case since other ethnic groups in Uganda and others in South Sudan, the DRC and CAR were equally victimised by the LRA.

#### **6.5.1.2 Traditional justice mechanism in Acholiland**

Northern Uganda has a traditional system of law and justice that reflects the principles of conflict management with both retributive and restorative elements. The objective is to reintegrate the perpetrators into their communities and to reconcile them with the victims through a process of establishing the truth, confession, reparation, repentance and forgiveness.<sup>82</sup> According to the Acholi elders, the Acholi justice mechanisms are based on oral, spiritual and cultural laws that correspond to the level and intensity of a crime committed.<sup>83</sup> Although ritual Acholi practices differ across clans, there are general principles and beliefs that are commonly shared by the Acholi people. These include the voluntary nature of the process, mediation of truth, acknowledgement of wrongdoing and reconciliation through symbolic acts and spiritual appeasement. Different crimes or conflicts were always handled at different councils of elders, ranging from the hut to the compound, clan, inter-clan or intertribal levels.<sup>84</sup> For example, matters relating to domestic affairs were dealt with at the compound where a domestic row occurred. However, even if traditional mechanisms are being proposed, they should not necessarily be reformed to compete with the formal courts. Traditional justice should not be taken out of, or superimposed onto, an inappropriate context.<sup>85</sup>

According to Acholi traditions and customs, when an offender declares that he or she has committed a wrong, the traditional conflict management system is triggered since the

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<sup>81</sup> See P. Acirokop (2013:198).

<sup>82</sup> See R. Nakayi (2008:20).

<sup>83</sup> See K.E. Baines (2007:103).

<sup>84</sup> See K.E. Baines (2007:103).

<sup>85</sup> See Africa Transitional Justice Policy Framework (2012:8).

process identifies certain behaviors as “kir”, or taboo.<sup>86</sup> The most commonly known Acholi justice process is *Mato oput*,<sup>87</sup> which is applied in cases of accidental or purposeful killing of an individual.<sup>88</sup> The word ‘mato oput’ can be literally translated as ‘drinking the bitter root,’ an exercise that is intended to bridge the gap between two clans by reconciling them and relieving the killer of the evil spirits that make him an evil person. It is performed between the clans of the perpetrator and the victim. It is a transparent process in which the elders act as neutral arbitrators of disputes. It encompasses the principles of truth, accountability, compensation and restoration of relationships as other justice processes.<sup>89</sup> Mato oput has a core principle of truth telling, showing of remorse, atonement through the payment of compensation, forgiveness and healing. These are necessary prerequisites for reconciliation and accountability.<sup>90</sup> The process ceases to be about an individual victim or perpetrator and becomes a matter for the entire community. The process of *Mato Oput* addresses a ‘spiritual dimension’, as it was believed that the spirit of the dead remained restless with bitterness and consequently brought misfortune to both the perpetrators and offenders.

The practice of *Mato Oput* is done in three processes: the cleansing ceremony, the purification ceremony and the actual reconciliation ceremony of *Mato Oput*. The cleansing ceremony is performed upon the return of a person who has been away from a community for a significant period of time, or who has committed a crime. The *Mato Oput* ceremony is

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<sup>86</sup> See C. Villa-Vicencio et al (2005:131); R. Cecily and F.M. Ssekandi (2007:110). According to the latter authors, these behaviors may range from the criminal to the antisocial—violent acts, disputes over resources, and sexual misconduct – including behavior that would prevent the settlement of the dispute.” Clans must then cleanse the “kir” through rituals which help to reaffirm communal values. See also S.A. Lamwony (2007:11). Before the coming of the British colonialists in Acholiland, a person that was killed was compensated by a girl. However, since 1934 a compensation of ten cows replaced that of a girl by order of the colonial administrators. Therefore, according to the Acholi, life is sacred and when lost it cannot be found again except in another life for the posterity of the bereaved clan.

<sup>87</sup> “Mato Oput” or “Opwut” are Acholi words for drinking the bitter roots of the oput..

<sup>88</sup> See K.E. Baines (2007:104); J.R. Quinn (2005:22); M.J. Muwonge (2007:8); G. Chembezi (2010:40).

<sup>89</sup> See K.E. Baines (2007:104).

<sup>90</sup> See H.J. Steiner and P. Alston (2000:203).



done to cleanse the person of all foreign elements so as to prevent them from entering the community with misfortunes.<sup>91</sup> It involves an elder using an egg and a stick of a tender plant known as *pobo* to tie objects together. The *pobo* is ripped open into two parts and placed on a pathway leading into the homestead where the returnee/perpetrator is to report. A raw egg is then placed in the middle of the pathway. As s/he approaches his or her homestead, the perpetrator/returnee is sprinkled with water on the chest and on both legs and feet by the elder. This symbolises a washing act of the heart and feet.<sup>92</sup> He is then instructed to step on the egg and break it, and thereafter allowed to join the other members of the community on the opposite end. The act of stepping on the egg and breaking it symbolises innocence and newness of life after being purified.<sup>93</sup> He then interacts with the members of the community and confesses to the ills he committed while still in the rebel ranks. The elders of the offender's clan are informed of the crimes and a meeting convened to resolve the issue. The elders of the offender's clan approach the victim's clan and relay the news of the death of their son or daughter. They then pledge readiness to pay compensation for the actions of their offending son or daughter.

The involvement of the elders of the offender's clan in this reconciliation process signifies the guilt of the whole clan for the acts committed by one of their members. Any member of the offender's clan, regardless of the financial status, would be required to contribute to any material compensation that is paid to the offended clan as agreed upon with the clan elders of the victim's side. The implication of this principle of collective responsibility was a behavioural modification process within each clan that used social pressure to discourage misbehaviour.<sup>94</sup> The payment of the compensation is made with the celebration of the rite of reconciliation called *matto opwut*. This is the final act which concludes the process of reconciliation. The compensation paid by the offender's clan can be used by the family of the victim to marry another woman to replace the deceased.

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<sup>91</sup> See D.W. Nabudere (2008:13).

<sup>92</sup> See Liu Institute for Global Issues, Gulu District NGO Forum & Ker Kwaro Acholi (2005:10).

<sup>93</sup> See D.W. Nabudere (2008:13); M.J. Muwonge (2007:8).

<sup>94</sup> See Liu Institute for Global Issues, Gulu District NGO Forum & Ker Kwaro Acholi (2005:10).

The last rite of reconciliation is known as *Mato Oput*. This process involves purification for psychological, moral and social re-integration. It involves the initial purification rite, preparation of the reconciliation mix of fruit juice known as *acuga* and the roots called *opwut*.<sup>95</sup> The drinking of the bitter herb, *Oput*, by both clans is intended to wash away bitterness. The bitterness of the root symbolises the nature of the crime and the loss of life. *Mato Oput* can only occur when a sense of guilt and responsibility are assumed /recognised by the perpetrator. Despite acceptance of the perpetrators back into the communities, individual victims may not want to forgive the perpetrators of serious crimes.<sup>96</sup> As earlier noted in this thesis, the conflict spread to other parts such as Lango, west Nile, Teso, whose traditional justice mechanisms differ from those of the Acholi. Therefore, in some instances, the process of *Mato Oput* was not a viable mechanism because of a lack of a perpetrator's knowledge of their victim's identity. On the other hand, it was also difficult for the perpetrators to identify their victims since they operated outside their own communities.

Acholiland comprises several cultural groups with differing perspectives on attaining justice and reconciliation. Yet, the conflict spread to the neighbouring districts of Madi, West Nile, Teso, Lango and Southern Sudan, which comprise different ethnic groups with varying cultural beliefs, different from the principles and beliefs applied in *Mato Oput* in northern Uganda. This, therefore, makes *Mato Oput* an unviable mechanism to be applied across all communities to address all the crimes committed in the region.<sup>97</sup> The customary systems in most fall short of the internationally recognised human rights standards, especially in regard to their marginalisation of women.<sup>98</sup>

Related to the above, many of the crimes committed during the northern Uganda conflict were unheard of in Acholiland. Historically, the process of *Mato Oput* was applied in handling minor crimes. Considering the magnitude and the gravity of the crimes

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<sup>95</sup> See S.A. Lamwony (2007:11).

<sup>96</sup> See R. Nakayi (2008:25).

<sup>97</sup> See Liu Institute for Global Issues, Gulu District NGO Forum & Ker Kwaro Acholi (2005:67); F. Onyango (2007); JLOS (2009: 45); G. Chembezi, (2010:41).

<sup>98</sup> See JLOS (2009: 45).

committed, there is likely to be a problem of determining the compensation needed to reconcile the victims with the offenders.<sup>99</sup> While Acholi traditional systems can serve some aspects of reconciliation between the LRA and Acholi people, they cannot be expected to address crimes committed outside the Acholi region or to non-Acholi victims and their families or to address fully the crime of forced marriage and the other gender-based and sexual crimes carried out by the LRA, in addition to ensuring reparations to victims.<sup>100</sup> Therefore, it would be impossible to apply a traditional justice system such as *Mato Oput* to a situation it has never been used. This will ultimately result in a failure to pursue forgiveness and attain reconciliation, which purpose *Mato Oput* is geared at achieving.

Another dilemma that confronts the application of the process of *Mato Oput* is how the officers of the UPDF will submit to the process.<sup>101</sup> The UPDF consists of officers from different cultural groups across Uganda, with traditional justice practices that differ completely from those practised by communities in northern Uganda. This makes it difficult to submit officers who are non-Acholi to a process whose relevance they cannot understand. In addition, the alleged offences committed by the UPDF soldiers are covered under the UPDF Act, which prescribes the process to be followed in handling such crimes. However, the UPDF Act does not provide for the application of traditional justice in handling crimes committed by members of the UPDF.<sup>102</sup> Therefore, this dilemma raises fundamental questions as to whether the victims of the abuses of the UPDF would attain justice when the proceedings of their perpetrators are tried under the UPDF Act.

Despite the shortcomings of the *Mato oput* traditional justice system, the philosophy underlying the ceremony is that crimes under Acholi must not be left unpunished as evidenced by the fact that there is temporary family severance in ties till a cleansing ceremony is undertaken.

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<sup>99</sup> See H. Mukasa (2008).

<sup>100</sup> See K. Carlson and D. Mazurana (2006:252); G. Chembezi (2010:40).

<sup>101</sup> See H. Mukasa (2008).

<sup>102</sup> See H. Mukasa (2008:12).

### 6.5.1.3 The Madi traditional justice system

In Uganda, the Madi people are situated in the West Nile districts of Moyo and Adjumani. Moyo and Adjumani districts were some of the northern Ugandan districts that suffered the brunt of the conflict. The Madi people's traditional justice system is known as *Tolu*, and comprises of the elements of justice, reconciliation and compensation. The *Tolu* traditional justice system involves rituals of conducting cleansing ceremonies as is the case with *Mato Oput*. It was applied in resolving armed conflicts and involved the whole community. The rituals included the bending of spears to end hostilities, slaughtering of bulls to be shared by the fighting clans and the slaughtering of a ram for cleansing purposes.

Historically, the practice involved the killing of a human being instead of bulls as is the practice today. However, crimes such as murder, defilement, rape and terrorism can no longer be dealt with by the system of *Tolu*. This is because there is a formal justice system to handle such offences.<sup>103</sup> The Madi women have been socialised not to make rape allegations against Madi men.<sup>104</sup> Yet, rape is one of the crimes that was committed during the conflict. This makes this traditional justice system a non-viable option for attaining justice and reconciliation.

### 6.5.1.4 The Langi traditional justice system

The Lango sub-region is made up of the districts of Amolatar, Alebtong, Apac, Dokolo, Kole, Lira, Oyam, and Otuke. The traditional justice system practised by the Langi ethnic group is known as *Kayo Cuk* or the "Culo Kwor". This ritual ceremony involves the perpetrator making a confession of the crimes he committed and subsequently giving compensation to the victim. However, there is no written record of use of this process for war-related crimes. There continues to be confusion and skepticism both within the international community and Ugandan society about the effectiveness and legitimacy of the *Mato Oput*

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<sup>103</sup> See Report of the Uganda Coalition on the International Criminal Court (2006:10).

<sup>104</sup> See J. Ocen (2007:1).

and *Kayo Cuk*.<sup>105</sup> Cultural leaders in the Lango sub-region have stated that they are not ready to forgo the contemporary legal justice system for the traditional justice systems, particularly in regard to ensuring accountability for the LRA perpetrators.

While seeking public opinions regarding the recommendations for justice to be included in a final peace agreement, the then Prime Minister of the Lango Cultural Foundation, Faustino Olwit Engol, stressed that the Langi were not ready to embrace reconciliation with the LRA.<sup>106</sup> This is further compounded by a lack of knowledge on the rationale for or procedures of the *Kayo Cuk*, especially amongst women, who comprise the majority of victims of the LRA war.<sup>107</sup> This indicates that instead of ensuring reconciliation between the victims and the offenders, the traditional justice systems would otherwise do little to heal the wounds of the victims.

#### **6.5.6 Criticisms and likely challenges in implementing Transitional Justice Processes in Uganda**

As already highlighted in this chapter, Uganda has laid the foundation for implementing transitional justice. However, what remains is a policy to weave together the different TJ mechanisms. Whereas this can be said to be moves in the right direction, a number of criticisms have been levelled against the Uganda's chosen transitional justice path. Needless to say, the country faces and will most likely face significant challenges in this course of action. The criticisms and challenges are discussed below:

Uganda does not have a transitional justice policy, which would guide the process of dealing with a legacy of conflicts and address issues of gross human rights violations. Although the process for the development of a TJ policy started as early as 2008 during the

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<sup>105</sup> See Jessica Anderson, Rachel Bergenfield & Adam Levy, Documenting Local Justice and Reconciliation: A Casebook for Sustainable Peace in Northern Uganda, <http://www.davisprojectsforpeace.org/media/view/571/original/> (accessed on 13th February 2013).

<sup>106</sup> See Lango Cultural Leaders say No to Traditional Justice for LRA, available <http://ugandaradionetwork.com/a/story.php?s=14211> (accessed on 11<sup>th</sup> February 2013).

<sup>107</sup> See P. Tso (2010:9).

stalled Juba Peace Process, to date, there is no approved policy. The draft policy is awaiting approval by Cabinet and Parliament.

Related to the above is the perceived lack of good will by the political leadership to embrace the proposed TJ mechanisms in Uganda. This would be attributed to the fear by the government to have its officials and military officers implicated in the commission of crimes committed in the armed conflicts that have afflicted Uganda since independence.

The conflict in northern Uganda stretched from Acholiland to as far as Teso, Madi and Lango. Each of these communities has differing traditional justice systems. For example, the Acholi practice Mato Oput and the langi, Kayo Cuk. This raises a challenge of applying widespread practices of traditional ceremonies. It is also unlikely that these ethnic groups would be willing to accept the Acholis' Mato Oput as some kind of universal traditional rite, or whether the different systems could be harmonised.<sup>108</sup> The traditional justice system is culture-specific and not flexible. Each of those traditional practices is applied to a person who subscribes to a particular tradition. Therefore, since the victims and the perpetrators have different traditions, it is virtually impossible for the traditional justice system to be administered in such a scenario. The practice may not be readily acceptable to neighbouring communities, and this may limit its application.

The youth were simultaneously the primary victims and the primary actors in the conflict in northern Uganda.<sup>109</sup> The majority of them have never witnessed or gone through the experience of a traditional justice system. Even if traditional approaches are still meaningful and important in Acholi land, they are less relevant to such a group of people who were victims and perpetrators. This is especially true for young people who have grown up during a time of war, with restricted opportunities to experience or participate in

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<sup>108</sup> See J. Ocen (2007:54).

<sup>109</sup> See Annan et al (2006:32).

such practices.<sup>110</sup> Therefore, this poses a challenge in determining the kind of justice system to be applied in cases involving such a group of people.

The more than 20 years' conflict in northern Uganda resulted in atrocities such as massacres, mass rape, abduction, arson and mutilation, which crimes Acholi elders are unfamiliar with in the history of the region. Although variants of such crimes have existed in Acholi history (raids by northern Nubians and Arab slave traders), the modern scale and devastation on the population have not been witnessed before.<sup>111</sup> The traditional mechanisms are not appropriate for crimes committed on such a scale. The extent of the crimes and the damage is beyond anything for which these mechanisms were created, or previously used. Okello argues that the principle of retributive justice demands that there must be proportionality; the punishment must be commensurate with the crime.<sup>112</sup>

The challenge of financial resources poses a threat to the effective implementation of TJ in Uganda. The processes under the TJ mechanisms require enormous resources to implement. For example, truth commissions need to be supported and facilitated to be able to reach the different regions of the country. Reparations programmes to support the victims of gross human rights violations are expensive initiatives requiring concerted efforts on the part of stakeholders. Uganda is ranked among the poorest countries in the world and its capacity to finance TJ processes is questionable. Whereas it is expected that these TJ processes will be financially supported by the government and development partners, the pertinent question is how sustainable TJ initiatives will be maintained in the event that donors pull out. This is a pertinent issue to interrogate before the overall strategy of implementing TJ is rolled out. To better illustrate this issue, is the case where donors withdraw funding of the PRDP programme, which was a programme to support the reconstruction and development of northern Uganda. The withdrawal of donor funding

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<sup>110</sup> See L. Huyse (2008:109).

<sup>111</sup> See J. Ocen (2007:21).

<sup>112</sup> See L. Okello (2008:1).

greatly affected the programmes in the region, including the reintegration programme of LRA ex-combatants.

There have also been accusations that Uganda's transitional justice processes are mainly skewed towards one side of the conflict, which raises major questions about the fair, authentic, inclusive and transparent concerning its outcomes. It is not in dispute that with regard to the northern Uganda conflict there were two sides (LRA and UPDF) to it. However, in the ICC and the ICD, only one side's top leadership has been indicted and prosecuted despite the fact that victims, evidence and complaints of atrocities committed by all sides. Even under the Uganda Amnesty Commission and the ceremonies that have taken place under the traditional justice initiatives in northern Uganda, there have not been cases where the UPDF soldiers have submitted themselves to them.

The transitional justice processes in Uganda are largely driven by the government of Uganda and to a lesser extent by the donors, while largely ignoring or relegating the role of the victims and civil society to the periphery. In seeking to adopt and implement various transitional justice mechanisms, the government of Uganda has chosen to use a top-down approach that severely limits the participation of victims and civil society groups such as religious groups, cultural groups and NGOs.

This study has pointed out that armed conflict is part of Uganda's history from pre-colonial times, through colonial times and then finally in post-colonial times. Of all the conflicts Uganda has faced, the northern Uganda war is the longest and the most brutal. It is, however, important to note that efforts to develop the national transitional justice policy and mechanisms should not only focus on the LRA insurgency but all the conflicts that have afflicted the country. One of the criticisms raised against the transitional justice approach adopted and pursued by the government of Uganda is that it focused mainly on northern Uganda. This kind of approach significantly and yet dangerously concentrates on one region and disregards the fact that other parts of Uganda have also been afflicted by conflict at one time or another. This will make implementation of the policy difficult.



Uganda's transitional justice scheme, as reflected in the draft transitional justice policy, focuses on the period of 1986 to the present date. The draft policy only makes references in passing about the previous conflicts that occurred in Uganda. Yet, as pointed out in this study, armed conflicts in Uganda occurred before 1986. Without the period 1962 to 1986 being incorporated and embedded under both the policy and approach, it leaves millions of dissatisfied and discontented people from other conflicts. There is no doubt that the majority, if not all the conflicts in Uganda have not been isolated regional grievances but have their origins from ignored national grievances or disputes. It is therefore important the TJ mechanisms broadly reflect national character and capacity to address the root causes of conflicts in Uganda and their impact.

This study recommends the establishment of a Truth and Reconciliation Commission modelled on that of South Africa but with necessary modifications, taking into account the Ugandan situation. Such a proposed commission should have a legal foundation, with powers to investigate complaints brought to it and it should have the powers to investigate on its own accord. It should have jurisdiction over human rights abuses committed from 1962 to date. The proposed commission should have powers to oversee the truth telling processes, refer perpetrators to the DPP for prosecution and have authority to grant reparations to victims. The law should provide for the establishment of a Trust Fund for Victims to support the victims to gain access to means of improving their livelihoods. The law should further define cases that would be handled through traditional justice systems and the cases to be referred for conditional amnesties to the Uganda Amnesty Commission. To ensure close co-operation between the ICD and TRC, it is proposed that the latter be the first point of reference for cases not handled by the formal courts. For cases partly heard or investigated through the formal justice system but not concluded over a long period of time, the TRC should have the power to investigate into them.

## **6.6 CONCLUSION**

Despite their limitations in regard to gender inclusion and legal procedures, traditional African and reconciliation practices give expression to the need for a high level of participation by victims and other citizens in decision making and conflict resolution. It is

this level of inclusivity rather than the exact procedures of formal courts that enable them to make an important contribution to the post-conflict restoration that proponents of international law would take into account.<sup>113</sup>

Uganda today presents a unique challenge for transitional justice practitioners, civil society and human rights groups, as the country grapples to come to terms with its legacy of large-scale past abuses and to ensure accountability, serve justice and achieve sustainable peace and reconciliation.<sup>114</sup> As Villa-Vicencio puts it, 'An imposed form of justice that fails to enjoy local ownership and that fails to build positive and constructive relationships between former enemies as basis for redressing past wrongs is unlikely to stand the test of time. By the same token, reconciliation is not possible where the rights of individuals are not protected and those responsible for their suffering are able to prosper in their impunity'.<sup>115</sup>

It bears noting that each mechanism affects the progress of the other.<sup>116</sup> Challenges of implementing transitional justice approaches using both judicial and non-judicial measures in resolving the northern Uganda conflict has ignited debates on whether such a process can ensure forgiveness and reconciliation. There have been particular concerns about the application of traditional justice systems. These have revolved around questions on whether transitional justice processes could actually be viable options in fostering reconciliation. However, justice needs to form part of the accountability processes to send a strong signal that impunity cannot be tolerated. In the realm of judicial measures, Uganda is faced with the challenges of ensuring that the newly established ICD conforms to the principles laid down in the Rome Statute.

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<sup>113</sup> See C. Villa – Vicencio (2009:130).

<sup>114</sup> See Angelo Izama (2006); Human Rights Watch (2007); D. Westbrook (2000:5); The JLOS Technical Committee on Transitional Justice is composed of four different committees on Prosecutions, Truth Telling, Traditional Justice Mechanisms and Integrated Approaches.

<sup>115</sup> See C. Villa – Vicencio (2009:11).

<sup>116</sup> See H.N. Musoke (2009:125).

As has been noted in the discussion, there are on-going plans to establish a truth and reconciliation commission to examine the legacies of past violations of human rights that have bedeviled Uganda since it attained independence in 1962. This would provide an avenue for truth telling, where individuals disclose their actions and their victims. This would be part of the healing process and would foster reconciliation between the perpetrators and the victims. This creates the need to address all the gaps within the National Reconciliation Bill so that the law does not suffer from manipulation, which would affect its effectiveness. The process for the development of this Bill needs to be inclusive of all key stakeholders such as legal practitioners, human rights activists, civil society organisations, academics, advocates, religious leaders, and the international community, among others.

The National Reconciliation Bill, 2009 envisages the close working relationship between the National Reconciliation Forum, the Amnesty Commission, Equal Opportunities Commission (EOC) and the Uganda Human Rights Commission. In regard to the granting of amnesty, the Bill provides for a referral to the Amnesty Commission. However, there is a need to address the gaps in the Amnesty law in regard to the crimes that can be amnestied, unlike the current status that provides for blanket amnesty. Furthermore, underfunding the Amnesty Commission has also been a challenge. One of the core mandates of the Amnesty Commission is to ensure the reintegration of former combatants. Reintegration has occurred through the provision of start-up economic ventures to support the combatants' livelihoods. However, the underfunding challenges have prevented the Commission from providing support to former combatants, which can potentially drive them back to re-join the rebellion. A close scrutiny of the operations of the EOC shows that it is thin on the ground, with the only office located in Kampala. At the time of writing, the EOC tribunal has been established and is traversing the country to receive complaints of discrimination.

## CHAPTER SEVEN

### COMPARATIVE ANALYSIS OF THE USE OF TRANSITIONAL JUSTICE MECHANISMS IN SOUTH AFRICA, KENYA, RWANDA AND SIERRA LEONE

#### 7.1 INTRODUCTION

In many post-conflict countries, it is a fact that retributive justice as practised by international criminal courts or tribunals takes precedence over traditional justice mechanisms or processes.<sup>1</sup> Important to note, however, with regard to Africa, is that despite the fact that retributive justice exists in the formalised state structures, restorative justice remains highly favoured and existent mostly in informal community structures. Given the ethnic and cultural diversity in Africa, and more so Uganda, African conflict resolution mechanisms differ, even within one country, although there are some common traits. Thus Villa-Vicencio has noted,

“there must be peace for justice to prevail and there must be justice for peace to endure – requiring a form of justice that addresses the demands of transition and restoration along with accountability, which may include prosecutions. For this to occur, three salient principles need to be followed. First is the need to find an appropriate balance between accountability and human rights on the one hand, and peace and reconciliation on the other. This involves a compromise with which those directly involved in the conflict are prepared to live. The second principle reiterates the caveat that transformation can only achieve what is acceptable to those involved and what is possible at a given time and in a given place. Third, to ensure that neither justice nor reconciliation is sacrificed under the guise of good intentions by all who are party to the negotiations, peace pacts need to be subjected to relentless scrutiny – with special attention being given to the needs and demands of the oppressed who are struggling to overcome past abuses. For justice to endure and become part of the national fabric, it needs to be embodied and executed in functioning institutions. These principles require a balance between demands for trials as a basis for establishing the rule of law and a level of political reconciliation that is likely to entail legal compromises”.<sup>2</sup>

<sup>1</sup> See C. Villa-Vicencio (2009:133).

<sup>2</sup> See C. Villa – Vicencio (2009:39).

This chapter will examine and discuss how different transitional justice mechanisms have been used in South Africa, Rwanda, Kenya and Sierra Leone. These countries, in particular South Africa, Rwanda, and Sierra Leone can act as reference points for Uganda to draw lessons as it is at the critical stage of engaging with the transitional justice mechanisms. As regards South Africa, this study will provide insights into the truth telling process, reparations to the victims and how the country has dealt with the issue of amnesty, which has been a thorny issue in addressing the conflict in northern Uganda. In the case of Rwanda, the study will draw lessons on the application of traditional justice in the overall framework of international criminal justice. Rwanda applied the gacaca court system, which is a system of community justice inspired by Rwandan tradition, in bringing the perpetrators of crimes committed during the civil war. The experience of Rwanda with the traditional justice systems will provide an opportunity for Uganda to draw lessons. Sierra Leone is one of the countries to have used a hybrid court in addressing conflicts that are characterised by crimes of international nature. In addition, the country was also confronted with the issue of granting amnesty to perpetrators accused of committing international crimes.



Therefore, it is important that Uganda draws lessons on how to deal with the issue of amnesty and ensuring effective complementarity of the domestic and international judicial systems to avoid conflicting roles, which might undermine the ultimate goal of the two institutions—ensuring justice to the victims. Kenya in the aftermath of the 2007 general election experienced a conflict that resulted in the creation of a truth and reconciliation commission and a Special Court to bring the perpetrators of the most serious crimes to account. Although the former was established, gathered information, and released a report with names of those most responsible for committing crimes, its impact was limited for no one was prosecuted. Therefore, understanding the dynamics at play in Kenya is essentially important for Uganda, as it shows what needs to be done to ensure that the victims attain justice.

## 7.2 TRUTH COMMISSIONS

### 7.2.1 The case of South Africa

South Africa has a history of conflict. The past century was dominated by the struggle against apartheid, institutionalised segregation, discrimination, oppression and exploitation of the majority of the population on racial grounds.<sup>3</sup> Several attempts aimed towards unravelling the truth about the country's past have been underway since the late 1980s. There were previous attempts by both the National Party and the African National Congress to unravel the truth about the past.<sup>4</sup> The first commission to be instituted was the McNally Commission which was appointed in 1989 to examine claims of alleged presence of a hit squad.<sup>5</sup> Although the Commission concluded that the allegations were unfounded, however, later, there was evidence that showed that indeed the hit squad existed and it was committing atrocities.<sup>6</sup> A second commission, the Commission of Inquiry Regarding the Prevention of Public Violence and Intimidation (also known as the Goldstone Commission) was established to investigate political violence and intimidation that occurred between July 1991 and the 1994 general election that ended apartheid in South Africa.<sup>7</sup> The Goldstone Commission played a critical role in providing more substantiation of human rights abuses committed by the security forces, and in defusing tensions at the time apartheid was waning as the country moved towards democratic transition.<sup>8</sup> In its findings, the Goldstone Commission noted that the violence was fuelled by third parties and also reported on the involvement of the security forces in the violence.<sup>9</sup>

<sup>3</sup> See Bubenzer (2009:1); Y. Beigbeder (1999: 115).

<sup>4</sup> See E. Doxtader and C. Villa-Vicencio (2004:70); A. Stuart Farson and M. Phythian (2011:1).

<sup>5</sup> See M. Abduroaf (2010:7); M.Hugo (1999). Some of the evidence presented before the McNally Commission is in P. Harris (2012).

<sup>6</sup> See M.Hugo (1999:2); M. Abduroaf (2010:15); Amnesty International (1998: 13).

<sup>7</sup> See H.P.P. Lötter (1997:3); R.J Goldstone (1993:1); G.C. Melanie (2000:254); C. Gould and P. Folb (2002:117).

<sup>8</sup> See F. du Bois and A. du Bois-Pedain (2008:98); M. Abduroaf (2010:8); C. Gould and P. Folb (2002:117).

<sup>9</sup> See A. Hart (2010:350) states that the Goldstone Commission played a critical role in uncovering and publicizing allegations of grave wrongdoing by the South African security forces and bringing home to white South Africans the extensive violence that was being done in their name. J. Shaw (2007:62) also stresses that the Goldstone Commission uncovered evidence of senior police officers' involvement in human rights abuses. Shaw further stresses that the Commission's work helped calm tensions in the effort to end apartheid and to

Later, another commission known as the Steyn Commission was established to follow up on the findings of the Goldstone Commission, and to also examine the responsibility of high level military personnel.<sup>10</sup> It produced a report which resulted in the forced resignation of 23 high-ranking officers of the South African Defence Force (SADF).<sup>11</sup> However, the report also noted that it would be difficult to sustain cases against those implicated in the acts because of the extensive destruction of documents and other evidence. Further, there were also concerns over the safety of sources, the fear that those implicated would resort to murder if they felt threatened, and the fact that many role-players protected each other. The Steyn Commission found out that three companies, namely, Delta G, Roodeplaat Research laboratories, and Protechnick, were involved in developing chemical and biological weapons. The report recommended that prosecutions be instituted against subordinates within SADF, Civil Cooperation Bureau (CCB) which was a unit of the South African Police, and other covert units.

Later, two other commissions, the Commission of Enquiry into the complaints by Former ANC Prisoners and Detainees (also known as the Skweyiya Commission)<sup>12</sup> and the Commission of Enquiry into certain allegations of cruelty and human rights abuses against ANC prisoners and detainees by ANC members (commonly known as the *Motsuenyane* commission),<sup>13</sup> were established in the country by the African National Congress (ANC) in 1992 and 1993, respectively. The former was initiated by a group of 32 former ANC detainees and came against a backdrop of sustained public and private pressure on the

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create a political climate that set the ground for establishment of the South African Truth and Reconciliation Commission. See also M. Abduroaf (2010:8) and J. Grimes (2012:4).

<sup>10</sup> See R.J. Goldstone (1993a); M. Abduroaf (2010:7); J. Grimes (2012:4-5); H. van der Merwe (1999); C. Gould and P. Folb (2002:16).

<sup>11</sup> See H. van der Merwe (1999); M. Abduroaf (2010:7); C. Gould and P. Folb (2002:117).

<sup>12</sup> See J. Balint (2011:125); P.B. Hayner (2001:278); L. Kurtz(2008);H. van der Merwe (1999:1); H. Kriel (2007:28).

<sup>13</sup> See J. Balint (2011:125-6); P.B. Hayner (2001:278); L. Kurtz (2008); H. van der Merwe (1999); H. Kriel (2007:29).

organisation to give an account of its conduct during the years of exile. It was composed of two ANC members and one independent person and reported directly to the President. Its role was restricted to investigating allegations that had been raised by the former ANC detainees against the organisation concerning poor detention conditions, maltreatment and the loss or destruction of property in the ANC detention camps from 1979 to 1991, and to recommend further actions.<sup>14</sup>

The Skweyiya Commission heard evidence from 17 former ANC detainees, including 11 from the 'group of 32' and six ANC officials.<sup>15</sup> However, the challenge was that it did not have statutory powers and was unable to subpoena witnesses or offer witness protection, and relied on witnesses coming forward voluntarily.<sup>16</sup> The Commission's findings revealed that prisoners in the ANC camps were detained for long periods of up to three to seven years. They were held without trial in overcrowded detention facilities without ventilation, in solitary confinement, under poor hygienic and medical conditions.<sup>17</sup> The final report documented 29 cases of disappearances, however, no individual was named for being responsible for the acts. The Commission was also limited in its mandate since it did not include an investigation of cases of murder or execution, nor was it empowered to investigate other cases of detention reported to it but in which the victim had not personally complained to the ANC.<sup>18</sup> The report recommended the appointment of another commission to investigate disappearances and other abuses in an unbiased setting. The Skweyiya Commission did not address the question of responsibility for the abuses, although it did name several senior ANC officials whom it considered to bear some responsibility for the abuses which had occurred.<sup>19</sup>

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<sup>14</sup> See P.B. Hayner (2001:278); L. Kurtz (2008:4); H. van der Merwe (1999:10).

<sup>15</sup> This is cited in TRC Final Report (1998: vol 2, chapter 4, para. 112).

<sup>16</sup> See TRC Final Report (1998: vol 2, chapter 4, para. 112); H. Kriel (2007:29).

<sup>17</sup> See Report of the Commission of Enquiry into Complaints by former African National Congress Prisoners and Detainees (1992); see also TRC Final Report (1998: vol 2, chapter 4, para. 112); *T.R.H. Davenport (1998:32)*.

<sup>18</sup> See S. Ellis (1994:281); Amnsety International (1992:3).

<sup>19</sup> See S. Ellis (1994:281). For a detailed audit of the ANC conduct in the camps, see P. Trehwela (1993).



The *Motsuenyane* Commission was established to follow up on the work of the *Skweyiya* commission. Unlike the latter that was made up of two ANC and one independent commissioner, the *Motsuenyane* Commission was made up of three independent commissioners.<sup>20</sup> It operated for seven months, from February to August 1993. The final report of the commission was released on 23 August 1993. It documented 32 cases of torture and other abuses in ANC detention camps and named those responsible. Although it mentioned the names of two senior ANC officials whom it found to have committed errors of conduct, it avoided determining the question of which senior ANC leaders might by reason of their office, be held responsible for the abuses which had taken place in exile.<sup>21</sup> The report was made public and Nelson Mandela accepted collective responsibility on behalf of the ANC leadership.

The South African Truth and Reconciliation (TRC) was a unique innovation, breaking with the international pattern of TRCs giving blanket amnesty and presenting a limited and conditional amnesty in relation to gross human rights violations.<sup>22</sup> A unique combination of criminal accountability and amnesty proceedings embedded in the TRC was employed. An amnesty is only legitimate if it is absolutely necessary to end ongoing violence. Here, the South African approach of an investigative amnesty provides a novel model for overcoming the typical problems of transitional societies. It resolves the clash between the duty to prosecute and the interest in ending ongoing violence by accepting a partial waiver of punishment, while at the same time emphasising the need to investigate and acknowledge past injustice.

The South African TRC is a product of the South African people themselves, hoping that a truth-telling operation, including full disclosure of all human rights abuses, can ensure that

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<sup>20</sup> See The *Skweyiya* commission comprised of 3 commissioners, two of whom were ANC members, while the *Motsuenyane* commission was made up of three independent commissioners. See also S. Ellis (1994:282).

<sup>21</sup> See the *Motsuenyane* Commission report (1993);

<sup>22</sup> See J.S. Hughes (2004:3); T. Abrahamsen and H. van der Merwe (2005:1); H. van der Merwe & A.R. Chapman (2008:10), Bubenzer (2007:1); M. Abduroaf (2010:6).

the facts are not forgotten but remain alive in the memory for the benefit of peace and reconciliation. It does not preclude all prosecutions nor deny reparations.<sup>23</sup> When the notion of a post-apartheid Truth Commission for South Africa was raised in 1995, it was rejected and denounced by those who had most reason to fear that their past evils would be revealed in public. Uppermost in the minds of the denouncers was the spectre of the Nuremberg or Tokyo tribunals. On the other hand, victims and survivors expected justice.<sup>24</sup>

During the consultations before the formation of the TRC, some people had recommended harsh penalties for the perpetrators of apartheid crimes, while others felt that investigation of past wrongs would endanger the fragile new democracy at the time.<sup>25</sup> In other cases, some people said they wanted the past to be forgotten and preferred opening up a new chapter in the country's history.<sup>26</sup> In the end, the new government opted to establish a commission to document what had happened in South Africa during the apartheid era between 1960 and 1994.

The amnesty process sought to hold individual perpetrators accountable through a public process in which they were required to make full disclosures of their criminal actions. Although amnesty was not designed as part of the broader truth seeking and reconciliation processes, it presented an opportunity to facilitate reconciliation between the perpetrators and survivors of such human rights violations. It aimed both at inter-personal reconciliation between former offenders and survivors, as well as national unity between former political opponents.<sup>27</sup>

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<sup>23</sup> See M. Hugo (1999); M. Abduroaf (2010:9); D. Shelton (2000:17).

<sup>24</sup> See L. Fernandez (2005:65).

<sup>25</sup> See D.O. Velez (2013:1); A. Gouws (2006:150).

<sup>26</sup> See Denise O. Velez (2013).

<sup>27</sup> See T. Abrahamsen and H. van der Merwe (2005:1). It has also emphasised that full disclosure provided a semblance of accountability and promoted reconciliation through apology. However, identifying whether or not disclosure was the true record of what transpired was difficult to tell. This was due to the limited investigative capacity of the Commission. The Commission relied on official documents and secondary sources. This seemed to leave the Commission to rely heavily on statement-taking, primary investigations and cross examination by counsel for the victims.

There is little doubt that South Africa's choice of granting amnesty to persons who committed gross human rights violations was not in accordance with international law. South Africa's democracy was not sprung from a revolutionary overthrow, which allowed for relentless prosecution of state criminality perpetrated by the former regime. It was the result of a negotiated settlement in which hard compromises were reached, one of them being that there would be no large-scale prosecutions of Apartheid officials who perpetrated gross human rights violations.<sup>28</sup> However, it is equally clear that without prosecuting those who deserve to be prosecuted the entire TRC will unravel into a farce. In order to build public trust in the organs of justice and in the Rule of Law, it is important that perpetrators of gross human rights violations be prosecuted without fear, favour or prejudice. This is vital for the fostering of a culture in which human rights are seen to count and matter. People need to know and see that the criminal justice process has a predictable course.

The mandate of the TRC included: investigating the human rights violations that had occurred between 1960 and 1994 in South Africa; providing support to victims of human rights abuses and their families; and providing a record of the effects of apartheid on the South African society.<sup>29</sup> It was also to look into the circumstances, factors, and context of such violations, and provide opportunity to victims to tell their story, grant conditional amnesty, construct an impartial historical record of the past, and draft a reparations policy.<sup>30</sup> The granting of amnesty had in fact been agreed upon by the new Government of National Unity after the 1994 general elections. The Interim Constitution stated that 'amnesty shall be granted in respect of acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past'.<sup>31</sup> The wording of the provision seemed vague and did not prescribe what amnesty would entail. What

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<sup>28</sup> See L. Fernandez (2005:80).

<sup>29</sup> See TRC Act, section 3.

<sup>30</sup> See TRC Act, section 3.

<sup>31</sup> See Constitution of the Republic of South Africa Act 200 of 1993 (Preamble).

amnesty would entail was left to the political processes to work out the details. It was argued that the conditions at the time would not favour the defining of what amnesty would entail, as this would have undermined the momentum that had been built towards the country's transition from apartheid rule.<sup>32</sup>

Furthermore, the TRC was to compile a final report providing detailed accounts of the activities and findings of the commission, together with recommendations of measures to prevent future violations of human rights.<sup>33</sup> The TRC had three committees: the Committee on Human Rights Violations, the Reparations and Rehabilitation Committee, and the Amnesty Committee. Of the three, the Reparations and Rehabilitation Committee was the least publicised although its task was specifically to provide support to victims to restore their dignity,<sup>34</sup> which is a very important aspect in improving the livelihood of the victims and bringing them to terms with the psychological trauma that they face. It was also responsible for designing and making recommendations for a reparations programme. The Committee on Human Rights Violations was charged with the role of investigating human rights abuses that had occurred during the apartheid era.<sup>35</sup> It was to use the statements made to the TRC to find victims and then to refer the victims of gross human rights violations to the Reparations and Rehabilitation Committee. The Amnesty Committee was responsible for ensuring that applications for amnesty were dealt with in accordance with the provisions of the TRC Act. It was also authorised to grant or refuse amnesty to individuals who committed human rights abuses.<sup>36</sup>

For a person to qualify for amnesty, two basic preconditions needed to be satisfied: the person's crime had to meet the definition of acts associated with a political objective as contained in the TRC Act, and the person had to provide full disclosure of the acts for which

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<sup>32</sup> See [http://truth.www.wits.ac.za/cat\\_descr.php?cat=3](http://truth.www.wits.ac.za/cat_descr.php?cat=3) (accessed on 22<sup>nd</sup> May 2016).

<sup>33</sup> See TRC Act, section 3.

<sup>34</sup> See M. Abduroaf (2010:10); M. Luseka (2000: Chapter 2).

<sup>35</sup> See TRC Act, section 12.

<sup>36</sup> See TRC Act, Ch. 4.

amnesty was sought.<sup>37</sup> The TRC received 7112 amnesty applications, the majority of which were from police officers and a few from the political leaders and military officers. Amnesty was granted in 849 cases and refused in 5392 cases, while other applications were withdrawn. Those who were granted amnesty had their names, information about the act, omission or offence in respect of which amnesty had been granted published in the Government Gazette.<sup>38</sup>

The TRC Act also specified categories of individuals who were eligible to be granted amnesty.<sup>39</sup> These included members of political organisations, liberation movements and members of state security forces. Any person who acted for personal gain would not qualify for amnesty, except if he or she received money or anything of value for being an informer.<sup>40</sup> Furthermore, a person who had committed a crime motivated by personal malice, ill will or spite was not granted amnesty.<sup>41</sup> If the crime was a gross violation of human rights, the Amnesty Committee had to conduct a public hearing before granting amnesty.<sup>42</sup> Each amnesty application had to be approved by then President, Mandela before it became final.<sup>43</sup>

The TRC had powers to subpoena, search, and seize enforced by domestic law enforcement officials.<sup>44</sup> Subpoenaed individuals were entitled to legal counsel, but they had to answer questions truthfully, even if such answers were self-incriminating. Individuals who asked to be granted amnesty were not required to make a formal apology or show sincere feelings of remorse in order to be granted amnesty, but instead reconciliation was sought

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<sup>37</sup> See TRC Act, section 20. For a detailed elaboration of acts associated with a political objective, see TRC Act, section 20 (3).

<sup>38</sup> See TRC Act, section 20 (6).

<sup>39</sup> See TRC Act, section 21 (2) (a)-(g).

<sup>40</sup> See TRC Act, section 21 (f) (i).

<sup>41</sup> See TRC Act, section 21 (3) (ii).

<sup>42</sup> See TRC Act, section 19(3) (b) (iii).

<sup>43</sup> See TRC Act, section 28.

<sup>44</sup> See TRC Act, section 29.

through the perpetrators' and survivors' own truth-telling of the incidents of gross human rights violations.<sup>45</sup> This remains one of the most controversial aspects of the South African amnesty process, particularly in relation to how survivors experienced the process. In this case, freedom was exchanged for truth, where the perpetrators had to speak out the truth in regard to their actions in order to be free. By the TRC emphasising social reconciliation, it was actually contributing to the idea of restorative justice, largely because retributive justice was unattainable. Public shaming that came through the open nature of the TRC procedures substituted reasonably well for penal justice. Mobekk is of the view that exposure is a punishment, which is a powerful component of accountability.<sup>46</sup> Exposing and shaming perpetrators is certainly better than letting them rewrite history, especially if some social healing and recognition of victims' experiences can be realised.

Information and evidence obtained by the TRC during the amnesty proceedings, whether by testimony or by subpoena, was not admissible in domestic courts. Out of the 7 112 perpetrators who applied for amnesty, only 849 were granted. 5 392 amnesty applications were rejected, and few of these individuals were later prosecuted, and thousands remained untouched. Some of the applications were rejected by the Committee on grounds that there was no political objective, the incident for which amnesty was applied for fell beyond the cut-off date for amnesty, thus rendering their applications defective. In other cases, the applicants argued that they had been wrongly convicted. In other incidents, some individuals were granted amnesty for certain incidents but not others. The amnesty process required that applications involving gross human rights violations be heard in public. Some applicants were denied and others granted amnesty after public hearings.<sup>47</sup>

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<sup>45</sup> See TRC Act, preamble tagged the granting of amnesty to full disclosure. See also T. Abrahamsen & H. van der Merwe (2005:2); K. Avruch and B. Vejarano (2000:41).

<sup>46</sup> See E. Mobekk (2005:268). This assertion was also expressed in Centre for the Study of Violence and Reconciliation and Friedrich-Ebert-Stiftung (2007:10-11); T.C. Call (2004:10).

<sup>47</sup> See Amnesty and the Truth and Reconciliation Commission, University of the Witwatersrand, retrieved from [http://truth.wvl.wits.ac.za/cat\\_descr.php?cat=3](http://truth.wvl.wits.ac.za/cat_descr.php?cat=3) (accessed on 20<sup>th</sup> June 2013); Legal Information Institute, South African Truth Commission, retrieved from [http://www.law.cornell.edu/wex/south\\_african\\_truth\\_commission](http://www.law.cornell.edu/wex/south_african_truth_commission) (accessed on 20<sup>th</sup> June 2013).

Most of those who sought amnesty had already been convicted through the courts and were in jail when they applied for amnesty. Others, however, were free, having not yet been convicted or even indicted.

Inherent in this amnesty for truth deal was a threat of prosecutions for those who did not apply for amnesty.<sup>48</sup> Non-convicts who were unwilling to participate in the amnesty process were threatened with prosecution in order to ensure that they were part in the process. The Committee decided that not only those who testified before the TRC about the harm they suffered were eligible for reparations. This incentive resulted in an increase in the number of people willing to testify. Victims who testified before the TRC surrendered their right to seek damages in court, and therefore were entitled to compensation for the abuses committed against them. Unfortunately, the government began paying compensation to victims in December 2003, five years after the TRC had presented its findings. A fund of 660m rand (US\$100m) was set aside to make one-off payments of 30 000 Rand to 22 000 victims - considerably less than the 3bn Rand fund recommended by the TRC.<sup>49</sup>

Amnesty also had significant legal consequences. Any pending legal proceedings were terminated, and those serving a sentence for the forgiven act were immediately released, and any criminal record of the offense expunged.<sup>50</sup> It also resulted in immunity against both criminal and civil liability, but civil judgments that had already been handed down for the forgiven act were not reversed. Amnesty afforded transactional immunity, unless the Committee later discovered that the applicant had failed to make full disclosure.

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<sup>48</sup> See Merwe (2009:2); J. Dugard (1999:1012); Tutu urges apartheid prosecutions, *BBC News*, 16 December 2005.

<sup>49</sup> See [http://www.ekkleisia.co.uk/content/news\\_syndication/article\\_051217tutu.shtml](http://www.ekkleisia.co.uk/content/news_syndication/article_051217tutu.shtml), (accessed on 20<sup>th</sup> January 2015). See also Tutu urges apartheid prosecutions, *BBC News*, 16 December 2005.

<sup>50</sup> See TRC Act, section 20(8)(a); Legal Information Institute 'South African Truth Commission: Overview' available at [http://www.law.cornell.edu/wex/south\\_african\\_truth\\_commission](http://www.law.cornell.edu/wex/south_african_truth_commission) (accessed on 24th September 2015).

Furthermore, the TRC did not enjoy the co-operation of the military and the politicians who were implicated in gross human rights violations.<sup>51</sup> On the side of the military, majority of the amnesty applicants were foot soldiers in the security forces and those who had already been imprisoned or were facing charges. Senior leaders in the security forces did not apply for amnesty. The members of the liberation movement argued that they had conducted a just war, and therefore their actions did not constitute gross violations of human rights.

In addition, the TRC focused its attention on actual cases and acts, but did not focus on the antecedents, causes, organizations, ideologies and perspectives that gave rise to the acts. The TRC appeared to assume that the purpose of these hearings was to document the nature of human rights abuses that took place within particular institutions and sectors.<sup>52</sup> Participation of the amnesty applicants and the victims in the proceedings of the TRC was also hampered by fears of reprisals by their victims and abusers who were still at large, while others especially women feared to tell their stories, as they felt they would be humiliated or rejected.<sup>53</sup> Ex-combatants were usually less prepared to identify themselves as victims. For example, the participation of ex-combatants in the TRC was limited primarily to the amnesty hearings. Ex-combatants expressed concerns that they had been left out of the amnesty process.

On 29 October 1998, the TRC handed over its final report to the then President, Nelson Mandela. However, there were attempts by former President, De Klerk, and the ANC to block the publication of the report because it had implicated them for being culpable for gross violations of human rights during the apartheid period.<sup>54</sup> The TRC decided to temporarily excise a small section of the report which implicated De Klerk, pending final

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<sup>51</sup> See Encyclopaedia Britannica, Truth and Reconciliation Commission, South Africa (TRC), available at <http://www.britannica.com/EBchecked/topic/607421/Truth-and-Reconciliation-Commission-South-Africa-TRC/288203/Challenges-and-limitations> (accessed on 21st June 2013).

<sup>52</sup> M. Abduroaf (2010:22).

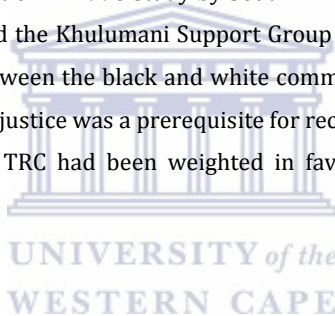
<sup>53</sup> See C.M. Renzetti (2009:119); Legal Information Institute, South African Truth Commission, retrieved from [http://www.law.cornell.edu/wex/south\\_african\\_truth\\_commission](http://www.law.cornell.edu/wex/south_african_truth_commission) (accessed on 20th June 2013).

<sup>54</sup> See P. van Zyl (1999:11); N. Ankatell (2013:17).



legal settlement of the matter in early 1999. The ANC argued that the TRC had failed to properly consider its objections to the TRC's findings regarding the party's responsibility for human rights abuses. However, the ANC's objections were rejected by the TRC. On the release of the TRC Report in 1998, the TRC and President Mandela made strong recommendations for criminal proceedings to be instituted where there was evidence of gross human rights violations. However, the government and the NPA implemented the recommendations reluctantly.<sup>55</sup>

The lack of a clear commitment and concentrated efforts after 1998 essentially reveal a lack of political will on the part of the government to support post-TRC prosecutions. This undermined efforts aimed at national reconciliation. A 1998 study by South Africa's Centre for the Study of Violence and Reconciliation and the Khulumani Support Group found that the TRC had failed to achieve reconciliation between the black and white communities, by stating that majority of the people believed that justice was a prerequisite for reconciliation rather than an alternative to it, and that the TRC had been weighted in favour of the perpetrators of abuse.



### 7.2.2 The case of Sierra Leone

The Truth and Reconciliation Commission (TRC) for Sierra Leone<sup>56</sup> had its origins in the Lomé Peace Agreement of 7 July 1999, which was a negotiated truce between the Government of Sierra Leonean and the Revolutionary United Front (RUF).<sup>57</sup> The establishment of the Sierra Leone TRC came against a backdrop of an 11-year-old conflict

<sup>55</sup> See Bubenzer (2007:229-30).

<sup>56</sup> See Truth and Reconciliation Act, 2000, Supplement to the Sierra Leone Gazette Vol. CXXXI, No. 9 (2000).

<sup>57</sup> See Article XXVI of the Lomé Peace Agreement under the section entitled "Human Rights Violation," states:

1. A Truth and Reconciliation Commission shall be established to address impunity, break the cycle of violence, provide a forum for both the victims and perpetrators of human rights violations to tell their story, get a clear picture of the past in order to facilitate genuine healing and reconciliation.

2. In the spirit of national reconciliation, the Commission shall deal with the question of human rights violations since the beginning of the Sierra Leonean conflict in 1991. This Commission shall, among other things, recommend measures to be taken for the rehabilitation of victims of human rights violations.

that had caused enormous destruction of property and loss of lives. It was established with a mandate to “create an impartial historical antecedence of the war; keeping records of violations and abuses of human rights and international humanitarian law related to the armed conflict in Sierra Leone, from the beginning of the conflict in 1991 to the signing of the Lomé Peace Agreement; to address impunity, to respond to the needs of victims, promote healing and reconciliation and to prevent a repetition of the violations and abuses suffered”.<sup>58</sup> Due to renewed fighting between the warring parties in May 2000, the process of creating the TRC stalled until 22 July 2002 when the Sierra Leonean parliament enacted the law establishing the body.<sup>59</sup> However, during this period, there was debate on the question of amnesty that had been laid down in the Lomé Agreement. The provision in the agreement thus read:

**PARDON AND AMNESTY**

1. In order to bring lasting peace to Sierra Leone, the Government of Sierra Leone shall take appropriate legal steps to grant Corporal Foday Sankoh absolute and free pardon.
2. After the signing of the present Agreement, the Government of Sierra Leone shall also grant absolute and free pardon and reprieve to all combatants and collaborators in respect of anything done by them in pursuit of their objectives, up to the time of the signing of the present Agreement.
3. To consolidate the peace and promote the cause of national reconciliation, the Government of Sierra Leone shall ensure that no official or judicial action is taken against any member of the RUF/SL [Revolutionary United Front], ex-AFRC [Armed Forces Revolutionary Council], ex-SLA [Sierra Leone Army] or CDF [Civilian Defence Forces] in respect of anything done by them in pursuit of their objectives as members of those organisations, since March 1991, up to the time of signing the present Agreement. In addition, legislative and other measures necessary to guarantee immunity to former combatants, exiles and other persons, currently outside the country for reasons related to the armed conflict shall be adopted ensuring the full exercise of their civil and political rights, with a view to their reintegration within a framework of full legality.<sup>60</sup>

It was argued that the inclusion of the amnesty clause in the Agreement was influenced by the desire to bring an end to the conflict. In fact, the then Sierra Leonean Attorney-General and Minister of Justice in Kabbah’s government, Solomon Berewa, supported the inclusion

<sup>58</sup> See Section 6, Sierra Leone TRC Act, 2000.

<sup>59</sup> See W.A. Schabas (2004:6); L. Connolly (2012:16); J.P. Pham (2008:54).

<sup>60</sup> See Part 3, Article IX of the Accord.

of the clause in the Agreement, arguing that “the RUF would have refused to sign the Agreement if the Government of Sierra Leone had insisted on including in it a provision for prosecutorial action against the RUF and had excluded the amnesty provision from the Agreement.”<sup>61</sup> The pardon granted to Fordoy Sankoh by virtue of the above provision was in light of his conviction to death in absentia for his attempted coup d’état in 1997. The UN objected to the inclusion of a clause guaranteeing amnesty to perpetrators of international crimes.<sup>62</sup>

The TRC Act also specified steps for the selection of commissioners on the Commission.<sup>63</sup> Four members of the commission were to be Sierra Leoneans, while there were international persons whose names were put forward by the UN High Commission for Human Rights. The TRC had the powers to require any source, including the government, to provide it with any information or materials considered relevant to its work; to visit any place without giving prior notice, and to enter any land or premises for any purpose related to the Commission’s mandate; to interview any individual or representative of a group, organisation, or institution; to request any person to meet with the Commission or its staff and answer questions, or attend a session or hearing; to order people to give information or materials it needs to do its work, by sending them “summonses” or “subpoenas.” The Commission also had powers to require that statements be given under oath or affirmation; to request information from the relevant authorities of foreign countries and to gather information from victims, witnesses, government officials, and others in foreign countries and to receive assistance from the police to enforce its powers.

Unlike the South African TRC that had Committees that were assigned different tasks, the Sierra Leonean TRC generally carried out its work in phases, with each phase dedicated to

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<sup>61</sup> See S. Berewa, “Addressing Impunity Using Divergent Approaches: The Truth and Reconciliation Commission and the Special Court” at <http://www.sierra-leone.org/trcbook-solomonberewa.html> (accessed on 25th January 2005); L. Gberie (2005:209) J.P. Pham (2008:61); P. Addo (2005:39).

<sup>62</sup> See B.K. Dougherty (2004:40); P. Addo (2005:34); E.L. Lutz and E. Babbitt (2009).

<sup>63</sup> See TRC Schedule relating to the Procedure for the Selection of Nominees for Appointment to the Commission.

a particular task. It planned for four months of statement taking, four months of public hearings, and four months of report writing. Research and investigations did not begin until April 2003. The hearings of the Commission were highly publicised through the media. The hearings were aired live on radio, and an half-hour summary was presented on television each night.

The TRC also followed the example adopted by the South African TRC in having closed hearings that involved women giving their experiences, especially in cases relating to sexual abuse. Women commissioners conducted hearings of cases involving testimonies of women in issues that pertained to sexual abuse and such sessions were attended by only female staff. As was the practice to have a video record of all hearings, in this case, the identity of the person giving her testimony was hidden for protection purposes. The closing of the hearings involving women giving testimonies in cases of sexual abuse was critical in providing Commissioners an understanding of the nature and the circumstances and context of these violations. Closed hearings were also a form of witness protection to those who wished to testify in camera. In situations where perpetrators were cited during public hearings, the Commission attempted to find those persons to allow a facilitated exchange between victim and perpetrator, if the victim wished. Testimonies of children were specifically heard only in closed session.

The TRC handed over its Final Report to Sierra Leonean President, Tejan Kabbah, and the United Nations Security Council on 5 October 2004 and 27 October 2004, respectively. Unlike the other truth commissions that make recommendations that have no force of law, the Sierra Leonean recommendations were legally binding. The recommendations were divided into four categories: "Imperative", "Work Towards", "Seriously Consider", and "Calls on". "Imperative" recommendations are those which government is under strict obligation to implement and are meant to uphold rights and values that the TRC found to be lacking in Sierra Leone. They require immediate implementation or as soon as possible. The "Work Towards" recommendations are those that require in-depth planning and the collecting of resources in order to ensure their implementation. These require the government to take measures to make them possible and to do so within a reasonable time

period. In the “Seriously Consider” category, the government is expected to engage in thorough evaluation of the recommendations. However, it is under no obligation to implement them. Under the “Calls On” category, the recommendations are directed at bodies that do not form part of the Executive or the Legislative arms of government or that are non- governmental bodies or members of the international community. In this case, the TRC “calls on” the body in question to implement the recommendation.

### **7.2.3 The case in Kenya**

The establishment of the Truth, Justice and Reconciliation Commission (TJRC) in Kenya was a product of the National Dialogue and Reconciliation process that followed the violence after the December 2007 disputed elections. The TJRC was part of the accountability component under Agenda Item Four of the National Accord Reconciliation Agreement (NARA) signed in 2008. Agenda Item Four sought to address long-term issues, including undertaking constitutional, legal and institutional reforms; land reform; tackling poverty and inequality as well as combating regional development imbalances; tackling unemployment, particularly among the youth; consolidating national cohesion and unity; and addressing transparency, accountability and impunity. The formation of the TJRC as an accountability mechanism resulted from Kenya’s unwillingness to set up a Special Tribunal and a referral of its situation to the ICC, and instead opted for a commission to deal with the perpetrators of the 2007 post-election violence.

Pursuant to the TJRC Agreement, the National Assembly enacted the Truth, Justice and Reconciliation Act (TJR Act) on 23 October 2008 that established the TRC. The Act received Presidential Assent on 28 November 2008 and came into operation on 17 March 2009. The TJRC had a mandate to investigate the gross human rights violations and other historical injustices in Kenya between 12 December 1963 and 28 February 2008.<sup>64</sup> The TJRC had powers to: 1) Gather information, documents, records and to compel production of such; 2) Visit any establishment or place without notice and carry out their mandate; 3) Interview any individual, group or organization; 4) Require any person to meet the commission or its

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<sup>64</sup> See Established by an Act of Parliament, Act No. 6 of 2008.

staff and to compel such attendance; 5) Request for information from an entity in a foreign country; 6) Require that statement be made under oath or affirmation; 7) Summons any retired or serving public officer; 8) Issue summonses to people; and 9) Request and receive police assistance.<sup>65</sup> The commission was to be composed of nine members, three of whom were to be non-nationals who were to be selected by the Panel of Eminent African Personalities for nomination by the National Assembly, while the six were to be Kenyan citizens selected by the Selection Panel. The selection panel was to comprise of two people nominated by the Joint Forum of Religious Organizations and seven people, each representing the following institutions: Law Society of Kenya, Federation of Women Lawyers, Central Organization of Trade Unions and Kenya National union of Teachers, Association Professional Societies of East Africa, Kenya National Human Rights Commission, Kenya Private sector Alliance, and Kenya Medical Association.

The hearings of the commission were to be public, unless where the security of the perpetrators, victims or witnesses was threatened or in the interest of justice. The Act provided also for amnesty for anyone whose matter fell under the jurisdiction of the TJRC. However, this provision excluded perpetrators of gross human rights violations, including persons implicated in extra-judicial killings, enforced disappearances, sexual assault, rape and torture.<sup>66</sup> This was in line with international norms that deny the granting of blanket amnesty, especially in respect of perpetrators of international crimes. Before granting amnesty, the Commission had to consider two grounds. In the case of human rights violations, the Commissions had to consider the objections of the victims, while in cases of economic crimes, focus was on whether restitutions had been effected.

In considering the application for amnesty, the Commission was required to consider the following: 1). The motive of the person; 2). The Context in which the act or omission or offence took place; 3). The legal and factual nature and gravity of the of the act, omission of offence; 4). The objective of the act or omission; 5). Whether the act was committed in

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<sup>65</sup> See TJRC Act 2008.

<sup>66</sup> See TJRC Act, s. 34(3).

execution of an order or not; and 6). The relationship between the act and the political objective pursued.

The work of the TJRC was accomplished by seven different departments. These were: the department of Finance and Administration;<sup>67</sup> the department of Communications;<sup>68</sup> the Special Support Services Unit;<sup>69</sup> the department of Legal Affairs;<sup>70</sup> the department of Investigations;<sup>71</sup> the department of Research;<sup>72</sup> and the Civic Education and Outreach Unit.<sup>73</sup> The commission's work was structured in four phases. These were statement-taking, conducting of public and private hearings, holding of Thematic and event hearings, and Institutional hearings. In terms of statement-taking procedure, victims were offered opportunities to tell the truth about their experiences and those of their close friends and relatives. The commission considered human rights violations that had occurred between 12 December 1963 and 28 February 2008. The phase of conducting of public and private hearings had victims, perpetrators and experts giving their testimonies relating to gross

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<sup>67</sup> This was responsible for providing support to the commission by organizing the logistical and administrative aspects of the commission's budget and finances.

<sup>68</sup> This department was charged with linking the commission and the public, through the provision of information to the media and ensuring public's access to the commission's proceedings and encouraging particularly victims of human rights violations to participate in the commission's proceedings, and facilitating national discourse.

<sup>69</sup> This was charged with working with the specific vulnerable groups, such as women, children, and people with disabilities, by giving emphasis on gender based violations, and ensuring that witnesses communicate in their chosen language, and focusing on the treatment of witness and their families.

<sup>70</sup> This unit was responsible for managing of all the commission's legal issues, through giving legal support and advice, organizing hearings, and providing support to the victims and witnesses in conjunction with the Special Services Unit.

<sup>71</sup> This had the role of collecting, analyzing, and providing the necessary evidence and information for the commission to run smoothly, through enabling the commission to construct a complete historical record by interviewing and collecting evidence from victims and witnesses of the gross human rights violations and mapping out scenes of violence for the commission's site visits.

<sup>72</sup> This was tasked with conducting research relating to the commission's mandate, assisting the research of other units within the commission, and coordinating the writing of the commission's final report.

<sup>73</sup> This was charged with educating and engaging the public in the workings of the commission.

violations of human rights. Under individual hearing phase, the focus was on individual cases and their experiences in relation to gross human rights violations and other issues under the jurisdiction of the commission. In the thematic and event hearings, focus was on specific types of violations and other broad themes under the jurisdiction of the commission. The phase of institutional hearings focused on the role played by institutions with respect to human rights abuses under the Commission's jurisdiction. The community dialogues involved discussions on the issues under the mandate of the Commission. These dialogues often brought together different groups across the country, including chiefs, women and youth to chart ways of establishing reconciliation, harmonious co-existence and national unity.

On 22 May 2013, the TJRC presented its Final Report to President Uhuru Kenyatta after much delay amidst allegations of its having been doctored. The Report implicated scores of current and former members of parliament, former provincial commissioners and senior military and police officers of alleged involvement in land grabbing, fanning ethnic clashes, brutal crackdown by security forces at the height of repression, and violations of torture.<sup>74</sup> It also recommends investigations and prosecutions for those involved in the acts, regardless of their status. The commission also directed the Director of Public Prosecutions to ensure that the individuals implicated in cases of ethnic violence by the previous commissions of inquiry are investigated and prosecuted. The previous commissions of inquiry included the Parliamentary Select Committee to Investigate Ethnic Clashes in Western Kenya and Other Parts of Kenya (known as the Kiliku Commission),<sup>75</sup> the Judicial Commission of Inquiry into Tribal Clashes in Kenya (known as the Akiwumi Commission),<sup>76</sup> and the report on the 2007/2008 Post-Election Violence. The report also

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<sup>74</sup> See TJRC Final Report (2013); Uhuru Kenyatta, William Ruto among 400 named in Truth Justice and Reconciliation Commission report, *Standard Digital*, 22 May 2013.

<sup>75</sup> This was appointed on 13 May 1992 by a resolution of the National Assembly passed on 29 April 1992.

<sup>76</sup> This Commission was established by Gazette Notice No. 3312 of 1 July 1998, with a mandate to investigate the underlying causes of the clashes, to investigate the action taken by the law enforcement officers and to assess the level of preparedness and effectiveness of the law enforcers in curbing the clashes, and to recommend the prosecution or further investigation into the conduct of those who might have participated in



recommended the establishment of the Implementation Committee to manage and administer the reparations program. The Commission noted that reparations should be undertaken through the court system and administrative programmes. It further found that reparations for victims would not be possible for each individual, but noted that some would be awarded reparations. However, it noted that the bulk of the awards would be channelled towards collective reparation programmes. These were to be established by the National Assembly through a separate proposed law, namely, the Committee for the Implementation of the Recommendations of the Truth, Justice and Reconciliation Commission Act. In December 2013, the Kenyan National Assembly adopted a resolution that would give it powers to alter or expunge parts of the report.<sup>77</sup> This enabled the National Assembly to delete the names of their close allies highlighted in the report, which would thus deny the victims justice. In 2015, President Uhuru Kenyatta created US\$110 million Restorative Justice Fund for victims. The Fund is to help not only victims of the 2007/2008 post-election violence, but also those that had suffered historical injustices. However, the fund has not yet been operationalized. The government has developed the draft Public Finance Management (Reparations for Historical Injustices Fund) Regulations, 2017 under the Public Finance Management Act to anchor the Restorative Justice Fund into a legal framework.<sup>78</sup> It is hoped that the Fund will contribute to the rebuilding of the lives of survivors of the PEV through providing them compensations and livelihood support.

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the clashes, suggest ways and means of eradicating the clashes in the future and to investigate any matter that may be related to the clashes. The Commission presented its report to the then President, Arap Moi on 31 July 1999. However, it was not made public until more than three years later, when the Attorney General, following a court order, published it on 18 October 2002. It is noteworthy that the AG published the report together with a parallel report. However, the Attorney General produced a parallel report in order to water down the contents of the Akiwumi report, accusing the Commission of among others things depending on extraneous evidence, its failure to lead evidence in open proceedings and bias against the Maasai and Kalenjin community.

<sup>77</sup> See the Truth, Justice and Reconciliation *Amendment Act* of 2013 (TJR *Amendment Act*).

<sup>78</sup> See Speech of Hon. Prof. Githu Muigai, Attorney General of the Republic of Kenya, during the International Day for the Rights to the Truth concerning Gross Human Rights Violations and for the Dignity of Victims held at the Inter-Continental Hotel, Friday, 24<sup>th</sup> March 2017.

In December the same year, victims of past human rights violations and mass violence petitioned the National Assembly asking it to formally adopt the TJRC report and enact the necessary legislation to implement its recommendations.<sup>79</sup> At the time of writing, the report had not been debated by the legislative body, which undermines victims' access to justice and reparations.

#### 7.2.4 The situation in Rwanda

In Africa, societies transitioning from conflict to peace commonly adopt traditional justice processes to complement prosecutions, truth commissions and other transitional justice processes to deal with violations committed during the violent times. The term 'gacaca' comes from the Kinyarwanda words 'gacaca' or 'Urucaca' or even 'Umucaca', meaning a patch of grass usually under a tree where people would meet to discuss or settle disputes between community members.<sup>80</sup> The *gacaca* is a traditional community-based mechanism of dispute resolution and a literal translation into English is 'lawn' or 'yard', referring to the fact that parties to a dispute as well as members of the *gacaca* sit on the grass whilst determining the dispute.<sup>81</sup>

The *Gacaca* courts adjudicated over minor conflicts relating to the ownership of property after divorce, property inheritance, payment of a debt, and division of land, and their decisions were not binding.<sup>82</sup> The parties could resort to ordinary courts for redress if dissatisfied with the *Gacaca*. The *Gacaca* law prohibits lawyers, career magistrates, politicians, soldiers and policemen in active service, and civil servants from standing as judges of the *gacaca*.<sup>83</sup> Advocates of restorative justice suggest that the presence of legal counsel or active prosecutors in the *gacaca* process would 'steal' the conflict and the responsibility for its resolution from the fractured community, and thereby retard reconciliation.

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<sup>79</sup> ICTJ (2015).

<sup>80</sup> See C. Villa-Vicencio et al (2005:88); J.D. Mucyo (2001: 49); J. Sarkin (2001:54).

<sup>81</sup> See C. Mibenge (2004:3); K.C. Doughty (2011:9).

<sup>82</sup> See J. Herrmann (2012:4; H. Among (2012:120).

<sup>83</sup> C. Villa-Vicencio et al (2005:90).

In 1994, following a surge in the number of genocide suspects overwhelming the national courts, the Rwandan government modified and adopted the traditional Gacaca courts to include punitive and restorative measures in order to end impunity by prosecuting all perpetrators, ensuring the participation of all Rwandans in realising justice, and providing opportunities for truth telling and facilitating national reconciliation.<sup>84</sup> In order to speed up the genocide trials and reduce the prison population, the government launched 11 000 community courts (gacaca).<sup>85</sup> Gacaca is often referred to as Rwanda's answer to demands of transitional justice, and has been described as 'the most ambitious transitional justice measure ever attempted'.<sup>86</sup> It almost exclusively focuses on accountability for the 1994 genocide, whilst neglecting other instruments of transitional justice. Yet, in order to be effective, transitional justice needs to include several measures that complement one another.<sup>87</sup> The gacaca courts incorporate the traditional values of Rwandan dispute resolution mechanisms. The gacaca trials, in particular, allowed for the restoration of a connection between survivors and their community through the mechanism of community restorative justice. The gacaca trials allowed all members of the community to take part in the reconciliation and justice process.<sup>88</sup> Accessibility is a crucial component of the fundamental right to a remedy. Gacaca gave the Rwandans an opportunity to access justice. The courts were brought nearer to the people, judges were known to and elected by people, and the accused was brought near his or her place of abode to defend himself.

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<sup>84</sup> See, Organic Law N° 40/2000 of 26 January 2001 setting up Gacaca Jurisdictions and Organizing Prosecutions for Offences Constituting the Crime of Genocide or Crimes against Humanity Committed Between 1 October 1990 and 31 December 1994, retrieved from <http://www.refworld.org/pdfid/452e37514.pdf> (Accessed 11th June 2013). See also C. Wibabara (2013:1); J. Sarkin (2001:63).

<sup>85</sup> See J. Herrmann (2012:4); H. Among (2012:120).

<sup>86</sup> See J. Herrmann (2012:4); K.C. Doughty (2011:9).

<sup>87</sup> See J. Herrmann (2012:4); K.C. Doughty (2011:10); H. Among (2012:120).

<sup>88</sup> See C. De Ycaza (2004:13); L.E. Carter (2008:45-6); C. Wibabara (2013:157).

Crimes were divided into four categories. Category 1 suspects including mass murders, rapists and persons who helped plan and execute the genocide were initially allocated to Rwanda's conventional courts. Category 2-4 included people whose criminal acts or participation caused death (category 2), who were guilty of other serious assault (category 3), and who committed an offense against someone's property (category 4). The gacaca courts are an innovative attempt to promote accountability and the rule of law and, but most importantly they are a relatively speedy way of handling the prosecution of hundreds of thousands of imprisoned Rwandans.

The gacaca courts had the powers to summons any person to appear before them whose contribution they considered necessary; order or carry out search of the defendant's property; take protective measures; pronounce sentences and fix damages to be awarded; order the withdrawal of the distraint of acquitted persons' property; order, if necessary, a person's appearance before the prosecution for purposes of augmenting the information required in the investigation; issue justice warrants to alleged perpetrators of offences; and order the detention in prevention, whenever necessary.<sup>89</sup>

*Gacaca* courts relied solely on the testimonies provided by witnesses, survivors and confessions by the accused to determine the outcome of a case. However, some of the testimonies were false, contradictory and unsubstantiated.<sup>90</sup> This resulted in the trial and conviction of innocent persons, and in some instances, with the knowledge of the *Inyangamugayos* who opted to sympathise with the victims instead of punishing them or rejecting such testimonies. Although punishment against anyone who refused to testify or give false testimony during trial was specified in the law, such conduct was rampant and rarely punished. In addition, most trials were open to the public, but there were problems regarding the intimidation of witnesses, which compromised their security. In some instances, survivors were killed while going to testify.<sup>91</sup>

<sup>89</sup> See Organic Law No.16/2004, Article 39.

<sup>90</sup> See F. Sheikh (2005:5); L. Eramian (2008:12); P. Clark (2010:122).

<sup>91</sup> See F. Sheikh (2005:5); C. Wibabara (2013:166). For a detailed analysis of the atrocities committed against the survivors, see African Rights and Redress (2008:2).

The gacaca process in Rwanda was also blemished by political interference on the part of the Rwandan government, which explains the non-prosecution of the RPF soldiers alleged to have committed war crimes and crimes against humanity during the conflict. The Rwandan government has been especially reluctant to prosecute RPF soldiers for what it terms “revenge killings” against Hutu civilians in 1994, and it has successfully blocked the UN International Criminal Tribunal for Rwanda from investigating such crimes,<sup>92</sup> arguing that such prosecutions could create a dangerous moral equivalence between war crimes and genocide that would promote genocide denial. The government has also been unwilling to institute other non-prosecutorial processes, such as a truth commission or vetting, to handle those crimes. In addition, there were shortcomings from the Rwandan government in terms of providing reparations to victims, due to the limited capacity of the National Assistance Fund for Needy Victims of Genocide and Massacres Committed in Rwanda (FARG) to assist all those survivors in need.<sup>93</sup> The Gacaca court system officially closed on 18 June 2012 after several deadline extensions. However, despite all misgivings regarding the quality of truth-finding in the Gacaca trials, this kind of trial was an affirmative state practice acknowledging the customary rights of victims of human rights violations to know the truth about what happened to them or their next of kin.

### 7.2.5 The case in Uganda

Like other countries emerging from conflict that have established truth commissions to unravel the human rights violations of the past, Uganda has also founded two under the sponsorship of its governments in a bid to gather the truth and the perpetrators of the atrocities committed during different periods. The first Commission—Commission of Inquiry into the Disappearance of People in Uganda<sup>94</sup>—was set up in 1978, while the second one—the Commission of Inquiry into the Violation of Human Rights<sup>95</sup>—was put in

<sup>92</sup> See HRW (2008: 4); L. Waldorf (2006:16); HRW (2011); C. Wibabara (2013:169); P.C Bornkamm (2012: 143).

<sup>93</sup> See P.C Bornkamm (2012:156); C. Wibabara (2013:165).

<sup>94</sup> See The Commission of Inquiry (Cap. 56), Legal Notice No. 2 of 1974.

<sup>95</sup> See The Commissions of Inquiry Act, Legal Notice No. 5 (May 16, 1986).

place in 1986. The former was established to investigate the disappearance of people by the security forces during the formative years of the then regime of Idi Amin Dada. The regime opted for this approach in order to redeem the image of the then government as a result of the increasing number of disappearances. It was a cosmetic gesture towards the international community so as to distance itself from the acts. The Commission implicated the special security agencies formed by Amin for the disappearances,<sup>96</sup> and army officers for abusing their powers. The Commission, in its recommendations, called for the reformation of the police and security forces, and the training of law enforcement officials in the legal rights of citizens. What is surprising is that the report of the Commission was never made public. One wonders why the government would conceal the report of the Commission and not make it public, yet by putting in place a Commission, it had expressed political will to address the disappearances of people, which cases were rife then. However, from the Commission's findings, the involvement of the army and other security agencies seems to have deterred the government from making the report public. In fact, to reinforce this point, it is important to understand the actions of the government towards the Commission. The Commission, in the course of its work, often faced political interference and intimidation. In fact, immediately after the submission of the report, the Pakistani Judge who chaired the Commission lost his job. Another commissioner was framed with murder charges and sentenced to death, while the third fled the country to avoid arrest.<sup>97</sup> In addition, the Commission's recommendations were never implemented. The experience of this Commission demonstrates the difficulty truth commissions face in extracting information about the past, especially if it involved inquiring into the actions of a sitting government or state authority. It also shows the difficulty of such a body operating in an intimidating environment that does not guarantee the safety of the Commission, which compromises its independence in executing its role.

Unlike the former Commission that did not produce any tangible results, the Commission of Inquiry into the Violation of Human Rights (CIHRV), to a large extent, achieved the purpose

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<sup>96</sup> See P.B. Hayner (1994:612); J.R. Quinn (2003:3).

<sup>97</sup> See P.B. Hayner (1994:612); R. Carver (1990:399).

for which it was established. However, just like is the case with state-sponsored commissions, the CIHRV also focused on atrocities committed by the previous governments and not by the successor regime.<sup>98</sup> The atrocities committed by the new regime were largely ignored and this denied the public the opportunity to know the truth about its conduct in its ascendance to power. Like the Commission created under Amin's regime, the CIHRV also suffered from a lack of political will to fully implement its recommendations and underfunding, which affected its staffing levels, the capacity to conduct investigations, as well inadequate office space.<sup>99</sup>

Currently, Uganda is in the process of establishing a Transitional Justice Policy to address the legacy of mass human rights violations and abuses that have been committed in the country. A truth commission under this framework is envisaged as a forum where the past would be brought to light so that the truth is established. However, in order to confront the underlying causes behind the country's legacy of conflicts, there is need to undertake this approach through an objective, independent, inclusive, participatory process, which is aimed at transformation. At the time of writing this report, the TJ policy development process had stalled due to government's unwillingness to provide the necessary resources to facilitate the process.

## **7.3 PROSECUTIONS**

### **7.3.1 The situation in South Africa**

In its final report, the TRC recommended more than 800 cases for further investigation and possible prosecution. In 2004, the National Prosecuting Authority (NPA) established a special unit to investigate these cases and institute prosecutions where necessary. In order to demonstrate its readiness and willingness to implement the TRC's recommendations, the NPA later arrested Gideon Nieuwoudt, a former police colonel, in 2004, marking the

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<sup>98</sup> See BJP/IJR Parliamentary Training Report (2009:11); B.P Hayner (1994:614);

<sup>99</sup> See J.R. Quinn (2005:17-18); J.R. Quinn (2013:243).

first post-TRC prosecutions.<sup>100</sup> However, this sparked controversy, which resulted in the Government suspending further prosecutions and insisting that the National Department of Public Prosecutions be given guidelines to balance the sensitivities of national reconciliation in its selection of cases. These guidelines were reportedly reviewed by Cabinet in June of 2005. In December 2005, a new National Prosecution Policy that gave the National Director of Public Prosecutions wide discretion whether or not to prosecute was enacted.<sup>101</sup> The NPA is empowered to make these assessments without public scrutiny and without making information about the case public (other than the final decision).

However, in 2008, the Pretoria High Court ruled that the policy was unconstitutional, unlawful and invalid as it would amount to immunity against prosecution for individuals who had not co-operated with or had been denied amnesty by the TRC. The court thus allowed prosecutions to continue. In October 2007, a United States Court of Appeal ruled that it had jurisdiction to hear a case concerning multinational corporations accused of “aiding and abetting” apartheid.<sup>102</sup> The law suit was lodged by South African residents who suffered under the racist regime from 1948 to 1994, against more than 50 international corporations. These included: IBM and International Computers Ltd that provided the computers that enabled South Africa to create the hated pass book system and to control the black South African population; Car manufacturers such as Ford and General Motors, which provided the armored vehicles that were used to patrol the townships; Arms manufacturers and oil companies that violated the embargoes on sales to South Africa;

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<sup>100</sup> See J. Sarkin (2004: 373); L. Mallinder (2009:106); Traces of Truth: Documents relating to the South African Truth and Reconciliation Commission, available at [http://truth.wvl.wits.ac.za/cat\\_descr.php?cat=5](http://truth.wvl.wits.ac.za/cat_descr.php?cat=5) (accessed on 17<sup>th</sup> June 2013).

<sup>101</sup> See L. Mallinder (2009:113-4); S. Benton (2006).

<sup>102</sup> See L. Knutson (2010:30); T. Adamski (2011:1518); W. Richey, U.S. High Court Allows Apartheid Claims against Multinationals, *Christian Science Monitor*, available at <http://www.globalpolicy.org/component/content/article/163/28129.html> (accessed on 21st June 2013); see also <https://www.ictj.org/news/south-africa-us-judge-rules-against-apartheid-claim> (accessed on 20th January 2015).



Rheinmetall Group, Daimler, and the banks that provided the funding that enabled South Africa to expand its police and security apparatus.

In 2007, the then President, Thabo Mbeki, instituted a process to grant special pardons and amnesties granted by the TRC Amnesty Committee.<sup>103</sup> Applications for a presidential pardon could be processed through a committee consisting of political party representatives.

The prosecution policy allows for prosecutions for apartheid era abuses to be quietly settled 'behind closed doors'. This process has been continued by Mbeki's successors, Motlanthe and Zuma. However, a network of South African civil society organisations challenged the special pardons process in domestic courts on grounds that they were developed without public consultation, and would deny survivors and the public any say in the process or information about the abuses that might be revealed to the committee. In 2008, the Pretoria High Court declared the Prosecution Policy's amendments unconstitutional and in 2010, the Constitutional Court upheld the right of victims to be consulted before political pardons were granted.<sup>104</sup>

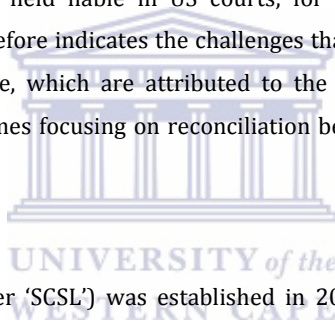
On 10 January 2008, the defendant companies petitioned the US Supreme Court, asking it to hear their appeal in regard to the October 2007 decision of the US Court of Appeal for the Second Circuit. In May 2008, the US Supreme Court declared that it could not intervene in the case since four of its nine justices had to recuse themselves for apparent conflicts. Because of lack of the required quorum to hear the case, the Supreme Court decided to uphold the decision of the Second Circuit Court of Appeals allowing the lawsuit to proceed. On 8 April 2009, the federal district court issued a ruling in this case,

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<sup>103</sup> See Address of the then President of South Africa, Thabo Mbeki to the joint sitting of Parliament to report on the processing of some Presidential Pardons, 21 November 2007, Cape Town, available at <http://www.anc.org.za/show.php?id=4240> (accessed on 22<sup>nd</sup> April 2016).

<sup>104</sup> See The Centre for the Study of Violence and Reconciliation, Transitional justice Programme, available at <http://www.csvr.org.za/index.php/programmes/transitional-justice.html> (accessed on 17th June 2013); see also <https://www.ictj.org/our-work/regions-and-countries/south-africa> (accessed on 20th November 2015).

narrowing the claims in the case, but allowed the case to continue against Daimler, Ford, General Motors, IBM and Rheinmetall Group. In August 2013, the US Court of Appeals for the Second Circuit returned the case to the lower court and recommended dismissing the case, citing the US Supreme Court's limitation on extraterritorial application of the Alien Tort Claims Act in *Kiobel v Shell*. On 26 December 2013, the lower court issued an order dismissing Daimler and Rheinmetall from the case, but the court declined to dismiss the claims against IBM and Ford. On 27 February 2012, the plaintiffs reached a settlement with US General Motors. In June 2014 the US Supreme Court dismissed the claim of the victims of apartheid. Attempts by the victims to appeal against the dismissal were rejected by the U.S. Supreme Court, thereby upholding an earlier ruling by the lower U.S. District Court, which held that IBM and Ford could not be held liable in US courts, for actions by its subsidiaries based in South Africa. This therefore indicates the challenges that confront the processes embedded in transitional justice, which are attributed to the competing needs of pursuing justice, while at the same times focusing on reconciliation between the victims and the perpetrators.



### 7.3.2 The case of Sierra Leone

The Special Court for Sierra Leone (hereinafter 'SCSL') was established in 2002 by the Government of Sierra Leone and the United Nations. It was set up in response to a request by the Government of Sierra Leone to the United Nations in 2000 for a special court to address serious crimes against civilians and UN peacekeepers committed during the 1991-2002 civil war in the country. The SCSL had jurisdiction over persons alleged to have committed crimes against humanity,<sup>105</sup> violations against Article 3 common to the Geneva Conventions and of Additional Protocol II,<sup>106</sup> other serious violations of international humanitarian law,<sup>107</sup> and certain serious violations of Sierra Leonean law.<sup>108</sup> The inclusion of domestic crimes in the SCSL Statute was done in an attempt to legitimise and revitalise the existing domestic legal system, which had been viewed as being complex and

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<sup>105</sup> See Art.2.

<sup>106</sup> See Art.3.

<sup>107</sup> See Art.4.

<sup>108</sup> See Art.5.

inaccessible.<sup>109</sup> Furthermore, because of the gaps in international criminal law regarding arson and crimes against girls, it was imperative to ground the court in the domestic perspective and circumstances of the Sierra Leone conflict. Some suggest that including domestic crimes was a diplomatic gesture to the Sierra Leone legal profession. However, the decision not to include violations of domestic law in the indictments may be pragmatic in view of potential complications arising out of, for example, the Lomé Peace Agreement and adjustments to the rules of procedure and evidence that may have been necessary for prosecutions under domestic law.

However, the court had no jurisdiction over those under the age of 15.<sup>110</sup> Any person before court, who at the time of the alleged commission of the crime was aged between 15 and 18 had to be treated with dignity and a sense of worth, taking into account his or her young age and the desirability of promoting his or her rehabilitation, reintegration into and assumption of a constructive role in society, and in accordance with internationally recognised human rights standards, in particular the rights of the child.

The Statute of the Special Court also asserts that amnesty does not bar prosecution of any person alleged to have committed crimes under the jurisdiction of the Court.<sup>111</sup> While the Sierra Leone Truth and Reconciliation Commission had the mandate to offer amnesty to any person who appeared before it, under the Special Court, one was not immune from prosecution even when he or she had been granted the same. The Appeals Chamber of the Special Court, in the case of *Prosecutor v Kallon and Kamara*, held that the amnesty granted by Sierra Leone cannot cover crimes under international law that are the subject of universal jurisdiction.<sup>112</sup> The Court's ruling is a very important precedent in affirming the prosecution of international crimes.

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<sup>109</sup> See D.J. Macaluso (2001-2002:362).

<sup>110</sup> See Art. 7.

<sup>111</sup> See Art. 10.

<sup>112</sup> See *Prosecutor v Kallon and Kamara*, Decision on challenge to JurisdictionL Lome Accord Amnesty, Case Nos. SCSL-2004-15-AR 72 (E) and SCSL-2004-16-AR72(E), 13 March 2004.

The Residual Special Court for Sierra Leone (RSCSL) was established pursuant to an agreement signed between the United Nations and the Government of Sierra Leone on 11 August 2010. It was ratified by Parliament on 15 December 2011 and signed into law on 1 February 2012. Its principal seat is in Freetown, but its functions are carried out at an interim seat in The Netherlands with a sub-office in Freetown for witness and victim protection and support.

Negotiations between the two entities (the UN and the Sierra Leone government) on the structure of the court and its mandate produced the world's first "hybrid" international criminal tribunal. It was the first modern international tribunal to sit in the country where the crimes took place, and the first to have an effective outreach programme on the ground. Further, it was superior to any court of Sierra Leone and could take precedence in cases of possible conflicting jurisdiction. Previous amnesties contrary to the remit of the court would be invalid. The Special Court for Sierra Leone was the first international court to be funded by voluntary contributions and, in 2013, became the first court to complete its mandate and transition to a residual mechanism.



### **7.3.3 The case of Kenya**

The prosecution of the perpetrators of the 2011 Post-election violence has been one of the key recommendations in the reports of both the Commission of Inquiry on Post-Election Violence (CIPEV)—also known as the Waki Commission, and that of Truth, Justice and Reconciliation Commission (TJRC). The former recommended for the establishment of a Special Tribunal comprising of national and international judges to seek accountability of persons bearing the greatest responsibility for crimes, particularly crimes against humanity, relating to the 2007 general elections in Kenya. The report had given a timeline of six months within which this recommendation was to be effected. The CIPEV report also urged parliament to accelerate the enactment of the International Crimes Bill 2008 in order to facilitate investigation and prosecution of crimes against humanity. It further called for the full utilisation of the Witness Protection Act 2008 in the protection of all witnesses who

would need such protection in the course of investigation, prosecution and adjudication of PEV cases.

The TJRC report recommended the investigation and prosecution of all adverse persons, regardless of their official or other status, mentioned in official reports on politically instigated ethnic violence or clashes. In December 2008, Kenya enacted the International Crimes Act<sup>113</sup> to domesticate the Rome Statute. This was in a bid to demonstrate to the international community the government's willingness to resolve the accountability question for perpetrators of the PEV and its commitment to implementing the recommendations highlighted in the CIPEV report.

However, on 12 February 2009, the Kenyan parliament voted against a constitutional amendment bill establishing the proposed tribunal.<sup>114</sup> It has been argued that the establishment of the Tribunal lacked the political will of both parties.<sup>115</sup> Later attempts to have the Tribunal established also failed.<sup>116</sup> On 9 July 2009, Kofi Annan handed an envelope with the names of the perpetrators of the 2007 post-election violence to Luis Moreno-Ocampo, the then ICC Prosecutor. However, on 30 July 2013, the Kenyan government issued a statement rejecting both a Special Tribunal and a referral to the ICC, and instead opted for a Truth, Justice and Reconciliation Commission (TJRC) to deal with the perpetrators of the 2007 post-election violence. This development demonstrated the Kenyan government's unwillingness to prosecute the perpetrators of the election violence and set the ground for the ICC to intervene and conduct investigations and subsequently to start prosecutions.<sup>117</sup>

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<sup>113</sup> See Act No. 16 of 2008. The act makes provision for the punishment of certain international crimes, namely genocide, crimes against humanity, and war crimes, and enables Kenya to cooperate with the ICC. The International Crimes Act came into force on January 1, 2009, and was gazetted on June 5, 2009.

<sup>114</sup> See Y. Dutton (2013:146); ICTJ (2013).

<sup>115</sup> See Y. Dutton (2013:146); ICTJ (2013).

<sup>116</sup> See H.T. Obel (2011:1-35); B.S. and C.L. Sriram (2012:244-60).

<sup>117</sup> In this case, the Kenyan government was unwilling to genuinely to carry out the investigation or prosecution. See Rome Statute, Art. 17.

At the time of writing, the prosecution against the current President of Kenya, Uhuru, had been terminated while the prosecution of his Deputy, William Ruto, had been dismissed for want of evidence. However, the events that unfolded at the commencement of the prosecutions show the challenges that the ICC faces and which have a bearing on attaining justice in as far as international criminal justice is concerned. The prosecution against Kenyatta, the first of the kind for a sitting President, raised discontent from the African Union, which urged for a unilateral withdrawal of the regional bloc from the ICC and the withdrawal of the case from the Court. The resolution of the African Union seemed to shield sitting presidents from prosecution, but at same time it provides ground for furtherance of impunity for perpetrators of international crimes, while hiding behind the shadow of immunity for sitting Heads of States. This puts the effectiveness of the Court in question since its work relies on the support of States Parties. The ICC also raised concern over Kenya's non-co-operation with the Court in as far as access to information to be used by the prosecution side is concerned. In fact, the failure of the Kenyan government to release key documents and to allow access to the witnesses were some the reasons raised by the ICC Prosecutor, Fatou Bensouda, while withdrawing charges against Francis Muthaura, who was Kenyatta's co-accused.<sup>118</sup> In other cases, the witnesses were too afraid to testify for the prosecution, while others had refused to speak with the prosecution. In December 2014, the ICC Prosecutor withdrew charges against Kenyatta, citing the death of witnesses, fear of witnesses testifying, withdrawals of witnesses and change of witness accounts and the government of Kenya's non-cooperation with the Court.<sup>119</sup>

It has been argued that the ICC's investigations and prosecutions in Kenya contributed to the stability of the country and the entire East African region of which Kenya is a key political, economic and social leech-pad. Since 2007, Kenya has acquired stability and has a

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<sup>118</sup> See J. Kaberia (2013:1). See also BCC News (2013).

<sup>119</sup> See Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the withdrawal of charges against Mr. Uhuru Muigai Kenyatta, retrieved from [http://www.icc-cpi.int/en\\_menus/icc/press%20and%20media/press%20releases/Pages/otp-statement-05-12-2014-2.aspx](http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/otp-statement-05-12-2014-2.aspx) (accessed on 17th January 2015).

projected real GDP growth rate of 5.7% for 2013.<sup>120</sup> The political and economic collapse of Kenya would have had a disastrous effect on the entire Eastern African region, including Somalia and Sudan.

The Kenyan government has also come up with a mechanism through which to ensure domestic accountability for perpetrators of crimes committed during the post-election period. On 20 April 2012, a multi-agency task force comprising the Office of the Director of Public Prosecutions (DPP), the State Law Office, the Ministry of Justice, National Cohesion and Constitutional Affairs, the Witness Protection Unit and the Police Service was established to review the 6000 cases arising out of the 2007/2008 post-election violence that had been arbitrarily shelved by the Office of the Attorney General.<sup>121</sup> An audit by the Attorney-General's office in 2009 had indicated that only 156 of these cases had been investigated and they all related to relatively minor offenses such as theft, house-breaking, malicious damage to property, publishing false rumors, criminal possession of offensive weapons, and robbery with violence, assaulting police officers, and breach of the peace. The Task Force reviewed all the 6000 cases, identified 1716 suspects and 420 potential witnesses. At the time of writing, four people had been prosecuted for murder, and 150 were facing charges of sexual and gender based violence.<sup>122</sup> The State was yet to issue its official report concerning the prosecutions although various reports of the Office of the DPP placed the number of prosecutions below 30, majority of which had ended up in acquittals.<sup>123</sup> This situation, therefore, casts doubt on whether justice which has been elusive for the victims since 2011 will ever be achieved.

#### **7.3.4 The case of Rwanda**

After the 1994 genocide in Rwanda, both the international community and the government of Rwanda embarked on the process of prosecuting alleged perpetrators as a way of

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<sup>120</sup> See L. Stewart (2001:1).

<sup>121</sup> See Kenyan Universal Periodic Review Report to the United Nations Human Rights Council (2012:17); FIDH/KHRC (2013:8).

<sup>122</sup> See FIDH/KHRC (2013:8); Amnesty International (2014:26).

<sup>123</sup> See FIDH/KHRC (2013:8); Amnesty International (2014:26).

ensuring justice and also promoting social reconstruction. Eradicating impunity is a prerequisite for peaceful coexistence followed by social cohesion, but it also implies the systematic capture, trial and sentencing of all those involved in the commission of gross human rights violations.<sup>124</sup> The prosecution of individuals who bore the greatest responsibility for the crimes committed during the 1994 Rwanda civil war were held at the International Criminal Tribunal for Rwanda (ICTR) based in Arusha, Tanzania, in national courts in Belgium and Switzerland, and under the country's local judicial system, *gacaca*.

The ICTR was established by UN Security Council Resolution 955 of 8 November 1994 with the purpose of prosecuting persons responsible for genocide, other serious violations of international humanitarian law committed in the territory of Rwanda, Rwandan citizens responsible for genocide, and other such violations committed in the territory of neighboring States between 1 January and 31 December 1994.<sup>125</sup> This was the first international court of law to have been established to prosecute high-ranking individuals for massive human rights violations in Africa. The tribunal had jurisdiction over genocide, crimes against humanity and war crimes, which are defined as violations of Common Article Three and Additional Protocol II of the Geneva Conventions (dealing with war crimes committed during internal conflicts). Suffice to say that by creating the ICTR, as a judicial organ, the UN was acting under Chapter VII of the UN Charter that gives it the power to take action with respect to threats to peace, breaches of peace, and acts of aggression and make recommendations or decide what measures to take to maintain or restore international peace and security. The Rwandan government viewed the creation of the ICTR as an indispensable component in ensuring the effective delivery of justice, rebuilding a broken society, and establishing an identity as a victim state.<sup>126</sup>

As of 20 February 2013, the ICTR had completed its work at the trial level with respect to 90 of the 93 accused persons. These included 55 first-instance judgments involving 75

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<sup>124</sup> J.D. Mucyo (2001:49); J. Sarkin (2001:54).

<sup>125</sup> See UNSC Res. 955 of 8 November 1994; P.M. Scharf (1998:1).

<sup>126</sup> See V. Peskin (2008:153).



accused persons, two withdrawn indictments, three indictees who died prior to or in the course of the trial and 10 referrals to national jurisdictions.<sup>127</sup> The 10 referrals included four apprehended accused persons – two of whom were on trial in France, one on trial in Rwanda, and one in Arusha pending appeal of his referral to Rwanda, as well as six fugitive cases which were referred to Rwanda. The Prosecutor stated that the three remaining fugitives, Kabuga, Mpiranya, and Bizimana, would be tried by the Mechanism for International Criminal Tribunals (MICT)<sup>128</sup> when arrested. The ICTR had acquitted 12 persons, and three other convicts, who have completed their sentences.<sup>129</sup>

However, since its creation, the tribunal was dogged by corruption, mismanagement and incompetence.<sup>130</sup> The long duration and pace of the genocide trials was a matter of concern which was attributed to the absence of a clear prosecutorial strategy, poor case management and courtroom control by the judges and a largely incompetent administration.<sup>131</sup> The tribunal was accused of squandering time and resources in prosecuting low-level suspects rather than the high-ranking political and military leadership, most of who were apprehended by 1999.

Although its mandate encompassed national reconciliation, the tribunal did little outreach to Rwanda, with the result being that most Rwandans remain poorly informed about its work. There was widespread lack of knowledge and awareness about the ICTR<sup>132</sup> which limited the participation of the victims in its process. Although it set up an outreach office in the capital Kigali, the impact of this office was minor. Most ordinary Rwandans knew

<sup>127</sup> See status of the ICTR detainees as at 20 February 2013, retrieved from <http://unictr.org/Cases/tabid/202/Default.aspx> (accessed on 11th June 2013).

<sup>128</sup> See The MICT is a new small, temporary and efficient body tasked with continuing the jurisdiction, rights and obligations and essential functions of the ICTR and the ICTY after the completion of their respective mandates. It was established by the United Nations Security Council Resolution 1966 on 22 December 2010.

<sup>129</sup> See status of the ICTR detainees as at 20 February 2013, retrieved from <http://unictr.org/Cases/tabid/202/Default.aspx> (accessed on 11th June 2013).

<sup>130</sup> See E.L. Lutz and C. Reiger (2009:161); E. Mendes (2010:14); L. Waldorf (2009:19).

<sup>131</sup> See L. Waldorf (2009:19); C. Wibabara (2013:71).

<sup>132</sup> See I.B. Steffja (2012:3); C. Wibabara (2013:76).

very little about the tribunal and the information they received was usually perceived as the propaganda of the Rwandan government.<sup>133</sup> A key problem of the ICTR was that it did not auger well with the national touch of the Rwandan communities and it appeared to be an internationally driven judicial system. Since the ICTR was located in the Tanzanian capital, Arusha, there was a perception that Rwandans were unaffected by its proceedings or found it irrelevant. In an attitudinal survey of Rwandans, 56 per cent said that they were not well informed about the ICTR, while another 31 per cent claimed to be not informed at all.<sup>134</sup>

Since the ICTR statute made no provision for compensation for victims, the Rwandan survivors felt disinterested in the proceedings of the tribunal, and hence did not participate in its processes. This is different from the Rome Statute of the International Criminal Court which makes a provision for compensation of victims.<sup>135</sup> Although it is worthwhile to state that the ICTR managed to prosecute several key leaders, including high ranking government officials, military leaders, as well as local leaders in media, business, and the church, unfortunately, reconciliation was never achieved. Individuals prosecuted at the ICTR, after completion of their sentences, were removed from their communities and relocated to suitable states that were willing to take them up, unlike the gacaca process where they were reintegrated into local communities.<sup>136</sup> Therefore instead of bringing the perpetrators closer to their victims and seek reconciliation, they were instead detached from their communities, by relocating to other states, other than their homelands.

The ICTR was been accused of administering one-sided justice by not prosecuting senior members of the Rwanda Patriotic Front (RPF) for crimes committed during the 1994

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<sup>133</sup> See I.B. Steflja (2012:3).

<sup>134</sup> See I.B. Steflja (2012:3).

<sup>135</sup> See Rome Statute, Art. 75.1.

<sup>136</sup> See Summary of Current State of Affairs of ICTR Detainees, retrieved from

<http://www.unict.org/Cases/StatusofDetainees/tabid/202/Default.aspx> (accessed on 11th June 2013).

Three convicts, who have completed their sentences, are currently in Arusha, and awaiting suitable States, which will be willing to accept them.

genocide. Robert Gersony, the then head of the team that was dispatched to Rwanda by the Office of the UN High Commissioner for Refugees, estimated that from April to August 1994, the RPF systematically killed between 25 000 and 45 000 Hutus, as it made its way towards the capital, Kigali.<sup>137</sup> However, a report was not written.<sup>138</sup> It is argued that Gersony was directed not to write a report to incriminate the RPF.<sup>139</sup> Louise Arbour, the former Chief Prosecutor of the ICTR, explained why prosecuting the RPF would hinder efforts to investigate and prosecute the genocidal acts of the Hutus and thus stated: “How could we investigate and prosecute the RPF while we were based in that country? It was never going to happen. They would shut us down.” The Rwandan government collaborated with the ICTR where it served its interests, and members of the government in function were in no way interested in going to the ICTR as accused.<sup>140</sup> The refusal to bring indictments against the senior RPF commanders represented a big blow to the victims of RPF crimes, and was seen as an extension of impunity and a mockery of justice.

In addition to the ICTR, prosecutions of those alleged to have participated in human rights abuses were also conducted through the Gacaca system and the Rwandan national courts. The Rwanda Judiciary was one of the organs that was devastated by the war, as most of the officials died or went in exile.<sup>141</sup> Of the 750 judges, 506 of them did not remain after the genocide, as many were murdered and most of the survivors had fled Rwanda. By 1997, Rwanda had only 50 lawyers in its judicial system.<sup>142</sup> However, the trials in Rwanda took long to commence because the country had no legal basis for trying individuals on crimes of genocide. Although it was a signatory of the Genocide Convention, having ratified the Convention in 1975, the crime had never been domesticated in its national law. This generated considerable consternation in the country’s judicial circles in the aftermath of

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<sup>137</sup> See Katherine Iliopoulos, ICTR Accused of One-Sided Justice, retrieved from <http://www.crimesofwar.org/commentary/ictr-accused-of-one-sided-justice/>

<sup>138</sup> <http://www.hrw.org/reports/1999/rwanda/Geno15-8-03.htm> (accessed on 21st September 2015).

<sup>139</sup> See I. Gilles (2011:1).

<sup>140</sup> See I. Gilles (2011).

<sup>141</sup> See I. Gilles (2011:1).

<sup>142</sup> See A.E. Tiemessen (2004:20).

the 1994 genocide, and many feared the oversight would render genocide prosecutions impossible.<sup>143</sup> After spending several years drafting a law to treat genocide suspects, the Organic Law that created special courts, including a special chamber of the Supreme Court, to try suspects accused of participating in the genocide, was eventually adopted on 30 August 1996.<sup>144</sup>

The law categorises crimes into four classes of offenders. Category 1 includes the leaders of the genocide, those who planned, organised, and supervised the killing from the national to the local level and those who killed with particular cruelty. Category 2 includes people who killed or intended to kill under the orders or direction of others. Category 3 includes those who caused serious bodily injury, while Category 4 includes individuals who committed property crimes.<sup>145</sup> Those found guilty of Category 1 crimes would receive a reduced sentence in exchange for a confession and for implicating others. Only those in the first category—organisers and planners of the genocide, persons in positions of authority within the military or civil infrastructure who committed or encouraged genocide, and persons who committed ‘odious and systematic’ murders, were subject to the death penalty. ‘Ordinary’ killers who participated in the genocide were punished with a maximum of life imprisonment, which was reduced to a custodial term of seven to 11 years if they confessed.

The genocide trials were marred by political considerations, corruption, inadequate resources and inefficiency, which impacted on the Rwandan courts in the administration of justice.<sup>146</sup> Military and government officials harassed and intimidated prosecutors and other judicial officials and pressured some of them into arresting and, in some cases, convicting individuals based on flimsy evidence. In 2007, the Rwandan government abolished the death penalty, which had last been carried out in 1998 when 22 people convicted of genocide-related crimes were executed. This development removed a major

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<sup>143</sup> See W.A. Schabas (2003:45).

<sup>144</sup> See E. Stover and H.M. Weinstein (2004:58); K. Nash (2007:79).

<sup>145</sup> See Organic Law No. 08/96 of August 30, 1996, Art. 2.

<sup>146</sup> See K. Nash (2007:79).

obstacle to the transfer of genocide cases from the ICTR to the national courts. The Rwandan government has been reluctant to prosecute RPF soldiers for what it terms “revenge killings” against Hutu civilians in 1994, and it has successfully blocked the ICTR from investigating such crimes. The government argued that such prosecutions could create a dangerous moral equivalency between war crimes and genocide that would promote genocide denial. Nevertheless, the government was unwilling to entertain other non-prosecutorial mechanisms to handle those crimes, such as a truth commission or vetting.

Third party trials for individual Rwandans alleged to have participated in the genocide also occurred abroad. Some countries are pursuing other kinds of criminal sanctions against alleged genocidaires. For example, in June 2001, Belgian courts convicted four Rwandans, Sister Gertrude Mukangango and Sister Maria Kisito Mukabutera, both Benedictine nuns, Vincent Ntezimana, a professor at the National University of Rwanda, and Alphonse Higaniro, a factory owner and an alleged supporter of President Juvenal Habyarimana, for their involvement in the 1994 Rwandan genocide.<sup>147</sup> In February 2013, the United States’ New Hampshire Federal Court convicted Beatrice Munyenyezi for her role in the genocide or affiliation with any political party at the time, and entering the US unlawfully by making the same false statements on her refugee and green card applications.<sup>148</sup> In Sweden, Stanislas Mbanenande, was convicted of genocide and a string of other crimes, including murder and abduction, in connection with a large number of massacres in the Kibuye prefecture of western Rwanda.<sup>149</sup> He was sentenced to life imprisonment by a Stockholm District court.

On the other hand, Rwanda has also sought the extradition of its citizens from other countries to face prosecution domestically, but with limited success. For example, in July 2012, the French High Court of Appeal quashed a French lower court ruling that had

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<sup>147</sup> See Nuns jailed for genocide role, *BBC News*, Friday, 8 June, 2001.

<sup>148</sup> See L. Tuohy (2013).

<sup>149</sup> See E. Musoni (2013:1).

approved the extradition of Claude Muhayimana to Rwanda to face genocide-related charges, arguing that the accused would not receive the proper guarantees to a fair trial in his home country.<sup>150</sup> However, on a positive note, some countries have demonstrated the will to have perpetrators of genocide face justice. For example, in 2012, Canada extradited to Rwanda Leon Mugesera, a former member of the then ruling party, the National Republican Movement for Democracy and Development, to face charges of genocide in the country. In 2011, the US returned to Rwanda two genocide suspects, Jean-Marie Vianney Mudahinyuka and Marie-Claire Mukeshimana to face trial.<sup>151</sup> In 2011, the European Court of Human Rights (ECHR) approved the extradition of Sylvere Ahorugeze to Rwanda to face charges of genocide.<sup>152</sup> The decision of the ECHR, although subject to review, is important for international criminal justice as it has a broad impact, particularly in Europe where it is believed hundreds of Rwandan genocide suspects reside. The refusal to extradite those suspected of involvement in the genocide in Rwanda to face prosecution is a setback in the country's zeal to ensure accountability and justice for the victims.

### 7.3.5 The case of Uganda

The idea of prosecuting perpetrators of international crimes before national courts in Uganda was first mooted during the Juba Peace talks between the Lord's Resistance Army (LRA) and the government of Uganda that commenced in 2006. The talks resulted in agreements that provided for the establishment of a special division to try individuals alleged to have committed offences falling within that category. Although the LRA never signed the agreement, the government implemented its obligations as per the agreement and took the initiative to ensure that a division of the High Court with jurisdiction over such crimes is instituted. Accordingly, the Chief Justice, through Legal Notice No. 10 of

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<sup>150</sup> See K. Corrie (2013:12); BBC News (2014). In 2015, the French Court of Cassation overturned an Appeals court ruling approving the extradition of Claude Muhayimana, Innocent Musabyimana, and Laurent Serubuga saying that the two men could be tried in Paris.

<sup>151</sup> See K. Corrie (2013:1); Beyond Arusha: The Global Effort to Prosecute Rwanda's Genocide, April 17, 2013.

<sup>152</sup> See K. Corrie (2013:1); O.A Maunganidze (2012:1).

2011,<sup>153</sup> formally established the International Crimes Division. The ICD has jurisdiction over cases of genocide, crimes against humanity, war crimes, as well as offences related to terrorism, human trafficking, and piracy. Other offences under ICD's mandate include those defined in the ICC Act, 2010, the 1964 Geneva Conventions Act, the Penal Code Act, and any other criminal law.<sup>154</sup> To date, the only case related to international crimes that is before the ICD is that of Thomas Kwoyelo.

Another case is that of Dominic Ongwen, which is currently ongoing at The Hague. Ongwen was one of the leaders of the rebel outfit, the LRA, who was captured in the Central African Republic. The case of Ongwen elicited contradicting views from the people in northern Uganda, with some calling for the application of the Amnesty Act, meaning that he be granted amnesty, while others argued that he was a victim who turned to be a perpetrator.<sup>155</sup> On 21 January 2015, Ongwen was transferred from the Central African Republic where he had been captured to the ICC in The Hague to face charges of war crimes and crimes against humanity. The transfer of Ongwen to the ICC in The Hague cast doubt on the government's willingness and ability to have the LRA leaders tried in their home countries, considering that Uganda had already established the ICD whose mandate covers crimes covered under the Rome Statute. On 26 January 2015, Ongwen appeared before the ICC for a pre-hearing and on 24 August 2015 for the confirmation of charges hearing. But Ongwen's case at the ICC poses legal and ethical dilemmas for the court, considering that he was abducted at the age of 10, and conscripted into the rebel movement in which he rose in rank.

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<sup>153</sup> See ICD Practice Directions, Legal Notice no. 10 of 2011, Legal Notices Supplement, Uganda Gazette, no. 38, vol. CIV, May 31, 2011.

<sup>154</sup> See ICD Practice Directions, para. 6(1).

<sup>155</sup> See NTV News Bulletin stream "Opinion leaders in Acholi call for Ongwen pardon", available at <http://www.ntv.co.ug/news/crime/18/jan/2015/opinion-leaders-acholi-call-ongwen-pardon#sthash.V2TFuMui.dpbs> (accessed on 18th January 2015); Y. Mugerwa (2015:6).

## 7.4 REPARATIONS

### 7.4.1 The case of South Africa

The aspect of reparations features prominently in the TRC Act. Reparation, under the Act, is defined as including any form of compensation, *ex gratia* payment, restitution, rehabilitation or recognition. The Reparations and Rehabilitation Committee of the TRC was authorised to devise policy recommendations on reparations and rehabilitation for the new South African government. The TRC made far-reaching recommendations on reparations for the victims of Apartheid state criminality. In its recommendation, the Committee proposed interim, individual and symbolic reparations as well as legal and administrative measures and institutional reforms as a holistic approach under the reparations program. Although the recommendations were intended to ensure an effective reparation program, the Committee lacked an enforcement mechanism to ensure implementation of their recommendations.

Reparations in South Africa are restricted only to the persons who were registered by the TRC. Therefore, approximately 17 000 victims registered by the TRC were the only ones entitled to compensation. This left out several victims who had not come forward to reveal their testimonies, and who are struggling to cope financially and psychologically.

Under pressure of victims groups, the South African government eventually made a one-off payment of approximately \$4000 to over 15,000 victims and family members as reparations. This payment, however, was insufficient to meet the needs of the victims. Several victims have not been compensated to date, partly because they cannot be located.

Some recommendations made by the TRC in regard to reparations, such as providing an annual payment for victims and collection of a 'wealth tax' from firms that benefited from apartheid, have not been implemented. The intention behind the latter proposal was to ensure that the reparations fund caters for the needs of the victims by, for example, supporting them in their education and in gaining access to medical services. There have also been symbolic reparations that were made in the form of creating freedom parks,



museums, and the naming and renaming of public places in memory of people who were regarded as heroes in the struggle against apartheid.

#### **7.4.2 The case of Sierra Leone**

The Sierra Leone TRC identified reparations to victims as one of the key issues for the country's rehabilitation and healing within society. Section 6 of the TRC Act mandated TRC, among other things, to respond to the needs of victims, promote healing and reconciliation and to prevent a repetition of the violations and abuses suffered. In its final report of 2004, the commission recommended that a reparations programme be set up for the most vulnerable victims, such as those who had been wounded in war, the war amputees, victims of sexual violence, war widows and child victims.<sup>156</sup> It further emphasised that the reparations was primarily the responsibility of the government and stressed that victims be provided free health care services, pensions, education, skills-training, micro loans, and symbolic reparations be made. The Commission also recommended the establishment of the National Commission for Social Action (NCSA) as the implementing agency for the reparations programme and the establishment of a Special Fund for War Victims.<sup>157</sup>

In 2008, the Sierra Leonean government, with support of the UN Peace Building Fund and the UN Development Fund for Women (UNIFEM), established the Sierra Leone Reparations Programme (SLRP). The SLRP is being implemented by NCSA. A number of people have so far been awarded cash subsistence, while others have received fistula surgery or other emergency medical treatment.<sup>158</sup>

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<sup>156</sup> See Report of the Sierra Leone Truth and Reconciliation Commission, 2004, Volume 2 Chapter 4: Reparations.

<sup>157</sup> See Report of the Sierra Leone Truth and Reconciliation Commission, 2004, Volume 2 Chapter 4: Reparations. The NaCSA was the main organ to be entrusted with the administration of the Special Fund for War Victims and it was to work closely with the different government ministries in decentralizing reparation programs and services.

<sup>158</sup> See <http://www.iom.int/cms/en/sites/iom/home/what-we-do/reparation-programmes/support-for-the-sierra-leone-reparations.html> (accessed on 17th January 2015).

### 7.4.3 The case of Rwanda

Since 1994, justice and reconciliation processes have been ongoing in Rwanda. The reconciliation processes focus on reconstructing the Rwandan identity, as well as balancing justice, truth, peace and security in the country. This has also resulted in the establishment of institutions to advance the the spirit of reconciliation in the country. One of such institutions is the National Unity and Reconciliation Commission (NURC). Created in March 1999 with the goal of combating discrimination and erasing the negative consequences of the genocide on the Rwandan people, the NURC has undertaken several efforts to reconcile the nation.

The NURC is charged with the mandate of preparing and co-ordinating the national programs for the promotion of national unity and reconciliation; putting in place and developing ways and means to restore and consolidate unity and reconciliation among Rwandans; educating and mobilising the population on matters relating to national unity and reconciliation; carrying out research, organizing debates, disseminating ideas and making publications relating to peace, national unity and reconciliation; making proposals on measures that can eradicate divisions among Rwandans and to reinforce national unity and reconciliation; denouncing and opposing acts, writings and utterances which are intended to promote any kind of discrimination, intolerance or xenophobia; making an annual report and such other reports as may be necessary on the situation of national unity and reconciliation.<sup>159</sup> However, NURC's mandate does not include a truth-finding component because this function is being fulfilled by the ICTR and the now completed gacaca process.

To reach its goal of reconciliation, the NURC has developed a number of tools, including peace-building and a reconciliation programme that brings together the Rwandan population to debate on topical issues related to national politics, thereby confronting the deeply-held perceptions regarding the past, present and future. Reconciliation efforts include combating sectarianism and promoting respect for human rights. The NURC also

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<sup>159</sup> See Constitution of Rwanda, 2003, Art. 178.

supports community-based initiatives through encouraging the participation of communities in the fight against poverty by providing financial support to community development groups comprising survivors, perpetrators and people whose family members are in prison.

In addition, the NURC has encouraged the setting up of reconciliation clubs in schools and in universities. The NURC has over the years been organising national summits that bring together the people of Rwanda, as well as important persons from the international community to make suggestions and listen to recommendations from the population about how to better serve the goal of reconciliation. The first summit was held in October 2000, followed by another in October 2002, a youth summit in 2004 and another national gathering in December 2006. The NURC supports community festivals that play an important role in the reconciliation process. The NURC encourages cultural activities such as theatre, music, dance and art as tools of social transformation and to strengthen unity amongst the people of Rwanda. These festivals help disseminate messages of peace, tolerance, unity and social justice that the NURC aims to promote. These activities are instrumental in bringing the people of Rwanda together to share ideas that would build the nation and make the people understand that they are one, and therefore important for them to live in harmony and peace.

However, it has been argued that a program of national unity and reconciliation has instead reinforced the government's political authority instead of introducing a series of reconciliation activities aimed at alleviating Rwandans' post-genocide feelings of fear, anger, and despair as they struggle to rebuild their lives and reconcile with themselves and one another.<sup>160</sup> The program also treats the Tutsi as the victims and survivors, while the Hutus are regarded as the ones who presided over the killing. This further divides the two groups instead of uniting them. Further, the program does not allow for public discussion

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<sup>160</sup> There has been a general feeling among Rwandese that the NURC and its programs are merely geared towards galvanizing the government grip on power through increasing popular support of the citizens as a result of the programs. See also S. Thomson (2014:1); E. Zorbas (2004:39).

of the physical violence that individual Rwandans experienced before and after the genocide, particularly those people who suffered at the hands of RPF soldiers during civil war. Preventing people from sharing the violence they experienced during the genocide undermines the reconciliation process.

In the aftermath of the genocide, attempts were made to create a fund for the victims of genocide from which compensation and additional assistance to the needy would be drawn. However, the law governing the fund never went beyond the drafting process. The majority of the survivors were in need of moral, psychological and material support, and needed to have their human dignity and civil rights restored. The victims also suffered terrible physical and psychological harm, and lost their families, which reduced their access to social networks, increasing their vulnerability.<sup>161</sup>In recognition of its duty to help 'needy citizens', the government adopted Law 02/98 that establishes a National Assistance Fund for Needy Victims of Genocide and Massacres Committed in Rwanda (FARG) to support and assist survivors of Tutsi genocide and other crimes against humanity and to provide assistance to victims of genocide and massacres perpetrated in Rwanda from 1 October 1990 to 31 December 1994. The FARG was also set up to contribute to the process of reconciliation after the country had been torn apart by the violent conflict. It helps widows, orphans and the disabled to gain access to health and education,<sup>162</sup> but this does not count as compensation.<sup>163</sup>

Over 12 000 people with special cases have so far benefited from the medical treatment from specialized doctors from the military hospital. Between 1995 and 2010, 38 657

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<sup>161</sup> See Human Rights Watch (2006:2); E. Brahm (2004:1); D. Mukamana & A. Collins (2006:13); Y.L. Lee (2014:1); Ervin (2006: 869).

<sup>162</sup> See Constitution of the Republic of Rwanda, adopted by referendum of 26 May 2003, Official Gazette, special edition of 4 June 2003, p.119. See Law No 02/98 of 22 January 1998, Art. 2. This law was reviewed by the Law No 69/2008 of 30 December 2008 (OG. N° Special of 15/04/2009). See also Bornkamm (2012:134); Nsanzimana (2013); P. Limón and J. von Normann (2011:12).

<sup>163</sup> See Law No 02/98 of 22 January 1998, Art. 2. This law was reviewed by the Law No 69/2008 of 30 December 2008 (OG. N° Special of 15/04/2009).

houses, including FARG's 14 857, were constructed for genocide survivors by different stakeholders. However, 3 971 people remained without shelter. Of the 41 370 houses that have so far been completed, 24 893 have been supported by the FARG programme.<sup>164</sup> The Government of Rwanda allocates five per cent of its annual budget into the funding pool, and all adult Rwandese contribute one per cent of their wages towards the fund. Donor countries such as the United States and the Netherlands also contribute to the fund. However, this funding pool is thought to cover only 30 per cent of the need. The selection of FARG beneficiaries for all programs is done at the cell level by the selection committee which comprises of six members of the community development committee and four representatives of the genocide survivors. Despite the above achievements, the FARG has been dogged by corruption and selective beneficiaries to the fund which was fuelling social envy among different groups of people. Furthermore, FARG is still too limited in its capacity to assist all those survivors in need and has not been able to repair irreparable harm, such as the loss of life.<sup>165</sup>

In order to curb the above problems, in April 2009, a new law on the Fund for the Support and Assistance to the Survivors of the Genocide entered into force, providing an increased budget from five to six per cent and giving the fund exclusive power to sue first category convicted persons for damages. This and other transitional justice mechanisms will contribute to addressing the economic needs and well-being of the survivors, and ensuring reconciliation in Rwanda. Putting in place infrastructural developments and provision of services such as building of schools for genocide survivors and hospitals to extend medical services, and extending material support to victims is in restoring human dignity and promoting or fulfilling their rights.

The Rwandan legal framework explicitly provides for genocide survivors to receive compensation. The fund was supposed to cover judicial awards to genocide survivors, where convicted genocidaires were too indigent to pay out the awards themselves.

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<sup>164</sup> See J.C. Nsanzimana (2013:1); J. de la Croix and E. Musoni (2013:7).

<sup>165</sup> See I.N Zarifis (2009:7); P.C. Bornkamm (2012:135).

Specialised chambers for prosecuting genocide suspects have awarded financial compensation to victims through judgments. However, although enforced on a criminal level, implementation of these decisions in as far as compensation is concerned has been lacking.<sup>166</sup> In some cases, the Rwandan government has been mandated to pay indemnities to the victims. However, the Minister of Justice ordered the suspension of all cases in which the Rwandan government is called upon to intervene. In 2001, a Bill that aimed to create a compensation fund was formulated, but it was never adopted. The action of the minister portrays the difficulties in undertaking reparation programmes and the politics around the subject. This is especially with a view that the government has often argued that compensation would threaten cohesion and unity within a country which is just emerging from the shock experienced during the conflict.

Since most victims were Tutsi, providing compensation to one group would arouse discontent and resentment from the Hutus. The latter group has also had its demands of getting the truth on the crimes against humanity and war crimes committed by the current regime in the course of the regime unaddressed.<sup>167</sup> This also presents a challenge in having an effective and comprehensive reparations program that addresses the demands of all victims and survivors. Therefore, for the government to balance between the needs, it needs to handle the situation delicately. However, the failure to establish a compensation fund has been attributed to financial constraints.<sup>168</sup> Because of the scale of the genocide, it has been extremely difficult to provide compensation to all the victims to whom it is due.

Another Rwanda government-led activity is the observance of a week-long commemoration of the genocide on every 7<sup>th</sup> day of April.<sup>169</sup> The introduction of the national week is to make Rwandans come to terms with the genocide of 1994 and the past history of conflict in the country. This day has also received international recognition as

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<sup>166</sup> See L. Waldorf (2009:519-23); G. Gahima (2013:254).

<sup>167</sup> See G. Gahima (2013:256); J.P. Mugiraneza (2013); L. Waldorf (2009:223); P. Limón and J. von Normann (2011:13).

<sup>168</sup> See G. Gahima (2013:255); L. Waldorf (2009:519).

<sup>169</sup> See G. Gahima (2013); A. M Brandstetter (2010:3).

this date, 7th April, has been designated by the UN General Assembly as the International Day of Reflection on the Genocide in Rwanda. The UN runs an outreach Programme on the Rwanda Genocide that focuses on the lessons of the Rwanda genocide in order to help prevent similar acts in the future, as well as raising awareness of the lasting impact of genocide on the survivors and the challenges that they face. The activities on this day are held both in Rwanda and other countries. These activities are marked by mourning and remembrance of the victims and survivors of the genocide and they are honoured in events organised by government to commemorate this day.<sup>170</sup> Ceremonies are held at memorials and gravesites across the country, with speeches, testimonies and prayers, and in the solemn reburial of human remains comprising the events to mark the day.

Symbolic reparations in form of memorialisation have also been part of the reparation programs in Rwanda. In fact, memorialization has been prioritised as the second most valuable form of state reparations after monetary compensation.<sup>171</sup> Several memorial sites, both in Rwanda and outside the country have been erected as a way of honouring those who suffered or died during the conflict. Some of the memorial sites that have been constructed include among others Kigali Memorial Center at Gisozi and the Murambi Technical School Memorial in Butare.<sup>172</sup> The former has mass graves and sanctuary gardens that act as a tribute to Kigali's victims and has an interactive museum that provides historical antecedents to the genocide and chronicles the months of the genocide. At Murambi lie bodies of hundreds of victims preserved in lime powder, depicting their original positions of massacre. Gacaca also offered some measure of symbolic reparations, in that those who plead guilty were required to reveal the whereabouts of their victims' remains if they want to benefit from reduced sentences.<sup>173</sup> To the genocide survivors, finding the remains of their loved ones and according them a decent burial was very critical in healing their hearts.

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<sup>170</sup> See G. Gahima (2013); A. M Brandstetter (2010:3).

<sup>171</sup> See L.M. Moore (2010:48); Brett el (2008:2); E. Zorbas (2010:39-40).

<sup>172</sup> See L.M. Moore (2010:55); P. Briggs and J. Booth (2010:107-110); David C. King (2007:89).

<sup>173</sup> See L. Waldorf (2009:17); SURF Survivors Fund (2011:14).

#### **7.4.4 The case of Uganda**

The aspect of reparations for victims of the northern Uganda conflict features prominently in the Juba Peace Agreement on Accountability and Reconciliation signed by the Government of Uganda. In this Agreement, the Government committed to support and or establish institutions that promote justice and reconciliation in respect to the conflict. Currently in Uganda, there is no policy governing the framework for the reparations programmes. The reparations programme is one of the aspects enshrined under the transitional justice policy that is currently being developed by the National Transitional Justice Working Group under the auspices of the Justice, Law and Order Sector. Under the draft policy, reparations are defined as the act of making amends, offering expiation, or giving satisfaction for a wrong or injury or something done or given as amends or satisfaction or the payment of damages. Reparations may be material, individual, communal or symbolic.

The Government of Uganda has endeavoured to initiate programmes that aim at addressing the development concerns of northern Uganda. Although these have not been instituted under the framework of a reparations policy, they have been geared towards addressing the development needs of the war-affected region and uplifting the standards of living of the people in that region. These include the Plan for Rehabilitation and Development Programme (PRDP) established in 2007 and currently in its second phase, that aims to address the recovery, development and peace needs of the Northern Uganda affected areas. Other programmes include the Northern Uganda Social Action Fund (NUSAF), also in its second phase, whose aim is to improve access of beneficiary households in Northern Uganda to income-earning opportunities and better basic socio-economic services. Another programme supporting recovery and development efforts is the Northern Uganda Agriculture Livelihoods Recovery Programme (ALREP), which focuses on stimulating the Northern Uganda agricultural sector as a means of increasing the prosperity of the war-affected population, as well as contributing to the economic growth of the region. Overall, the PRDP programme has resulted in infrastructural development in the region, which includes the construction of medical facilities, roads, and the provision of seeds and farm inputs to farmers to improve productivity. Furthermore, support under the programme has



also been extended to the security and justice institutions, which has resulted in the construction of courts and recruitment of police personnel to serve in the region.

#### **7.4 CONCLUSION**

Africa stands arguably at the cutting edge of the international debate on transitional justice as exemplified in the current attempts throughout the continent to move beyond war to the beginning of peace.<sup>174</sup> A good number of countries, small or large, poor or rich, ethnically homogenous or heterogeneous, have experienced divisions that led to a state of anarchy, conflict and severe violence, and if one is to resolve such conflicts decisively and comprehensively, one must completely understand the 'what', 'when', 'by whom' and 'why' that drove or propelled that conflict.<sup>175</sup>

Transitional justice in countries emerging from conflicts is, and remains the most critical aspect in ensuring that victims come to terms with life and addressing the legacy of conflicts. The application of transitional justice with all its mechanisms is key to solving the puzzle of establishing a middle ground of ensuring peace and justice in a society affected by a violent conflict. Although certain mechanisms might not be applicable in certain situations, however, some of them, as indicated in the case studies of various countries covered under this chapter, have registered success. In all these mechanisms, it ought to be noted that the victim should be at the centre of the initiatives, and the effectiveness of the mechanisms depends on the extent it addresses victims' challenges.

As seen from the case studies from the different jurisdictions that have gone through transitional justice processes, it can be concluded that no single mechanism best addresses the legacy of conflicts, but rather each is best suited for a specific situation. However, it can also be deduced that the aspect of reparations and compensation remains a critical issue that should be at the centre of transitional justice process as this is key in the rehabilitation

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<sup>174</sup> See C. Villa – Vicencio (2009:11). The aborted Juba Peace talks between the Government of Uganda and the LRA that juxtapose local initiatives for justice and reconciliation with international demands for prosecutorial justice are an appropriate example of the same.

<sup>175</sup> See C. Villa – Vicencio (2009:170).

of victims. Since conflicts often result in the disempowerment of the victims and affect victims' livelihoods, reparation programs are important in addressing the livelihood needs of the victims and the community at large. Respective governments involved with transitional justice need to give reparations programs the priority they deserve, otherwise a state of discontent ensues, which might jeopardise the already fragile socio-political situation.

## **CHAPTER EIGHT**

### **GENERAL CONCLUSION AND RECOMMENDATIONS**

#### **8.1 INTRODUCTION**

Proceeding from the analysis of the northern Uganda conflict and the numerous efforts to end the conflict and ensure accountability for perpetrators, this chapter concludes with a set of recommendations emanating from an evaluation of the facts that have informed the contents of this study. The over two-decades-long conflict that has claimed the lives of thousands of people, the forced displacement of whole communities, and destruction of property, is the longest and the most brutal that Uganda has faced in its history. However, as the study has documented, a number of both locally- and internationally-led efforts, including the use of military force have been to no avail in achieving long-lasting peace. As the region returns to normalcy, the debates on how to ensure accountability for perpetrators of crimes committed during the conflict have received both local and international attention. This has proved to be a very complicated issue as it has sparked differing opinions from both the human rights activists and peace activists.

## 8.2 RECOMMENDATIONS

The use of TJ accountability mechanisms need to be applied with a greater degree of urgency. The priority they deserve arises from the fact that they have a more comprehensive reach than individualised ICJ solutions. Besides, they embrace a socio-economic and developmental component which offers a more promising prospect of empowering people than a pure application of ICL does.

The government of Uganda needs to fast-track the development and implementation of a transitional justice policy for Uganda. The policy should acknowledge fully the country's troubling legacy of conflict since independence and not concentrate on just the region of northern Uganda. It needs to address broadly matters of peacebuilding, conflict resolution, accountability, reconciliation, reparations and stakeholder participation in post-conflict situations of Uganda. It should also provide for the role of traditional justice initiatives in conflict resolution and justice demands, victims' rights and participation, special attention to the situation of women and children who were affected by conflict, and the promotion of a holistic approach to justice, highlighting a complementary and harmonised approach to justice through the adoption of both formal and informal mechanisms.

Related to the above, it is important that the new policy does not use amnesties contrary to international practice. However, the opportunity to apply for amnesty needs to be extended to those who are still involved in hostilities against the state within or outside the borders of Uganda.

There is need to create as part of the TJ policy, or separately, a national reparations policy which includes a reparations fund in line with the Implementation Protocol to the Agreement on Comprehensive Solutions and the Agreement on Accountability and Reconciliation from the Juba Peace Talks. Specifically, any reparations programmes should be sensitive to the needs of different categories of victims, especially formerly abducted persons, children born in captivity, and survivors of sexual and gender-based violence. This policy should also ensure that there is a provision for effecting both collective and

individual, as well as material and symbolic forms of reparations. The reparations policy should lay out systematically the implementing institutions, including the ICD, and procedures for the award of reparations. The reparations policy should be phased into immediate, mid-term and long-term categories without them necessarily waiting for outcomes of the ICC, ICD and Truth and Reconciliation.

In relation to the above, there is need to enact enabling laws for the awarding of reparations by judicial organs such as the International Crimes Division of the High Court of Uganda. The process of awarding reparations should be tied to judicial processes in order to avoid the politicisation of a reparations process in Uganda.

There is need to fast-track the enactment of the law that gives effect to the national transitional justice policy that has been in the pipeline for much too long. The law will give legal force to the provisions in the policy and enforce compliance by all players. It will provide for the allocation of resources from the national budget in addition to any other sources to facilitate transitional justice processes and peace-building and conflict resolution measures.

There is need to amend the laws of Uganda so that they take account of the principles of transitional justice. The TJ approach adopted by the government of Uganda needs to encourage and provide for the active participation of victims and civil society in the TJ mechanisms. The Constitution of Uganda should be amended to include specific clauses that promote human rights values and also punish perpetrators of gross human rights violations.

There is need to harmonise the laws in Uganda to conform to international standards in as far as the granting of amnesties, and the relationship between ICD and the ICC is concerned. Some of the areas that need harmonisation include the denial of amnesty for perpetrators of international crimes, the development of a witness protection scheme for witnesses and victims, the development of a victims trust fund, and victims' participation in the ICD proceedings.

The mandate of the Uganda Amnesty Commission needs to be revisited and extended to include supporting victims of those to whom it grants amnesties. As it stands today, the primary focus of the commission is limited to processing and granting amnesties, and rehabilitation of returnees or ex-rebels. The lack of assistance to victims and focus on singularly helping returnees has sown a seed of discontentment and disgruntlement among the victims. The commission therefore must be empowered within the scope of its mandate and work to provide assistance to the victims as a result of crimes committed by those they granted amnesties. This would be critical in facilitating reconciliation and reintegration between victims and perpetrators.

### **8.3 GENERAL CONCLUSION**

Transitional justice, as an accountability mechanism for dealing with past atrocities, has been a very thorny issue for countries emerging from conflict. In most conflict-affected communities where international crimes are committed, the joint pursuit of peace, justice, reconciliation and reparations has always presented serious challenges. Uganda, as a country that is still grappling with how to deal with perpetrators of crimes committed during the northern Uganda conflict, is embroiled in the dilemma of how to embark on transitional justice processes and ensure justice for the victims. Satisfaction of the victim's aspirations is a very critical component in the realm of justice. While there are differing schools of thought emanating from both the peace and justice activists, the opinions of the two categories are complementary to each other. Adam Branch summarizes these challenges by emphasizing that:

“The decision, on the one hand, to seek justice through punishment or, on the other, to forgo punishment in favour of justice through reconciliation, is a decision that must be made by the concrete community that is the victim of the crimes and that will have to live with the consequences of the decision. Humanity is too thin a community upon which to base a universal right to punish... If local injustice is the price to be paid for the kind of international justice that results from ICC prosecution, then we must abandon the Court and imagine new modes of building a truly global rule of law.”

The application of a hybrid system that provides for a parallel and simultaneous functioning of formal and non-formal justice systems depending on the gravity of the crime committed by the perpetrators, is the ideal methodology of ensuring accountability for perpetrators of gross human rights violations committed during the conflict in northern Uganda and in promoting reconciliation between the victims and the perpetrators. In pursuit of this, it is highly critical that political consequences be weighed in a particular context with regard to sustainable peace, societal restoration and reconciliation. It is important, therefore, that both retributive and restorative justice mechanisms and processes be examined, considered and instituted since peace and justice have similar aims and can be interdependent and/or inseparable.



## BIBLIOGRAPHY

### PRIMARY SOURCES

#### E. LEGISLATION

Amnesty (Amendment Act) Act, 2002 Cap. 294 Laws of Uganda

Constitution of Rwanda, 2003.

Constitution of the Republic of Uganda, 1995.

Gazette Notice No. 3312 of 1 July 1998 Establishing Judicial Inquiry into Tribal Clashes in Kenya.

Gazette Notice No. 8737 establishing The Truth, Justice and Reconciliation Commission Act No 6 of 2008.

Geneva Conventions Act Cap 363 1964 (Uganda).

Draft of the National Reconciliation Bill, 2009.

Evidence Act Cap 6 Laws of Uganda Revised edition, 2000

Government of Rwanda, Organic Law N° 40/2000 of 26 January 2001.

Government of Rwanda Organic Law No. 08/96 of 30 August 1996.

Government of Rwanda Organic Law N° 40/2000 of 26/01/2001.

Government of Rwanda Organic Law No.16/2004 (O.G Special N° of 19/06/2004).

Legal Notice No. 5 of 1986 made under the Commission of Inquiry Act, Cap 56 of the Laws of Uganda, establishing a Commission of Inquiry into Violations of Human Rights in Uganda from the time of Independence on the 9 October 1962 to 26 January 1986.

Penal Code Act, Cap. 120 Laws of Uganda, (rev. ed. 2000).

Prevention and Prohibition of Torture Act, Act No 3 of 2012 (Uganda).

Prohibition of Mixed Marriages Act, Act No 55 of 1949 (South Africa).

Promotion of National Unity and Reconciliation Act 34 of 1995 (South Africa).

The Immorality Amendment Act, Act No 21 of 1950 (South Africa).

The International Criminal Court Act, Act No.11 of 2010 (Cap. 120).

The Population registration Act, Act No 30 of 1950 (South Africa).

The Trial on Indictment Act, Chapter 23 Laws of Uganda.

Rwanda Organic Law N° 40/2000 of 26/01/2001

Rwanda Organic Law N° 33/2001 of 22/06/2001

## **F. CASES**



Almonacid-Gomez versus Chile, Inter-American Court of Human Rights, 26 September 2006

Azanian People's Organisation and 7 Others, CCT 17/96 (1996) ZACC 16

Barrios Altos versus Peru, Inter-American Court of Human Rights, 14 March 2001

Thomas Kweyolo versus Uganda, Constitutional (Reference) Petition No. 36 of 2011

Uganda versus Thomas Kwoyelo, Constitutional Appeal No. 01 of 2012

Valasquez Rodriguez, the Inter-American Court of Human Rights

#### **G. TREATIES, CONVENTIONS, AGREEMENTS AND RESOLUTIONS**

Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal, United Nations" General Assembly Resolution No. 95(1) adopted on 11 December 1946.

Agreement on Accountability and Reconciliation between the Government of the Republic of Uganda and the Lord's Resistance Army / Movement, 29 June 2007.

Agreement on Comprehensive Solutions between the Government of the Republic of Uganda and Lord's Resistance Army / Movement, Juba, Sudan, 2 May 2007.

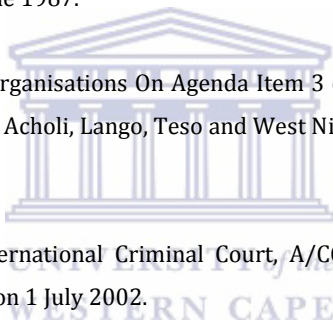
Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, United Nations G A Res. A/RES/60/147, adopted 16 December 2005.

Charter of the International Military Tribunal at Nuremberg appended to the London Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis of 8 August 1945.

Convention on the Prevention and Punishment of the Crime of Genocide adopted by United Nations General Assembly Resolution No. 260 (III) on 9 December 1948 and entered into force on 12 January 1951.

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment adopted by United Nations General Assembly Resolution 39/46 of 10 December 1984 and entered into force on 26 June 1987.

Declaration by Northern Uganda Civil Society Organisations On Agenda Item 3 of the Juba Peace Talks (Accountability and Reconciliation), Acholi, Lango, Teso and West Nile Regions, Gulu, September 2007.



Rome Statute of the Establishment of the International Criminal Court, A/CONF.183/9 adopted on 17 July 1998 and entered into force on 1 July 2002.

Statute of the International Criminal Tribunal for the Former Yugoslavia, UN DOC S/RES/827 (1993) adopted on 25 May 1993.

Statute of the International Criminal Tribunal for Rwanda, UN DOC S/RES/955 (1994) adopted on 8 November 1994.

Versailles Peace Treaty between Germany and Allied Powers signed on 28 June 1919.

## SECONDARY SOURCES

### A. Books and Chapters in books

Abrahamsen T. & Van der Merwe H., *Reconciliation through Amnesty? Amnesty Applicants' Views of the South African Truth and Reconciliation Commission* (2005), Cape Town: Centre for the Study of Violence and Reconciliation.

Adedeji A. (Ed.), *Comprehending and Mastering African Conflicts, The Search for Sustainable Peace and Good Governance* (1999), London: Zed Books.

Akiba O., (Ed.), *Constitutionalism and Society in Africa* (2004), Aldershot: Ashgate Publishing Limited.

Alden C., Thakur M. & Arnold M., *Militias and the challenges of post-conflict peace: silencing the guns* (2011), London: Zed Books.

Allen T., *Trial Justice; The International Criminal Court and the Lord's Resistance Army* (2006), London/New York: Zed Books Ltd.

Allen T., *War and Justice in Northern Uganda: An Assessment of the International Criminal Court's Intervention* (2005), London: Crisis States Research Centre, Development Studies Institute, London School of Economics.

Allen T. & Vlassenroot K., *The Lord's Resistance Army: Myth and Reality* (2010) London: Zed Books.

Almqvist J. & Esposito C., *The Role of Courts in Transitional Justice: Voices from Latin America and Spain* (2012), New York: Routledge.

Alston P. and Goodman R., *International Human Rights; The successor to international human rights in context: Law, Politics and Morals* (2013), Oxford University Press.

Ambos K., 'The Legal Framework of Transitional Justice: A Systematic Study with a Special Focus on the Role of the ICC' in Werle G. (Ed.), *Justice in Transition – Prosecution and Amnesty in Germany and South Africa* (2006), Berlin: BWV Berliner Wissenschafts-Verlag GmbH.

Ambos K, *Treatise on International Criminal Law: Volume 1: Foundations and General Part* (2013), Oxford University Press.

Ambos K, Large J and Wierda M. (Eds.), *Building a Future on Peace and Justice: Studies on transitional justice, peace and development* (2009), Berlin: Springer-Verlag.

Amnesty International, *Commissioning Justice: Truth Commissions and Criminal Justice* (2010), London: Amnesty International.

Anders G. & Zenker O. (Eds.), *Transition and Justice Negotiating the Terms of New Beginnings in Africa* (2015), Sussex: John Wiley & Sons Ltd.

Anderson J., Bergenfield R. & Levy A., *Documenting Local Justice and Reconciliation: A Casebook for Sustainable Peace in Northern Uganda* available at <http://www.davisprojectsforpeace.org/media/view/571/original/> (Accessed on 13<sup>th</sup> February 2013).

Andrina D.A., *Through the Eyes of a South African Woman and Other Children* (2010), Strategic Book Group, LLC.

Anglin D., *Conflict in Sub-Saharan Africa* (1999), Cape Town: Centre for Southern African Studies, University of the Western Cape, South Africa, No. 81.

Annan K., *The Rule of Law in Conflict and Post-Conflict Societies* (2004), New York: United Nations.

Arnold G., *Africa, A Modern History* (2006), London: Atlantic Books.

Atieno-Odhiambo E.S., Ouso T.I. & Williams J.F.M., *A History of East Africa* (2007), London: Longman.

Atkinson R.R., *The Roots of Ethnicity: Origins of the Acholi of Uganda Before 1800* (2010), Kampala: Fountain Publishers.

Baehr P.R., 'How to come to terms with the past' in Hughes E., Schabas W.A. & Thakur R. (Eds.), *Atrocities and International Accountability; Beyond Transitional Justice* (2007), Tokyo: United Nations University Press.

Bantekas I. & Oette L., *International Human Rights Law and Practice* (2013), Cambridge: Cambridge University Press.



Bantekas I. & Nash S., *International Criminal Law* (2007), New York: Routledge-Cavendish.

WESTERN CAPE

Barash D.P. & Webel C.P., *Peace and Conflict Studies* (2002), New York: Sage Publications.

Barkan J.D., *Ethnic fractionalization and the propensity for conflict in Uganda, Kenya and Tanzania*, in McNamee T., Herbst J. & Mills G. (Eds.), *On the Fault line: Managing Tension and Divisions within Societies* (2012), London: Profile books.

Bassiouni M.C., *Crimes Against Humanity in International Criminal Law* (1999), The Hague: Kluwer Law International.

Bassiouni M.C. (Ed.), *International Criminal Law* (1999), New York: Transnational Publishers Inc.

Bassiouni M.C., *International Criminal Law: International Enforcement* (2008), Leiden: Martinus Nijhoff Publishers.

Bassiouni M.C., *The Legislative history of the International Criminal Court: Introduction, Analysis and Integrated Text* (2005), New York: Transnational Publishers Inc.

Bassiouni M.C., 'The Making of the International Criminal Court' in Bassiouni M.C. (Ed.), *International Criminal Law: International Enforcement* (2008), Leiden: Martinus Nijhoff Publishers.

Bassiouni M.C., *Post-Conflict Justice* (2002) New York: Transnational Publishers.

Beigbeder Y., *Judging War Criminals: The Politics of International Justice* (1999), New York: Palgrave Publishers Ltd.

Bellelli R., *International Criminal Justice: Law and Practice from the Rome Statute to its Review* (2010), Surrey: Ashgate Publishing Limited.

Best S.G. (Ed.), *Introduction to Peace and Conflict Studies in West Africa* (2004), Lagos: Spectrum Books Limited.

Bickford L., 'Transitional Justice' in Shelton D.L. (Ed.), *Encyclopedia of Genocide and Crimes Against Humanity* (2005), Farmington Hills: Thomas Gale.

Bisset A., *Truth Commissions and Criminal Courts* (2012), New York: Cambridge University Press.

Bloomfield D., Barnes T. & Huysse L., *Reconciliation After Violent Conflict: A Handbook, International Institute for Democracy and Electoral Assistance* (2003), Stockholm: International IDEA.

Branch A., 'Exploring the Roots of LRA Violence: Political Crisis and Ethnic Politics in Acholiland', in Allen T. & Vlassenroot K. (Eds.), *The Lord's Resistance Army: Myth and Reality* (2010), London: Zed Books.

Boas G., Bsichoff J.L., Reid N.L. & B. Taylor D., *International Criminal Procedure: International Criminal Law Practitioner Library Series* (2011), New York: Cambridge University Press.

Boed R., 'The International Criminal Tribunal for Rwanda' in Bassiouni M.C., *International Criminal Law: International Enforcement* (2008), Leiden: Martinus Nijhoff Publishers.

Boleslaw A.B *International Law: A Dictionary* (2005), Maryland: Scarecrow Press.

Boraine A., *A Country Unmasked: South Africa's Truth and Reconciliation Commission* (2000), Oxford: Oxford University Press.

Bornkamm P.C., *Rwanda's Gacaca Courts: Between Retribution and Reparation* (2012), Oxford: Oxford University Press.

Brett S *The Pinochet Effect: Ten Years on From London 1998* (2008), Santiago: Universidad Diego Portales.

Broch-Due V. (Ed.), *Violence and Belonging; The quest for identity in post – colonial Africa* (2005), New York: Routledge.

Brock-Utne B., *Feminist Perspectives on Peace and Peace Education* (1989), New York: Pergamon Press.

Brownlie I., *Principles of Public International Law* (2008), Oxford: Oxford University Press, Oxford.

Bubenzer O., *Post – TRC Prosecutions in South Africa: Accountability for Political Crimes after the Truth and Reconciliation Commission’s Amnesty Process* (2009), Leiden: Martinus Nijhoff Publishers.

Buergethal T. & Maier H.G., *Public International in a Nutshell* (1985), Minnesota: West Publishing Co.

Burke-White W.W. & Kaplan S., ‘Shaping the contours of domestic justice: The International Criminal Court and an admissibility challenge in the Uganda situation’ in Stahn C. & Sluiter G. (Eds.), *The Emerging Practice of the International Criminal Court*, Martinus Nijhoff Publishers, Leiden, The Netherlands, 2009.

Butler D. & Ranney A., *Referendums Around the World: The Growing Use of Direct Democracy* (1994), Washington, D.C.: AEI Press.

Capps P., *Human Dignity and the Foundations of International Law* (2009), Portland: Hart Publishing.

Carey H.F. & Richmond O.P. (Eds.), *Mitigating Conflict: The Role of NGOs* (2003), London: Frank Cass Publishers.

Cassese A., ‘From Nuremberg to Rome: International Military Tribunal to the International Criminal Court’ in Cassese A, Gaeta P. & Jones J.R.D., *The ICC Statute of the International Criminal Court: A Commentary* (2002) New York: Oxford University Press.

Cassese A., *International Criminal Law* (2008), Oxford: Oxford University Press.

Cassese A., Acquaviva G., Fan M. and Whiting A., *International Criminal Law: Case and Commentary* (2011), Oxford: Oxford University Press.



Clark P., *Law, Politics and Pragmatism: ICC Case Selection in the Democratic Republic of Congo and Uganda*, in Waddell N. & Clark P., *Courting Conflict? Justice, Peace and the ICC in Africa* (2008), London: Royal African Society.

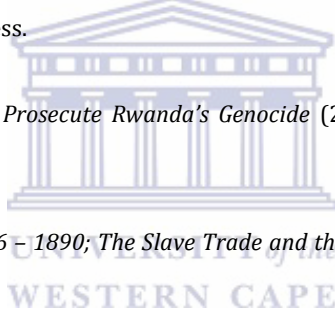
Clark P., *The Gacaca Courts, Post-Genocide Justice and Reconciliation in Rwanda* (2010), New York: Cambridge University Press.

Cole S., *Prehistory of East Africa* (1963), New York: New American Library of World Literature.

Collins C., *Post-Transitional Justice: Human Rights trials in Chile and El Salvador* (2010), Pennsylvania: Pennsylvania State University Press.

Corrie K., *Beyond Arusha: The Global Effort to Prosecute Rwanda's Genocide* (2013) New York: Open Society Foundations.

Coupland R., *The Exploitation of East Africa, 1856 – 1890; The Slave Trade and the Scramble* (1968), London: Faber and Faber Limited.



Cryer R., Friman H., Robinson D., & Wilmschurst E., *An introduction to International Criminal Law and Procedure* (2007), Cambridge: Cambridge University Press.

Cryer R., *Prosecuting International Crimes; Selectivity and the International Criminal Law Regimes* (2005), Cambridge: Cambridge University Press.

Damgaard C., *Individual Criminal Responsibility for International Crimes* (2010), Berlin: Springer.

D'Ascoli S., *Sentencing in international criminal law: the UN ad hoc Tribunals and future perspectives for the ICC* (2011), Portland: Hart Publishing.

Dembour M.B., *Who Believes in Human Rights; Reflections on the European Convention* (2006), Cambridge: Cambridge University Press.

De Mucyo J., 'Gacaca Courts and Genocide in Rwanda', in Villa-Vicencio C. & Savage T., *Dialogue: Addressing the Legacies of Genocide and a Crime Against Humanity* (2001), Cape Town: Institute for Justice and Reconciliation.

De Schutter O., *International Human Rights Law: Cases, Materials, Commentary* (2010), Cambridge: Cambridge University Press.

De Temmerman E., *Aboke Girls; Children abducted in northern Uganda* (2001), Kampala: Fountain Publishers.

De Than C. & Shorts E., *International Criminal Law and Human Rights* (2003), London: Sweet & Maxwell.



Dojcinovic P. (Ed.), *Propaganda, War crimes trials and International Law; From Speakers' corner to War crimes* (2012), New York: Routledge.

Doria J., Gasser H.P. & Bassiouni M.C (Eds.), *The Legal Regime of the International Criminal Court* (2009), Leiden: Martinus Nijhoff Publishers.

Dowen R., *Africa; altered states, ordinary miracles* (2009), London: Portobello Books Ltd.

Drumbl M.A., *Atrocity, Punishment and International Law* (2007), New York: Cambridge University Press.

Dugard J *International Law: A South African Perspective* (2001), Johannesburg: Juta & Company Ltd.

Dugard J. & Van den Wyngaert C. (Eds.), *International Criminal Law and Procedure* (1996), Aldershot: Dartmouth Publishing Company Limited

Du Plessis M. & Ford J. (Ed.), *Unable or Unwilling? Case – studies on Domestic implementation of the ICC Statute in selected African counties* (2008), Pretoria: ISS Monograoh Series No. 141.

Ellis M.S. & Goldstone R.J (Eds.), *The International Criminal Court: Challenges to Achieving Justice and Accountability in the 21<sup>st</sup> Century* (2008), New York: The International Debate Education Association.

Eser A. & Lagodny O., (Eds.), *Principles and Procedures for a new Transnational Criminal Law* (1992), Documentation of an International Workshop, 1991 in Freiburg, Freiburg: Max-Planck Institut.

Evans-Pritchard E.E., *The Nuer; A Description of the modes of Livelihood and Political institutions of a Nilotic People* (1969), Oxford: Oxford University Press.

Fage J.D., *A History of Africa* (1995), London: Routledge.

Fisher K.J., *Moral Accountability and International Criminal Law: Holding Agents of Atrocity Accountable to the World* (2012), New York: Routledge.

Fernandez L., 'Post-TRC prosecutions in South Africa' in G. Werle (Ed.) *Justice in Transition – Prosecution and Amnesty in Germany and South Africa* (2005), Berlin: BWV: Verlag.

Fletcher G.P., *Basic Concepts of Criminal Law* (1998), Oxford: Oxford University Press.

Fletcher G.P., *Tort Liability for Human Rights Abuses* (2008), Portland: Hart Publishing.

Francis D.J. (Ed.), *Peace and Conflict in Africa* (2008), London: Zed Books.

Freeman M., *Truth Commissions and Procedural Fairness* (2006), New York: Cambridge University Press.

Gallie W.B., *Understanding War* (1991), London: Routledge.

Gahima G., 'Alternatives to Prosecution: The case of Rwanda' in Hughes E., Schabas W. & Thakur R. (Eds.), *Atrocities and International Accountability: Beyond Transitional Justice* (2007) New York: United Nations University Press.

Garner B.A., *A Dictionary of Modern Legal Usage*, New York: Oxford University Press.

Garuka C., 'Genocide as prosecuted by the International Criminal Tribunal for Rwanda and Gacaca Courts in Rwanda' in Murungu C. & Biegon J. (Eds.) *Prosecuting International Crimes in Africa* (2011), Cape Town: Pretoria University Law Press.

Gersony R., *The Anguish of Northern Uganda: Results of a Field Based Assessment of the Civil Conflict in Northern Uganda* (1997), Kampala: USAID.

Gordon A.A. & Gordon D.L. (Eds.), *Understanding contemporary Africa* (1996), London: Lynne Rienner Publishers.

Gutman R., Rieff D. & Dworkin A. (Ed.), *Crimes of War: What the public should know* (2007), London: W.W. Norton & Company.

Hall C.K., *The Role of the Permanent International Criminal Court in prosecuting Genocide, other crimes against Humanity and serious violations of Humanitarian Law* (2001) 7 The Hague/Boston/London: Martins Nijhoff Publishers.

Hansen T., *The Gacaca Tribunals in Post-Genocide Rwanda* (2005) Center for Restorative Justice & Peacemaking: University of Minnesota.

Hansen H.B. & Twaddle M. (Eds.), *Uganda Now: Between Decay and Development* (1988), London, Nairobi and Athens: James Currey Ltd.

Haslam E., 'Redemption, Colonialism and International Criminal Law: The Nineteenth Century Slave-Trading Trials of Samo and Peters' in Kirkby D.E. (Ed.), *Past Law, Present Histories* (2012), Canberra: ANU E Press.

Hayner P.B., *Unspeakable Truths: Facing the Challenge of Truth Commissions* (2002), New York: Routledge.

Heike B., 'Is Alice Lakwena a Witch?' in Holger Hausen and Michael Twaddle (Eds.) *Changing Uganda: The Dilemmas of structural adjustment and revolutionary change* (1991), London: James Curry.

Heller K. & Simpson G., *The Hidden Histories of War Crimes Trials* (2013), Oxford: Oxford University Press.

Herbst J., McNamee T. & Mills G., *On the Fault line; Managing tensions and divisions within societies* (2012), London: Profile Books Ltd.

Hinton A.L. (Ed.), *Transitional Justice: Global Mechanisms and Local Realities after Genocide and mass Violence* (2010), New Jersey: Rutgers University Press.

Hughes E., Schabas W.A. & Thakur R. (Eds.), *Atrocities and International Accountability; Beyond Transitional Justice* (2007), Tokyo: United Nations University Press.

Human Rights Watch, *Protectors or Pretenders: Government Human Rights Commissions in Africa* (2001), New York: Human Rights Watch.

Human Rights Watch, *The Christmas Massacres: LRA attacks on Civilians in Northern Congo* (2009), New York: Human Rights Watch.

Human Rights Watch, *The Scars of Death; Children abducted by the Lord's Resistance Army in Uganda* (1997), New York: Human Rights Watch.

Human Rights Watch, *Turning Pebbles: Evading Accountability for Post-Election Violence in Kenya* (2011), New York: Human Rights Watch.

Human Rights Watch, *Uprooted and Forgotten: Impunity and Human Rights Abuses in Northern Uganda* (2005), New York: Human Rights Watch.

Ingadotti T. (Ed.), *The International Criminal Court: Recommendations on Policy and Practice; Financing, Victims, Judges, and Immunities* (2003), New York: Transnational Publishers Inc.

Ingelaere B., *Traditional Justice and Reconciliation after Violent Conflict: The Gacaca courts in Rwanda* (2008), Stockholm: International Institute for Democracy and Electoral Assistance.

Ingham K., *A History of East Africa* (1970), London: Longman Group Limited.

IRRI, *In the Interests of Justice? Prospects and Challenges for International Justice in Africa* (2008), IRRI: New York.

Iversen K.A., *Transitional Justice in Northern Uganda: A report on the pursuit of justice in ongoing conflict* (2009), Roskilde: International Development Studies.

Jelin E., Judy R. & Marcial G.A., *State Repression and the Labors of Memory* (2003), Minneapolis, MN: University of Minnesota Press.

JLOS, *Transitional Justice in Northern, Eastern Uganda and some Parts of West Nile Region* (2009), Kampala: JLOS.

Jonneke M., Naber M. & Waston R. (Eds.) *African Faith-based Communities: Advancing Justice and Reconciliation in Relation to the ICC* (2006), The Hague: Centre for Justice and Reconciliation.

Jorgensen J.J., *Uganda; A Modern History* (1981), London: Croom Helm Ltd.

Joseph S. & McBeth A. (Eds.), *Research Handbook on International Human Rights Law* (2010), Cheltenham: Edward Elgar Publishing Limited.

Karugire S.R., *A Political History of Uganda* (2010), Kampala: Fountain Publishers.

Kasozi A.B.K., *The social origins of violence in Uganda, 1964–1985* (1999), Kampala: Fountain Publishers.

Kittichaisaree K., *International Criminal Law* (2002), Oxford: Oxford University Press.

Keane J., *Violence and Democracy* (2004), Cambridge: Cambridge University Press.

Kemp G., *Individual Criminal Liability for the International Crime of Aggression* (2010), Antwerpen: Intersentia.

Kennedy T.A., 'Uganda' in Legum C., (Ed.) *Africa: A Handbook, revised and enlarged edition* (1967) London: Anthony Blond.

Khan K.A.A. & Dixon R., *Archold International Criminal Courts: Practise, Procedure and Evidence* (2009), London: Sweet & Maxwell.

Kleffner J.K., *Complementarity in the Rome Statute and National Criminal Jurisdictions* (2008), Oxford: Oxford University Press.

Knoops G.J.A., *Theory and Practice of International and Internationalized Criminal Proceedings* (2005), Deventer: Kluwer BV.

Kriesberg L., *Constructive Conflicts; From Escalation to Resolution* (2003), Boston: Rowman and Littlefield Publishers Inc.

Kritz N.J., 'The Dilemmas of Transitional Justice' in Kritz N.J. (Ed.), *Transitional Justice. How emerging Democracies Reckon with Past Regimes Vol. 1 General Considerations* (1995) Washington D.C.: United States Institute of Peace.

Kritz N.J. (Ed.), *Transitional Justice. How Emerging Democracies Reckon with Former Regimes* (2005), Washington, D.C.: United States Institute of Peace.

Langseth P., Katorobo J., Brett E. & Munene J. (Eds.), *Uganda: Landmarks in Rebuilding a Nation* (1997), Kampala: Fountain Publishers.

Lattanzi F. & Schabas W.A. (Eds.), *Essay on the Rome Statute of the International Criminal Court* (1999), Teramo: Il Sirente.

Laucci C., *The Annotated Digest of the International Criminal Court* (2010), Leiden: Martinus Nijhoff Publishers.

Lederach J.P., *The Little Book of Conflict Transformation* (2003), New York: Good Books.

Lincoln J., *Transitional Justice, Peace and Accountability: Outreach and the role of international courts after conflict* (2011), New York: Routledge.



Lomo Z., *Why the International Criminal Court must withdraw Indictments against the Top LRA Leaders: A Legal Perspective* (2006), Kampala: Refugee Law Project.

Lugard L., *The Dual Mandate in British Tropical Africa* (1965), London: Frank Cass & Co. Ltd.

Maharaj M., *The ANC and South Africa's Negotiated Transition to Democracy and Peace* (2008), Berlin: Berghof Research Center for Constructive Conflict Management.

Mallinder L., *Amnesty, Human Rights and Political Transitions: Bridging the Peace and Justice Divide* (2008), Portland: Hart Publishing.

Mamdani M., *When Victims Become Killers: Colonialism, Nativism, and the Genocide in Rwanda* (2001), Princeton: Princeton University Press.

Manfred N., *Introduction to the International Human Rights Regime* (2003) Martinus Nijhoff Publishers: Leiden / Boston.

Mani R., 'Does power trump morality? Reconciliation or transitional justice?' in Hughes E., Schabas W.A. & Thakur E. (Eds.) *Atrocities and International Accountability: Beyond Transitional Justice* (2007), Tokyo: United Nations University Press.

Martinez J.S., *The Slave Trade and the Origins of International Human Rights Law* (2012), Oxford: Oxford University Press.

Mazrui A.A. (Ed.), *The Warrior Tradition in Modern Africa* (1977), Leiden: E. J. Brill.

McAdams J. (Ed.), *Transitional Justice and the Rule of Law in New Democracies* (1997), Indiana: University of Notre Dame Press.

McEvoy K. & McGregor L. (Eds.), *Transitional Justice from Below; Grassroots Activism and the Struggle for Change* (2008), Portland: Hart Publishing.

McGoldrick D., Rowe P. & Donnelly E. (Eds.), *The Permanent International Criminal Court: Legal and Policy Issues* (2004), Oregon: Hart Publishing.

McNamee T., Herbst J. & Mills G. (Eds.), *On the Fault line: Managing Tension and Divisions within Societies* (2012) London: Profile Books.

Mendez J.E., 'In Defence of Transitional Justice' in McAdams AJ (Ed.) *Transitional Justice and the Rule of Law in New Democracies* (1997), Notre Dame: University of Notre Dame University Press.

Mibenge C., *Enforcing International Humanitarian Law at the National Level: The Gacaca Jurisdictions of Rwanda* (2004), 7 Yearbook of International Humanitarian Law, Cambridge: Cambridge University Press.

Mihalkanin E.S. & Gorman R.F., *The A to Z of Human Rights and Humanitarian Organizations* (2009), London: Scarecrows Press.

Mikaberidze A. (Ed.) *Atrocities, Massacres, and War Crimes: An Encyclopedia* (2013), Santa Barbara: ABC-CLIO.

Mikaela Heikkilä *Coping with International Atrocities through Criminal Law: A Study into the Typical Features of International Criminality and the Reflection of these Traits in International Criminal Law* (2013), Abo: Åbo Akademi University Press.

Minow M., *Between Vengeance and Forgiveness* (1998), Boston: Beacon Press.

Mobekk E., 'Transitional Justice in Post-Conflict Societies – Approaches to Reconciliation' in Ebnöther A.H. & Fluri P.H. (Eds.) *After Intervention: Public Security Management in Post-*

*Conflict Societies—From Intervention to Sustainable Local Ownership* (2005), Geneva: Partnership for Peace Consortium Working Group on Security Sector Reform.

Mokhtar G., *General History of Africa II; Ancient Civilizations of Africa* (1990), London: James Currey Ltd.

Mulugeta K., *The Role of Regional and International Organisations in Resolving the Somali Conflict: The Case of IGAD* (2009), Addis Ababa: Friedrich Ebert Stiftung.

Murungu C., 'Prosecution and punishment of international crimes by the Special Court for Sierra Leone' in Murungu C. & Biegon J. (Eds.), *Prosecuting International Crimes in Africa* (2011), Cape Town: Pretoria University Law Press.

Museveni Y.K., *Sowing the Mustard Seed* (1997), London: Macmillan.

Musila G., *Rethinking International Criminal Law: Restorative Justice and the Rights of Victims in the International Criminal Court* (2010), Saarbrücken: LAP Lambert Academic Publishing.

Mutibwa P., *Uganda since Independence; A Story of Unfulfilled Hopes* (1992), London: Hurst & Company.

Naber J.M.M. & Watson R., *Training Manual for African Faith Based Communities: Advancing Justice and Reconciliation in Relation to the International Criminal Court* (2006), The Hague: Centre for Justice and Reconciliation.

Nabudere D.W., *Restorative Systems of Justice and International Humanitarian Law* (2008), Mbale: Marcus-Garvey Pan Afrikan-Institute.

Nalepa M., *Skeletons in the Closet: Transitional Justice in Post-Communist Europe* (2010), New York: Cambridge University Press.

Natekas I. & Nash S., *International Criminal Law* (2007), Oxon: Routledge-Cavendish.

Nhema A. & Zeleza P.T. (Eds.), *The Resolution of African Conflicts; The Management of Conflict Resolution and Post Conflict Reconstruction* (2008), Oxford: James Currey.

No Peace Without Justice, *Closing the gap: The role of non-judicial mechanisms in addressing impunity* (2010), Rome: Italy.

Nordstrom C., *Shadows of War; Violence, power, and international profiteering in the twenty-first century* (2004), Los Angeles: University of California Press.

Ntsebeza D.B., *Can Truth Commission in Africa Deliver Justice?* in Bosl A. & Diescho J. (Eds.), *Human Rights in Africa: Legal Perspectives on their Protection and Promotion* (2009), Windhoek: Konrad-Adenauer Stiftung.

Ntoubandi Z.F., *Amnesty for Crimes Against Humanity Under International Law* (2007), Leiden: Martinus Nijhoff Publishers.

Obura K., *'Duty to prosecute international crimes under international law'* in Murungu C. and Biegon J. (Eds.) *Prosecuting International Crimes in Africa* (2011), Cape Town: Pretoria University Law Press.

Ochieng L., *Gulu: The tale of war and suffering in The origin of the conflict in northern Uganda* (2002), Kampala: Always Be Tolerant Organisation (ABETO).

Odello M. & Cavandoli S. (Eds.), *Emerging Areas of Human Rights in the 21<sup>st</sup> Century: The role of the Universal Declaration of Human Rights* (2011), New York: Routledge.

OHCHR, *The relationship between Transitional Justice mechanisms and the Criminal Justice system: Can conflict-related human rights and humanitarian law violations and abuses be*

*deferred or suspended on the basis of commitments to establish a Truth and Reconciliation Commission?* (2001), OHCHR: Nepal.

OHCHR *Rule-of-Law Tools for Post-Conflict States: Amnesties* (2009) UN: New York / Geneva.

Olakounle G., *The role of ECOWAS in managing political crisis and conflict: The cases of Guinea and Guinea-Bissau* (2010), Abuja: Friedrich Ebert Stiftung.

Olasolo H., *Essays on International Criminal Justice* (2012), Oxford: Hart Publishing Ltd.

Olsen T.D., Payne L.A. & Reiter A.G., *Transitional Justice in Balance: Comparing Processes, weighing efficacy* (2010), Washington D.C: United States Institute of Peace Press.

O'Shea A., *Amnesty for Crime in International Law and Practice* (2004), Leiden: Koninklijke Brill NV.

Peskin V., *International Justice in Rwanda and the Balkans: Virtual trials and the struggle for state cooperation* (2008), New York: Cambridge University Press.

Pham P. & Vinck P., *A Population based survey on attitudes about social reconstruction and justice in Northern Uganda* (2010), California: Human Rights Center, University of California.

Pham P., Vinck P. & Stover E., *Abducted: The Lord's Resistance Army and Forced Conscription in Northern Uganda* (2007), California: Human Rights Center, University of California.

Podgor E.S. & Clark R.S., *Understanding International Criminal Law* (2008), San Francisco: LawLexisNexis Group.

Politi M. & Gioia F. (Eds.), *The International Criminal Court and National Jurisdictions* (2008), Surrey: Ashgate Publishing Limited.

Ratner S.R. & Abrams J.S., *Accountability for Human Rights Atrocities in International Law; Beyond Nuremberg Legacy* (2001), Oxford: Oxford University Press.

Ratner S.R., Abrams J.S. & Bischoff J.L., *Accountability for Human Rights Atrocities in International Law; Beyond the Nuremberg Legacy* (2009), New York: Oxford University Press.

Reardon B.A., *Education for a culture of peace in a gender perspective* (2001), Paris: United Nations Educational, Scientific and Cultural Organization.

Redress, *Ending Threats and Reprisals against Victims of Torture and Related International Crimes: A Call to Action* (2009), London: Redress.

Richards P. (Ed.), *No Peace No War; An Anthropology of Contemporary Armed Conflicts* (2005), Oxford: James Currey Ltd, Oxford.

Robertson G., *Crimes against Humanity* (2002), London: The Penguin Group.

Romano C.P.R., Nollkaemper A. & Kleffner J.K. (Eds.), *International Criminal Courts; Sierra Leone, East Timor, Kosovo and Cambodia* (2004), Oxford: Oxford University Press.

Roht-Arriaza N., 'The New Landscape of Transitional Justice' in Roht-Arriaza N. & Mariezcurrena J. (Eds.) *Transitional Justice in the Twenty-First Century: Beyond Truth Versus Justice* (2006), Cambridge: Cambridge University Press.

Roht-Arriaza N., *The Pinochet Effect: Transnational Justice in the Age of Human Rights* (2005), University of Pennsylvania Press.

Roht-Arriaza N. & Mariezcurrena J. (Eds.), *Transitional Justice in the Twenty-First Century: Beyond Truth versus Justice* (2006), New York: Cambridge University Press.

Safferling C.J.M., *Towards an International Criminal Procedure* (2001), New York: Oxford University Press.

Samaddar R. (Ed.), *Peace Studies, An Introduction to the Concept, Scope and Themes* (2004), New Delhi: Sage Publications India Pvt Ltd.

Sands P. (Ed.), *From Nuremberg to The Hague: The Future of International Criminal Justice* (2003) Cambridge: Cambridge University Press.

Sarkin J., 'Gacaca Courts and Genocide in Rwanda', in Villa-Vicencio C. & Savage T., *Dialogue: Addressing the Legacies of Genocide and a Crime Against Humanity* (2001), Cape Town: Institute for Justice and Reconciliation.

Schabas W.A., *An Introduction to the International Criminal Court* (2007), Cambridge: Cambridge University Press.

Schabas W.A. & Bernaz N. (Eds.), *Handbook of International Criminal Law* (2011), New York: Routledge.

Schabas W.A. (Ed.), *The Cambridge Companion to International Criminal Law* (2016), Cambridge: Cambridge University Press.

Schmidt B.E. & Scroder I.W. (Eds.), *Anthropology of Violence and Conflict* (2001), London: Routledge.

Schmitt M., *International Law across the Spectrum of Conflict* (2000), Cambridge: Cambridge University Press.

Schwebel S.M., *Justice in International Law; Selected Readings* (1999), Cambridge: Cambridge University Press.

Schuon C., *International Criminal Procedure: A Clash of Legal Cultures* (2010), The Hague: T.M.C Asser Press.

Shany Y., *Regulating Jurisdictional Relations between National and International Courts* (2007), New York: Oxford University Press.

Shany Y., *The Competing Jurisdictions of International Courts and Tribunals* (2003), New York: Oxford University Press.

Sharanjeet P, Mindy JR, Saudamini S and Sowa T (eds) *Children and Transitional Justice: Truth-Telling, Accountability and Reconciliation* (2010) Minnesota: Harvard Law School.

Shaw M.N., *International Law* (1997), Cambridge: Cambridge University Press.

Shelton, D.L. (Ed.), *Encyclopedia of Genocide and Crimes Against Humanity* (2005), New York: Macmillan.

Shelton D.L. (Ed.), *International Crimes, Peace, and Human Rights: The Role of the International Criminal Court* (2000), New York: Transnational Publishers Inc.

Shelton D.L., *Remedies in International Human Rights Law* (2005), New York: Oxford University Press.

Shipton P., *Mortgaging the Ancestors; Ideologies of Attachment in Africa*, New Haven: Yale University Press.

Shipton P., *The Nature of Entrustment; Intimacy, Exchange, and the Sacred in Africa* (2007), New Haven: Yale University Press.

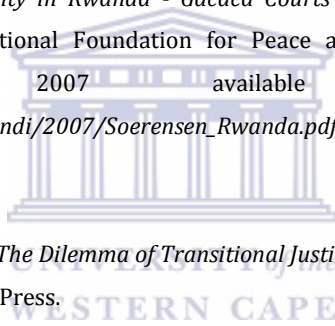


Simbeye Y., *Immunity and International Criminal Law* (2004), Aldershot: Ashgate Publishing Limited.

Smith D., *Trends and Causes of Armed Conflicts* (2003) Berlin: Berghof Research Centre for Constructive Conflict Management.

Smith R.K.M., *Textbook on International Human Rights* (2014), Oxford: Oxford University Press.

Soerensen Majken Jul *Truth, Justice and Security in Rwanda - Gacaca Courts as a Post-Genocide Reconciliation Effort* Lund: Transnational Foundation for Peace and Future Research, 15 July 2007 available at [http://www.oldsite.transnational.org/Area\\_Burundi/2007/Soerensen\\_Rwanda.pdf](http://www.oldsite.transnational.org/Area_Burundi/2007/Soerensen_Rwanda.pdf) (accessed on 21st January 2012).



Sriram C.L & Pilly S. (Eds.), *Peace versus Justice; The Dilemma of Transitional Justice in Africa* (2009), Scottsville: University of KwaZulu Natal Press.

Stacy H.M., *Human Rights for the 21<sup>st</sup> Century; Sovereignty, Civil Society, Culture* (2009), California: Stanford University Press.

Stahn C. and Sluiter G. (Eds.), *The Emerging Practice of the International Criminal Court* (2009), Leiden: Martinus Nijhoff Publishers.

Stan I. & Nedelsky N. (Eds.), *Encyclopedia of Transitional Justice* (2013), New York: Cambridge University Press.

Stanley H.M., *In Darkest Africa 1841-1904* (1890), New York: Scribner's sons.

Stedman S.J., *Peace Processes and the Challenges of Violence in Contemporary Conflict, Violence and Peace Processes* (2003), New York: Palgrave Macmillan.

Steiner H.J. & Alston P., *International Human Rights in context; Law, Politics, Morals* (2000), New York: Oxford University Press.

Stewart W.J., *Law Dictionary* (2001), Glasgow: HarperCollins Publishers.

Stevens G., *Truth, Confessions and Reparations: Lessons from the South African Truth and Reconciliation Commission* (2005), Johannesburg: Institute for Social and Health Services, University of South Africa.

Stover E. & Weinstein H.M. (Eds.), *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity* (2004) Cambridge: Cambridge University Press.

Stroud F., *Judicial Dictionary of Words and Phrases Judicially interpreted, to which has been added statutory definitions* (1931), London: Sweet and Maxwell.

Sunga L.S., *The Emerging System of International Criminal Law; Development in Codification and Implementation* (1997), The Hague: Kluwer Law International.

Teitel R.G., *Transitional Justice* (2000), New York: Oxford University Press.

Tomuschat C., *Human Rights: Between Idealism and Realism* (2008), Oxford: Oxford University Press.

Triffterer O., (Ed.) *Commentary on the Rome Statute of the International Criminal Court* (1999), The Hague: Baden-Baden.

Trumble W., Siefring J., & Bailey C., *Shorter Oxford English Dictionary on Historical Principles* (2007), Volume I A – M, New York: Oxford University Press.

Van den Wyngaert C. & Stessens G., *International Criminal law; A Collection of International and European Instruments* (1996), The Hague: Kluwer Law International.

Van der Merwe H., Baxter V. and Chapman A.R. (Eds.), *Assessing the Impact of Transitional Justice: Challenges for Empirical Research* (2009), Washington DC: United States Institute of Peace.

Van der Merwe H. & Lamb G., *Transitional Justice and DDR: The Case of South Africa* (2009), New York: International Center for Transitional Justice.

Van der Walt B.J., *When African and Western cultures meet from confrontation to appreciation* (2006), Potchefstroom: The Institute for Contemporary Christianity in Africa

Van Zyl P., *'Justice without punishment: guaranteeing human rights in transitional societies'* in Villa-Vicencio C. & Verwoerd W. (Eds.) *Looking Back Reaching Forward: Reflections on the Truth and Reconciliation Commission of South Africa* (2000) Cape Town: UCT Press.

Victor P *International Justice in Rwanda and the Balkans: Virtual Trials and the Struggle for state cooperation* (2008), Cambridge: Cambridge University Press.

Villa – Vicencio C., *Walk with Us and Listen; Political Reconciliation in Africa* (2009), Washington, D.C: Georgetown University Press, Washington, D.C.

Villa-Vicencio C., Nantulya P. & Savage T., *Building Nations; Transitional Justice in the African Great Lake Region* (2005), Cape Town: Institute for Justice and Reconciliation.

Villa-Vicencio C. & Savage T. (Eds.) *Rwanda and South in Dialogue: Addressing the Legacies of Genocide and a Crime Against Humanity* (2001) Rondebosch: Institute for Justice and Reconciliation.

Vohrah L.C., Pocar F., Faetherstone Y., Fourmy O., Graham C., Hocking J. & Robson N. (Eds.), *Man's Inhumanity to Man: Essays on International Law in Honour of Antonnio Cassese* (2003), The Hague: Kulwer Law International.

Volker N., Apartheidkriminalität vor Gericht. *Der Beitrag der südafrikanischen. Strafjustiz zur Aufarbeitung von Apartheidunrecht* (2002), Berlin: Germany.

Waldorf R.S.L. & Hazan P. (Eds.), *Localizing Transitional Justice: Interventions and Priorities After Mass Violence* (2010), California: Stanford University Press.

Waldorf R.S.L., *Transitional Justice and DDR: The Case of Rwanda* (2009), New York: International Transitional Justice Centre.

Waterston A. (Ed.), *An Anthropology of War* (2009), New York: Berghahn Books.

Were G.S. & Wilson D.A., *East Africa through a Thousand Years* (1984), New York: Africana Publishing Company.

Werle G., *Principles of International Criminal Law* (2009), The Hague: T.M.C Asser Press.

Werle G. (Ed.), *Justice in Transition – Prosecution and Amnesty in Germany and South Africa* (2006), Berlin: BWV Berliner Wissenschafts-Verlag GmbH.

Werle G., *Principles of International Criminal Law 2ed* (2009), The Hague: T. M. C. Asser Press.

Williams M.S., Nagy R. and Elster J. (Eds.), *Transitional Justice* (2012), New York: New York University Press.

World Bank, *Reshaping the Future; Education and Post-conflict and Reconstruction* (2005), Washington, D.C: The World Bank.

Yarwood L., *State Accountability under International Law: Holding states accountable for a breach of jus cogens norms* (2011), Abingdon: Routledge.

Zahar A. & Sluiter G., *International Criminal Law: A Critical Introduction* (2008), Oxford: Oxford University Press.

Zappala A., *Human Rights in International Criminal Proceedings* (2003), Oxford: Oxford University Press.

#### **B. Journal articles and papers**

African Union Panel of the Wise, 'Peace, Justice, and Reconciliation in Africa: Opportunities and Challenges in the Fight Against Impunity', *The African Union Series*, New York: International Peace Institute, February 2013.

Ambos K., 'Establishing an International Criminal Court and an International Criminal Code: Observations from an International Criminal Law Viewpoint' (1996), 7 *European Journal of International Law*.

Among H., 'An Assessment of the Traditional *Gacaca* Courts in Rwanda: Lessons for Communities in Uganda' (2012) 19 *EAST AFR. J. PEACE HUM. RIGHTS*, pp.118-39.

Avruch K. & Vejarano B., 'Truth and Reconciliation Commissions: A Review Essay and Annotated Bibliography' (2000) 4 *The Online Journal of Peace and Conflict Resolution* pp.37-76.

Bainomugisha A. & Tumushabe G., 'The Torturous Peace Process in Northern Uganda: An Analysis of Peace Initiatives and Prospects for a Settlement' (2005), 1 *MACOMBA Policy and Academic Research Series*.

Bangura A.K., 'The Politics of the Struggle to Resolve the Conflict in Uganda: Westerners Pushing Their Legal Approach versus Ugandans Insisting on Their Mato Oput' (2008) 5 *The Journal of Pan African Studies*.

Bassiouni M.C., 'Searching for Peace and Achieving Justice: The Need for Accountability' (1996) 59 *Law and Contemporary Problem* 9, p.19.

Bassiouni M.C., 'The ICC-Quo Vadis?' (2006) 4 *J Int Criminal Justice* pp.421-27.

Bassiouni M.C., 'Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practise' (2001) 42 *Va. J. Int'l L.* 81-162.

Bathurst M.E., 'The United Nations War Crimes Commission' (1945) 39 (3) *American Journal of International Law*, pp.565-70.

Bellamy A. J., 'Responsibility to Protect or Trojan Horse? The Crisis in Darfur and Humanitarian Intervention after Iraq' (2005), 19 *Ethics and International Affairs*.

Bell C., 'Transitional Justice, Interdisciplinarity and the State of the 'Field' or 'Non-Field'' (2009)3 *The International Journal of Transitional Justice*, 5-27.

Bethell L., 'The Mixed Commissions for the Suppression of the Transatlantic Slave Trade in the Nineteenth Century' (1966)7 *The Journal of African History*, pp 79-93.

Beyond Juba Project, 'Why Being Able to Return Home Should be Part of Transitional Justice: Urban IDPs in Kampala and their quest for a Durable Solution', *Refugee Law Project Working Paper No. 2* (2010).

Borland R.M., The Gacaca Tribunals and Rwanda after Genocide: Effective Restorative Community Justice or Further Abuse of Human Rights? Swords and Ploughshares, A Journal of International Affairs . Available online at: [http://www.1sis.american.edu/students/sword/current\\_issue/ess1.pdf](http://www.1sis.american.edu/students/sword/current_issue/ess1.pdf) (accessed on 20th February 2016).

Brahm E., 'Uncovering the Truth: Examining Truth Commission Success and Impact' (2007) *International Studies Perspectives* pp.16-25.

Brock-Utne B., 'Peace Research with a Diversity Perspective: A Look to Africa', (2004) 9 *International Journal of Peace Studies*.

Burke-White W.W., 'A community of courts: Toward a system of International Criminal Law Enforcement' (2003), *Michigan Journal of International Law* [Vol. 24:1], pp.1-101.

Burke-White W.W. & Kaplan S., 'The International Criminal Court and an Admissibility Challenge in the Uganda Situation' (2009) 7 *J Int Criminal Justice* pp.257-79.

Campbell P.J., 'The Truth and Reconciliation Commission (TRC): Human Rights and State Transitions--The South Africa Mode' (2000) 4 *The online Journal for African Studies* available at <http://www.africa.ufl.edu/asq/v4/v4i3a2.htm> (accessed on 14th June 2013).

Chapman C. & Kagaha A., 'Resolving conflicts using traditional mechanisms in the Karamoja and Teso regions of Uganda' *Minority Rights Group International Briefing Paper* (2009).

Charles C.T., 'Is Transitional Justice Really Just?' (2004) 11, *Brown Journal of World Affairs*, pp.101-13.

Carter L.E., 'Justice and Reconciliation on Trial: Gacaca Proceedings in Rwanda' (2008) 14 *New Eng. J. Int'l & Comp. L.* 41.

Clark J.N., 'Peace, Justice and the International Criminal Court: Limitations and Possibilities' *Journal of International Criminal Justice* (2011), Oxford University Press 1-25.

Clark T.H., 'The Prosecutor of the International Criminal Court, Amnesties and the Interests of Justice: Striking a Delicate Balance' (2005) 4 *Wash. U. Glob. Stud. L. Rev.* pp.389-414.

De Ycaza C., 'Performative Functions of Genocide Trials in Rwanda: Reconciliation through Restorative Justice? An Examination of the Convergence of Trauma, Memory and Performance through Legal Responses to Genocide in Rwanda' *African Journal of Legal Studies* pp.9-28.

Dickinson L.A., 'The Promise of Hybrid Courts' (2003), 97 *The American Journal of International Law* pp.295-310.

Dignan J. & Cavadino M., 'Towards a framework for conceptualising and evaluating models of criminal justice from a victim's perspective' (1996), 4 *International Review of Victimology*.

Dinnen S., 'Restorative Justice in Papua New Guinea' (1997), 25 *International Journal of the Sociology of Law* pp. 245-262.

Drumbl M.A., 'Punishment, Post-Genocide: From Guilt to Shame to 'Civis' in Rwanda' (2000) 75 *N.Y.U. L. REV* 1221.

Dugard J. & Reynolds J., 'Apartheid, International Law, and the Occupied Palestinian Territory' (2013) 24 *EJIL* pp. 867-913

Dugard J., 'Dealing With Crimes of a Past Regime. Is Amnesty Still an Option?' (1999) 12 *Leiden Journal of International Law*, pp 1001-1015.

Đukic D., 'Transitional justice and the International Criminal Court – in “the interests of justice”?' (2007), 89 *International Review of the Red Cross* pp.691-718.



El Bushra J. & Lopez E.P., *Development in Conflict: The Gender Dimension* (1994), Report of a workshop held in Thailand, February 1993, *Oxfam Discussion Paper* 3.

El Zeidy M., 'The Ugandan Government Triggers the First Test of the Complementarity Principle: An Assessment of the First State's Party Referral to the ICC' (2005) 5 *International Criminal Law Review* pp.83-119.

Erin B.K., 'The Haunting of Alice: Local Approaches to Justice and Reconciliation in Northern Uganda' (2007) 1 *The International Journal of Transitional Justice*.

Galtung J., 'Violence, Peace and Peace Research' (1969), *Journal of Peace Research*, vol. 6, no. 3, pp. 167-192.

Galtung J. & Hoivik T., 'Structural and Direct Violence' (1971), *Journal of Peace Research*, vol. 8, no. 1, pp. 73-76.

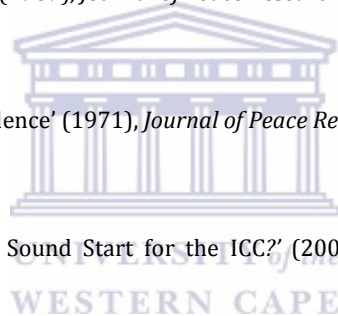
Gaeta P., 'Is the Practice of "Self-Referrals" a Sound Start for the ICC?' (2004), 2 *J Int Criminal Justice*, pp.249-252.

Graybill L., 'Assessing South Africa's Truth and Reconciliation Commission' (2002), 36 *Canadian Journal of African Studies*, pp.356-61.

Greenawalt K.A., 'Complementarity in Crisis: Uganda, Alternative Justice, and the International Criminal Court' (2009) 50 *Virginia Journal of International Law* pp.107-162.

Greppi E., 'The Evolution of Individual Criminal Responsibility under International Criminal Law' (1999), 5 *International Review of the Red Cross*, pp. 531-553.

Hascall S.C., 'Restorative Justice in Islam: Should Qisas Be Considered a Form of Restorative Justice?' (2011)4 *Berkeley J. Of Middle Eastern & Islamic Law*.



Hayner P.B., 'Fifteen Truth Commissions— 1974 to 1994: A Comparative Study' (1994) 16 *Human Rights Quarterly* pp. 597-655.

Hazel F., Warbrick C. & McGoldrick D., 'The Pinochet Case No. 3' (1999) 48 *International and Comparative Law Quarterly* pp.687–702.

Henrard K., 'Post Apartheid South Africa's Democratic Transformation Process: Redress of the Past, Reconciliation and 'Unity in Diversity' (2002) 1 *The Global Review of Ethnopolitics* pp. 18-38.

Herrmann J., 'A critical analysis of the transitional justice measures incorporated by Rwandan Gacaca and their effectiveness' (2012) 19 *James Cook University Law Review*, pp.90-112.

Honeyman C., Hudani S., Tiruneh A., Hierta, Leila C.J., Iliff A., & Meierhenrich J., 'Establishing Collective Norms: Potentials for Participatory Justice in Rwanda (2004)', *Journal of Peace Psychology*, 10 (1), pp. 1–24.

Hovil L. & Lomo Z., 'Whose Justice?: Perceptions of Uganda's Amnesty Act 2000: The Potential for Conflict Resolution and Long Term Reconciliation; (2005), No. 15 *Refugee Law Project Working Paper*.

Hovil L. & Quinn J.R., 'Peace First, Justice Later: Traditional Justice in Northern Uganda' (2005), No. 17 *Refugee Law Project Working Paper*.

Iliff R.A., 'Root and Branch: Discourses of 'Tradition' in Grassroots Transitional Justice', *IJTJ*, Vol. 6, 2012, pp. 253-273.

Iverson J., 'Transitional Justice, Jus Post Bellum and International Criminal Law: Differentiating the Usages, History and Dynamics' (2013) *The International Journal of Transitional Justice*, 1-21.

JLOS, 'The Amnesty Law' (2000) *Issues Paper*, A Review by the Transitional Justice, Working Group, April 2012.

Jones P.E., 'Justice and Rule of Law: Conflict Prevention, Post-Conflict Support and Peace Building' (2004), Address to the International Security and Global Issues Research Group, *David Memorial Institute Seminar Paper*.

Justice and Reconciliation Project, To Pardon or to Punish, *Situational Analysis*, 15 December 2011.

Kasaija P.A., 'Amnesty and International Law: The case of the Lord's Resistance Army insurgents in Northern Uganda' (2005) 5 *African Journal on Conflict Resolution* pp.33-62.

Keller L.M., 'Achieving Peace with Justice: The International criminal Court and Uganda Alternative Justice Mechanisms' (2007) 23 *Connecticut Journal of Int'l Law* 209.

Kirsten A., 'The International Criminal Court on trial' (2011) 24 *Cambridge Review of International Affairs*, 24 (3) pp. 309-333.

Knoops G.J.A., 'International and Internationalized Criminal courts: The face of international peace and security?' (2004), 4 *International Criminal Law Review*, p. 527.

Lanz D., 'Uganda: Beyond the Simplicity of Peace vs. Justice' *The Fletcher School of Law and Diplomacy* (May 2007).

Lanz D., 'The ICC's Intervention in Northern Uganda: Beyond the Simplicity of Peace vs. Justice' (2007) *The Fletcher School of Law and Diplomacy* available at

[http://reliefweb.int/sites/reliefweb.int/files/resources/EC66215A0071F156C12573910051D06D-Full\\_Report.pdf](http://reliefweb.int/sites/reliefweb.int/files/resources/EC66215A0071F156C12573910051D06D-Full_Report.pdf) (accessed on 20th February 2016).

Laplante L.J. 'Outlawing Amnesty: The Return of Criminal Justice in Transitional Justice Schemes' (2009) 50 *Va. J. Int'l L.* 915, pp.915-84.

Laurel E. Fletcher and Harvey M. Weinstein 'Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation' (2002) 24 *Hum. Rts. Q.* 573.

Leebaw B.A., The Irreconcilable Goals of Transitional Justice (2008), *Human Rights Quarterly*, Volume 30, Number 1, pp. 95-118.

Le Mon C.J., 'Rwanda's Troubled Gacaca Courts' (2007), 14 *Human Rights Brief*, pp.16-20.

Lomo A.Z., 'Why the International Criminal Court must withdraw Indictments against the Top LRA Leaders: A Legal Perspective' *Refugee Law Project Press Release* (2006).

Maina C.P., 'The International Criminal Tribunal for Rwanda: Bringing the killers to book' (1997) 321 *International Review of the Red Cross*, pp.695-704.

Mallinder L., 'Indemnity, Amnesty, Pardon and Prosecution Guidelines in South Africa' in *Legalism: Amnesties, Transition and Conflict Transformation* Institute of Criminology and Criminal Justice Queen's University Belfast, *Working Paper* No. 2 (2009), pp.105-7.

Masha Fedorova, Sten Verhoeven & Jan Wouters 'Safeguarding the Rights of Suspects and Accused Persons in International Criminal Proceedings' Institute for International Law, Working Paper No. 27 (June 2009).

Mutua M., 'Beyond Juba: Does Uganda Need a National Truth and Reconciliation Process?' (2007), 13 *Buffalo Human Rights Law Journal*, pp. 401-14.

Naqvi Y., 'Amnesty for war crimes: Defining the limits of international recognition' (2003)85 RICR.

Nash K., 'A Comparative Analysis of Justice in Post Genocidal Rwanda: Fostering a Sense of Peace and Reconciliation' (2007) 1 *Africana Journal* pp.51-101.

Nouwen S.M.H., "'Hybrid Courts": The Hybrid Category of a new type of International Crimes Courts' (2006), 2 *Utrecht Law Review, Volume 2, Issue 2*, 190-214.

Ocen J., 'Can Traditional Rituals Bring Justice to Uganda' *ACR Issue* 123, 16 October 2007, Institute for War and Peace Reporting: London available at <http://iwpr.net/report-news/can-traditional-rituals-bring-justice-northern-uganda> (accessed on 28th January 2016).

Pascoe D., 'Are truth and reconciliation commissions an effective means of dealing with state-organized criminality?' (2007), 3 *Cross-sections*, pp.93-115.

Pensky M., 'Amnesty on Trial: Impunity, Accountability, and the Norms of International Law' (2008) 1 *Ethics & Global Politics*.

Pitsch A.M., 'The Gacaca Law of Rwanda: Possibilities and problems in adjudicating genocide suspects' (2002) *Working Paper* NUR-UMD Partnership Center for International Development and Conflict Management, Baltimore: University of Maryland.

Quinn J.R., 'Beyond Truth Commissions: Indigenous Reconciliation in Uganda' (2006) *Review of Faith and International Affairs* pp.31-37.

Quinn J.R., 'Social Reconstruction in Uganda: The Role of Customary Mechanisms in Transitional Justice' (2007) *Human Rights Review*.

Refugee Law Project, 'Ambiguous Impacts: The Impacts of the International Criminal Court Investigations in Northern Uganda' *Working Paper* No. 22 (October 2013) Kampala: Uganda.

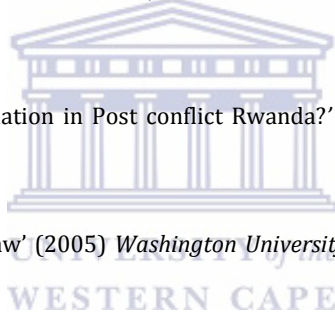
Refugee Law Project, 'Behind the Violence: Causes, Consequences and the Search for Solutions to the War in Northern Uganda' *Working Paper* No. 11 (2004) Kampala: Uganda.

Refugee Law Project, 'Partial Justice: Formal and Informal Justice Mechanisms in Post Conflict West Nile' *Working Paper* No. 21 (2007) Kampala: Uganda.

Refugee Law Project 'Peace First, Justice Later: Traditional Justice in Northern Uganda' *Working Paper* No. 17 (2005) Kampala: Uganda.

Rettig M., 'Gacaca: Truth, Justice, and Reconciliation in Post conflict Rwanda?' (2008) 51 *African Studies Review* No. 3, pp.25-50.

Sadat L.N., 'Exile, Amnesty and International Law' (2005) *Washington University School of Law Working Paper*.



Sarkin J., 'The Tension Between Justice and Reconciliation in Rwanda: Politics, Human Rights, Due process and the Role of the Gacaca Courts in dealing with the Genocide' (2001) 45 *Journal of African Law* pp.143-72.

Schabas W.A., 'Genocide Trials and Gacaca Courts' (2005) 3 *J Int Criminal Justice* pp. 879-895 available at <http://jicj.oxfordjournals.org/content/3/4/879.full?sid=5cc9a993-dac3-45ba-9fff-d30690ba6117> (accessed on 20<sup>th</sup> May 2013)

Schabas W.A., 'National Courts Finally Begin to Prosecute Genocide, the 'Crime of Crimes' (2003), 1 *J. Int Criminal Justice*, pp.39-63.

Schabas W.A., 'Victor's Justice: Selecting "Situations" at the International Criminal Court' (2010) 43 *J. Marshall L. Rev.* pp. 535-552.

Scharf M.P., 'No way out? The Question of Unilateral withdrawals of Referrals to the ICC and other Human Rights Courts' *Legal Studies Working Paper 08-21*, available at <http://ssrn.com/abstract=1240802> (accessed on 21st January 2012).

Scharf M.P., 'The legacy of the Milosevic Trial' (2003) 37 *New England Law Review* pp.915-932.

Sinclair J., 'The International Criminal Court in Uganda' (2010)1 *Undergraduate Transitional Justice Review* pp. 73-87.

Ssenyonjo M., 'The International Criminal Court and the Lord's Resistance Army Leaders: Prosecution or Amnesty?' (2007) 54 *Netherlands International Law Review* 51-80.

Stahn C., 'Complementarity, Amnesties and Alternative Forms of Justice: Some Interpretative Guidelines for the International Criminal Court' (2005) 3 *J Int Criminal Justice* 695-720.

Stephen B. & Sriram C.L., 'When the Hyena is the Judge, the Goat will Never have Justice: The Politics of Criminal Accountability for Post-Election Violence in Kenya' (2012) 111 *African Affairs*.

Stoett P., 'A Question of Indictment: The International Criminal Court and Conflict Resolution' (2010) 26 *Centre d'étude des politiques étrangères et de sécurité (CEPES): Canada*.

Tamfuh Y.N.W., 'The International Criminal Tribunal for Rwanda (ICTR) and the Development of International Justice' (2010) 16 *EAST AFR. J. PEACE HUM. RIGHTS* pp.268-93.

Teitel G.R., 'Transitional Justice Genealogy' (2003) 16 *Harvard Human Rights Journal* 69-94.

Tiemessen A.E., 'After Arusha: Gacaca Justice in Post-Genocide Rwanda' (2004) 8 *African Studies Quarterly* pp.57-76.

Tiemessen A.E., 'The Anti-Politics of the International Criminal Court' (2010) 1 Centre for Transitional Justice and Post Conflict Reconstruction: South Africa.

Tindifa S.B., 'Listen To The People! Towards An Inclusive Approach to the Peace Process in Northern Uganda' (2006)3 *HURIPEC Working Paper*.

Tso P., 'Women and Reconciliation in Northern Uganda' (2010) *International Relations News and Views*, Vol. IX, Issue 3.

United Religions Initiative (URI) and Acholi Religious Leaders Peace Initiative (ARLPI), *Mitigating Land Based Conflicts in Northern Uganda: A Must Guide for Stake Holder Mediation, Sensitization and Reconciliation Processes* (2012), URI & ARLPI.

Uribe C., Do Amnesties Preclude Justice? (2012) *Int. Law: Rev. Colomb. Derecho Int.* [online] pp. 297-359.

Val-Garijo F., 'Reparations for Victims as a Key Element of transitional Justice in the Middle East Occupied Territories: A Legal and Institutional Approach' (2010) 6 *International Studies Journal* pp.39-62.

Van der Merwe H., 'Reversing Accountability in South Africa: From Amnesty to Pardons and Non-Prosecutions' (2009) 5 *Global Studies Review* available at <http://www.globality-gmu.net/archives/1831> (accessed on 25th June 2013).

Van Zyl P., 'Dilemmas of Transitional Justice: The Case of South Africa's Truth and Reconciliation Commission' (1999) 52 *Journal of International Affairs* 646-667.



Villaba C.S., *Transitional Justice: Key Concepts, Processes and Challenges* (2011), IDCR Briefing Paper (IDCR-BP-07/11).

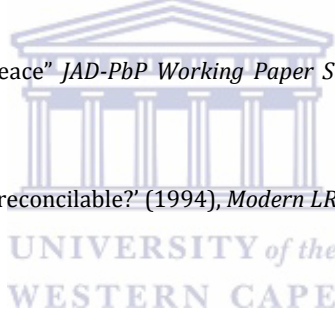
Waldorf L., 'Mass Justice for Mass Atrocity: Rethinking Local Justice as Transitional Justice' (2006) 79 *Temp. L. Rev.* 1-88.

Wilson S., 'The Myth of restorative justice: Truth, reconciliation and ethics of amnesty' (2001), 17 *SAJHR*.

Winter S., Towards a Unified Theory of Transitional Justice, *IJTJ* (2013) 7 (2), pp. 224-244.

Yaacov B.S.T., "Just Peace: Linking Justice to Peace" *JAD-PbP Working Paper Series* No. 5 October 2009.

Zedner L., 'Reparation and retribution: are they reconcilable?' (1994), *Modern LR* 57.



### C. THESES

Abduroaf M., *Truth Commissions: Did the South African Truth and Reconciliation Commission serve the purpose for which it was established?* (2010), Research paper, University of the Western Cape.

Aceng J.C., *Progress and Challenges of Implementing the Rome Statute of the International Criminal Court in Uganda* (2012), Research Paper, University of the Western Cape.

Acirokop P., *Accountability for Mass Atrocities; The LRA Conflict in Uganda* (2012), LL.D Thesis, University of Pretoria.

Boersema J.R., *Afrikaner, Nevertheless: Stigma, Shame & the Sociology of Cultural Trauma* (Dissertation, Faculty of Social and Behavioural Sciences, Universiteit van Amsterdam, 2013).

Chembezi G., *Traditional Justice and States' Obligations for Serious Crimes under International Law: An African Perspective* (2010), Research Paper, University of the Western Cape.

Ibrahimbegovic S., *The concept of Amnesty in the Crossfire between International Criminal Law and Transitional Justice* (2009), Research Paper, University of the Western Cape.

Hardy K., *An analysis of the domestic implementation of the repression of violations of international humanitarian law* (LLM dissertation in International Law, University of Pretoria, 2012).

Mathiasen F., *The African Union and Conflict Management* (Master of Strategic Studies Thesis, U.S. Army War College, Carlisle Barracks, Pennsylvania, 2006).

Musila G.M., *Restorative justice in international Criminal law: The rights of victims in the International criminal court* (unpublished Ph.D Dissertation, University of the Witwatersrand, Johannesburg, 2009).

Nzioka B., *The Rwandan Genocide: Eye Witnesses to a Human Catastrophe* (unpublished Master's Thesis, Faculty of the School of Continuing Studies and of the Graduate School of Arts and Sciences, Georgetown University, Washington, D.C, 2011)

Ohlson T., *Power Politics and Peace Policies; Intra-State Conflict Resolutions in Southern Africa* (1998), Dissertation for the Degree of Doctor of Philosophy in Peace and Conflict Research, Uppsala University, Report No. 50.

#### **D. CONFERENCE AND RESEARCH PAPERS**

Africa Transitional Justice Policy Framework: Expert's Consultation Report, Pretoria, 12-13 March 2012.

Bell C., 'The 'new law' of transitional justice' (2007) (Report of International Conference on Building a Future on Peace and Justice, 25 – 27 June 2007, Nuremberg, Germany).

Binder C., 'Introduction to the Concept of Transitional Justice, in: Transitional Justice. Experiences from African and the Western Balkans, National Defence Academy' (2013).

Brock-Utne B., 'Indigenous conflict resolution in Africa' (A paper presented to the week-end seminar on indigenous solutions to conflicts held at the University of Oslo, Institute for Educational Research, 23 – 24 February 2001).

De Greiff P., *Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence* (2015), United Nations General Assembly A/HRC/21/46, 9 August 2012.

Du Toit F., 'Truth, Reconciliation, Compensation Lessons, Wishes and Warnings from the South' (October 2013).

FIDH/KHRC, 'Report on the Run up to Kenya's 2013 General Elections: Where Does Justice Stand for Victims of 2007/2008 Post Election Violence?' (2013).

FHRI, 'The Human Rights Status Report', 2007, FHRI: Kampala.

Government of Uganda, 'Report of Health and mortality survey among internally displaced persons in Gulu, Kitgum and Pader districts', July 2005 available at: [www.who.int/hac/crises/uga/sitreps/Ugandamortsurvey.pdf](http://www.who.int/hac/crises/uga/sitreps/Ugandamortsurvey.pdf) (accessed on 3rd June 2016).

Halderman F., 'A Different Kind of Justice: Transitional Justice as Recognition' 7 February 2006.

HRC, ICTJ & PCID, 'When the War Ends: A Population-Based Survey on Attitudes about Peace, Justice, and Social Reconstruction in Northern Uganda' (December 2007).

Human Rights Watch, 'The Meaning of 'The Interests of Justice' in Article 53 of the ICC Statute', Human Rights Policy Paper, available at [www.iccnw.org/documents/HRWInterestsOfJusticeJun2005.pdf](http://www.iccnw.org/documents/HRWInterestsOfJusticeJun2005.pdf) (accessed on 23<sup>rd</sup> February 2011).

Muwonge M.J., 'Community Based Reintegration Of Ex-Combatants: A Case Study of the Lord's Resistance Army In Northern Uganda' (Paper presented at the 4th International Institute for Peace through Tourism African Conference: Educators Forum, held at Serena Hotel –Kampala, Uganda, 20 May 2007).

Nabudere D.W. & Mukasa B.L., 'Comprehensive Research Report on Restorative Systems of Justice and International Humanitarian Law' (2008) Mbale: Marcus-Garvey Pan-Afrikan Institute (Report resulting from the proceedings of a workshop on Restorative Systems of Justice and International Humanitarian Law, held at Intercontinental Hotel, Nairobi, Kenya, 17-20 August 2008).

OHCHR, (May 2012), UN Position on Uganda's Amnesty Act, 2000: Submission to the Honourable Minister of Internal Affairs, OHCHR: Uganda.

OHCHR and UHRC, 'The Dust Has Not Yet Settled: Victims' Views on The Right to Remedy and Reparation' (A Report from the Greater North of Uganda, 2011).

Parry E.J., 'Justice and Rule of Law: Conflict Prevention, Post-Conflict Support and Peace Building' (2004) (Address to the International Security and Global Issues Research Group, David Memorial Institute Seminar, 2004).

Quinn J.R., 'What of Reconciliation? Traditional Mechanisms of Acknowledgement in Uganda' (A paper prepared for presentation at the conference, "Reconciliation" held by the Nationalism and Ethnic Conflict Research Group, The University of Western Ontario, London, 15 May 2005).

RLP & IJP, 'Report of the training on Transitional justice for Parliamentarians of the Greater North Parliamentary Forum', Imperial Botanical Beach Hotel, Entebbe, 19-21 November 2009.

UNDP, 'Transitional Justice in Northern, Eastern Uganda and Some Parts of West Nile Region' (July 2007).

Villa-Vicencio C., 'Where the old meets the new: Transitional Justice, Peace-building and Traditional Reconciliation Practices in Africa', Claude Ake Memorial Paper No. 5, Department of Peace and Conflict Research, Uppsala University and Nordic Africa Institute Uppsala.



#### **E. INTERNET REFERENCES AND NEWS PAPER SOURCES**

Afako B., 'Reconciliation and justice: 'Mato oput' and the Amnesty Act' (2002) available at <http://www.c-r.org/our-work/accord/northern-uganda/reconciliation-justice.php> (accessed on 21st January 2012).

AFP, Let LRA rebel hearing be held in Uganda, says ICC, New Vision, 11 September 2015.

Al Jazeera, 'Kenya calls on UN to drop Kenyatta trials', Al Jazeera, 09 May 2013, <http://www.aljazeera.com/news/africa/2013/05/201359142310140810.html> (accessed on 21st July 2013).

American Non-Governmental Organisations Coalition for the International Criminal Court, 'The ICC Prosecutor's Application for Authorisation to Open an Investigation in the Situation of Kenya available' at *Kenya\_Application.pdf* (accessed on 23<sup>rd</sup> June 2013).

Amnesty International, *Public Statement*, Public Statement of 30 January 2004, No. 022, Index: AFR 59/001/2004.

Ankuda P., 'LRA too weak to attack Uganda', *New Vision*, 22 May 2014.

Arinaitwe S., 'The Madhvani quest for Amuru land', *Daily Monitor*, July 31, 2013.

Atuhaire P.M., *The Monitor Newspaper*, 27 January 2016 at <http://allafrica.com/stories/201601270143.html#> (accessed on 14<sup>th</sup> February 2016).

Baldauf S., 'International Criminal Court prosecutor Ocampo names six top Kenyans for post election violence trial' *The Christian Monitor* 15 December 2010 available at <http://www.csmonitor.com/World/Africa/2010/1215/International-Criminal-Court-prosecutor-Ocampo-names-six-top-Kenyans-for-post-election-violence-trial> (accessed on 10th June 2013).

BBC, 'African Union accuses ICC of 'hunting' Africans' *BBC News*, 27 May 2013 available at <http://www.bbc.co.uk/news/world-africa-22681894> (accessed 22nd June 2013).

BBC, 'Kenya admits mistakes over 'massacre'', *BBC News*, 18 October 2000, available at <http://news.bbc.co.uk/2/hi/africa/978922.stm> (accessed on 24th June 2014).

BBC, 'Museveni rejects Hague LRA trial', *BBC News*, Wednesday 12 March 2008, retrieved from <http://news.bbc.co.uk/2/hi/africa/7291274.stm> (Accessed on 22nd February 2013).

BBC, 'Tutu urges apartheid prosecutions' *BBC News* 16 December 2005 available at <http://news.bbc.co.uk/2/hi/africa/4534196.stm> (accessed on 21st June 2013).

Benton S., 'South Africa: Policy on Prosecution of Apartheid-Era Human Rights Offenders Unveiled' *Allafrica*, 17 January 2006, available at <http://allafrica.com/stories/200601180126.html> (accessed on 13th June 2013).

Borland R.M., 'The Gacaca Tribunals and Rwanda after Genocide: Effective Restorative Community Justice or Further Abuse of Human Rights?' available at [http://www1.sis.american.edu/students/sword/Current\\_Issue/essay1.pdf](http://www1.sis.american.edu/students/sword/Current_Issue/essay1.pdf) (accessed on 23rd April 2012).

Bosire L.K., 'Misconceptions I — The ICC and the Truth, Justice and Reconciliation Commission' *Oxford Transitional Justice Research Working papers* available at [http://www.csls.ox.ac.uk/documents/Bosire\\_.pdf](http://www.csls.ox.ac.uk/documents/Bosire_.pdf) (accessed on 21<sup>st</sup> February 2012).

Bosire L.K., 'Misconceptions II - Domestic Prosecutions and the International Criminal Court' *Oxford Transitional Justice Research Working papers* (2009) available at <http://www.csls.ox.ac.uk/documents/Bosire2.pdf> (accessed on 23rd February 2012).

Busharizi P., Are we seeing the last of Kony?, Sunday Vision, 30 March 2014.

Butagira T., 'LRA commander Okot feared dead', *Daily Monitor*, February 14, 2014 <http://www.monitor.co.ug/News/National/LRA-commander-Okot-Odhiambo-feared-dead/-/688334/2205586/-/w4e3h2/-/index.html> (accessed 3rd March 2014).

Candia S., 'Army hunts Joseph Kony's son', New Vision, 21 May 2014.

Cassese A., 'Affirmation of the Principles of International Law Recognized by the Charter of the Nüremberg Tribunal' (2003) Audiovisual Library of International Law available at [http://untreaty.un.org/cod/avl/pdf/ha/ga\\_95-1/ga\\_95-1\\_e.pdf](http://untreaty.un.org/cod/avl/pdf/ha/ga_95-1/ga_95-1_e.pdf) (accessed on 11th February 2012).

Coalition for the International Criminal Court 'History of the ICC' available at <http://www.iccnw.org/?mod=icchistory> (accessed on 2<sup>nd</sup> February 2012).

Cobban H., 'Uganda: When International Justice and Internal Peace are at Odds', *Christian Science Monitor*, 2006.

Daily Monitor, 'GoSS suspends talks over LRA attacks', *The Daily Monitor*, 8 June 2008  
Kampala: Uganda.

De la Croix J., Tabaro E. & Musoni E., 'FARG in new plan to shelter survivors', *The New Times*, 15 April 2013, available at <http://www.newtimes.co.rw/news/index.php?i=15328&a=65946> (accessed 19<sup>th</sup> June 2013).

Egeland J., 'A Ugandan Tragedy', *Washington Post*, 10 November 2004

Encyclopaedia Britannica, Truth and Reconciliation Commission, South Africa (TRC), available at <http://www.britannica.com/EBchecked/topic/607421/Truth-and-Reconciliation-Commission-South-Africa-TRC/288203/Challenges-and-limitations> (accessed on 21st June 2013).

Fombad C.M., (2008) *Transitional Justice in Africa: The Experience with Truth Commissions*, available at [http://www.nyulawglobal.org/globalex/Africa\\_Truth\\_Commissions.htm](http://www.nyulawglobal.org/globalex/Africa_Truth_Commissions.htm) (accessed on 22nd August 2015).

France 24 International, 'African Union asks ICC to transfer Kenyatta case', *France 24 International News*, May 27, 2013 Available at <http://www.france24.com/en/20130527-icc-hague-rejects-african-union-kenya-president-kenyatta> (accessed on 22nd June 2013).

Gilles I., 'Does the ICTR contribute to long-lasting stability in Rwanda' *Legal Frontiers*, 29 October 2011 available at <http://www.legalfrontiers.ca/2011/10/does-the-ictr-contribute-to-long-lasting-stability-in-rwanda/> (accessed on 21<sup>st</sup> June 2013).



Human Rights Watch, 'ICC: Prosecutor Seeks OK on Kenya Inquiry, Kenyan Authorities Should Cooperate Fully and Hold Credible National Trials, *Press Release* 26 November 2009.

ICC-OTP, 'Interpol Issues First ICC Red Notices' (Press Release, 1 June 2006), available from <http://www.icc-cpi.int> (accessed on 4<sup>th</sup> March 2014).

ICTJ, 'What is Transitional Justice?' International Center for Transitional Justice, December 2008, <http://ictj.org/about/transitional-justice> (accessed on 24<sup>th</sup> February 2014).

ICTJ & DGF, Joint Press Release, Daily Monitor, 17 June 2015.

ICTR, 'ICTR Detainees - Status on 20 February 2013' available at <http://www.unicttr.org/cases/tabid/202/Default.aspx> (accessed on 21<sup>st</sup> June 2013).

Iliopoulos K, 'ICTR Accused of One-Sided Justice' Crimes of War Project: USA, available at <http://www.crimesofwar.org/commentary/ictr-accused-of-one-sided-justice/> (accessed on 16<sup>th</sup> June 2013).

IRIN, 'Uganda: Government Ready for Conditional Truce with Rebels' available at <http://www.irinnews.org/report.aspx?reportid=60463> (accessed on 21<sup>st</sup> January 2012).

IRIN, 'Rebel amnesty reinstated in Uganda' available at <http://www.irinnews.org/report/98133/rebel-amnesty-reinstated-in-uganda> (accessed on 5<sup>th</sup> March 2014).

Kaberia J., 'ICC Prosecutor drops Muthaura's case' *Capital News* 11 March 2013, available at <http://www.capitalfm.co.ke/news/2013/03/icc-drops-case-against-kenyatta-co-accused-muthaura/> (accessed on 19<sup>th</sup> June 2013).

Kaija B., 'Keep the Fire on Joseph Kony', Sunday Vision, 18 May 2014.

Kasasira R., 'Hunting down Kony harder than fighting him in CAR', Sunday Monitor, 22 June 2014.

Kelley K.J., 'Central Africa's multiple crises deepening despite progress on LRA', EastAfrican, 17 – 23 May 2014.

Kersten M., Uganda's Controversial First War Crimes Trial: Thomas Kwoyelo (2011) available at <http://justiceinconflict.org/2011/07/12/ugandas-controversial-first-war-crimes-trial-thomas-kwoyelo/> (accessed on 24<sup>th</sup> April 2016).

Kisia A. & Sum A., 'Raila Odinga calls for implementation of Truth Justice and Reconciliation Commission report', Standard Digital, Sunday, 26 May 26 2013 available at <http://www.standardmedia.co.ke/?articleID=2000084568> (accessed on 24<sup>th</sup> June 2013).

Mabikke S.B., Escalating Land Grabbing in Post-conflict Regions of Northern Uganda: A Need for Strengthening Good Land Governance in Acholi Region, Paper presented at the International Conference on Global Land Grabbing, 6-8 April 2011, Institute of Development Studies, University of Sussex.

Makumbi C. & Eriku J., 'Clergy Demand Truth and Reconciliation Commission for Northern Region' The Daily Monitor 12 September 2011 Kampala: Uganda.

Maliti T., 'ICC confirms charges against four out of six Kenyan suspects, *Kenya Monitor*' 23 January 2012 available at <http://www.icckenya.org/2012/01/icc-confirms-charges-against-four-out-of-six-kenyan-suspects/> (accessed on 13<sup>th</sup> June 2013).

Mukasa H., 'New Justice System for LRA', The New Vision, 4 July 2008 Kampala: Uganda.

Mukasa H., 'UN mounts pressure on LRA rebels' *The New Vision* 12 April 2012 Kampala: Uganda.

Mukiibi C. & Aber P., Lukoya a controversial leader, *Sunday Vision*, 18 May 2014.

Museveni Y.K., 'Cultural bodies should lead to integration', *Sunday Vision*, 1 June 2014.

New Vision, Wanted top LRA rebel 'may be dead', *New Vision Newspaper*, February 14, 2014, <http://www.newvision.co.ug/news/652614-wanted-top-lra-rebel-may-be-dead.html> (accessed on 1st March 2014).

Nsanzimana J.C., 'Self-reliance: some Genocide survivors miss out' *The Rwanda Focus*, 7 April 2013, available at <http://focus.rw/wp/2013/04/self-reliance-some-genocide-survivors-miss-out/> (accessed on 19<sup>th</sup> June 2013).

Nyakairu F., 'Uganda: Museveni Amnesty to Kony Illegal— ICC', *The Daily Monitor* 6 July 2006 Kampala: Uganda.

Obbo C.O., 'From an altar boy to the ultimate diabolical genius: The Kony nightmare', *The EastAfrican*, 2 to 8 April 2012.

Ochola D., 'Ocampo to probe Barlonyo massacre', *New Vision*, 24 March 2014.

Odora O., 'The ICC and the Situation in Northern Uganda' *Acholi Times* Monday 16 April 2012, available at <http://acholitimes.com/index.php/perspectives/opinion/160-the-icc-and-the-situation-in-northern-uganda-the-big-picture> (accessed on 2nd March 2012).

Oduor A., Truth Justice and Reconciliation Commission proposes Reconciliation Day, *Standard Digital*, 22 May 2013

[http://www.standardmedia.co.ke/?articleID=2000084155&story\\_title=team-proposes-reconciliation-day](http://www.standardmedia.co.ke/?articleID=2000084155&story_title=team-proposes-reconciliation-day) (accessed on 24<sup>th</sup> June 2013).

Okello L., 'Mato Oput Is a Cloak for Impunity in Northern Uganda' (2007), available at: [http://www.friendsforpeacein africa.org/index2.php?option=com\\_content&do\\_pdf=1&id=209](http://www.friendsforpeacein africa.org/index2.php?option=com_content&do_pdf=1&id=209) (accessed 21<sup>st</sup> January 2012).

Olupot M., 'Rebel chief refuses to sign peace deal' The New Vision 10 April 2008 Kampala: Uganda.

Omondi F., 'Is The Anti-ICC Revolt Sincere?' *The Star*, 6 June 2013 available at <http://www.the-star.co.ke/news/article-123363/anti-icc-revolt-sincere> (accessed on 15th June 2013).

Onyalla H., 'The one to come after Lakwena anointed', Sunday Vision, 18 May 2014.

Onyango E., 'ICC judges confirm cases against four top Kenyans', *Daily Nation Newspaper*, 23 January 2012 available at <http://allafrica.com/stories/201201231901.html> (accessed on 15th April 2013).

Onyango F., 'Mato Oput not a viable Alternative to the ICC' The New Vision 11 July 2007 Kampala: Uganda.

Radio Netherlands Worldwide, 'Call for a truth and reconciliation commission in Uganda', 17 November 2010, available at <http://www.rnw.nl/africa/article/call-a-truth-and-reconciliation-commission-uganda> (accessed on 27th July 2015).

Refugee Law Project & Democratic Governance Facility (DGF), Press Release, Daily Monitor, 10 July 2013.

Refugee Law Project & Human Rights Focus, *Not A Crime to Talk: Give Peace a Chance in Northern Uganda*, Press Statement, July 2006.

Richey W., U.S. High Court Allows Apartheid Claims against Multinationals, Christian Science Monitor, available at <http://www.globalpolicy.org/component/content/article/163/28129.html> (accessed on 21st June 2013).

Roberts M.J., *Conflict Analysis of the 2007 Post-election Violence in Kenya* (2009) New Dominion Philanthropy Metrics, available at [http://www.ndpmetrics.com/papers/Kenya\\_Conflict\\_2007.pdf](http://www.ndpmetrics.com/papers/Kenya_Conflict_2007.pdf) (accessed on 14th June 2013).

Seils P., 'Integrity of Kenya's Truth Commission Report must be restored', *Al Jazeera*, 9 June 2013, available at <http://en-maktoob.news.yahoo.com/integrity-kenyas-truth-commission-report-must-restored-150113561.html> (accessed on 19th June 2013).

Southwick K., *When Peace and Justice Clash*, *International Herald Tribune*, 14 October 2005.

Standard Media, 'Uhuru Kenyatta, William Ruto among 400 named in Truth Justice and Reconciliation Commission report' *Standard Digital* 22 May 2013 available at <http://www.standardmedia.co.ke/?articleID=2000084131> (accessed on 21<sup>st</sup> June 2013).

Steflja I., 'Challenges of Transitional Justice in Rwanda' (2012) 18 Centre for International Governance Innovation: Canada, available at *Backgrounder No.18-Challenges of Transitional Justice in Rwanda.pdf* (accessed on 20<sup>th</sup> June 2013).

Sudan Tribune, 'Ugandan rebels suspend peace talks, appoint new team', *Sudan Tribune*, 11 April 2008 Khartoum: Sudan.

Twonomugisha N., 'Amnesty is necessary for peace and reconciliation', Daily Monitor, 11 August 2014.

United Nations, 'Prosecutor Receives Referral of Situation in Democratic Republic of Congo', *Press Release* 2003, available at <http://www.un.org/News/Press/docs/2004/afr903.doc.htm> (accessed on 21st January 2012).

Walubiri M., 'The hunt for Kony carries on', Sunday Vision, 18 May 2014.

Wandera S., 'Ogoola calls for confession and unity The Daily Monitor 3 October 2001, Kampala: Uganda.

Wanyeki L.M., 'Impunity for 'senior officials'? Shame on AU, The EastAfrican, 28 June to 4 July 2014.

Volqvartz J., 'ICC under fire over Uganda probe', CNN.com, 23 February 2005.

<http://www.pict-pcti.org/courts/hybrid.html>

[www.inkiko-gacaca.gov.rw](http://www.inkiko-gacaca.gov.rw)

[http://en.wikipedia.org/wiki/Gacaca\\_court](http://en.wikipedia.org/wiki/Gacaca_court)

<http://www.aljazeera.com/news/africa/2013/10/africans-urge-icc-no>

<https://www.cia.gov/library/publications/the-world-factbook/geos/ct.html>