THE HIDDEN TRUTH: A CRITICAL EXAMINATION OF UGANDA'S TRANSITIONAL JUSTICE LEGAL AND POLICY REFORMS ON TRUTH-SEEKING

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AUGUST 2021

Submitted in partial fulfillment of the requirements for the LLM degree in Transnational Criminal Justice University of the Western Cape

ACKNOWLEDGEMENTS

Completing this research has been no mean feat. However, I would wish to acknowledge the support of my supervisor Prof John-Mark Iyi whose guidance and feedback has helped refine my drafts and kept me on course to completing this academic task. I am as well grateful to the University of Western Cape for granting us the opportunity to undertake this course and specifically for granting me a partial scholarship to pursue the course. I will forever remain grateful.

I also wish to extend my sincere gratitude to Ms Brenda Biira my wife for the moral support she has accorded me during this exercise, Mr Ivan Magala my former supervisor at the Inspectorate of Government, who encouraged me and supported me by allowing me some time off duty to attend to my studies, and my friend Mr Jesse Mugero, who gave me pointers to some of the academic texts to look out for while doing this research.

DEDICATION

This thesis is dedicated first to the God of the heavens and the earth and our lord Jesus Christ who has granted me the divine ability to execute this task to its conclusion. And then to my parents, Hajji Mustapha Byaruhanga and Mrs Rukia Byaruhanga Mbasalizaki for sacrificing all they could so that I would acquire a good education.

LIST OF ACRONYMS

AAR Agreement on Accountability and Reconciliation

DPP Directorate of Public Prosecutions

ICD International Crimes Division of the High Court

ICTJ International Centre for Transitional Justice

ICTR International Criminal Tribunal for Rwanda

ICTY International Criminal Tribunal of Yugoslavia

IDP Internally Displaced Persons

JLOS Justice Law and Order Sector

LRA Lord's Resistance Army

NGO Non-Government Organization

NRA National Resistance Army

NTJP National Transitional Justice Policy

PWDs Persons with Disabilities

RPF Rwandan Patriotic Front

UHRC Uganda Human Rights Commission

UNHCHR Office of the United Nations High Commissioner for Human Rights

UPDF Uganda People's Defence Forces

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ABSTRACT

In the past, analyses of Uganda's Transitional Justice legal and policy measures on truth-seeking have been focussed on evaluating the efficacy of a truth commission. However, being cognizant of the limitations entailed in taking that approach, this research adopts a more comprehensive examination of the problem, assessing the viability of all the known truth-seeking avenues and the opportunities they present in enabling Uganda to effectively address the challenge of enforcing accountability for past violations. The research uses a doctrinal study to demonstrate that even if Uganda were to adopt a truth commission as a truth-seeking initiative, there are no guarantees for its success. In fact, the research illustrates that, given the political context of there being no actual transition, a truth commission is more likely to fail and may only be used to achieve political rather than truth and justice objectives. Yet, the research finds that the current Transitional Justice discourse and the recent enactment of the National Transitional Justice Policy 2019 present good opportunity for the incorporation of traditional justice mechanisms into Uganda's formal justice processes to enhance their truth-seeking capability. Nevertheless, it is still evident that these traditional justice practices have to overcome the scepticism of some of the judicial officers who continue to unjustifiably challenge their legitimacy. The research also identifies problems with a lack of cultural consciousness in the legal and policy stipulations on exhumations, the absence of restorative justice measures in plea bargain processes, the minimal recognition of the plight of the PWDs in the policy prioritizations on truth-seeking, the imposition of the mandate to check the excesses of security agencies on the Inspectorate of Government rather than the Uganda Human Rights Commission, and the prioritization of development initiatives over the reparative justice concerns of the victims. Accordingly, the study makes some recommendations that should be able to address the problems identified in Uganda's Transitional Justice legal and policy reforms on truth-seeking.

Key words: Transitional Justice, truth, law reform, policy reform, human rights, accountability, traditional justice mechanisms

CHAPTER 1

INTRODUCTION AND RESEARCH METHODOLOGY

1.1 BRIEF OVERVIEW

Establishing the truth about the past is central to the reconstruction of transitioning societies and can be an effective measure of accountability for past human rights violations in such societies. Truth-seeking is said to have its origins in Latin America during the struggle for establishing facts about disappeared persons by their families, but has as well increasingly become a component of various international human rights instruments.[1] The Human Rights Resolution 2005/66 on the Right to Truth recognizes the significance of enforcing the right to truth in the efforts to overcome impunity.[2]

The United Nations Updated Set of Principles on the Protection and Promotion of Human Rights through Action to Combat Impunity creates an absolute right to credible information about the commission of past atrocious crimes and the circumstances under which those crimes were committed.[3] The International Convention for Protection of all persons from Enforced Disappearance upholds the right to be informed of the circumstances regarding any enforced disappearances, the progress of respective investigations, and the fate of the disappeared persons.[4] 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 provide for the right to reparations of the victim which includes "verification of the facts, and full and public disclosure of the truth".[5]

At the national level, Uganda's Constitution recalls the country's political history that is dotted with incidents of constitutional instability and commits to founding a new constitutional order that espouses inter alia, the ideals of peace and social justice.[6] The Constitution also requires that Uganda's foreign policy esteems international law and the obligations that emanate from its governing treaties.[7]

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[1]International Centre for Transitional Justice Briefing 2012 – *Confronting the past: Truth telling and reconciliation in Uganda* (2012) 1-5

[2]UN Commission on Human Rights, *Human Rights Resolution 2005/66: Right to the Truth*, UNCHR, 2005 E/CN.4/RES/2005/66 Resolution (2005)

[3]Principle 2 United Nations Updated Set of Principles on the Protection and Promotion of Human Rights through Action to Combat Impunity, UN, 2005 E/CN.4/2005/102/Add.1 Resolution (2005)

[4]Article 24 (2) International Convention for the Protection of All Persons from Enforced Disappearance, 2010 UN Doc. A/61/448 Treaty (2010)

[5]Principle 24 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, 2006 UN A/RES/60/147 Resolution (2005)

[6]The Preamble the Constitution of the Republic of Uganda, 1995

[7]Principle XXVIII National Objectives and Directive Principles of State Policy Constitution of the Republic of Uganda, 1995

The Uganda National Transitional Policy, 2019 stipulates that truth-seeking denotes the process adopted to give victims of past atrocious violations of human rights and the society an opportunity to share their experiences, in the hope of coming to grips with their past pain and suffering, and ultimately to prevent future repetition. It may include formal and non- formal processes of investigation to establish true and/ or unprejudiced records of the past.[8]

There are various mechanisms of truth-seeking truth-seeking which may include among others documentation processes, commissions of inquiry, exhumations, fact-finding inquiries, parliamentary hearings and criminal trials.[9] In the past, Uganda has instituted commissions of inquiry as avenues for truth-seeking. Unfortunately, Uganda's commissions of inquiry are largely considered to have under-delivered in their quest to unveil the truth pertaining to past atrocities.[10] The 1974 Commission of Inquiry into the Enforced Disappearance of Persons was bedevilled with various forms of undue political interference in its work, and its report was shelved upon publication.[11] The 1986 Commission of Inquiry into Violation of Human Rights limped under strains of gross underfunding for its work when it took eight years to complete its work. For an institution that was set up to accomplish its work within a couple of years, by 1994 when it completed its work, there was little public interest in its findings.[12]

In 2008, following years of the Northern Uganda insurgence, the Uganda government through the Juba Agreement on Accountability and Reconciliation (AAR)[13] committed to reform the Transitional Justice policy landscape and establish viable mechanisms for post-conflict truth-seeking and reconciliation. When the policy formulation was still in its nascent stages, setting up a truth commission remained high on the agenda, however, by the time the policy was enacted in 2019, the establishment of a truth commission had been replaced with what some critics have regarded as vague mechanisms of truth-seeking.[14] The critics blame the anomaly on the political manoeuvring of the sitting government which is perceived as being disinclined to embrace any form of accountability for its misgivings.[15] This thesis therefore seeks to critically examine the viability of the truth-seeking legal and policy options that have been adopted in Uganda's recent Transitional Justice reforms, and assessing the validity of the criticisms of the policy and the suggested alternatives.

[8]Ministry of Internal Affairs National Transitional Justice Policy (2019) VIII
[9]International Centre for Transitional Justice Briefing 2012 – *Confronting the past: Truth telling and reconciliation in Uganda* (2012) 1-5
[10]Hayner PB '*Unspeakable Truths': Transitional Justice and the Challenge of Truth Commissions'* 2 ed (2010) 97-99
[11]Quinn JR 'Constraints the undoing of the Uganda Truth Commission' (2014) 26 *Human Rights Quarterly* 401 427
[12]Quinn JR 'Constraints the undoing of the Uganda Truth Commission' (2014) 26 *Human Rights Quarterly* 401 427
[13]Agreement on Accountability and Reconciliation between the Government of the Republic of Uganda and the Lord's Resistance Army/Movement Juba, Sudan, 2007 UNSC s12007143 5 Annex 1 (2007)
[14]Macdonald A 'Somehow this whole process became artificial: Exploring the Transitional Justice implementation gap in Uganda' *International Journal of Transitional Justice* (2019) 13 225 248
[15]Macdonald A 'Somehow this whole process became artificial: Exploring the Transitional Justice implementation gap in Uganda' *International Journal of Transitional Justice* (2019) 13 225 248

1.2 PROBLEM STATEMENT

At the outset of Uganda's Transitional Justice policy formulation, it was hoped that it would make provision for a truth commission and set operational parameters of the commission. However, in 2019 when the policy was enacted, following a protracted process of policy formulation, the idea of a truth commission was stifled and rather substituted with what was viewed as vague truth-seeking mechanisms by some policy analysts.[16] There were fears that in their current state, the stipulated truth-seeking policy mechanisms could not be employed as an effective Transitional Justice tool to enforce accountability for past human rights abuses. Therefore, this research aims at examining the viability of the legal and policy reforms on truth-seeking in Uganda.

1.3 SIGNIFICANCE OF THE STUDY

The majority of previous studies on truth-seeking in Uganda have been limited in their scope of assessment, usually focussed on the viability of a truth commission.[17] However this study takes on a broader scope assessing the varied truth-seeking mechanisms including prosecutions, documentations and traditional justice mechanisms among others in a bid to provide deeper insights into Uganda's truth-seeking legal and policy reforms.

1.4 AIMS AND OBJECTIVES

The aim of this research is to develop viable policy suggestions on truth-seeking in Uganda.

The objectives of the research are:

1. To critically examine Uganda's truth-seeking legal and policy measures and their viability.
2. To critically assess the validity of any legal and policy alternatives to Uganda's truth-seeking policy mechanisms.
3. To develop workable recommendations for the enhancement of Uganda's truth-seeking legal and policy framework.

1.5 RESEARCH QUESTIONS

1. What are the merits and demerits of Uganda's truth-seeking legal and policy measures?
2. What are the possible alternatives to Uganda's truth-seeking legal and policy measures and what's their viability?
3. What measures can be implemented to enhance truth-seeking and enforce accountability for past human rights abuses and international humanitarian law violations in Uganda?

[16]Macdonald A 'Somehow this whole process became artificial: Exploring the Transitional Justice implementation gap in Uganda' *International Journal of Transitional Justice* (2019) 13 225 248

[17]Acirokop P 'A truth commission for Uganda? Opportunities and challenges' (2012) 12 *Afr. hum. rights law j* 417 447; Hayner PB '*Unspeakable Truths': Transitional Justice and the challenge of truth commissions'* 2 ed (2010): Quinn JR 'Constraints the undoing of the Uganda truth commission' (2014) 26 *Human Rights Quarterly* 401 427;

1.6 RESEARCH METHODOLOGY

This mini thesis will take the form of a doctrinal study and will take a qualitative approach. The paper will be based on a desk review of books, articles and other journal sources from electronic and hardcopies. The research will also review government policy documents, legislation, court cases and reports related to the subject of the research.

1.7 CONCEPTUAL FRAMEWORK

The conception of truth-seeking stems from the broader conception of Transitional Justice, a norm that has increasingly become associated with resolving political crises and is often the expected response when there is a regime change from conflict to peace, democracy, prosperity and harmony. It encompasses post-conflict practices and mechanisms that are adopted to redress legacies of previous human rights abuses and violations of humanitarian law.[18]

It has thus been propounded that Transitional Justice seeks neither vengeance nor amnesia but acknowledgement and responsible memory.[19] However Transitional Justice can as well be regarded a sub-component of criminal justice which may be conceptualized as being retributive or restorative in its application. Restorative Justice is victim and community-centred, and aims at reconciling offenders with the victims as well as the community, who actively participate in the justice process, that is punctuated with dialogue and and negotiation. Restorative justice may thus entail forgiveness, truth telling, compensation and vetting among other measures.[20] Conversely, retributive justice processes disregard the victim and community needs of reconciliation, and render them peripheral to the justice process. It rather focuses on the punishment of the offender by the state and the process is characterized by adversarial relationships.[21]

Teitel narrates the context of the development of accountability for international crimes that coincides with a transition from retributive to restorative norms of justice in the historical patterns. She postulates that the first wave of Transitional Justice interventions was retributive with national trials of offenders and sanctions of nations which had breached international law norms. The second wave was characterized by international trials and individual accountability for war crimes. However in the post-cold war period, the limits of the retributive mechanisms of Transitional

[18]Bishnu P 'A comparative study of the world's truth commissions: From madness to hope' (2017) 4 *World Journal of Social Sciences Research* 192 230

[19]Justice, Law and Order Sector Report 2008 - *Transitional Justice in Northern Uganda, Eastern Uganda and some part of West Nile region* (2008) 12-13

[20]Chirichetti J 'Transitional Justice and its role in development in post conflict Northern Uganda' 2013 *Independent Study Project (ISP) Collection*

[21]Justice, Law and Order Sector Report 2008 - *Transitional Justice in Northern Uganda, Eastern Uganda and some part of West Nile region* (2008) 26-27

Justice became more pronounced. This called for the incorporation of restorative justice in the transitional justice response symbolized by the emergence of truth commissions.[22]

However, conceptualizing transitional justice only in the context of actual transitions can be limiting. As the contexts which require Transitional Justice responses are increasingly varied and now include non-transitional contexts tending towards what Gissel christens the normalized paradigm of Transitional Justice.[23] Gissel posits that this normalization has been mutually re-enforced through 3 key processes of internationalization, legalization and professionalization over the years.[24] The legalization originated in the 1990s and entailed the advocacy for the inclusion of conversations on truth in the criminal justice discourse because apparently, the conceptual distinctions of truth and justice had become increasingly blurred. Moreover, political and legal elements of transitions became constituted in mutual but broader narratives.

On the other hand, internationalization necessitated participation of international actors in local transitional justice contexts and the adjustment of domestic models to fit international standards. Thus, as Transitional Justice extended its reach, individuals and organizations gained specialized expertise in Transitional Justice which led to its professionalization. Gissel argues that, for instance, the failures of Uganda's previous commissions of inquiry were pegged to their emergence at a time when Transitional Justice had not been properly institutionalized and professionalized, in moments when criminal accountability was less emphasized. Gissel then concludes that the fact-finding commissions of inquiry, for that reason, got away with non-adherence to best practices.[25]

Likewise, Quinn identifies a tendency for transitional justice efforts to be significantly less effective in circumstances where they are implemented before the cessation of hostilities or prior to any kind of political transition. To support their analysis Quinn proposes that first; understanding when the transitions begin is vital although she admits to the problems of identifying moments when transitions begin.[26] For instance Quinn highlights that the problem of tagging the commencement of transitions to the signing of peace agreements lies in the assumption that signing the agreements guarantees subsequent peace, yet, that is not always the case. She then maintains that even in cases where the transition is said to commence at the end of hostilities, it cannot not

[22]Teitel RG 'Transitional justice genealogy' (2003) *16 Harv. Hum. Rts. J.* 69 94
[23]Gissel LE 'Contemporary Transitional Justice: Normalizing politics of exception' (2017) 31 *Global Society 353* 369
[24]Gissel LE 'Contemporary Transitional Justice: Normalizing politics of exception' (2017) 31 *Global Society 353* 369
[25]Gissel LE 'Contemporary Transitional Justice: Normalizing politics of exception' (2017) 31 *Global Society* 353 369
[26]Quinn JR '*Failure to launch: The consequences of prematurely conceived transitional justice'* Paper presented at the European Consortium for Political Research, 29 August 2015

be wholly definitive as there may be recurrence of violence in moments after the cessation of hostilities.[27]

Quinn also identifies problems with tagging the commencement of transitions to the fall of repressive or violent regimes as questions may abound when there is a mere change of guard from one regime to another, without any fundamental reformations to guarantee the respect for human rights by the new regime. She further posits that even in the circumstances where the change of regime is through elections, there are no guarantees of actual transitions as democracy may in some instances turn out to be counterproductive in fragile states.[28] Quinn also dismisses attempts to tag the commencement of a transition to the time when a new regime 'is firmly in place' on the premise that it is a vague parameter of determining when a transition starts since there are no clear indicators of what constitutes being 'firmly in place' in regards to the new regime.[29]

Subotic highlights the essence of domestic backing for the Transitional Justice mechanisms that states adopt and insists that there must be a genuine demand from the masses to counter crimes committed in the past if the measures adopted are to succeed. However, she recognizes that such domestic support may be lacking in non-transitional contexts.[30] She then further argues that when the process is implemented without the popular demand for accountability, it facilitates the use of transitional justice mechanisms for attaining other political objectives which are actually opposed to the intended justice aims. Accordingly, she observes that whereas the ruling elites in such circumstances may appear to value the Transitional Justice institutions, in actual sense they only use them to achieve their political aspirations of suppressing their political opponents and as a means to gain political capital in the international geo political arena.[31]

1.8 LITERATURE REVIEW

The Uganda National Transitional Justice Policy (NTJP) was enacted on 17th June 2019.[32] Prior to its enactment, the proposed mechanisms of truth-seeking in its earlier drafts that included proposals for formation of a truth commission were a subject of serious contention.

Macdonald documents these contestations stating that the process of policy formulation was driven by a desire for reputational gains other than actual commitment from the government to develop

[27]Quinn JR '*Failure to launch: The consequences of prematurely conceived transitional justice'* Paper presented at the European Consortium for Political Research, 29 August 2015
[28]Quinn JR '*Failure to launch: The consequences of prematurely conceived transitional justice'* Paper presented at the European Consortium for Political Research, 29 August 2015
[29]Quinn JR '*Failure to launch: The consequences of prematurely conceived transitional justice'* Paper presented at the European Consortium for Political Research, 29 August 2015
[30]Subotic J 'Bargaining Justice: A theory of Transitional Justice compliance' in Buckley-Zistel S, et al (ed) (2013) *Transitional justice theories: An introduction* 127-143
[31]Subotic J 'Bargaining Justice: A theory of Transitional Justice compliance' in Buckley-Zistel S, et al (ed) (2013) *Transitional justice theories: An introduction* 127-143
[32]Avocats San Frontieres 'Uganda adopts a Transitional Justice Policy' available at *https://www.asf.be/blog/2019/10/14/the-long-walk-uganda-adopts-a-transitional-justice-policy/* (Accessed 8 August 2021)

viable truth-seeking policy mechanisms. Moreover, the situation was further compounded by questionable donor interests that were deemed antagonistic to the Transitional Justice goals.[33]

However, the problems that emerged during the process seemed to be much deeper and are traceable to the Juba AAR[34] at the genesis of the policy formulation. Macdonald reasons that the Agreements were merely a cosmetic gesture to showcase some semblance of commitment to the Transitional Justice norms but otherwise remained detached from the Transitional Justice ideals**.** She then concluded that Uganda became a specimen of experimentation on ideas about Transitional Justice that had little or no chance of success. Apparently, in the context where there was no political transition, The Transitional Justice agenda became 'an extension of politics by other means'.[35] In their report Avocats Sans Frontieres contend that the disconnect in the Transitional Justice initiatives which have caused some of them to clash during implementation are attributable to the limited political commitment to Transitional Justice norms and the absence of a streamlined national strategy to address past violations in Uganda.[36]

Meanwhile, the desire for truth-seeking among the masses is evident and not contested. A study of Justice Law and Order Sector (JLOS) found that 70% of respondents desired truth and reconciliation to resolve the Northern Uganda conflict. 76% indicated the need for a viable truth telling process.[37] The Uganda Human Rights Commission (UHRC) and the Office of the United Nations High Commissioner for Human Rights (UNHCHR) also found that respondents wanted the truth about the past revealed and hoped that there would be government efforts to investigate past violations.[38]

Uganda's truth-seeking mechanisms have been a subject of academic scholarship for various researchers who have critically assessed and examined the problem with the truth-seeking measures adopted in the country. For instance, Macdonald highlights 'the implementation gap' as the key hindrance to genuine truth-seeking in non-transitioning nations such as Uganda. The implementation gap' entails designing policies, getting them donor-funded but evading implementation.[39] She uses the illustration of Uganda's refusal to the adopt a truth commission in

[33]Macdonald A 'Somehow this whole process became artificial: Exploring the Transitional Justice implementation gap in Uganda' (2019) 13 *International Journal of Transitional Justice* 225 248

[34]Agreement on Accountability and Reconciliation between the Government of the Republic of Uganda and the Lord's Resistance Army/Movement Juba, Sudan, 2007 UNSC s12007143 5 Annex 1 (2007)

[35]Macdonald A 'In the interests of justice? The International Criminal Court, Peace talks and the failed quest for war crimes accountability in Uganda' (2017) 11 *Journal of East African Studies* 628 648

[36]Avocats Sans Frontieres 2013 – *Towards a comprehensive and holistic transitional justice policy for Uganda: Exploring linkages between transitional mechanisms* (2013) 36

[37]Acirokop P 'A truth commission for Uganda Opportunities and challenges' (2012) 12 *Afr. hum. rights law j* 417 447

[38]Uganda Human Rights Commission and Office of the United Nations High Commissioner for Human Rights 2011 – "The dust has not yet settled" victims' views on the right to remedy and reparation (2011) 59-70

[39]Macdonald A 'Somehow this whole process became artificial: Exploring the Transitional Justice implementation gap in Uganda' (2019) 13 *International Journal of Transitional Justice* 225 248

the NTJP 2019 and the decision to supplant it with what she terms as vague ideas of nation building and reconciliation as an example of the implementation gap.

Assessment or examination of Uganda's truth-seeking mechanisms has been mainly through the lenses of a truth commission. For instance, Acirikop assesses whether there is a need for truth commissions whilst Macdonald faults Uganda's NTJP framers for excluding the incorporation of a truth commission into the policy framework. Chirichetti vouches for a truth commission arguing that the commission will create historical records, be more aligned to the needs of the victims, make perpetrators more accountable and will be facilitative of the reconciliation processes necessary for sustainable peace.[40] Quinn evaluates the performance of Uganda's past truth commissions.[41] All the said studies tend to base their analysis of Uganda's truth-seeking mechanisms on problematizing the viability of truth commissions.

Therefore, this mini thesis seeks to examine the Uganda's truth-seeking legal and policy instruments from a broader perspective beyond the limited scope of a truth commission. This study problematizes truth-seeking in the wider scope assessing the viability of the respective legal and policy measures on criminal prosecutions, documentations and traditional justice mechanisms, their relation to truth-seeking and the inter-linkages with amnesties and reparations. This study takes this approach based on the recognition that the parameters of defining truth commissions are much more limited as compared to truth-seeking. For instance, truth commissions have been defined as being temporary, which excludes permanent human rights bodies and based on official sanction which excludes Non-Government Organizations (NGO). Yet, there are incidents where permanent human rights bodies and NGOs have been more beneficial to some countries' truth-seeking processes than the established truth commissions.[42] .

1.9 SCOPE OF THE STUDY

This Research will focus on a critical evaluation of Uganda's truth-seeking legal and policy reforms for the period of January 1986 when the National Resistance Army (NRA) led by President Yoweri Kaguta Museveni took over power to June 2019 when the Uganda NTJP was enacted.

1.10 CHAPTER OVERVIEW

Chapter 1: Introduction and Research Methodology

This chapter provides an overview and background of the research, the scope, methodology, conceptual framework, the objectives and the aim the research seeks to achieve.

Chapter 2: The Official Truth: A Critical Review of Uganda's Official Truth-Seeking Mechanisms

[40]Chirichetti J 'Transitional Justice and its role in development in post conflict Northern Uganda' 2013 Independent Study Project (ISP) Collection
[41]Quinn JR 'Constraints the undoing of the Uganda Truth Commission' (2014) 26 *Human Rights Quarterly* 401 427
[42]Brahm E 'What is a truth commission and why does it matter?' (2009) 3 *Peace and Conflict Review* 1 14

This chapter critically examines Uganda's official truth-seeking mechanisms. The chapter examines the legal and policy provisions on the work of the commissions of inquiry, the UHRC, and the International Crimes Division of the High Court (ICD) as instruments of truth-seeking. The Chapter will also discuss the implication of witness protection and victim participation efforts, the right to truth, exhumations and plea bargains in regards to official truth-seeking.

Chapter 3: The Unofficial Truth: The Challenges and Opportunities of Unofficial Truth-Seeking In Uganda

This chapter scrutinizes Uganda's unofficial truth-seeking options. Some of the options whose viability it assesses include documentation by the civil society and communities, public interest litigation, and traditional justice avenues of truth-seeking.

Chapter 4: Deconstructing the Official Discourse: A Case for Truth Based Amnesties and Reparations

This chapter critically assesses Uganda's legal and policy reforms on amnesties and how they relate to the truth-seeking mechanisms. The chapter further examines the contradictions in the mandates of truth-seeking and amnesties and how the contradictions can be reconciled. This chapter will also evaluate how the conflation of reparations and social and economic development programmes in Uganda affects truth-seeking mechanisms.

Chapter 5: Recommendations and Conclusions

This chapter stipulates the recommendations developed as result of the research done and states the conclusions drawn from the findings of the research.

CHAPTER 2

THE OFFICIAL TRUTH: A CRITICAL REVIEW OF UGANDA'S OFFICIAL TRUTH-SEEKING MECHANISMS

2.1 INTRODUCTION

The phrase official truth-seeking may enlist varying meanings depending on its application. For instance, a construction of the phrase may limit official truth-seeking mechanisms to truth commissions which are, in the majority of cases, the specially sanctioned means of truth-seeking.[43] However, for purposes of this thesis, official truth-seeking mechanisms include other legally sanctioned state mechanisms such as the courts of judicature and the permanent human rights bodies, which although not necessarily established for truth-seeking purposes, do in some cases play vital roles in the truth-seeking process.[44] Thus, in this chapter, the discussion commences with highlighting the successes and deficiencies of the past commissions, and explaining why a truth commission may not necessarily be the answer to the truth-seeking challenges in Uganda's Transitional Justice process. The discussion then delves into assessing the constitutionality of the right to truth in Uganda and its nexus to the freedom of access to information. The chapter concludes with a review of the other established official truth-seeking avenues such as the courts of judicature and the UHRC. The role of the Inspectorate of Government in Uganda's official truth-seeking efforts is particularly highlighted since it is also a state organ that possesses a legal mandate that may allow it to play a role in the truth-seeking process.

2.2 WHAT IS A TRUTH COMMISSION?

There have been efforts to define truth commissions through characterization of their varied facets. One aspect of the definition regards their mandate or essentially the purpose of their establishment. In that regard, truth commissions are defined as bodies set up to investigate past violations of human rights in their respective countries.[45] Other definitions incorporate aspects of the time specifications within which to deliver on their mandate. For example, Quinn and Teitel characterize truth commissions as bodies expected to execute their mandate within given time specifications and thus adopt the characterization of truth commissions as temporary bodies.[46] The definition of truth commissions also includes aspects of official sanctioning. Teitel speaks of an official body created by national governments.[47] Quinn speaks of an investigatory body that the

[43]Hayner PB 'Past truths, present dangers: The role of official truth-seeking in conflict resolution and prevention' in Stern PC and Daniel D (ed) *International conflict resolution after the Cold War* (2000) 338-382
[44]Brahm E What is a truth commission and why does it matter? (2009) 3 *Peace and Conflict Review* 1 14
[45]Hayner PB '*Unspeakable Truths': Transitional Justice and the Challenge of Truth Commissions'* 2 ed (2010) 12 13
[46]Teitel RG 'Transitional justice genealogy' (2003) 16 *Harv. Hum. Rts. J.* 78: Quinn J R Dealing with a legacy of mass atrocity: Truth commissions in Uganda and Chile (2001) 19 *Netherlands Quarterly of Human Rights* 383-402
[47]Teitel RG 'Transitional justice genealogy' (2003) 16 *Harv. Hum. Rts. J.* 78

state or the leading opposing faction sets up.[48] The official sanction of the commission as well includes the requirement to provide a formal report with findings, conclusions and recommendations at the time of winding up.[49]

Drawing from the foregoing characterization of truth commissions, they may then be defined as investigatory bodies that a state or any leading faction of the state institutes for a temporal period of time, to probe allegations of past human rights abuses, and to report on their findings and conclusions when winding up.

It has been indicated that the 1st truth commission to be established was in 1981 in Argentina, the National Commission on the Disappeared (CONADEP), which followed a state clampdown on the suspected subversives causing the enforced disappearance of some of them. This was apparently followed by a series of other truth commissions in South America.[50] However, this historical account remains contestable as for instance in the case of Uganda; there was a Commission of Inquiry into Disappearance of Persons established by Idi Amin Dada as far back as 1974.[51]

There have been attempts to distinguish truth commissions from commissions of inquiry. Commissions of inquiry are defined as quasi-judicial fact-finding bodies that investigate past human rights abuses with a limited truth-seeking mandate, usually established on the initiative of the Head of the State.[52] Yet, truth commissions have a mandate that is not limited to merely providing reliable accounts of the past but to also avail victims with appropriate redress as well as recommend measures to curb recurrence. The mandate of truth commissions therefore enjoins them to delve into underlying causes of conflicts and make recommendations accordingly.[53] Consequently, it has been suggested that the truth commission's ultimate contribution is to open and not to close an intricate historical process, essentially to other interventions which may then enable a more meaningful translation of an oppressed past into a less troubling memory.[54]

Whereas truth commissions may take on varied forms, Uganda's past 'truth commissions' have come in the form of commissions of inquiry. The 1974 Commission of Inquiry into the Disappearance of Persons was established by the then President Idi Amin Dada in response to a public outcry for a probe into disappearances of persons that had become common place in the

[48]Quinn J R 'Dealing with a legacy of mass atrocity: Truth commissions in Uganda and Chile' (2001) 19 *Netherlands Quarterly of Human Rights* 383

[49]Hayner PB 'Past truths, present dangers: The role of official truth-seeking in conflict resolution and prevention' in Stern PC and Daniel D ed *International conflict resolution after the Cold War* (2000) 338-382

[50]Simic O (ed) '*An Introduction to Transitional Justice*' Olivera Simic 2 ed (2020) Ch 5

[51]Mugero J From periphery to the foreground: a case for economic, social and cultural rights in Uganda's Transitional Justice policy framework 2018 Youth 4 Policy 36-43

[52]International Centre for Transitional Justice Briefing 2012 – *Confronting the past: Truth telling and reconciliation in Uganda* (2012) 1-5

[53]International Centre for Transitional Justice Briefing 2012 – *Confronting the past: Truth telling and reconciliation in Uganda* (2012) 1-5

[54]Hayner PB 'Past truths, present dangers: The role of official truth-seeking in conflict resolution and prevention' in Stern PC and Daniel D ed *International conflict resolution after the Cold War* (2000) 338-382.

early years of his regime.[55] Later the 1986 Commission of Inquiry into Human Rights Violations was established by President Yoweri Kaguta Museveni when he took over power to investigate human rights violations committed in the prior regimes from the time of independence.[56]

The power to institute a Commission of Inquiry is vested in the responsible minister. The Minister constitutes the commission by appointing the commissioners and authorizing them to probe the conduct of any public officer, any matters regarding management of any government department or institution or otherwise any matter concerning the public welfare.[57] The commissioners report to the Minister and are also required to furnish the Minister with information on their proceedings and the basis for their findings and conclusions after their inquiries.[58]

Despite the provisions of the law, the practice in establishing commissions of inquiry in the recent past has been through presidential directives. For instance, in the Commission of Inquiry into Allegations of Mismanagement of the Global Fund to fight Aids, Tuberculosis and Malaria was established through a presidential directive.[59] Similarly the Commission of Inquiry into the Effectiveness of Land Administration Processes was established by a presidential directive.[60] Questions still abound on where the President derives the legal mandate to establish a commission of inquiry when the law vests the power in the Minister.

2.3 THE PROBLEM WITH UGANDA'S 1986 TRUTH COMMISSION[61]

The 1986 Commission of Inquiry into Violations of Human Rights handled 200 cases which were later referred to the Police for conclusive investigation. 50 of the cases investigated were prosecuted with 12 convictions secured, although the convictions were for minor offences such as attempted murder.[62] The Commission is credited for having made a major contribution to the formulation of the Bill of Rights under the Constitution when it called for the inclusion a comprehensive band of civil, political and social-economic rights in the Bill and for the establishment of a Human Rights Commission.[63]

[55] USIP 'Truth Commission Uganda 1974' available at https://www.usip.org/publications/1974/06/truth-commission-uganda-74 (accessed 8 March 2022)
[56]Quinn JR 'Constraints the undoing of the Uganda Truth Commission' (2014) 26 *Human Rights Quarterly* 401 427
[57]S.1 Commissions of Inquiry Act Cap 166
[58]S.6 Commissions of Inquiry Act Cap 166
[59]The Commission of Inquiry (Allegations of Mismanagement of the Global Fund to fight Aids, Tuberculosis and Malaria) Legal Notice No. 15 of 2005
[60]Amongi B 'Government constitutes a Commission of Inquiry into the effectiveness of the land law' available at https://ugandamediacentreblog.wordpress.com/2016/12/23/government-constitutes-a-commission-of-inquiry-into-the-effectiveness-of-the-land-law/ (accessed 4 April 2021)
[61]Whereas the Commission of Inquiry into Disappearance of Persons established by Idi Amin Dada in 1974 was bedevilled with various shortcomings, the scope of this research is limited to the assessment of Uganda truth-seeking legal and policy reforms since 1986 and will not delve into discussion of that commission.
[62]Hayner PB '*Unspeakable Truths': Transitional Justice and the Challenge of Truth Commissions'* 2 ed (2010) 97-99
[63]Quinn JR 'Constraints the undoing of the Uganda Truth Commission' (2014) 26 *Human Rights Quarterly* 401 427

Nevertheless, the commission was hampered with several political and structural constraints that prevented it from enforcing the prosecution of the tens of thousands implicated in its report. The police, that was tasked with the responsibility of further investigations, lacked the capacity to carry out investigations of the culpable individuals because it was under staffed, under resourced and with limited expertise in human rights investigations. The commission is said to have acknowledged that it made an unrealistic recommendation in that regard.[64]

There was no provision for witness protection and thus minimal incentive for witness participation. Moreover, some of the witnesses got intimidated by those implicated.[65] There was no regard to command responsibility with the focus of the Commission limited to individual responsibility. The superiors who issued orders to juniors escaped implication without proper justification.[66] But even then, perpetrators were excused from punishment for political expedience. There were reported incidents of deliberate obstruction of justice where some commissioners ordered the destruction of audio and video evidence that appeared to implicate their relatives.[67] There were also undue restrictions on the commission not inquire into actions of NRA during the bush war.[68]

The Commission's work was without any stipulated time limit coupled with a broad and vague mandate.[69] The problem was further compounded by the meagre resources and as a result, the Commission concluded its work in 1994, 8 years after its inception, and at time when public interest in its work had waned.[70] This was contrary to the generally recommended best practice of a commission having to conclude its work within a couple of years from the time of inception.[71] Moreover, the Commission was also criticized for having limited truth-seeking goals that were tied to investigating past abuses without any further aspirations to enable general community healing.[72]

In spite of the shortcomings of the 1986 Commission, there have been consistent calls for another truth commission and it was a key issue of contestation during formulation of the NTJP 2019.[73] Proponents of the establishment of a truth commission provide justifications for its establishment

[64]Hayner PB '*Unspeakable Truths': Transitional Justice and the Challenge of Truth Commissions'* 2 ed (2010) 97-99
[65]Hayner PB '*Unspeakable Truths': Transitional Justice and the Challenge of Truth Commissions'* 2 ed (2010) 97-99
[66]Hayner PB '*Unspeakable Truths': Transitional Justice and the Challenge of Truth Commissions'* 2 ed (2010) 97-99
[67]Acirokop P 'A Truth Commission for Uganda? Opportunities and Challenges' (2012) 12 *Afr. hum. rights law j* 417 447
[68]Acirokop P 'A Truth Commission for Uganda? Opportunities and Challenges' (2012) 12 *Afr. hum. rights law j* 417 447
[69]Quinn JR 'Constraints the undoing of the Uganda Truth Commission' (2014) 26 *Human Rights Quarterly* 401 427
[70]Hayner PB '*Unspeakable Truths': Transitional Justice and the Challenge of Truth Commissions'* 2 ed (2010) 97-99
[71]Hayner PB '*Unspeakable Truths': Transitional Justice and the Challenge of Truth Commissions'* 2 ed (2010) 97-99
[72]Quinn JR 'Constraints the undoing of the Uganda truth commission' (2014) 26 *Human Rights Quarterly* 401 427
[73]Macdonald A 'Somehow this whole process became artificial: Exploring the Transitional Justice implementation gap in Uganda' (2019) 13 *International Journal of Transitional Justice* 225 248

as providing a window to challenge questionable narratives of the past and to overcome enforced silences, creating an avenue for public recognition of victims' suffering to curb stigmatization, encouraging victims to participate in public life, offering a platform for entrenching the state's reparation obligations, and bridging the accountability gap left unfulfilled by the other truth-seeking measures.[74] It is also suggested that truth commissions can be a precursor to criminal prosecutions and thus contribute to complementarity in the Transitional Justice processes when there are linkages between the truth commissions and criminal justice systems. In that sense truth commissions are said to enhance prosecution and enforcement of accountability for international crimes.[75]

In the context of Uganda, it is then claimed that questionable strategies adopted by government in handling the war in Northern Uganda that spanned over decades, the involvement of children in the insurgency, the failed peace talks, the abductions, the disappearances, the torture and the murder of innocent civilians during the insurgency are a good example of what should be appropriate fodder for the establishment of a truth commission.[76]

2.4 DOES UGANDA REALLY NEED A TRUTH COMMISSION? MAKING SENSE OF THE CONTESTATIONS

Notably, there were no express provisions for the establishment or the role of a truth commission in the Juba AAR. Instead the Agreement highlighted the roles of the Amnesty Commission and the Human Rights Commission which were earmarked as the key implementing institutions of the Agreement.[77] Also, the NTJP 2019 has its priority mechanisms as formal justice processes, traditional justice, nation building and reconciliation, amnesty, and reparations.[78] Although there is neither express provision nor clear modalities for the establishment of a truth commission, it has been suggested that the Policy can still accommodate a truth commission in its current framework.[79] There should therefore be a discussion on whether establishing a truth commission would be necessary in the circumstances.

Generally, there are what are considered to be viable indicators of a successful truth commission. They include the existence of due process which involves reaching out to all victims and survivors through providing psychological support to the traumatized, witness protection mechanisms, broad participation of the public, perception of fairness and the co-operation of former perpetrators and

[74]Acirokop P 'A truth commission for Uganda? Opportunities and challenges' (2012) 12 *Afr. hum. rights law j* 417 447
[75]Hayner PB '*Unspeakable Truths': Transitional Justice and the Challenge of Truth Commissions'* 2 ed (2010) 97-99
[76]Acirokop P 'A truth commission for Uganda? Opportunities and challenges' (2012) 12 *Afr. hum. rights law j* 417 447
[77]Article 5.5 of Agreement on Accountability and Reconciliation between the Government of the Republic of Uganda and the Lord's Resistance Army/Movement Juba, Sudan, 2007 UNSC s12007143 5 Annex 1 (2007)
[78]Ministry of Internal Affairs National Transitional Justice Policy (2019) 18-20
[79]Redress and Impunity Watch 2020 - *Victims front and centre: Lessons on meaningful victim participation from Guatemala and Uganda (2020)* 25

those affiliated to the abusive forces with the investigations.[80] Besides, the commission must report accurately, with no bias and represent reasonably and completely the evidence of the victims with specific recommendations for reform.[81] Thereafter, it is expected that there is community and individual healing and reconciliation with reduced tension over past violations, acknowledgement and apology for past wrongs, improved confidence to confront the past, and memory preservation to inspire longer term action to redress the past wrongs. There must therefore be mechanisms implemented to avert future abuse which may be by executing recommended action such as prioritising reparations at policy level.[82]

It is then hoped that a successful truth commission may trigger other truth-seeking interventions including judicial responses. In Argentina, detailed documentation of findings of the truth commission constituted vital proof to support the trials which consequently dismantled the laws that unjustifiably guaranteed immunity to people who had committed atrocities in previous regimes.[83]

While there is evidence that supports better human rights protection in some countries that have employed truth commissions, other studies of the same have had varied conclusions with some finding unsatisfactory evidence of truth commissions benefiting subsequent human rights interventions and a few even suggesting human rights efforts were disadvantaged by truth commissions.[84] Therefore, success for a truth commission is not guaranteed as is often presumed by those who advocate for their establishment. For a truth commission to register the anticipated success there should be favourable factors to support its cause.

Truth commissions require substantial preparatory work, extensive stakeholder involvement, independence and immunity from political interference and sufficient resources among others if they are to thrive.[85] Moreover, it is quite pertinent that there is political will for the establishment of a truth commission. In Bosnia and Herzegovina, initiatives to establish a truth commission faced immense political resistance that caused their failure.[86] In India families of thousands of disappeared persons in Kashmir desired to know the truth about the demise of their relatives but

[80]Hayner PB 'Past truths, present dangers: The role of official truth-seeking in conflict resolution and prevention' in Stern PC and Daniel D ed *International conflict resolution after the Cold War* (2000) 338-382
[81]Hayner PB 'Past truths, present dangers: The role of official truth-seeking in conflict resolution and prevention' in Stern PC and Daniel D ed *International conflict resolution after the Cold War* (2000) 338-382
[82]Hayner PB 'Past truths, present dangers: The role of official truth-seeking in conflict resolution and prevention' in Stern PC and Daniel D ed *International conflict resolution after the Cold War* (2000) 338-382
[83]Hayner PB 'Past truths, present dangers: The role of official truth-seeking in conflict resolution and prevention' in Stern PC and Daniel D ed *International conflict resolution after the Cold War* (2000) 338-382
[84]Brahm E 'What is a truth commission and why does it matter?' (2009) 3 *Peace and Conflict Review* 1 14
[85]International Centre for Transitional Justice Briefing 2012 – Confronting the past: Truth telling and reconciliation in Uganda (2012) 1-5
[86]Bishnu P 'A comparative study of the world's truth commissions: From madness to hope' (2017) 4 *World Journal of Social Sciences Research* 192 230

the viable truth-seeking measures were said to have been frustrated by lack of genuine political will.[87]

It is therefore required that there is a reasonable degree of state political backing for a truth commission which may help determine how much access is granted to specified documentation and the co-operation of officials during inquiries.[88] The political will may also determine if the state will implement recommendations, accept conclusions and publicize findings.[89] Political will may as well determine if a state prevails over perpetrators who hold significant power and allows a commission to exercise its mandate without any restrictions on its operational independence, and with little or no room for the perpetrators to justify past wrongs or even refuse to co-operate with investigations.[90] In such circumstances, the power of perpetrators can be significantly weakened and tilted in favour of the commission because the acknowledgement of past wrongs and co-operation with investigations becomes incentivized with favourable political implications, which in effect enhances a truth commission's power and influence.[91] Besides, it is necessary that the civil society is strong and organized to push for a strong mandate. Information from monitoring groups can help streamline commission investigations as they provide the necessary checks and balances to the commission's work. The Civil society also provides a backbone of expertise and investigative experience that may be recruited to the commission.[92]

However, these factors that are necessary for the success of a truth commission are a scarce commodity in Uganda's political context. A new truth commission will therefore have the same odds stacked against it as the past truth commissions of 1974 and 1986 which are considered to have failed. There are no guarantees for significant planning, stakeholder engagement and independence from political manoeuvring, as well as accessibility to adequate resources because in Uganda Transitional Justice functions in the context of absence of change of government in the past 35 years, and there is a propensity to shield state officials from accountability for the past atrocities.[93] It is therefore unlikely that the government will accede to the jurisdiction of a truth commission or even guarantee its independence without any political meddling.[94]

[87]Bishnu P 'A comparative study of the World's Truth Commissions: From Madness to Hope' (2017) 4 *World Journal of Social Sciences Research* 192 230

[88]Hayner PB 'Past truths, present dangers: The role of official truth-seeking in conflict resolution and prevention' in Stern PC and Daniel D ed *International conflict resolution after the Cold War* (2000) 338-382

[89]Hayner PB 'Past truths, present dangers: The role of official truth-seeking in conflict resolution and prevention' in Stern PC and Daniel D ed *International conflict resolution after the Cold War* (2000) 338-382

[90]Hayner PB 'Past truths, present dangers: The role of official truth-seeking in conflict resolution and prevention' in Stern PC and Daniel D ed *International conflict resolution after the Cold War* (2000) 338-382

[91]Hayner PB 'Past truths, present dangers: The role of official truth-seeking in conflict resolution and prevention' in Stern PC and Daniel D ed *International conflict resolution after the Cold War* (2000) 338-382

[92]Hayner PB 'Past truths, present dangers: The role of official truth-seeking in conflict resolution and prevention' in Stern PC and Daniel D ed *International conflict resolution after the Cold War* (2000) 338-382

[93]Acirokop P 'A Truth Commission for Uganda? Opportunities and Challenges' (2012) 12 *Afr. hum. rights law j* 417 447

[94]Acirokop P 'A Truth Commission for Uganda? Opportunities and Challenges' (2012) 12 *Afr. hum. rights law j* 417 447

As a result, it has been said that in the absence of a clean break from the past, there can't be any assurances on the effectiveness of a truth commission as an enforcement tool for human rights violations.[95] Evidence suggests that a state, which is infested by individuals whose records are tainted with participation in past human rights abuses and political impunity may have little moral grounding to support a truth commission.[96] In the circumstances, a truth commission may even be used as an opportunity for evading rather than ensuring accountability.[97]

It is therefore necessary that Uganda's truth telling efforts are applied with the requisite modifications and have the flexibility to be seamlessly adapted to the country's circumstances in design.[98] It is then anticipated that the mechanisms would suit the unique Transitional Justice demands and interests of the country because even when truth commissions are less constrained by institutional weaknesses, they can be inhibited during implementation due to administrative delays, participation impediments, and political resistance to recommended actions.[99] Moreover, a strong institution in the form of an Independent truth commission could be perceived as a threat to the excessive dominance of the prevailing political order and those who wield state power in Uganda may want to clip its wings to maintain it under their control.[100] For that reason, a truth commission could be used to deny justice to victims and perpetuate the marginalization of the vulnerable and disadvantaged groups when it gets hijacked by the powerful elites.[101]

Nevertheless, there have been suggestions that exerting international pressure on a sitting government may force its hand and per adventure cause it to wholly embrace a truth commission in what is claimed to be the international role in the truth-seeking process.[102] Still, that line of argument can be contested. Contrary evidence suggests that when policy changes are derived from foreign influence, they complicate efforts to compel domestic compliance as the changes tend to be detached from the local political realities. Increased international pressures induce states to use Transitional Justice processes to signal adherence to international norms but without actual compliance.[103] The ends of Transitional Justice such as truth, justice and reconciliation are then

[95]Brown S 'Transitional Justice as Subterfuge' available at *https://opencanada.org/transitional-justice-as-subterfuge/* (Accessed 31 January 2021)
[96]Brown S 'Transitional Justice as Subterfuge' available at *https://opencanada.org/transitional-justice-as-subterfuge/* (Accessed 31 January 2021)
[97]Brown S 'Transitional Justice as Subterfuge' available at *https://opencanada.org/transitional-justice-as-subterfuge/* (Accessed 31 January 2021)
[98]International Centre for Transitional Justice Briefing 2012 – Confronting the Past: Truth Telling and Reconciliation in Uganda (2012) 1-5
[99]International Centre for Transitional Justice Report 2017 – *Justice Mosaics: How context shapes Transitional Justice in fractured societies* (2017) 11
[100]Macdonald A 'Somehow this whole process became artificial: Exploring the Transitional Justice implementation gap in Uganda' (2019) 13 *International Journal of Transitional Justice* 225 248
[101]Bishnu P 'A comparative study of the World's truth commissions: From Madness to Hope' (2017) 4 *World Journal of Social Sciences Research* 192 230
[102]Hayner PB 'Past truths, present dangers: The role of official truth-seeking in conflict resolution and prevention' in Stern PC and Daniel D ed *International conflict resolution after the Cold War* (2000) 338-382.
[103]Subotic J 'Bargaining Justice: A theory of Transitional Justice Compliance' in Buckley-Zistel S et al (ed) *Transitional justice theories: An introduction* (2013) 127-143

overcome by the manoeuvres of the political class. As a result, contestations emerge among the political actors on how to leverage the transitional moments as well as appeal to the international players for political advantage.[104]

Some use nationalism, drawing on the ever-present desire for sovereignty and independence to rally support for their political aspirations. Others appeal to the need for belonging to court the state to accept the demands of the international community with minimal resistance while others employ moral arguments of what should be 'the right thing to do' in the circumstances.[105] As a result, the key objectives for justice are substituted with contrary political agendas where the justice mechanisms are then used to mute the people's voices, alternatively as a propaganda tool, and ultimately to entrench repressive rule.[106]

This may be exemplified by Rwanda's ingando camps which on one hand purported to be a platform for countering genocide ideology and yet on the other, were ostensibly used as an avenue to disseminate skewed Rwandan historical accounts and indoctrinate participants with Rwanda Patriotic Front (RPF) ideology.[107] In Kenya's case, the country set up a Truth, Justice and Reconciliation Commission at a time when those responsible for the 2007 Kenya post-election violence were largely still in charge of the country's affairs. There was no commitment to the commission, its work was jeopardized by political interference and further prejudiced by being placed under the overall leadership of a Chairperson who was accused of having participated in abuses of past regimes in the 1990s. It was therefore perceived as a tool used to protect other than expose those culpable for the 2007 post-election violence.[108]

Similarly, in Uganda, the 1986 Commission of Inquiry was arguably established for reputational purposes. It was more of a political gimmick to give the Museveni's government some semblance of legitimacy before the international community at a time when it was short on legitimacy, just after he had taken over government following a protracted armed struggle.[109] The commission did not receive genuine support from the government but was rather used as a means to promote Museveni's political agenda of consolidating his rule. The commission therefore became a useful apparatus for appeasing internal opposition and enlisting foreign support for his government.[110]

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[104]Subotic J 'Bargaining Justice: A theory of Transitional Justice Compliance' in Buckley-Zistel S et al (ed) *Transitional justice theories: An introduction* (2013) 127-143

[105]Subotic J 'Bargaining Justice: A theory of Transitional Justice Compliance' in Buckley-Zistel S et al (ed) *Transitional justice theories: An introduction* (2013) 127-143

[106]Subotic J 'Bargaining Justice: A theory of Transitional Justice Compliance' in Buckley-Zistel S et al (ed) *Transitional justice theories: An introduction* (2013) 127-143

[107]Hansen OT 'The Vertical and Horizontal Expansion of Transitional Justice: Explanations and implications in a contested field' in Buckley-Zistel S et al (ed) *Transitional justice theories: An introduction* (2013) 105-124

[108]Brown S 'Transitional Justice as Subterfuge' available at *https://opencanada.org/transitional-justice-as-subterfuge/* (Accessed 31 January 2021)

[109]Quinn JR 'Constraints the undoing of the Uganda Truth Commission' (2014) 26 *Human Rights Quarterly* 401 427

[110]Quinn JR 'Constraints the undoing of the Uganda Truth Commission' (2014) 26 *Human Rights Quarterly* 401 427

Besides, Truth Commissions tend to be most effective when there is dwindling national support for a regime on the elite and popular levels; where there is clear consensus on the need for accountability and more pronounced confidence to report past violations.[111] Yet, in the contemporary Ugandan context, it is observed that although Museveni's government may have lost support at the elite levels, there is indication that it still enjoys popular support among the rural populations.[112] Accordingly, the viability of successfully establishing a strong and independent truth commission is still disputed.

From the foregoing discussion, it is discernible that due to Uganda's political context, a truth commission would have no guarantees of success given the unfavourable factors that would eventually lead to its demise chief of which is the absence of political commitment. Whereas this political commitment may be enforced through donor pressures, this would most likely instigate a show of compliance without actual adherence. In the past the government has approached Transitional Justice processes by manipulating the processes to tilt them in favour of the regime rather than blatantly suppress the processes. And as the African proverb posits, the leopard has never changed its spots, it is possible that even where a truth commission were to be established, the regime would manipulate it to work for the regime aims other than out rightly suppress it.[113] In the end the Commission may be constrained to achieve its truth-seeking objectives anyway.

2.5 REVISTING THE RIGHT TO TRUTH: IS IT CONSTITUTIONAL?

Truth can be regarded as verifiable information that is socially generated through various procedural or structural avenues and may be corroborated by evidence from official sources or records of events.[114] It is, in other words, a testament to what happened that it actually happened. It is possible that there are different accounts of truth provided they adequately meet the test of verifiability.[115] Thus the accounts of the truth may be forensic or factual, personal or narrative, and may be for social purpose or for healing and restoration.[116] The hard or forensic truth refers to the attested facts regarding the crime and human rights that were violated, while the emotional truth denotes the psychological and physical implications of the information derived on the victims.[117]

[111]Hayner PB 'Past truths, present dangers: The role of official truth-seeking in conflict resolution and prevention' in Stern PC and Daniel D ed *International conflict resolution after the Cold War* (2000) 338-382.
[112]Cheeseman N, Lynch G and Willis J 'Museveni's NRM Party still has huge support in Rural Uganda' available at https://www.theeastafrican.co.ke/tea/oped/comment/museveni-s-nrm-party-still-has-huge-support-in-rural-uganda--1345252 (accessed on 11 May 2021)
[113]Macdonald A 'Somehow this whole process became artificial: Exploring the Transitional Justice implementation gap in Uganda' (2019) 13 *International Journal of Transitional Justice* 225 248
[114]Naqvi Y 'The right to truth in international laws; Fact or fiction?' (2006) 88 *International Review of the Red Cross* 245 273
[115]Naqvi Y 'The right to truth in international laws; Fact or fiction?' (2006) 88 *International Review of the Red Cross* 245 273
[116]Naqvi Y 'The right to truth in international laws; Fact or fiction?' (2006) 88 *International Review of the Red Cross* 245 273
[117]Simic O (ed) '*An Introduction to Transitional Justice*' Olivera Simic 2 ed (2020) Ch 5

The truth is disseminated and perceived through various forms of expression that include oral, audio, visual, and artistic means among others.[118]

The model of the historical truth entails what is recognized as the agreed record of past human rights abuses with information on those deemed to be responsible for the abuses.[119] The manner in which the past is portrayed has serious moral implications given that the politicization of the truth about the past makes it suspect and exploited. In other words, the challenges of the past have to be addressed without any political scheming that is likely to be viewed with scepticism or to cause a general dissatisfaction with the implemented initiatives.[120]

Also, the conceptualization of truth is regarded as being limited in its scope and unable to encompass the various perceptions of what it means to the conflict participants.[121] It may consequently entail several meanings or denotations to those differently affected by past violations. For example, there are mixed views on the Kwoyelo case[122] as some people believe he is a victim turned perpetrator who needs to be pardoned while others continue to view him in the strict frame of a perpetrator who must face justice.[123]

To meet Transitional Justice challenges, a society should therefore thoroughly examine the circumstances regarding past atrocities and thereafter publicize the truth about them as it has been argued that truth can help legitimatize other criminal justice interventions.[124] For instance, in East Timor victims were dissatisfied with the criminal trials held in foreign countries where they were excluded from participation because apparently, that arrangement had limitations that constrained the revelation of the factual truth regarding the fate of their loved ones.[125] The truth therefore is expected to enable community healing, foster reconciliation, encourage acknowledgment of past wrongs, and prevent the recurrence of past abuses.[126]

Cumulatively, the prevalent practice of establishing truth-seeking measures by international and domestic actors and their incorporation into national legislative instruments as well as their gradual adoption as a universal norm have nearly turned the right to truth into a customary right.[127] Judicial

[118]Naqvi Y 'The right to truth in international laws; Fact or fiction?' (2006) 88 *International Review of the Red Cross* 245 273
[119]Lambourne W 'Transformative justice, reconciliation and peace building' in Buckley-Zistel S et al (ed) *Transitional justice theories: An introduction* (2013) 19-39
[120]Simic O (ed) '*An Introduction to Transitional Justice*' Olivera Simic 2 ed (2020) Ch 5
[121]Lambourne W 'Transformative justice, reconciliation and peace building' in Buckley-Zistel S et al (ed) *Transitional justice theories: An introduction* (2013) 19-39
[122]*Uganda v Thomas Kwoyelo* Constitutional Appeal No. 1 of 2012 [2015] UGSC 5
[123]Redress and Impunity Watch 2020 - *Victims front and centre: Lessons on meaningful victim participation from Guatemala and Uganda* (2020) 44
[124]Simic O (ed) '*An Introduction to Transitional Justice*' Olivera Simic 2 ed (2020) Ch 5
[125]Lambourne W 'Transformative justice, reconciliation and peace building' in Buckley-Zistel S et al (ed) *Transitional justice theories: An introduction* (2013) 19-39
[126]International Centre for Transitional Justice Briefing 2012 – Confronting the Past: Truth Telling and Reconciliation in Uganda (2012) 1-5
[127]Naqvi Y 'The right to truth in international laws; Fact or fiction?' (2006) 88 *International Review of the Red Cross* 245 273

remedies such as habeas corpus may be used and have been touted as possible procedural measures for protecting the right to truth, and possibly as a means, to portray it as being non-derogable.[128]

Although, the Constitution does not out rightly provide for the right of truth, it makes provision for the right to truth when a purposive interpretation is applied. The Preamble recalls the country's turbulent history, recognizes the struggles against past oppression, tyranny and exploitation and entails commitments that portend a brighter future resulting from a political and constitutional order that is premised on inter alia, the ideals of peace and social justice.[129] Likewise, the Constitution recognizes that the rights and freedoms stipulated in its Bill of Rights are not exhaustive.[130] It therefore extends protection to other rights that may not be specifically mentioned in the constitution.[131] This suggests that even in the absence of a specific mention, the right to truth is still protected under the Constitution. Moreover, people are entitled to seek court redress when their rights or freedoms that are protected by the Constitution are infringed and this entitlement is even extended to seeking court redress for the infringement of other people's rights and freedoms.[132]

Nevertheless, the right to truth may also be regarded as a component of the right of access to information for which the Constitution makes specific provision.[133] The Constitution provides for the right to access state information except in cases where there is a probability that disclosing the information will be detrimental to the state's security or sovereignty or intrude on other people's privacy.[134] Parliament is also enjoined to legislate on the kind of information that may fall within the exception and as well the procedures to be followed for the access to information.[135]

The Access to Information Act, 2005 makes exceptions of information which may be disclosed to include cabinet records and records of on-going civil proceedings[136] information on Military tactics and strategy in preparation of hostilities or to detect, prevent or subvert hostilities, or information held for the intelligence and defence of Uganda.[137] There is also a cap on disclosing information regarding pending prosecutions, where disclosure may impede a prosecution or cause injustice, prejudice investigations, enable the identity of confidential information or lead to intimidation or coercion of witnesses.[138]

[128]Naqvi Y 'The right to truth in international laws; Fact or fiction?' (2006) 88 *International Review of the Red Cross* 245 273
[129]Preamble Constitution of the Republic of Uganda, 1995
[130]Article 45 Constitution of the Republic of Uganda, 1995
[131]Article 45 Constitution of the Republic of Uganda, 1995
[132]Article 50 Constitution of the Republic of Uganda, 1995
[133]Article 41 Constitution of the Republic of Uganda, 1995
[134]Article 41 (1) Constitution of the Republic of Uganda, 1995
[135]Article 41 (2) Constitution of the Republic of Uganda, 1995
[136]S.2 Access to Information Act, 2005
[137]S. 32 Access to Information Act, 2005
[138]S. 31(II) Access to Information Act, 2005

Uganda is not the only country that makes provision for the freedom of information. The majority of constitutions are cognizant of the right to access information. Consequently, other countries have used their laws on the freedom of information to reveal truth about past human rights violations. Examples in the US and South Africa suffice where their access to information laws have been used to expose the atrocities that happened in South Africa, Elsalvador, Peru and Guatemala.[139] The same cannot be said of Uganda as there is no suggestive evidence of using the respective laws to reveal credible facts about past human rights violations. One may blame it on the restrictions put on the freedom of information, more so in regard to security considerations. However, from the examples of other countries this may not hold, since there are comparable public order, national security and other related restrictions on the freedom of information laws in those countries where they have been put to good truth-seeking effect.[140]

Alternatively, the Right to Truth may be analysed by scrutinizing the opportunities that Uganda's institutionalized truth-seeking mechanisms give to the marginalized groups to participate in the truth-seeking processes. Generally, Uganda's Transitional Justice processes have been criticized for alienating concerns and the rights of the Persons with Disabilities (PWDs) to the truth.[141] Whilst the NTJP 2019 makes provision for PWDs and they are incorporated in the definition of victims as well as the vulnerable[142] there is no elaboration on the parameters of inclusion in the various truth-seeking mechanisms.[143] For example the Policy calls for special consideration for the inclusion of women and children in witness protection, victim participation and access to justice measures but excludes making mention of PWDs.[144] Equally, no provision is made for specific consideration in compensation of the war-disabled victims for the reduction in their productive potential even when the war continues to be embodied in their disabilities and acts as a constant reminder of the suffering brought upon them.[145] The Policy only speaks of the stigmatization and marginalization of the PWDs in generic terms and instead emphasises the plight of children of war and their mothers much more[146] which seemingly relegates the plight PWDs as conflict victims to being of lesser consequence. In effect, the Policy has little regard to the limitations of those with

[139]Naqvi Y 'The right to truth in international laws; Fact or fiction?' (2006) 88 *International Review of the Red Cross* 245 273
[140]Naqvi Y 'The right to truth in international laws; Fact or fiction?' (2006) 88 *International Review of the Red Cross* 245 273
[141]Hollander T and Gill B 'Every day the war continues in my body: Examining the marked body in post conflict Northern Uganda' (2014) 8 *International Journal of Transitional Justice* 217 234
[142]Ministry of Internal Affairs National Transitional Justice Policy (2019) 16
[143]African Union Transitional Justice Policy (2019) 15: Comparable provision in the African Union Transitional Justice Policy includes specific elaboration on the need for memorialization initiatives to accommodate multiple narratives and varying experiences of different groups including those of Persons with Disabilities.
[144]Ministry of Internal Affairs National Transitional Justice Policy (2019) 8
[145]Hollander T and Gill B 'Every day the war continues in my body: Examining the marked body in post conflict Northern Uganda' (2014) 8 *International Journal of Transitional Justice* 217 234
[146]Ministry of Internal Affairs National Transitional Justice Policy (2019) 20

mental shortcomings and who may as a result not express themselves as well as those with limited mobility which could be a physical obstacle for them to participate in truth-seeking initiatives.[147]

2.6 THE COURTS AND THEIR TRUTH-SEEKING ROLE

A study in Northern Uganda indicated that 70% of respondents vouched for enforcement of accountability for past human rights violations. 50% called for the Lord's Resistance Army (LRA) leaders to bear the brunt of accountability. 70% of the respondents faulted the Uganda People's Defence Forces (UPDF) for the atrocities committed in Northern Uganda and 55% of the respondents called for the prosecution of the culpable UPDF officers.[148] There is also a proposition that a truth-seeking process that incorporates prosecutions serves the justice needs of some survivors who may prefer retribution, and that their coercive nature can instigate adherence to the rule of law.[149]

However, trials have been criticized for having limited focus, failing to investigate social or political causal factors of violence.[150] Trials are blamed for prioritizing achievement of individual criminal liability at the expense of the wider ends of truth and justice which may necessitate examining patterns of crimes over extended periods of time, developing preventive strategies to avoid recurrence and instituting formal reparative measures to redress past wrongs.[151] Moreover, prosecutions are also criticized for being capable of only establishing a bit of the truth usually constituted in facts that pass the test of 'relevance' and 'admissibility' in criminal trials, but then omitting other facts that may be deemed 'irrelevant' and 'inadmissible' as per the rules of evidence even in the circumstances where they are relevant to the victims. Therefore, the incremental appeal of truth commissions as a transitional justice apparatus is regarded to be possibly arising from the limitations encountered with using court processes as an accountability avenue.[152]

In the Ugandan context the constraints of truth-seeking through court processes may be typified by the deficiencies of the ICD. At the time of its establishment, there were fears that the ICD would be a victor's court working at the whims of government and the fears seem to have been justified as the ICD appears to have been stifled and kept weak on purpose.[153] Questions on trials of the UPDF in the ICD have been met with scepticism from the political class and there is a

[147]Hollander T and Gill B 'Every day the war continues in my body: Examining the marked body in post conflict Northern Uganda' (2014) 8 *International Journal of Transitional Justice* 217 234
[148]Pham PN et al - *'When the war ends: Peace, Justice, and Social Reconstruction in Northern Uganda'* (2007) 4
[149]Lambourne W 'Transformative justice, reconciliation and peace building' in Buckley-Zistel S et al (ed) *Transitional justice theories: An introduction* (2013) 19-39
[150]Hayner PB 'Past truths, present dangers: The role of official truth-seeking in conflict resolution and prevention' in Stern PC and Daniel D ed *International conflict resolution after the Cold War* (2000) 338-382
[151]Hayner PB 'Past truths, present dangers: The role of official truth-seeking in conflict resolution and prevention' in Stern PC and Daniel D ed *International conflict resolution after the Cold War* (2000) 338-382
[152]Hayner PB 'Past truths, present dangers: The role of official truth-seeking in conflict resolution and prevention' in Stern PC and Daniel D ed *International conflict resolution after the Cold War* (2000) 338-382
[153]Macdonald A 'Somehow this Whole Process became Artificial: Exploring the Transitional Justice Implementation Gap in Uganda' (2019) 13 *International Journal of Transitional Justice* 225 248

deliberate political effort to make it appear that trying UPDF through the court martial systems is more suitable by depicting civilian legal processes as overly lenient.[154]

Problems still exist with the mechanisms for victim participation as the rules have remained ambiguous and there is no transparent framework and strategy for victim participation before the ICD.[155] Consequently, the Court has been forced to resort to ad hoc and unpredictable measures which in effect alienate the victims. In such circumstances the victims are not afforded opportunity to tell their story, face the accused person/s in the dock and actively participate in unveiling the truth about the traumatic events.[156] This lack of protection mechanism for victims and witnesses, and a questionable outreach programme were blamed for frustrating participation in the Kwoyelo case.[157] The problem is further compounded by the limited training to judicial officers in regards to witness participation and protection in international criminal trials.[158] Yet, in the absence of guarantees of witness protection, witnesses may fear to appear before the national court as a measure to conceal their identity.[159]

The role of courts in the truth-seeking process should also be reviewed through the lenses of the legal provisions on the disappearance of persons and exhumations. It is evident that the laws mandate the courts with crucial truth-seeking roles in that regard.

The courts are mandated to declare an order of presumption of death in cases where there is proof that a person has not been heard of or seen by those who might be expected to have seen or heard of the person if they were alive for a period of seven years.[160] The laws then provide for the distribution of the disappeared person's estate within 3 years of their disappearance.[161] Thus the estate of the disappeared person in the circumstances where its management was not provided for prior to the person's disappearance is subject to administration of any relative to whom court grants powers of administration over the estate.[162]

On the other hand, the Inquests Act empowers courts to discover truths regarding the circumstances relating to the violent deaths of persons. The Inquests Act mandates Magistrates[163]

[154]Macdonald A 'Somehow this Whole Process became Artificial: Exploring the Transitional Justice Implementation Gap in Uganda' (2019) 13 *International Journal of Transitional Justice* 225-248
[155]Avocats Sans Frontieres Policy Brief 2019 'Reflections on Victim Participation before the International Crimes Division in Uganda' (2019)
[156]Avocats Sans Frontieres Policy Brief 2019 'Reflections on Victim Participation before the International Crimes Division in Uganda' (2019)
[157]Redress and Impunity Watch 2020 - *Victims front and centre: Lessons on meaningful victim participation from Guatemala and Uganda* (2020) 41
[158]Redress and Impunity Watch 2020 - *Victims front and centre: Lessons on meaningful victim participation from Guatemala and Uganda* (2020) 42
[159]Avocats Sans Frontieres 2013 – *Towards a Comprehensive and Holistic Transitional Justice Policy for Uganda: Exploring linkages between Transitional Mechanisms* (2013) 28-29
[160]S. 47 (1) Registration of Persons Act 2015. See also S. 108 of the Evidence Act Cap 6
[161]S. 26 of Estates of Missing Persons (Management) Act Cap 159
[162]S. 2 of Estates of Missing Persons (Management) Act Cap 159
[163]S. 2 Inquests Act, Cap 11

to institute inquests where they are of the opinion that a death has been caused by the violence of any other person other than the deceased. The Magistrates are as well expected to institute inquests in deaths of people that have occurred within their jurisdiction while under prison or police custody and where there is credible information and reasonable basis to believe that a person's death has resulted from violence or unnatural causes.[164] They are accordingly expected to make findings on the deceased's personal details that include name and sex, occupation, residence, location and time of demise, and any other related facts.[165] The Magistrates may also order inquests where they are directed by the High Court to hold inquests.[166] However the Act equally grants the High Court the mandate to hold inquests, quash any inquests made or even re-open inquests.[167]

Magistrates may also order for the exhumations of bodies where it is in the interest of justice to examine the body of any person which has been buried and may following the exhumation hold an inquest into the circumstances regarding the death and thereafter order the re-interment of the body as soon as may be convenient. The expenses of any exhumation made pursuant to an order under the act and the re-interment of the body are payable out of the government resources.[168]

The truth-seeking role of inquests and exhumations cannot be over stated. Those interred without investigation, and the concealed deaths are a continuous reminder of the injustices suffered.[169] It is then argued that exhumation closes the justice conversation when non-exhumation could have kept the conversation open.[170] It is evident that truth-seeking processes that include exhumations significantly contribute to the acknowledgement of contested facts, the preservation of historical truths and the founding of a collective memory. And even where the disclosure of truth may not be fourth coming due to the lack of political will, there can be follow up measures instituted to satisfy those that yearn to discover where to find the remains of their loved ones.[171]

However, even with all the merits of exhumations, Uganda is said to lack the scientific infrastructure to conduct large scale investigations involving exhumations as there are prominent resource constraints especially in regard to costs and availability of the required expertise for the exhumation of mass graves in the country.[172] Yet, even if there was capacity to conduct them, the end of such exercises remains incongruous with survivors' material and other concerns and reflects

[164]S.4 (1) Inquests Act, Cap 11
[165]S.23 Inquests Act, Cap 11
[166]S.4 (2) (d) Inquests Act, Cap 11
[167]S. 27 Inquests Act, Cap 11
[168]S. 5 Inquest Act, Cap 11
[169]Kim J and Hepner RT 'Of Justice and the Grave. The role of the Dead in Post Conflict Uganda' (2019) 19 International *Criminal Law Review* 819 843
[170]Kim J and Hepner RT 'Of Justice and the Grave. The role of the Dead in Post Conflict Uganda' (2019) 19 *International Criminal Law Review* 819 843
[171]Hayner PB 'Past truths, present dangers: The role of official truth-seeking in conflict resolution and prevention' in Stern PC and Daniel D ed *International conflict resolution after the Cold War* (2000) 338-382
[172]De Yeaza C and Fox N 'Role of memory and memorialization in addressing Human Rights Violations in Post Conflict Rwanda and Uganda (2013) 8 *Society without borders* 344 372

the misguided prioritization of remains of evidence of wrong doing over survivors' needs.[173] The expatriates who are often employed to execute the exhumation processes are usually unfamiliar with the local cultural contexts and tend to disregard customary considerations during the exhumations.[174] Moreover, in cases where some survivors expect to be given back the bodies of their relatives for traditional burial, instead the bodies may be kept for evidence purposes to the chagrin of the survivors.[175] Unfortunately, although the Act grants magistrates the discretion to order re-interment based on the convenience of the circumstances, it out rightly disregards contrary customs, even where consideration for such customs could be more suitable to the needs of the victims.[176]

Therefore, Uganda's laws on exhumation are a manifestation of the tensions on the status of the dead and purposes of exhumation which continue to reflect the inconsonance between forensic science that values bodies only for their evidentiary significance and survivors' perceptions on the treatment given to the dead as embodying serious religious, social and cultural connotations which affect everyday life.[177]

The courts and their truth-seeking role may further be reviewed by examining the implication of the rules and regulations that govern plea bargains. Plea Bargain is defined under the Judicature (Plea Bargain) Rules, 2016 as the process through which a compromise is reached by an accused person with a prosecutor. The accused person consents to enter a plea of guilty so as to obtain lenience from the Prosecutor who may then lessen the charges against the accused or recommend a less detrimental sentence. The rules require that any compromise reached between the parties has to be sanctioned by court to take legal effect.[178]

In the international crimes context, plea bargains are credited for increasing the amount of evidence collected in the prosecution processes. In cases such as the Gacaca Courts where they were used, release from prison and reduction of sentences were preconditioned on the abundance and sincerity of detail provided in public apologies and confessions. Through a 2003 presidential decree one could in principle have one's sentence reduced by revealing comprehensive information about crimes committed.[179] It is therefore argued that plea bargains can be a vital truth-seeking measure as the guilty plea entered following a plea bargain defuses contestations regarding responsibility for the violations committed, and can incentivise the volunteering of information by defendants,

[173]Kim J and Hepner RT 'Of Justice and the Grave. The role of the Dead in Post Conflict Uganda' (2019) 19 *International Criminal Law Review* 819 843
[174]De Yeaza C and Fox N 'Role of memory and memorialization in addressing Human Rights Violations in Post Conflict Rwanda and Uganda (2013) 8 *Society without borders* 344 372
[175]De Yeaza C and Fox N 'Role of memory and memorialization in addressing Human Rights Violations in Post Conflict Rwanda and Uganda (2013) 8 *Society without borders* 344 372
[176]S. 5 Inquests Act Cap 11.
[177]Kim J and Hepner RT 'Of Justice and the Grave. The role of the Dead in Post Conflict Uganda' (2019) 19 *International Criminal Law Review* 819 843
[178]Rule 4 Judicature (Plea Bargain) Rules, 2016
[179]Ingalaere B 'The Gacaaca Courts in Rwanda' in Salter M and Huyse L (ed) *Traditional Justice and Reconciliation after Violent Conflict; Hearing from African experiences* (2008) 25-60

which may otherwise remain unknown. For instance, Momir Nikonv exposed the lies regarding the execution of thousands of Muslims at Sbrenica following a plea of guilt that he entered in the International Criminal Tribunal of Yugoslavia (ICTY). It was then discovered that the people in the top leadership of the Bosnian Serb army were aware of how the executions were planned and effected and could therefore not deny their individual or collective responsibility in the atrocities that were committed.[180]

However, plea bargains also have their own set of challenges. In Rwanda, plea bargains were faulted for encouraging partial testimonies during prosecutions in the Gacaca courts, with those culpable admitting only minor crimes and passing the blame to the deceased or disappeared for complicity while they remained silent on their own involvement.[181] Therefore, plea bargains may debatably only facilitate the telling of the convenient truth but covering up the actual truth.

Likewise, plea bargains are often viewed as being the state's justice efficiency machinery; more aligned to serve interests of the state than those of the accused. Consequently, questions are raised on the voluntariness of the accused's participation in the processes, and there are suggestions that the factors such as the fear for prolonged trials may coerce the accused to take on plea bargains against their free will.[182] Besides, the complications of the legalese used in court and poor legal representation in some cases may further alienate the accused from the procedures and in effect disadvantage them in the plea bargain negotiations.[183] Unfortunately, Uganda's Judicature (Plea Bargain) 2016 Rules largely reflects only state centric aspirations. Accordingly the Rules' objectives are inter alia to improve the efficiency of the criminal justice system, enable the negotiation of appropriate punishment of culpable individuals, counter case backlogs, and the quicken the criminal justice processes.[184]

Whereas the Rules could be commended for making considerations for the victims and aggrieved communities,[185] they still do not provide sufficient guidance on the modalities of their participation. On this note, Gray makes a proposition for incorporating restorative justice measures in Uganda's plea bargain processes on the premise that restorative measures are community and victim oriented, collaborative and harmonious.[186] In the same vein, Kisekka argues that the incorporation of compensation orders and public apologies to offended communities or victims in

[180]Naqvi Y 'The right to truth in international laws; Fact or fiction?' (2006) 88 *International Review of the Red Cross* 245 273
[181]Ingalaere B 'The Gacaaca Courts in Rwanda' in Salter M and Huyse L (ed) *Traditional Justice and Reconciliation after Violent Conflict; Hearing from African experiences* (2008) 25-60
[182]Kisekka GN 'Plea bargaining as a human rights question' (2020) 6 *Cogent Social Sciences* 1 29
[183]Kisekka GN 'Plea bargaining as a human rights question' (2020) 6 *Cogent Social Sciences* 1 29
[184]Rule 3 Judicature (Plea Bargain) Rules, 2016
[185]Rule 11 Judicature (Plea Bargain) Rules, 2016
[186]Gray H 'Can restorative justice processes help improve plea bargaining in Uganda's criminal justice system?' (2019) 19 Pepperdine *Dispute Resolution Law Journal* 215 230

the plea bargain processes can cater for the interests of all parties, as well as render the processes more legitimate.[187]

2.7 THE UGANDA HUMAN RIGHTS COMMISSION AND OTHER STATE BODIES

Whereas permanent human rights bodies are created to address contemporary human rights issues and essentially act as the state watch dogs for human rights observance, they may choose to review past incidents of human rights abuses when they receive complaints to that effect and in circumstances where they are granted the mandate. There have been some circumstances where they play vital truth-seeking roles that supersede those of some truth commissions.[188] The Human Rights and Equal Opportunity Commission in Australia in 1997 reported on an age-old state policy that was found to be prejudicial to the rights of aboriginal children since it required a forcible separation from their families.[189] Similarly the National Commissioner of Human Rights in Honduras in 1994 reported on the enforced disappearances of 179 people in the 1980s and early 1990s.[190]

Other established state organs may as well play vital truth-seeking roles based on their given mandate. In Ethiopia the Special Prosecutors Office documented the atrocities committed during the Mengistu regime.[191]

In Uganda, the constitution established the UHRC[192] which may initiate human rights investigations on its own or based on complaints received and may recommend effective redress measures which include compensating victims and their families when it conducts investigations.[193] The AAR also highlights the Human Rights Commission as a key implementing institution for some of the aspects of the Agreement.[194] Nevertheless, the other state institution with a closely related truth-seeking mandate is the Inspectorate of Government. The Inspectorate is mandated to investigate methodologies of security and law enforcement that the respective agencies employ in the course of doing their work, and the implications of their actions on the rule of law in Uganda.[195]

[187]Kisekka GN 'Plea bargaining as a human rights question' (2020) 6 *Cogent Social Sciences* 1 29
[188]Hayner PB 'Past truths, present dangers: The role of official truth-seeking in conflict resolution and prevention' in Stern PC and Daniel D ed *International conflict resolution after the Cold War* (2000) 338-382
[189]Hayner PB 'Past truths, present dangers: The role of official truth-seeking in conflict resolution and prevention' in Stern PC and Daniel D ed *International conflict resolution after the Cold War* (2000) 338-382
[190]Hayner PB 'Past truths, present dangers: The role of official truth-seeking in conflict resolution and prevention' in Stern PC and Daniel D ed *International conflict resolution after the Cold War* (2000) 338-382
[191]Hayner PB 'Past truths, present dangers: The role of official truth-seeking in conflict resolution and prevention' in Stern PC and Daniel D ed *International conflict resolution after the Cold War* (2000) 338-382
[192]A. 51 Constitution of the Republic of Uganda, 1995
[193]A. 52 Constitution of the Republic of Uganda, 1995
[194]Article 5.5 Agreement on Accountability and Reconciliation between the Government of the Republic of Uganda and the Lord's Resistance Army/Movement Juba, Sudan, 2007 UNSC s12007143 5 Annex 1 (2007)
[195]S. 8 (1) (g) Inspectorate of Government Act, 2002

Unfortunately, even when the Inspectorate has such a function, the reality presents constraints that cannot allow the Inspectorate to effectively exercise the function. The Inspectorate is already burdened with an overly expansive mandate which includes functioning as the state's anti-corruption agency as well as well as performing the government's ombudsman role.[196] Moreover, the Institution is perpetually under resourced and has in the past been politically undermined by the President who created a parallel anti-corruption body within state house.[197]

On the other hand, Uganda's security agencies have continued to evade accountability for the various human rights violations they are alleged to have committed[198] even when the Constitution enjoins them to observe and respect human rights in the performance of their functions.[199] As already highlighted, the Inspectorate appears to be constrained and unable to bring them to book.

It therefore remains problematic that the Inspectorate of Government continues to hold the extra responsibility to check the excesses of security agencies when the role could possibly be more suited to the UHRC which has the overall mandate to investigate human rights violations and was as well identified as key implementing institution for some aspects of the AAR. Likewise, even the NTJP mentions the UHRC as one of the priority implementing institutions for the policy. Yet, the policy makes no mention of the Inspectorate of Government, not even among the ministries, departments and agencies of government that are expected to enable the operationalization of the NTJP[200]

2.8 CHAPTER CONCLUSION

This chapter reveals that in the current context, truth commissions are not a viable truth-seeking option in Uganda due to various constraints they are likely to face, chief of which is the absence of political commitment. A review of the other official truth-seeking avenues indicates that although they have their unique constraints as well, the constraints can be overcome through some strategic legal and policy interventions. Therefore, they remain feasible truth-seeking alternatives. However, recommendations on how the identified constraints can be overcome shall be discussed in chapter 5.

[196]S. 8 (1) (a), (b) and (C) Inspectorate of Government Act, 2002
[197]Asiimwe G 'Museveni blasts IGG Mulyagonja, unveils parallel Anti- Graft Unit' available at https://chimpreports.com/museveni-blasts-igg-mulyagonja-unveils-parallel-anti-graft-unit/ (accessed 11 May 2021)
[198]Uganda Human Rights Commission and Office of United Nations High Commissioner for Human Rights 2011 – '"The dust has not yet settled" victims' views on the right to remedy and reparation (2011) 59-70
[199]A. 221 Constitution of the Republic of Uganda, 1995
[200]Ministry of Internal Affairs National Transitional Justice Policy (2019) 23

CHAPTER 3

THE UNOFFICIAL TRUTH: THE CHALLENGES AND OPPORTUNITIES OF UNOFFICIAL TRUTH-SEEKING

3.1 INTRODUCTION

The NTJP 2019 conflates truth-seeking, nation building and reconciliation on the premise that truth-seeking is a key component of the various measures for resolving conflict and is vital for maintaining comprehensive accounts of conflicts. Therefore, the policy presents truth-seeking as a tool for accountability, a springboard for dispute resolution, a precursor to information presentation as well as a healing and a reconciliation avenue.[201]

Meanwhile, there are believed to be varied perceptions of the past where conflict and violence is recurrent over time, as there is never one truth but everyone with their own versions of events and distinct memories.[202] Therefore questions arise on the possibility of establishing a single universe of comprehensibility and which can possibly be an impediment to reconciliation.[203]

Accordingly, a healing process which facilitates memorialization, forgiveness, acceptance of the past and acknowledgement is rendered a necessity.[204] These elements then constitute the conditions of reconciliation in informal truth-seeking processes and they are actualised when there is an end to the violence or the threat of violence, official acknowledgment and recognition of the violent past as well as the rebuilding of relationships following sustained community rehabilitation initiatives, and which are expected to extend beyond emotional or psychological processes to address structural inequalities and victims' material needs.[205]

The chapter commences with tracing the role of civil society in Uganda's truth-seeking efforts and the void they fill in the absence of adequate state-led truth-seeking initiatives. It then discusses traditional justice mechanisms and advocates for their incorporation into formal justice systems.

3.2 TRACING THE ROLE OF THE CIVIL SOCIETY IN UGANDA'S TRUTH-SEEKING INNITIATIVES

A 2012 Study Report on Transitional Justice, truth telling and national reconciliation in Uganda found that conflict-affected communities desired truth telling measures that were community-oriented and initiated at the local level as a response to the conflicts in their communities.[206] Cultural and religious institutions were cited as having the requisite capacity to significantly

[201]Ministry of Internal Affairs National Transitional Justice Policy (2019) 11-13 & 19
[202]Simic O (ed) '*An Introduction to Transitional Justice*' Olivera Simic 2 ed (2020) Ch 5
[203]Simic O (ed) '*An Introduction to Transitional Justice*' Olivera Simic 2 ed (2020) Ch 5
[204]Quinn JR 'Constraints the undoing of the Uganda Truth Commission' (2014) 26 *Human Rights Quarterly* 401 427
[205]Simic O (ed) '*An Introduction to Transitional Justice*' Olivera Simic 2 ed (2020) Ch 5
[206]International Centre for Transitional Justice Briefing 2012 – Confronting the Past: Truth Telling and Reconciliation in Uganda (2012) 1-5

contribute to peace building efforts in the absence of state-led truth-seeking mechanisms.[207] Nevertheless, the Report also advocated for the creation of linkages between community documentation, commemoration ceremonies that were pursued as well as the reconciliation processes and the national truth telling processes.[208] There was a strong belief that having local truth-seeking efforts integrated with national truth telling processes could possibly enhance acknowledgement of the victims' suffering at the national level.[209]

Previously, national truth-seeking efforts have been constrained to deliver effectively and thus necessitated that unofficial truth-seeking mechanisms are adopted to fill the void. There are various examples of non-governmental projects which unveiled abuses of prior regimes. Despite the restrictions on access to information, these organizations have in some cases had a remarkable impact. In Brazil investigators covertly obtained copies of official court documents that contained prisoners' complaints of abuse.[210] In Zimbabwe, when the state refused to publicize findings on the repression of the 1980s, human rights civil society organizations documented the events of the time by recording interviews with the respective victims.[211] The Documentation Centre for Cambodia gathered evidence by collecting stories from survivors regarding the genocide and as result generated knowledge and in some sense, instigated acknowledgement of the peoples' suffering during the Pol Pot era.[212]

In the case of Uganda, the civil society responded to the delay to enact the Transitional Justice policy by implementing its own truth-seeking programmes and memorialization in communities affected by the conflict. They combined national level advocacy such as petitions to parliament and local action to provide victims relief in the absence of government support.[213] With the involvement and the endorsement of the civil society, unofficial truth-seeking processes replaced official processes at community level, where they were used as a means to inquire into systematic human rights abuses and as avenues to amplify victims' voices.[214]

[207]International Centre for Transitional Justice Briefing 2012 – *Confronting the Past: Truth Telling and Reconciliation in Uganda* (2012) 1-5
[208]International Centre for Transitional Justice Briefing 2012 – *Confronting the Past: Truth Telling and Reconciliation in Uganda* (2012) 1-5
[209]Redress and Impunity Watch 2020 - *Victims front and centre: Lessons on meaningful victim participation from Guatemala and Uganda* (2020) 27
[210]Hayner PB 'Past truths, present dangers: The role of official truth-seeking in conflict resolution and prevention' in Stern PC and Daniel D ed *International conflict resolution after the Cold War* (2000) 338-382
[211]Lawry-White M 'The reparative effect of Truth-seeking in Transitional Justice' (2015) 64 *The International and Comparative Law* Quarterly 141 177
[212]Lambourne W 'Transformative justice, reconciliation and peace building' in Buckley-Zistel S et al (ed) *Transitional justice theories: An introduction* (2013) 19-39
[213]International Centre for Transitional Justice Report 2017 – *Victims fighting impunity: Transitional Justice in the African Great Lake Region* (2017) 1-40
[214]International Centre for Transitional Justice Briefing 2012 – Confronting the Past: Truth Telling and Reconciliation in Uganda (2012) 1-5

This was in line with the Juba AAR which encouraged the incorporation of formal and non-formal truth, justice and reconciliation measures in the national legal instruments.[215] The agreement required that reconciliation and other symbolic gestures such as commemorations, memorials and apologies constitute the truth-seeking measures adopted by the parties [216]

The manifestations of Uganda's community truth-seeking initiatives have been varied in form and have included community class actions, memorials and traditional rituals.

In the Barlonyo case, there was a civil claim initiated in the Lira High Court in 2018 on behalf of thousands of victims seeking compensation for injuries, loss of property and lives lost due to government's failure to protect them from the 2004 LRA Massacre in the Barlonyo camp.[217] The Uganda Association of Women Lawyers also instituted proceedings against the government for failing to protect a group of women from being sexually assaulted during the Northern Uganda conflict.[218]

On the other hand, an annual memorial service and candle-lit vigil is often held in February to commemorate the 2004 Barlonyo Massacre. The event draws people from different regions to share experiences. The prayers are fused with storytelling, songs, testimonies and artistic performances. The local communities readily embraced this oral transmission of memory as it was considered to be more in sync with local traditions and norms than the 'colonially infested' writing of histories.[219] Similarly the Refugee Law Project National Memory and Peace Documentation Centre emerged as a historic clinic.[220] The centre facilitates local truth telling and profiles significant conflict incidents to encourage victim-centric narratives of the conflict.[221] Participants have also indicated willingness to embrace the body mapping processes used in Columbia and South Africa and called for their incorporation into Uganda's memorialization practices.[222]

At another memorial site in Pader, a district in Northern Uganda, they keep a list of the names and other details of missing persons for traditional ritual purposes. The rituals involve mentioning

[215]Article 2.1 Agreement on Accountability and Reconciliation between the Government of the Republic of Uganda and the Lord's Resistance Army/Movement Juba, Sudan, 2007 UNSC s12007143 5 Annex 1 (2007)
[216]Article 9 Agreement on Accountability and Reconciliation between the Government of the Republic of Uganda and the Lord's Resistance Army/Movement Juba, Sudan, 2007 UNSC s12007143 5 Annex 1 (2007)
[217]Olaka D 'Barlonyo Survivors drag government to court' available at https://ugandaradionetwork.com/story/barlonyo-lra-survivors-drag-govt-to-court-1 (Accessed 15 July 2021)
[218]*The Prosecutor V. Dominic Ongwen* No.: ICC-02/04-01/15 Request for leave to submit Amicus Curiae observations on the legal questions presented in the Order for Submissions on Reparations (pursuant to Rule 103 of the Rules of Procedure and Evidence) of 6th May 2021
[219]De Yeaza C and Fox N 'Role of memory and memorialization in addressing Human Rights Violations in Post Conflict Rwanda and Uganda (2013) 8 *Society without borders* 344 372
[220]Amani Institute Uganda 2020 – 'Cul Pi Bal Reparations for Northern Uganda Conflict' (2020) 99
[221]Amani Institute Uganda 2020 – 'Cul Pi Bal Reparations for Northern Uganda Conflict' (2020) 99
[222]De Yeaza C and Fox N 'Role of memory and memorialization in addressing Human Rights Violations in Post Conflict Rwanda and Uganda (2013) 8 *Society without borders* 344 372

names of missing persons so as to cause healing and encourage closure for the affected members of the community.[223]

Despite the evident purpose of the unofficial truth-seeking mechanisms, there are still various limitations that constrain their effectiveness in addressing the victim's needs in regard to truth-seeking.

First, the rhetoric of commemoration is criticised for being highly politicized and seemingly coerces survivors to forgive whilst presenting a charade of reconciliation to the outside world.[224] Consequently, in the absence of mutual historical references, memorialization efforts continue to be disputed and have resulted in multiple competing truths and narratives.[225] In Uganda there are continued contestations on the role of the rebel groups versus the government forces in the Northern Uganda insurgency as the government has maintained a stance of official denial of the atrocities committed, refusing to acknowledge responsibility as well as contesting the numbers of those killed during the war.[226] The state's refusal to acknowledge its transgressions and the accepted accounts as well as memories is perceived as being antagonistic to the communal justice requirements and a stance that threatens to deter healing.[227]

At the Barlonyo memorial site, a monument refers to 121 victims commemorated, yet the victims maintain that the casualties of the massacres were more than 300 and it is said they were buried in haste thereafter.[228] Some victims therefore consider the monument to be a government attempt to conceal what happened and accordingly a misrepresentation of the truth. In effect the monument seems to have instigated anguish rather than cause healing for the community.[229] Similarly, a memorial site at Mukura in Teso is regarded as being one aimed at vindicating the actual perpetuators by advancing what is believed to be a false narrative of the conflict. It is said the government was responsible for the Mukura killings yet the monument there appears to memorialize the government forces' 'contribution' to the protection of Ugandans.[230]

Besides, the government is also faulted for offering minimal financial and logistical support to the various memorialization initiatives. A comparative study done in Uganda and Rwanda revealed

[223]Redress and Impunity Watch 2020 - *Victims front and centre: Lessons on meaningful victim participation from Guatemala and Uganda* (2020) 48
[224]De Yeaza C and Fox N 'Role of memory and memorialization in addressing Human Rights Violations in Post Conflict Rwanda and Uganda (2013) 8 *Society without borders* 344 372
[225]De Yeaza C and Fox N 'Role of memory and memorialization in addressing Human Rights Violations in Post Conflict Rwanda and Uganda (2013) 8 *Society without borders* 344 372
[226]De Yeaza C and Fox N 'Role of memory and memorialization in addressing Human Rights Violations in Post Conflict Rwanda and Uganda (2013) 8 *Society without borders* 344 372
[227]Redress and Impunity Watch 2020 - *Victims front and centre: Lessons on meaningful victim participation from Guatemala and Uganda* (2020) 38
[228]Redress and Impunity Watch 2020 - *Victims front and centre: Lessons on meaningful victim participation from Guatemala and Uganda* (2020) 48
[229]Redress and Impunity Watch 2020 - *Victims front and centre: Lessons on meaningful victim participation from Guatemala and Uganda* (2020) 48
[230]Amani Institute Uganda 2020 – 'Cul Pi Bal Reparations for Northern Uganda Conflict' (2020) 99

that whereas in Rwanda, commemoration initiatives received considerable state backing, in Uganda memorialization efforts have been mainly initiated by the civil society with scant government input.[231] Uganda's nominal involvement in memorialization is understood to be due to the lack of government acknowledgement of responsibility.[232] Yet, class actions which are supposed to compel government to acknowledge its transgressions and redress the victims are also costly. Given that, the majority of victims in Uganda are indigent, on some occasions their financial limitations have hampered evidence gathering during the court processes and threatened their success.[233]

Memorialization initiatives in Uganda also continue to be accused of encouraging marginalization of women as there are few public testimonies of gendered violence because women face stigmatization when they come out to testify. There have therefore been calls for gender-sensitive approaches to memorialization.[234]

Overall, the challenges of Uganda's unofficial truth-seeking mechanisms have been further amplified by the continued fragmentation of the civil society. The civil society is believed to have failed to develop a strong base of membership, as it has failed to rally members towards a common agenda due to the diminishing civic space for human rights non-governmental organizations and the revolving donor priorities, which fuel tensions among the sector players. These tensions have then bred a scramble for scarce resources and further compounded the challenges of operating in a restricted political space.[235] Civil society organizations also lack consensus on the mechanisms of truth-seeking Uganda should adopt, with some vouching for the establishment of a reconciliation forum with no mandate to sanction wrong doing, and others calling for the establishment of a truth commission whose recommendations have far reaching ramifications.[236]

3.3 TRADITIONAL JUSTICE MECHANISMS AS A TRUTH-SEEKING MEASURE: CHALLENGES AND OPPORTUNITIES

Examples of traditional practices that have gained prominence in the truth-seeking processes include the Mato Oput, Nyono Tong Gweno, Cul Kwor and Gono Tong. These local rituals have been used for community level reconciliation as well as truth-seeking between warring clans and

[231]De Yeaza C and Fox N 'Role of memory and memorialization in addressing Human Rights Violations in Post Conflict Rwanda and Uganda (2013) 8 *Society without borders* 344 372
[232]De Yeaza C and Fox N 'Role of memory and memorialization in addressing Human Rights Violations in Post Conflict Rwanda and Uganda (2013) 8 *Society without borders* 344 372
[233]Redress and Impunity Watch 2020 - *Victims front and centre: Lessons on meaningful victim participation from Guatemala and Uganda* (2020) 38
[234]De Yeaza C and Fox N 'Role of memory and memorialization in addressing Human Rights Violations in Post Conflict Rwanda and Uganda (2013) 8 *Society without borders* 344 372
[235]Redress and Impunity Watch 2020 - *Victims front and centre: Lessons on meaningful victim participation from Guatemala and Uganda* (2020) 28
[236]Redress and Impunity Watch 2020 - *Victims front and centre: Lessons on meaningful victim participation from Guatemala and Uganda* (2020) 28

individuals. In the context of the LRA, these practices have been adopted to ease the reintegration of the ex-combatants into the communities.[237]

"Nyono Tong Gweno" which means stepping on eggs in Acholi is used as a reconciliation mechanism when an individual has been away from the community for an extended period of time after committing a transgression against the community. The ritual is performed at the person's own home and is symbolically believed to cleanse an individual from the foreign elements which are, through the ritual, believed to be barred from entering the community to cause contamination. Thus, the egg used in the ritual symbolizes innocence and purity, and the crushed shell symbolizes foreign elements that are capable of contaminating the community, but which are crushed beforehand. The ritual is also accompanied with a twig of the Opobo Tree and the Layiibi, the stick that opens the granary. The twig is symbolic of a purging from evil as the consumption of the Layiibi soup signifies a return to eat in a familiar territory.[238]

On the other hand, Mato Oput is applicable in circumstances of both intentional and accidental homicides and may in some cases involve only a quick resolution of conflict lasting a few weeks. However it may also, in other cases, be a prolonged process taking some years to complete. The process may not begin until misfortunes befall offending clans and social pressures motivate the perpetrator or their family to seek reconciliation. It involves a separation between the affected clans after the killing which is considered to be a time for them to cool off so as to subdue any inclinations towards vengeance. This period involves suspending relations, forbidding of intermarriages, and the pausing of any forms of socializing that involve sharing food and drink.[239]

Subsequently, there is the mediation period within which the perpetrators are expected to voluntarily confess motives, and provide context and express remorse. It is believed that the offender's confessions and efforts at rectification avert the possibility of being plagued by the spirits of the dead, which may continue tormenting the perpetrator through nightmares, disease and death if not addressed.[240]

Once the clans agree on commencing the process of reconciliation, they hold a day-long ceremony presided over by the Rwot Moo, the local chief. The offending party hits a stick and runs away to signify guilt. Parties also slaughter half a sheep representing guilt, haunting the clan while the injured supplies a goat to symbolize entry and willingness to forgive and reconcile. The clans then share in a meal of local greans symbolizing the readiness to reconcile. Representatives from both clans drink the Oput (bitter root) from a calabash. The Oput symbolizes bitterness in the respective clans, and the drinking of the participants is done to 'wash away' that bitterness. Parties also eat

[237]Amani Institute Uganda 2020 – 'Cul Pi Bal Reparations for Northern Uganda Conflict' (2020) 19
[238]Cecily R 'Looking beyond amnesty and traditional justice and reconciliation mechanisms in Northern Uganda: A proposal for truth telling and reparations' (2008) 28 *Boston College Third World Law Journal* 345 400
[239]Cecily R 'Looking beyond amnesty and traditional justice and reconciliation mechanisms in Northern Uganda: A proposal for truth telling and reparations' (2008) 28 *Boston College Third World Law Journal* 345 400
[240]Cecily R 'Looking beyond amnesty and traditional justice and reconciliation mechanisms in Northern Uganda: A proposal for truth telling and reparations' (2008) 28 *Boston College Third World Law Journal* 345 400

Ocwiny, liver of sheep and goat, to symbolize unity of blood. They also eat Odeyo, the remains of source pans, to show parties are free to share meals again. For all the days, food must be eaten, to show complete reconciliation with no bitterness. The offending family then compensates the aggrieved family. The compensation, which is raised through families, usually consists of cattle and money, and must be affordable to maintain relations between families.[241]

The other ritual is the Gono Tong (the binding of spears), which is a peace-making ceremony to commemorate the resolution of violent conflict. It is applicable in inter- ethnic reconciliation, and one that does not involve any form of economic recompense. Rather, it involves taking 'ceasefire' vows to suspend inter-ethnic killings indefinitely among the warring parties symbolized by the bending spears into shapes of U and their exchange between the foes to exhibit the futility of war and the double-edged nature of its consequences. This ritual is said to have been last performed in the 1980s during conflicts between the Acholi and Western Nile people.[242]

Traditional justice mechanisms of truth-seeking are credited for strengthening existing structures, to facilitate nation building and reconciliation at all levels. Traditional justice mechanisms are also credited for fostering dialogue, upholding tested methods of reconciliation, as well as generating community focused outcomes.[243] They are commended for being open in nature and promoting unity by encouraging community participation. They are also believed to have a finality inherently enshrined in their processes, given that, a high degree of compliance is usually anticipated, because of their community designed nature that requires an agreement to be implemented to the community satisfaction. Consequently, perpetrators are said to rarely negate or avoid the process.[244]

However, even with all their merits, critics have continued to advance arguments that question the significance of traditional justice mechanisms in enabling effective truth-seeking. Traditional justice mechanisms are mostly criticized for being culture specific and rigid. They are therefore perceived to be susceptible to opposition by those who do not ascribe to the culture or traditions from whence they emanate and which in effect is said to limit their application across different cultures.[245] Accordingly, it is presumed that in cases where perpetrators are from different ethnicities, they are likely to be reluctant to embrace the traditional practices of another tribe affected by the conflict.[246] Moreover, the practices are depicted as lacking uniformity and

[241]Cecily R 'Looking beyond amnesty and traditional justice and reconciliation mechanisms in Northern Uganda: A proposal for truth telling and reparations' (2008) 28 *Boston College Third World Law Journal* 345 400
[242]Cecily R 'Looking beyond amnesty and traditional justice and reconciliation mechanisms in Northern Uganda: A proposal for truth telling and reparations' (2008) 28 *Boston College Third World Law Journal* 345 400
[243]Latigo OJ 'Northern Uganda: Traditional-based practices in Acholi region' in Salter M and Huyse L (ed) *Traditional Justice and Reconciliation after Violent Conflict; Hearing from African experiences* (2008) 85-122
[244]Latigo OJ 'Northern Uganda: Traditional-based practices in Acholi region' in Salter M and Huyse L (ed) *Traditional Justice and Reconciliation after Violent Conflict; Hearing from African experiences* (2008) 85-122
[245]Latigo OJ 'Traditional based-practices in Acholi region' in Salter M and Huyse L (ed) *Traditional Justice and Reconciliation after Violent Conflict; Hearing from African experiences* (2008) 85-122
[246]Cecily R 'Looking beyond amnesty and traditional justice and reconciliation mechanisms in Northern Uganda: A proposal for truth telling and reparations' (2008) 28 *Boston College Third World Law Journal* 345 400

considered to be largely unsuitable to the unique circumstances that arise from varied multicultural contexts.[247] These disputations are partly premised on the evidence of the limited understanding of local cultural practices such as Mato Oput even among the Acholi people, which problem is then compounded by the multiple variations of the traditional practices, the lack of documentation, and the absence of written codes to streamline their implementation.[248]

The other prevalent criticism of traditional justice mechanisms is that they are male dominated with limited application of balanced gender roles and therefore inadequately prepared to address concerns of women in the truth-seeking processes.[249]

On the other hand, the capability of traditional justice mechanisms to deal with international crimes is also questioned. Whereas there are propositions for the adoption of traditional justice mechanisms in dealing with international crimes on the premise that they are restorative, in the place of the western formalized justice mechanisms that are considered retributive, there are contestations that the dichotomies between the western formal legal system and the indigenous informal justice mechanisms are over-simplified and in effect tend to mask the complexities of human interaction with the varied justice mechanisms.[250] Thus, the tendency to front informal cultural practices as being more befitting Transitional Justice models for remedying the commission of serious international crimes is said to be misleading, and considered to be only used as a means to coerce survivors to embrace restorative justice as sufficient, in circumstances where retributive justice would otherwise be more suitable.[251] The capacity of the victims to forgive is contested and believed to be over-estimated.[252] Traditional justice mechanisms are also criticized for making no provision for command responsibility and thus creating opportunity for those who would otherwise have been held responsible on the account of being commanders to escape liability.[253]

In the Ugandan context, traditional justice mechanisms are faulted for creating a wrong perception of war as being a single-tribe affair,[254] and as a result failing to deliver a holistic approach to victim

[247]Latigo OJ 'Traditional based-practices in Acholi region' in Salter M and Huyse L (ed) *Traditional Justice and Reconciliation after Violent Conflict; Hearing from African experiences* (2008) 85-122
[248]Cecily R 'Looking beyond amnesty and traditional justice and reconciliation mechanisms in Northern Uganda: A proposal for truth telling and reparations' (2008) 28 *Boston College Third World Law Journal* 345 400
[249]Redress and Impunity Watch 2020 - *Victims front and centre: Lessons on meaningful victim participation from Guatemala and Uganda* (2020) 45
[250]Lambourne W 'Transformative justice, reconciliation and peace building' in Buckley-Zistel S et al (ed) *Transitional justice theories: An introduction* (2013) 19-39
[251]Lambourne W 'Transformative justice, reconciliation and peace building' in Buckley-Zistel S et al (ed) *Transitional justice theories: An introduction* (2013) 19-39
[252]Cecily R 'Looking beyond amnesty and traditional justice and reconciliation mechanisms in Northern Uganda: A proposal for truth telling and reparations' (2008) 28 *Boston College Third World Law Journal* 345 400
[253]Cecily R 'Looking beyond amnesty and traditional justice and reconciliation mechanisms in Northern Uganda: A proposal for truth telling and reparations' (2008) 28 *Boston College Third World Law Journal* 345 400
[254]Latigo OJ 'Traditional based-practices in Acholi region' in Salter M and Huyse L (ed) *Traditional Justice and Reconciliation after Violent Conflict; Hearing from African experiences* (2008) 85-122

participation and reconciliation at the national level. They are regarded to be ill- equipped to tackle impunity or restore relationships between society and the state.[255]

Besides, it is said that the social fabric on which traditional justice mechanisms rely for their effectiveness appears to be weakened by the social disintegration caused by war.[256] To support this proposition, factors such as forced migrations, living in internally displaced persons' (IDP) camps and the emergence of a new breed of children said to be detached from the cultural norms[257] are cited as some of the war-related causes for the substantive decline of the utilization of traditional justice mechanisms in Northern Uganda.[258]

Traditional justice mechanisms are as well criticised for being ad hoc and not ascertainable because of their reliance on the resource mobilization capabilities of the communities or families who are required to source for sacrificial animals, ritual specialist services, meals and transport for the participants among others.[259] The verbal agreements reached during the traditional rituals are criticised for being overly dependent on the commitment, goodwill, and character of those involved.[260] The reliance on elders' knowledge and experience other than professional mediators is as well contested and said to create possibilities of delaying the justice process when elders are unavailable and when the rituals cannot be performed at a particular time following agreed formula due to their absence.[261]

However a close scrutiny of the criticisms levelled against traditional justice mechanisms reveals that some of the claims made against the measures remain unsubstantiated. First, the assumption that traditional justice cannot be applicable across different ethnicities is mistaken and the framing of its mechanisms as being culture specific and rigid in application is contestable. Generally, customary law in its various forms has been found to be flexible in nature and capable of adjustment to unforeseen circumstances. This is so because customs evolve with the evolution of the society's order, values, behaviours and norms due to their inherent interdependence.[262] The Nyono Tong Gweno traditional ritual in Acholi may exemplify this as it was reported to have

[255]Redress and Impunity Watch 2020 - *Victims front and centre: Lessons on meaningful victim participation from Guatemala and Uganda* (2020) 45-46

[256]Latigo OJ 'Traditional based-practices in Acholi region' in Salter M and Huyse L (ed) *Traditional Justice and Reconciliation after Violent Conflict; Hearing from African experiences* (2008) 85-122

[257]Atim T and Proctor K 'Modern Challenges to Traditional Justice: The Struggle to Deliver Remedy and Reparation in War-Affected Lango' (2013) 4: A study done in Lango Sub- Region after the war depicted the locals as being detached from traditional justice norms and with no understanding of their role in addressing serious crimes and violations.

[258]Institute of Justice and Reconciliation Policy Brief 2011 - '*Traditional Justice and War Crimes in Northern Uganda'* (2011) 1-8

[259]Latigo OJ 'Traditional based-practices in Acholi region' in Salter M and Huyse L (ed) *Traditional Justice and Reconciliation after Violent Conflict; Hearing from African experiences* (2008) 85-122

[260]Latigo OJ 'Traditional based-practices in Acholi region' in Salter M and Huyse L (ed) *Traditional Justice and Reconciliation after Violent Conflict; Hearing from African experiences* (2008) 85-122

[261]Latigo OJ 'Traditional based-practices in Acholi region' in Salter M and Huyse L (ed) *Traditional Justice and Reconciliation after Violent Conflict; Hearing from African experiences* (2008) 85-122

[262]Bwire B 'Integration of African Customary Legal Concepts into Modern Law: Restorative Justice: A Kenyan Example' 2019 *MDPI* 1-8

enabled thousands of people including the LRA returnees from other tribes reconcile with the respective aggrieved communities, and enabled their integration following the war.[263]

Moreover, the assumption of rigidity appears to be based on a flawed 'Eurocentric' paradigm that assumes some notions of justice as necessarily universal when they actually remain a western construct.[264] For instance, in Uganda individuals from different cultural backgrounds are subject to state led judicial processes originating from the British and Roman legal traditions and the Judeo Christian heritage.[265] Whereas these kinds of justice measures are made applicable to individuals from different cultural backgrounds, usually without the necessary modifications, the application of justice mechanisms drawn from African traditions is resisted on the purport of cultural specificity and rigidity.

Besides, there are common elements of traditional justice that are identical across different cultures although the different practices in their actual application are not uniform. These common elements include the emphasis on volunteering of the truth as a gesture of remorse, symbolic restitution measures for the victims, the ceremonial sacrificing of livestock in ritual cleansing practices and the community participation in the processes.[266] Quinn provides the example of various tribes such as the Karimojong, Iteso and Acholi that maintain analogous systems of elder mediation to adjudicate disputes based on similar although not uniform cultural norms.[267] It is also evident that even among the Bantu tribes where traditional justice practices such as the Kitewuliza in Buganda and Okurakaba in Ankole are less regularly used, these norms are generally espoused and there remains a common understanding of what they entail.[268]

In the case of Mifumi (U) Ltd & Anor v Attorney General & Anor,[269] the Supreme Court took judicial notice of the custom of bride price in Uganda and refuted claims of the appellants who attempted to challenge its legitimacy based on the lack of uniformity in its application among the different tribes.[270]

[263]Latigo OJ 'Traditional based-practices in Acholi region' in Salter M and Huyse L (ed) *Traditional Justice and Reconciliation after Violent Conflict; Hearing from African experiences* (2008) 85-122
[264]Mutua M 'What is the future of transitional justice?'.(2015) 9 International Journal of Transitional Justice 1-9
[265]Institute of Justice and Reconciliation Policy Brief 2011 - '*Traditional Justice and War Crimes in Northern Uganda'* (2011) 1-8
[266]Institute of Justice and Reconciliation Policy Brief 2011 - '*Traditional Justice and War Crimes in Northern Uganda'* (2011) 1-8
[267]Quinn JR *'Power to the people? Abuses of power in Traditional Practices of acknowledgement in Uganda'* Paper presented at the Annual Meeting of the Canadian Political Science Association, 2 June 2010
[268]Quinn JR *'Power to the people? Abuses of power in Traditional Practices of acknowledgement in Uganda'* Paper presented at the Annual Meeting of the Canadian Political Science Association, 2 June 2010
[269]*Mifumi (U) Ltd & Anor v Attorney General & Anor* Constitutional Appeal No. 02 of 2014 [2015] UGSC 13
[270]Halsbury's Laws of England 3 ed, Vol. 15 "Judicial notice should be taken of facts which are familiar to any judicial tribunal by virtue of their universal notoriety or regular occurrence in the ordinary course of nature or business. As judges must bring to the consideration of the questions they have to decide their knowledge of the common affairs of life, it is not necessary on the trial of any action to give formal evidence of matters with which men of ordinary intelligence are acquainted whether in general or due to natural phenomenon"

Although it is true that the disintegration that follows war may negatively affect the social fabric on which traditional justice mechanisms depend for their success, this is not unique to the traditional justice mechanisms and equally affects the formal criminal justice system. In fact, the evidence suggests that formal criminal justice processes are more vulnerable to disintegration after war. There is also evidence that traditional justice mechanisms have the potential to reach many more people in the dispensation of post conflict criminal justice than the formal court processes which only have a limited reach.[271]

In Rwanda, the Gacaca courts were established to prosecute crimes using traditional justice mechanisms and to complement the ICTR in the dispensation of International Criminal Justice.[272] In the end the courts managed to prosecute many more cases than the ICTR.[273] Likewise, in Uganda, Tamale found that only 5% of disputes were resolved through formal court processes with the majority of disputes resolved through customary practices.[274]

A report of the UNHCHR highlighted that the formal court system got dismantled by the Northern Uganda conflict causing access to justice challenges.[275] The report further highlighted that locals resorted to traditional justice mechanisms to obtain justice as they were a lot more functional than the courts at the time.[276] Interestingly, whereas there were sustained efforts of JLOS to re-establish the functionality of the formal criminal justice system thereafter, there were no serious government efforts geared towards the improvement of the functionality of the traditional justice system.[277]

While the claim that the traditional justice mechanisms are male dominated and as a result prejudice the rights of women may not necessarily be contested, it should be recognized that such an anomalous situation can be rectified through targeted sensitization and advocating for the incorporation of affirmative action in the composition of the traditional councils of elders to make them more inclusive of women as they evolve. The Constitution provides for affirmative action rights for women which are supposed to redress the traditional, customary and historically prevalent gender imbalances.[278]

[271]Office of the United Nations High Commissioner for Human Rights Report 2008 - Access to Justice in Northern Uganda (2008) 1-46
[272]Ingalaere B 'The Gacaaca Courts in Rwanda' in Salter M and Huyse L (ed) *Traditional Justice and Reconciliation after Violent Conflict; Hearing from African experiences* (2008) 25-60
[273]Ingalaere B 'The Gacaaca Courts in Rwanda' in Salter M and Huyse L (ed) *Traditional Justice and Reconciliation after Violent Conflict; Hearing from African experiences* (2008) 25-60
[274]Tamale S 'Decolonization and Afro-feminism' (2020)
[275] Office of the United Nations High Commissioner for Human Rights Report 2008 - Access to Justice in Northern Uganda (2008) 5-7
[276]Office of the United Nations High Commissioner for Human Rights Report 2008 - Access to Justice in Northern Uganda (2008) 35-37
[277]Office of the United Nations High Commissioner for Human Rights Report 2008 - Access to Justice in Northern Uganda (2008) 40-46
[278]Article 32 and 33 of the Constitution of the Republic of Uganda, 1995

That said, it is crucial that before this discussion is closed, there is a special focus on the High Court case of Uganda v Kanyamunyu[279] for a more critical analysis of Justice Stephen Mubiru's proclamations on traditional justice mechanisms in the case. This is necessary because in that case, Justice Mubiru encapsulated the legal and policy contestations regarding incorporation of traditional justice mechanisms into the formal justice processes. And although the case only involved the domestic crimes of murder and manslaughter that were being tried in the High Court,[280] it was a symbolic portrayal of formal justice responses to conflict and some of their shortcomings when juxtaposed with traditional justice responses to conflict. Also, the reaction of the citizenry in the aftermath of the murder reflected undertones of the ethnic schisms that have in the past fomented conflict.[281]

The accused Mathew Kanyamunyu[282] shot Jimmy Akena[283] following a disagreement when they were involved in a minor car accident. Thereafter, the accused attempted to cover up the truth by hiding the gun and denying any involvement in the murder of Akena.[284] Nevertheless, he later opted to undergo the Acholi's traditional justice processes of Mato Oput. And at the next hearing of the case, he lodged an interlocutory application where he sought to have an adjournment of the prosecution to complete the Mato Oput process.[285] However the court declined to grant his requests as it viewed the completion of a Mato Oput process, as not sufficient reason for allowing the adjournment.[286]

Interestingly, Kanyamunyu was eventually convicted a few days thereafter following a plea bargain process. The Director of Public Prosecutions (DPP) changed the charges from murder to manslaughter, Kanyamunyu entered a plea of guilt and he was sentenced to 5 years in prison.[287]

[279] *Kanyamunyu Mathew v Uganda* (Criminal Miscellaneous Application-2020/151) [2020] UGHCCRD 144

[280] The High Court is the court of first instance in trying capital offences. See S. 1 of the Trial on Indictments Act Cap 23 and S. 164 of the Magistrates Court Act Cap 16

[281] Matooke Republic 'Akena death stirs tribal sentiments' available at *https://www.matookerepublic.com/2016/11/18/akena-death-stirs-tribal-sentiments/* (Accessed 20 July 2021)

[282] Kanyamunyu is from the Ankole tribe one of the tribes in South Western Uganda and also the tribe of President of the Republic of Uganda Yoweri Kaguta Museveni. See Matooke Republic 'Akena death stirs tribal sentiments' available at *https://www.matookerepublic.com/2016/11/18/akena-death-stirs-tribal-sentiments/* (Accessed 20 July 2021)

[283] Akena is from the Acholi tribe is one of the tribes in Northern Uganda a region which had the LRA insurgency for more than 20 years of Museveni's rule. See Matooke Republic 'Akena death stirs tribal sentiments' available at *https://www.matookerepublic.com/2016/11/18/akena-death-stirs-tribal-sentiments/* (Accessed 20 July 2021)

[284] Otto A 'Lugogo shooting: priest calls for speedy, detailed investigation' available at *https://ugandaradionetwork.com/story/lugogo-shooting-clergy-wants-detailed-investigation-on-case/* (Accessed 20 July 2021)

[285] Ntezza M 'Your case must be settled in court not Mato Oput - judge tells Kanyamunyu' available at https://chimpreports.com/your-case-must-be-settled-in-court-not-mato-oput-judge-tells-kanyamunyu/ (Accessed 20 July 2020)

[286] Ntezza M 'Your case must be settled in court not Mato Opu - judge tells Kanyamunyu' available at *https://chimpreports.com/your-case-must-be-settled-in-court-not-mato-oput-judge-tells-kanyamunyu/* (Accessed 20 July 2020)

[287] URN 'Akena murder: Kanyamunyu sentenced to 6 years as girlfriend walks free' available at *https://observer.ug/news/headlines/67358-akena-murder-kanyamunyu-sentenced-to-5-years-as-girlfriend-walks-free* (Accessed 20 July 2020)

To reject the application, Justice Mubiru dismissed the appeals for traditional justice mechanisms on the premise that they created the illusion of the existence of adequate 'meso-social structures or ordered sets of relationships sufficient to generate the social power and coercion to support dispute resolution.' He further argued that the presumption that the social and moral proclivities of the disputants were mutual, that they existed in proximate communities, and that they were related in a way was based on idealistic conjecture but was far from the reality.[288] Accordingly, he doubted the reconciliatory potential of Mato Oput, one of the prominent traditional justice mechanisms in Northern Uganda and said it was merely 'romanticised' as an effective criminal justice measure whereas it was not.[289]

He contended the empirical grounding of the propositions regarding the capacity of traditional justice processes to facilitate reconciliation, which he regarded as being theoretical, on the basis that there was little published data on their effectiveness. He reasoned that the only evidence available to support their effectiveness were fragmented anecdotal narratives and indicated that some of the rituals were rarely practiced in contemporary Acholi society.[290] Justice Mubiru further reasoned that despite adoption of the NTJP 2019, traditional justice processes and principles had not been properly detailed and developed and that therefore the idealistic propositions for traditional justice appeared to be detached from the actual practice.[291]

He then concluded that without established rule based safe guards or methods of execution during the process; offenders risked being shamed by victims which was likely to inhibit their expression for fear of upsetting the victims. He also highlighted the risk of discrimination and marginalization of offenders in the absence of adequate safeguards against political, financial and other undue influences based on distinctions of family ties and social stratifications resulting from wealth and gender parities. He as well underlined the potential dangers of violating human rights principles and the likelihood of falling short of constitutional standards since the traditional justice mechanisms were shrouded in legal ambiguity.[292]

However, a critical review of the judgement reveals that Justice Mubiru's assertions were flawed in some respects that are hereby discussed in detail.

As highlighted earlier, incorporating restorative justice processes can enhance the effectiveness of plea bargain processes.[293] It is therefore arguable that the Kanyamunyu case was a missed opportunity for courts to endorse the use of traditional justice mechanisms in formal criminal justice processes. This case presented an opportunity to illustrate the practicality of incorporating a restorative justice process into formal criminal justice procedures. Unfortunately, based on

[288]*Kanyamunyu Mathew v Uganda* (Criminal Miscellaneous Application-2020/151) [2020] UGHCCRD 144 para 29
[289]*Kanyamunyu Mathew v Uganda* (Criminal Miscellaneous Application-2020/151) [2020] UGHCCRD 144 para 30
[290]*Kanyamunyu Mathew v Uganda* (Criminal Miscellaneous Application-2020/151) [2020] UGHCCRD 144 para 28
[291]*Kanyamunyu Mathew v Uganda* (Criminal Miscellaneous Application-2020/151) [2020] UGHCCRD 144 para 27
[292]*Kanyamunyu Mathew v Uganda* (Criminal Miscellaneous Application-2020/151) [2020] UGHCCRD 144 para 27
[293]Gray H 'Can restorative justice processes help improve plea bargaining in Uganda's criminal justice system?' (2019) 19 Pepperdine *Dispute Resolution Law Journal* 215 230

Justice Mubiru's scepticism of Mato Oput's reconciliatory potential and his prioritization of a speedy trial, the accused's application for an adjournment was rejected, and he was instead pushed into accepting a plea bargain.[294] It was unfortunate that Justice Mubiru failed to appreciate the value that this Mato Oput process had added to the trial process, especially in addressing the needs of the victims,[295] as well as delivering to the accused and the victims a personalized kind of justice that fitted into their unique needs.[296]

Similarly, Justice Mubiru's hesitation to incorporate Mato Oput in the formal criminal justice processes is attributable to the failure to appreciate the distinctions between official customary law and the living customary law.[297] Therefore, while looking for the legitimation for Mato Oput, his search was biased towards finding 'empirical evidence' and detailed documentation of the Mato Oput custom to prove its 'reconciliatory potential'. In other words he was looking for official records.[298] Therefore, Justice Mubiru out rightly rejected the 'fragmented anecdotal narratives' and disregarded what he knew about the actual practice of traditional justice which could have been good indication of the living customary law.[299] This approach to affirmation of customary law which requires strict proof originates from the colonial times when evidence of the legitimacy of customary practices had to be drawn from anthropological studies and other forms of official documentation.[300] However, this approach to determining the acceptability of customary practices is considered out-dated. Therefore, there have been calls for courts to embrace the liberal approaches that require judges to learn about the living customary law on their own initiative to allow their incorporation into the court processes other than wait for proof of the same through evidence presented in court.[301]

Interestingly, Justice Mubiru recognized the fact that the Courts were ill equipped and under resourced with no sufficient capacity to fully achieve their criminal justice role.[302] In effect he

[294]URN 'Akena murder: Kanyamunyu sentenced to 6 years as girlfriend walks free' available at *https://observer.ug/news/headlines/67358-akena-murder-kanyamunyu-sentenced-to-5-years-as-girlfriend-walks-free* (Accessed 20 July 2020)
[295]Kisekka GN 'Plea bargaining as a human rights question' (2020) 6 *Cogent Social Sciences* 1 29
[296]Gray H 'Can restorative justice processes help improve plea bargaining in Uganda's criminal justice system?' (2019) 19 Pepperdine *Dispute Resolution Law Journal* 215 230
[297]Bennett TW 'Re-Introducing African Customary Law to the South African Legal System' (2009) 57 *American Journal of Comparative* Law 1 32: Bennettt Distinguishes official customary law regarded to be the customary law as stipulated in the codifications and other authoritative texts from living customary law which are the norms that govern people's everyday life and not determinable based on perceptions of outsiders such as the legal experts or codification.
[298]Oba AA 'The future of Customary Law in Africa' in Fenrich J Galizzi P and Higgins TE (ed) '*The future of African customary law*' (2011) 58-82
[299]Oba AA 'The future of Customary Law in Africa' in Fenrich J Galizzi P and Higgins TE (ed) '*The future of African customary law*' (2011) 58-82
[300]Dennison B 'Proving Customary Law in Uganda: Roadmaps and Roadblocks' available at *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2441861* (Accessed 20 July 2020)
[301]Dennison B 'Proving Customary Law in Uganda: Roadmaps and Roadblocks' available at *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2441861* (Accessed 20 July 2020)
[302]*Kanyamunyu Mathew v Uganda* (Criminal Miscellaneous Application-2020/151) [2020] UGHCCRD 144 para 23

acknowledged that traditional criminal justice could be a viable alternative to formal criminal justice complementarily dealing with some offences.[303]

But then, he cautioned against using traditional justice mechanisms to 'undermine' formal criminal justice processes; by proclaiming simultaneous jurisdiction and causing 'confusion' among those who were seeking for justice as to where they should go.[304] He seemed to suggest though, that this 'confusion' could be dealt with through legislation.[305]

Justice Mubiru's stance that portrayed traditional practices as those likely to cause 'confusion' in the dispensation of justice reflects the second- class status to which the Ugandan courts have relegated African customary laws and values[306] and is as well a manifestation of a hegemonic conception of Transitional Justice. It is also a harsh reminder of the failure to wholly decolonize the mind of African judges from 'westernized' justice approaches that encouraged the denigration of African tradition.[307] It particularly indicates the failure to completely exorcise the Rex v Amkeyo 'demon'[308] from Uganda's jurisprudence.

Unfortunately, Justice Mubiru seems not to have realised that the rejection of African customary practices in favour of colonial ideals of justice was responsible for the decimation of the meso-social structures that he believed would have enabled traditional justice processes to flourish.[309] Therefore, his nuanced reference to the non-existence of the meso-social structures as an impediment for the effective implementation of traditional justice processes is a damning indictment on modern lifestyles of the westernized elites who have been taken up by the globalization wave that has led to the dismantling of the communal altruistic value system (what Lubogo called the Obuntu Bulamu),[310] and which was foundational to African customs and tradition.[311]

Moreover, Justice Mubiru's caution on the likelihood of non- adherence to constitutional standards and presumed susceptibility to abuse depicted traditional justice practices as being inherently problematic, whereas they were not.[312] Instead, cognisance should have been taken of the fact that

[303]*Kanyamunyu Mathew v Uganda* (Criminal Miscellaneous Application-2020/151) [2020] UGHCCRD 144 para 31
[304]*Kanyamunyu Mathew v Uganda* (Criminal Miscellaneous Application-2020/151) [2020] UGHCCRD 144 para 31
[305]*Kanyamunyu Mathew v Uganda* (Criminal Miscellaneous Application-2020/151) [2020] UGHCCRD 144 para 31
[306]Kabumba B 'Black laws matter: Benedicto Kiwanuka's legacy and the rule of law in the "new normal"' Key note address at the 3rd Benedicto Kiwanuka memorial lecture, 21 September 2020
[307]Kabumba B 'Black laws matter: Benedicto Kiwanuka's legacy and the rule of law in the "new normal"' Key note address at the 3rd Benedicto Kiwanuka memorial lecture, 21 September 2020
[308]In *Rex v Amkeyo* 7 E.A.L.R. 14 (1917) Lord Hamilton dismissed customary marriages as mere wife purchase because they were potentially polygamous and required the payment of bride price. The case is widely cited as reflecting the misunderstanding of African tradition by the Colonial Judges in East Africa.
[309]Oba AA 'The future of Customary Law in Africa' in Fenrich J Galizzi P and Higgins TE (ed) '*The future of African customary law*' (2011) 58-82
[310]Lubogo CI 'Obuntu Bulamu and the law: an extra textual aid and interpretation tool' (2020) 97
[311]Oba AA 'The future of Customary Law in Africa' in Fenrich J Galizzi P and Higgins TE (ed) '*The future of African customary law*' (2011) 58-82
[312]Kabumba B 'Black laws matter: Benedicto Kiwanuka's legacy and the rule of law in the "new normal"' Key note address at the 3rd Benedicto Kiwanuka memorial lecture, 21 September 2020

following the promulgation of the Constitution of the Republic of Uganda in 1995 customary law gained constitutional status.[313]

The Constitution is Uganda's supreme law and renders any contrary laws or customs to be void to the extent of their inconsistency.[314] Under its objectives on National Unity and Stability the Constitution recognizes the need for the tolerance and acceptance of one another's customary and traditional beliefs.[315] Similarly, under its cultural objectives the constitution esteems customs and cultural values which are aligned to fundamental rights and freedoms stipulated in the constitution and encourages their development and incorporation into the Ugandan ways of life. Accordingly, the State is enjoined to encourage the preservation of the cultural values and practices that uphold the dignity and progress of Ugandans.[316] The Constitution also provides for the right to practice any culture as well as belong to any cultural or religious institution.[317]

In the Mifumi (U) Ltd case, the court disregarded the claims that the abuse of the custom of bride price by some people who employed it as a means to extort money from grooms and their families was sufficient basis to render it unconstitutional, since the giving of bride price, was only meant as a gift to the parents according to the respective cultural norms.[318] Drawing from the reasoning in the Mfumi case, it can then be deduced and concluded that even when traditional justice measures are presumed to be susceptible to abuse by some people, their constitutional legitimacy cannot be challenged just because of that presumption.

3.4 CHAPTER CONCLUSION

In this Chapter it is evident that the informal truth seeking measures heralded by the civil society arose as a response to the seeming inadequacy of state-led initiatives in enabling truth seeking. Moreover the civil society has had to overcome government resistance with the ever diminishing civic space. But more importantly, with the support of some civil society initiatives, the unofficial truth-seeking measures including traditional justice mechanisms have become more pronounced. Consequently, this chapter adds a voice to the call for the incorporation of traditional justice mechanisms into formal justice processes, questioning its continued resistance and highlighting the benefits in taking such a policy direction.

[313]Lubogo CI 'Obuntu Bulamu and the law: an extra textual aid and interpretation tool' (2020) 141
[314]Article 2 Constitution of the Republic of Uganda, 1995
[315]National Objective III Constitution of the Republic of Uganda 1995
[316]National Objective XXIV Constitution of the Republic of Uganda 1995
[317]Article 37 Constitution of the Republic of Uganda 1995
[318]*Mifumi (U) Ltd & Anor v Attorney General & Anor* Constitutional Appeal No. 02 of 2014 [2015] UGSC 13

CHAPTER 4

DECONSTRUCTING THE OFFICIAL DISCOURSE: A CASE FOR TRUTH BASED AMNESTIES AND REPARATIONS

4.1 INTRODUCTION

The NTJP 2019 includes amnesties and reparations in its priority Transitional Justice mechanisms.[319] This mirrors the Juba AAR which underlines the Amnesty Commission as one of the key implementing institutions of the agreement.[320] This Chapter looks at the challenges associated with amnesties and reparations and critically analyses the efficacy of the respective legal and policy measures that Uganda has adopted in that regard. In the first part of the discussion, the Chapter makes a case for pre-conditioning the grant of amnesties to the disclosure of the truth regarding past human rights violations. In the subsequent part of the discussion, the chapter examines flaws in the government's policy of conflating broader development programmes with reparations.

4.2 A CASE FOR CONDITIONAL AMNESTIES

The Black's law dictionary defines amnesty as "a pardon extended by the government to a group or class of persons" for a political offence or "the act of a sovereign power officially forgiving certain classes of person who are subject to trial but who have not yet been convicted."[321] On the one hand the Black's Law Dictionary equates amnesties to pardons (which are essentially granted post-conviction) yet on the other hand it portrays amnesties as being only applicable prior to convictions. In Uganda, the the Amnesty Act also equates amnesty to a pardon. Amnesty is thus defined as "a pardon, forgiveness, exemption or discharge from criminal prosecution or any other form of punishment by the State."[322]

However, this is not unique to Uganda, domestic laws governing amnesties across various jurisdictions have tended to produce a range of legal effects that blur distinctions between amnesties and other leniency options such as pardons.[323] As a result, conceptual distinctions of pardons as being applicable post-conviction and amnesties as being applicable prior to conviction[324] do not reflect the practical realities. A number of countries such as the Democratic

[319]Ministry of Internal Affairs National Transitional Justice Policy (2019) 19
[320]Article 5.5 Agreement on Accountability and Reconciliation between the Government of the Republic of Uganda and the Lord's Resistance Army/Movement Juba, Sudan, 2007 UNSC s12007143 5 Annex 1 (2007): See also National Transitional Justice Policy (2019) 18-20 which stipulates the Amnesty Commission within the Ministry of Internal Affairs as one the key implementing institutions of the policy
[321]Garner BA (ed) 'BLACK'S LAW DICTIONARY', 9 ed (2009)
[322]S. 1 Amnesty Act, 2000
[323]Transitional Justice Institute University of Ulster 2013 - *The Belfast Guidelines on Accountability, Amnesty and Accountability* (2013) 58
[324]Sarkin JJ 'How conditional amnesties can assist transitional societies on delivering on the right to truth' (2017) 6 *International Human Rights Law Review* 143 175

Republic of Congo and the Cote D'Ivoire have granted post- conviction amnesties.[325] Perhaps the more fitting contrasts may be what were provided in the case of Uganda v Thomas Kwoyelo.[326] In that case amnesties were said to be applicable to classes of persons unlike pardons which could be granted to persons in their individual capacity. The court also highlighted differentiations in the class of offences to which amnesties were regarded to be applicable. Amnesties were considered to be applicable to a class of offences that caused infractions of the peace of the nation yet ordinary pardons could apply across a broad range of domestic crimes and not just a specific class. The judgement also seemed to suggest that whereas pardons could only be granted post- conviction, amnesties were less limited in application and could be granted both prior to and after conviction of offenders. The South Africa Truth and Reconciliation Commission had the powers to grant amnesties that had the effect of expunging criminal records including convictions of the pardoned perpetrators.[327]

It has been argued that peace by means of amnesty side steps the truth and alienates victims from the justice processes.[328] There is therefore an emerging emphasis on truth-seeking as a prerequisite for amnesty, given that, even amidst the willingness to compromise through amnesties to enable the success of peace processes, it is been found to be necessary to attend to the justice demands of the victims.[329] Accordingly, there have been calls for amnesties to be preconditioned on divulging reliable information about violations so that they are facilitative of truth-seeking in their implementation.[330] The Belfast Guidelines on Amnesty and Accountability suggest that preconditioning amnesties to truth-seeking requirements legitimates amnesties and enhances their contribution to accountability efforts.[331] It is further argued that when amnesties are preconditioned on disarmament and non-recidivism they may help deter future conflict.[332]

Generally, the justifications for conditional amnesties are based on the perception of perpetrators as a key source of truth as they are believed to have more information about the past violations than everyone else. The amplification of perpetrators' voices is therefore favourably viewed as being desirable and capable of enhancing truth-seeking efforts.[333] It is believed that perpetrators

[325]Transitional Justice Institute University Ulster 2013 - *The Belfast Guidelines on Accountability on Amnesty and Accountability* (2013) 59
[326]*Uganda v Thomas Kwoyelo* Constitutional Appeal No. 1 of 2012 [2015] UGSC 5
[327] *Du Toit v Minister for Safety and Security of the Republic of South Africa and Another* CCT91/08 [2009] ZACC 22
[328]Ingalaere B 'The Gacaca Courts in Rwanda' in Salter M and Huyse L (ed) *Traditional Justice and Reconciliation after Violent Conflict; Hearing from African experiences* (2008) 25-60
[329]Pham PN et al - *'When the war ends: Peace, Justice, and Social Reconstruction in Northern Uganda'* (2007) 4
[330]Naqvi Y 'The right to truth in international laws; Fact or fiction?' (2006) 88 *International Review of the Red Cross* 245 273
[331]Transitional Justice Institute University of Ulster 2013 - *The Belfast Guidelines on Accountability, Amnesty and Accountability* (2013) 8-9
[332]Transitional Justice Institute University of Ulster 2013 - *The Belfast Guidelines on Accountability, Amnesty and Accountability* (2013) 8-9
[333]Sarkin JJ 'How conditional amnesties can assist transitional societies on delivering on the right to truth' (2017) 6 *International Human Rights Law Review* 143 175

can reveal motivations, underlying causal factors, command structure and the role of government officials in the conflict if any, when given assurances on protection from legal liability.[334]

Conversely, it has also been underscored that for the whole process to be successful, there is need for the proverbial carrot and stick approach where amnesty is given to lure perpetrators to forsake war, but accompanied with serious implications for those who contravene the respective conditions for the amnesty grant.[335]

The Transitional Justice Policy 2019 provides that the grant of amnesty should be preceded by a truth-seeking exercise.[336] And by so doing, the Policy attempts to correct a historical mistake where amnesties have in the past been granted without any preconditions tagged to truth-seeking. Moreover the Policy provides more clarity when it precludes acts that constitute international crimes from grant of amnesty.

Previously, the re-integration programme of Amnesty Commission was criticized for disorienting communal truth telling and reconciliation processes as it appeared to deflate what should have been a complex process through the generous hand out of amnesty certificates to seemingly underserving perpetrators. It is also said to have deliberately excluded the participation of victims in the re-integration process which made it more perpetuator-focussed than victim-centric.[337]

While available evidence indicated that the people overwhelmingly supported the grant of amnesty,[338] it is believed that public sentiment on grant of amnesties was influenced by the confluence of the victim and perpetrator identities attributed to the child soldiers. This is said to have created difficulties in differentiating whether they were collaborators or sympathisers.[339] But even then, the citizens desired that the forgiveness of perpetrators be conditioned on truth telling and open community dialogue.[340]

Meanwhile, the Amnesty Act was also believed to have inadequate safeguards for truth-seeking. There were two incidents that could precede the grant of amnesty under the Act, the surrender of a dissident to the state or their capture and subsequent placement under lawful custody. Where they surrendered, amnesty was granted based on the discretion of the Minister[341] and where they

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[334]Sarkin JJ 'How conditional amnesties can assist transitional societies on delivering on the right to truth' (2017) 6 *International Human Rights Law Review* 143 175

[335]Sarkin JJ 'How conditional amnesties can assist transitional societies on delivering on the right to truth' (2017) 6 *International Human Rights Law Review* 143 175

[336]Ministry of Internal Affairs National Transitional Justice Policy (2019) 19

[337]Redress and Impunity Watch 2020 - *Victims front and centre: Lessons on meaningful victim participation from Guatemala and Uganda (2020)* 27

[338]Agger K - *'The end of amnesty in Uganda implications for LRA defections'* available at https://enoughproject.org/reports/end-amnesty-uganda-implications-lra-defections (Accessed 20 July 2021)

[339]Jeffrey R 'Forgiveness amnesty and justice: The case of LRA in Northern Uganda' (2011) 46 *Cooperation and Conflict* 78 95

[340]Agger K - *'The end of amnesty in Uganda implications for LRA defections'* available at https://enoughproject.org/reports/end-amnesty-uganda-implications-lra-defections (Accessed 20 July 2021)

[341]S. 4 Amnesty Act, 2000

were under lawful custody following their capture by the state, the Act pre-conditioned the grant of Amnesty upon the certification of the DPP.[342]

Accordingly, earlier analyses of the Amnesty Act depicted the Act as one that granted blanket Amnesties.[343] However, the Supreme Court in the Kwoyelo case indicated that the Amnesty Act did not endorse blanket amnesties as was claimed. The court stipulated that under the Act, amnesties were preconditioned on acts done in furtherance or the cause of war and only political crimes such as treason, sedition and rebellion were the ones that could be subject to amnesty as they were the crimes envisaged to be committed in the furtherance of war. However, international crimes which involved the wanton destruction of property and killing of innocent civilians went beyond the purview of what could be covered by the Amnesty Act as acts done in the furtherance of war.[344] The court further distinguished Uganda's Amnesty Act from South Africa's laws where amnesty was conditional upon the disclosure of the truth.

From the reading of the judgement, it appears that the court drew the gist of its argument from S. 3 of the Act that required certification of the DPP prior to the grant of amnesty as an indication that the Act provided limits for the grant of amnesty and was not a blanket offer as it seemed. The court also pointed to the discretion that the Act gave to the Minister to determine eligibility for Amnesty as further evidence that the Act had preconditions for amnesty.

However, it is evident that court overlooked some prominent flaws in the Amnesty Act and made some conclusions in its judgement based on observations that can be disputed. For instance, the court disregarded the pleas of the respondent in regards to unequal treatment under the Amnesty Act. The respondent alleged that other perpetrators who had allegedly committed similar atrocities he was accused of were granted amnesty whereas he was denied.

Unfortunately, the court applied a problematic textual interpretation to the meaning of S. 21 of the Constitution that provides for equal treatment of the law and stipulated that equal protection of the law was restricted to cases where there was discrimination on grounds of sex, race, color, ethnic origin, tribe, birth, creed or religion, social or economic standing, political opinion or disability.[345] The court failed to appreciate the significance of according a generous interpretation to legislation when it regarded the rights of individuals. It is generally recommended that for constitutional protection of peoples' freedoms and rights to be guaranteed, cognizance should be taken of the underlying values of the law rather than just looking at the text of the legislation in its strict frame.[346] In such a case the court should have assessed whether the Amnesty Act provided

[342]S. 4 (2), (3) and (4) Amnesty act
[343]Office of the United Nations High Commissioner for Human Rights 2012- *'UN position on Uganda's Amnesty Act 2000'* (2012) 7-14
[344]*Uganda v Thomas Kwoyelo* Constitutional Appeal No. 1 of 2012 [2015] UGSC 5
[345] S.21 (2) of the Constitution of the Republic of Uganda, 1995
[346] *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* (CCT69/06) [2007] ZACC 12

sufficient safeguards against abuse of discretion for those with the mandate to determine eligibility for grant of amnesty.

It is also possible that if the court had looked at equivalent legislative provisions on Amnesty in South Africa much more critically and for comparative purposes, it could had made contrary observations to those it made and perhaps even come up with recommendations on legislative reform on Amnesty. The contrasts between South Africa's Amnesty laws and the Ugandan laws were not only in making the disclosure of the truth a precondition for amnesty.[347] In fact the Promotion of National Unity and Reconciliation Act of South Africa provided for multiple considerations for the grant of amnesty and which included restricting the grant of amnesty to only actions associated with a political objective.[348] The Act further detailed the parameters of determining acts associated with a political objective to be the motive of the actors, context of actions being done, the nature and gravity of the incident, the nature of those targeted and whether the actions were ordered and approved by the political entity to which the actors subscribed.[349]

Interestingly, the court in the Kwoyelo case presumed that even in the absence of such parameters to guide the Minister and the DPP in their mandate, they would exercise their rather unclearly defined discretion to grant amnesty without abuse and with fairness. Unfortunately, the case of Brig. Kenneth Banya, one of those mentioned in court suggests otherwise. Brig. Banya seems to have been unjustifiably granted amnesty. As per some witness accounts, it is alleged that Brig. Kenneth Banya one of the former LRA rebels who was granted Amnesty in 2004 masterminded a massacre in Odokonyero village in 1991.[350] He also reportedly admitted to being party to some incidents of sexual violence during the insurgency.[351]

It is as well notable that the amendments providing for Amnesty to be granted based on the ministers' discretion were adopted in 2006, 6 years after the enactment of the Amnesty Act and with no clear criteria on eligibility.[352] Besides, the JLOS observed that there was no evidence of the minister using his discretionary powers frequently to deny some people amnesty based on the failure to meet eligibility requirements.[353]

[347] S. 20 Promotion of National Unity And Reconciliation Act 34 Of 1995
[348] S. 20 (1) (b) Promotion of National Unity And Reconciliation Act 34 Of 1995
[349] S. 20 (3) Promotion of National Unity And Reconciliation Act 34 Of 1995
[350]URN 'LRA victims call for psycho-social support' available at https://www.independent.co.ug/lra-victims-call-for-psycho-social-support/ (Accessed 10 March 2022)
[351]BBC 'Former LRA commander admits rape' available at https://www.bbc.co.uk/news/world-africa-19314264 (Accessed 1O March 2022)
[352]Justice Law and Order Sector 'Justice at crossroads: A special report on the Thomas Kwoyelo trial' available *https://www.jlos.go.ug/index.php/com-rsform-manage-directory-submissions/services-and-information/press-and-media/news-archive/item/200-justice-at-cross-roads-a-special-report-on-the-thomas-kwoyelo-trial* (Accessed 25 July 2021)
[353]McNamara K 'Seeking Justice in Uganda Courts: Amnesty and the case of Thomas Kwoyelo' (2013) 12 *Washington University Global Studies Law Review* 653 671

Besides, the government failed to assuage the disquiets of the victims and the perpetrators whom the government had granted Amnesty for the sake of peace. On the one hand there was resentment from some displaced and impoverished victims who perceived the resettlement facilitation given to the rebels as unjustified given that they committed atrocities for which they should have been punished other than get 'rewarded'.[354] On the other, some former insurgents regarded the governments' delayed grant of the resettlement facilitation as a retraction on their commitments to them.[355]

This dissatisfaction from some rebels seems to have created problems that have had spill-over consequences in the contemporary times. Investigations into a spate of recent clandestine assassinations of high-profile persons in Uganda indicate that the assassination missions were planned and executed by former rebels who had been granted amnesty but violated the amnesty.[356] In other words, these former rebels seemed to have metamorphosed into an urban clique of agile criminals and for more than 5 years, they successfully assassinated their targets with little or no trace of evidence. However, their most previous attempt to assassinate a former Chief of Defence Forces failed and left crucial clues that have led to the arrest of a number of suspects and the recovery of some alleged killer guns used in previous murders.[357] It has been has suggested that their motivation for violating the amnesty conditions could be attributable to their dissatisfaction with the rewards they received upon being granted amnesty[358]

Overall, despite their limitations, the government appears to be predisposed to continue prioritising amnesties over other Transitional Justice mechanisms. Perhaps this is so because of the propaganda benefit that they afford government, since they have the tendency to paint the government with a saintly picture.[359] Whereas this may not be necessarily desirable, fortunately, the Transitional Justice Policy 2019 preconditions the grant of amnesties to truth telling. It is therefore hoped that as the Transitional Justice legal framework is further developed these policy provisions requiring conditional amnesties will be reflected in the respective laws that will be enacted to give effect to the Policy.

4.3 REPARATIONS AND ECONOMIC DEVELOPMENT: DECONSTRUCTING THE OFFICIAL DISCOURSE

[354]Cecily R 'Looking beyond amnesty and traditional justice and reconciliation mechanisms in Northern Uganda: A proposal for truth telling and reparations' (2008) 28 *Boston College Third World Law Journal* 345 400
[355]Cecily R 'Looking beyond amnesty and traditional justice and reconciliation mechanisms in Northern Uganda: A proposal for truth telling and reparations' (2008) 28 *Boston College Third World Law Journal* 345 400
[356]Kazibwe K 'Inside the arrest of Gen Katumba alleged attackers' available at *https://nilepost.co.ug/2021/07/02/inside-the-arrest-of-gen-katumba-alleged-attackers/* (Accessed 25 July 2021)
[357]Kazibwe K 'Inside the arrest of Gen Katumba alleged attackers' available at *https://nilepost.co.ug/2021/07/02/inside-the-arrest-of-gen-katumba-alleged-attackers/* (Accessed 25 July 2021)
[358]Mufumba I 'Why ADF has outlived other rebels fighting Museveni' available at *https://www.monitor.co.ug/uganda/magazines/people-power/why-adf-has-outlived-other-rebels-fighting-museveni-s-government-3485712* (Accessed 25 July 2021)
[359]Latigo OJ 'Northern Uganda: Traditional-based practices in Acholi region' in Salter M and Huyse L (ed) *Traditional Justice and Reconciliation after Violent Conflict; Hearing from African experiences* (2008) 85-122

Reparations consist of civil remedies that seek to redress harms caused by the unlawful violations of rights of others. They consist of a number of pecuniary and non-pecuniary measures implemented as a recompense for the harms suffered in periods of conflict, repression and political violence.[360] The pecuniary measures may be such as what were implemented in Brazil where the state established a reparations programme to provide approximately US dollars 100,000 to each family in 135 cases of enforced disappearances.[361] Similarly, in Yolasquez Rodriguez's case the Inter American Court of Human Rights awarded a lump sum payment to the next-of-kin of the victims or to their families.[362]

On the other hand, the non-pecuniary reparations constitute physical and mental health interventions, education, livelihood support, youth empowerment, apologies, public acknowledgement, information regarding disappearances and respectful handling of the dead.[363]

The forms of reparation may also be distinguished based on whether they are material or symbolic. Material forms of reparation include medical and education services, housing, cash, pension and other material benefits,[364] whereas the symbolic forms of compensation include apologies, official acknowledgement, reburials, dignified commemorations and public memorials among others.[365]

Reparations are an avenue for victims to speak about harms, what happened to them, and can be regarded as an opportunity for apologies.[366] Reparations require public recognition and acknowledgement of the state and individual perpetuator's responsibility. They may draw on existing institutions or require the establishment of a body of inquiry to achieve their aims. However, reparations are believed to be more effective when linked with other Transitional Justice mechanisms such as prosecution and truth- telling among others.[367] It is argued that when truth telling measures are incorporated into restitution initiatives, they reassure victims of commitment beyond reparations which may otherwise be viewed as a temporary stop gap measure.[368]

The NTJP recognizes that truth-seeking as a measure is required to sieve and verify legitimate victims who qualify for remedies through a vetting process in which the communities

[360]Laplante LJ 'The Plural justice aims of reparations' in Buckley-Zistel S et al (ed) *Transitional justice theories: An introduction* (2013) 66-83
[361]Simic O (ed) '*An Introduction to Transitional Justice*' Olivera Simic 2 ed (2020) Ch 5
[362]Simic O (ed) '*An Introduction to Transitional Justice*' Olivera Simic 2 ed (2020) Ch 5
[363]Uganda Human Rights Commission and Office of United Nations High Commissioner for Human Rights 2011 – *"The dust has not yet settled" victims' views on the right to remedy and reparation* (2011) 71-96
[364]Uganda Human Rights Commission and Office of United Nations High Commissioner for Human Rights 2011 – *"The dust has not yet settled" victims' views on the right to remedy and reparation* (2011) 13-20
[365]Uganda Human Rights Commission and Office of United Nations High Commissioner for Human Rights 2011 – *"The dust has not yet settled" victims' views on the right to remedy and reparation* (2011) 13-20
[366]Uganda Human Rights Commission and Office of United Nations High Commissioner for Human Rights 2011 – "*The dust has not yet settled" victims' views on the right to remedy and reparation* (2011) 13-20
[367]Uganda Human Rights Commission and Office of United Nations High Commissioner for Human Rights 2011 – *"The dust has not yet settled" victims' views on the right to remedy and reparation* (2011) 59-60
[368]Sarkin JJ 'Ensuring Justice Reparations and Truth through a Truth Commission and other processes in Uganda' (2015) 8 *Law and Politics in Africa, Asia and Latin America* 390 401

participate.[369] Reparations should therefore espouse acknowledgement and seek to ensure that the harm inflicted is redressed in a manner that is satisfactory to the affected victims.[370] There is a danger of the reparative action getting undermined when truth-seeking is considered a peripheral issue during the process.

Acknowledgement of the perpetrator is required because it denotes a sense of empathy for the suffering of the victims as well as a willingness to take responsibility[371] It is therefore stipulated that the truth in itself can also constitute a form of reparation.[372]

However, the satisfaction that truth telling affords to the victims depends on its credibility and which credibility is dependent upon legitimacy. The legitimacy is realized through procedural fairness in the truth-seeking process. The process must therefore be neutral and must provide sufficient opportunity for all the parties to be heard. It must also be rational if it to be considered procedurally fair.[373] Perceptions of bias, poor representation and perception of shallowness have the capacity to undermine the process and must be avoided.[374]

Likewise, reparations may also be a yardstick to measure the success of a truth telling process. The institutional overlap between truth commissions and reparation schemes enables reparations to enhance the effectiveness and responsiveness of the truth-seeking efforts.[375] Whereas acknowledgment that there is harm inflicted and apportioning responsibility after conflict is necessary to render justice to victims, it is also required that there is restitution and sustained efforts to appropriately compensate those affected.[376]

There may therefore be perceptions of injustice when truth is not accompanied with reparations and which may then be a hindrance to national reconciliation. In South Africa, the truth commission was regarded as having perpetuated an injustice by failing to provide for adequate reparation measures to address the inequalities between whites and blacks following the fall of the apartheid regime. Addressing the inequalities was considered to be a pre-requisite for

[369]Ministry of Internal Affairs National Transitional Justice Policy (2019) 11
[370]Amani Institute Uganda 2020 – 'Cul Pi Bal Reparations for Northern Uganda Conflict' (2020) 43
[371]Quinn JR 'Constraints the undoing of the Uganda Truth Commission' (2014) 26 *Human Rights Quarterly* 401 427
[372]Lawry-White M 'The reparative effect of Truth-seeking in Transitional Justice' (2015) 64 The *International and Comparative Law* Quarterly 141 177
[373]Lawry-White M 'The reparative effect of Truth-seeking in Transitional Justice' (2015) 64 The *International and Comparative Law* Quarterly 141 177
[374]Sarkin JJ 'Ensuring Justice Reparations and Truth through a Truth Commission and other processes in Uganda' (2015) 8 *Law and Politics in Africa, Asia and Latin America* 390 401
[375]Lawry-White M 'The reparative effect of Truth-seeking in Transitional Justice' (2015) 64 *The International and Comparative Law* Quarterly 141 177
[376]Van Boven T 'Victim-oriented perspectives: Rights and realities' in Bonacker T and Safferling T (ed) *Victims of international crimes: an interdisciplinary discourse* (2013) 17-27

reconciliation and in the absence of the anticipated measures ultimate reconciliation was never achieved.[377]

In the case of Uganda, reparations continue to be a highly contested affair and there seems to be lack of clarity on the government policy stance on reparations. They have been selective and ad hoc with a few victim groups from Northern Uganda and West Nile compensated, mainly with out of court settlements.[378] For instance the government reached a compromise with the Acholi War Debt Claimants Association for compensations worth Shillings 2 Billion meant for 14,000 claimants for livestock and equipment lost during the conflict but still it only constituted a fraction of the earlier claim of shillings 45 Billion that the association had sought from government[379] In other cases, the government has only given out petty hand-outs to the people when scheming for re-election while maintaining a stance of official denial of the responsibility of its forces in the human rights abuses committed.[380]

To further compound the problem, the government has erroneously tried to portray development programs or its random monetary awards handed out to individuals as qualifying to be forms of reparations.[381] The Government of Uganda therefore, as matter of policy has conflated broader development programmes with reparations and inscribed into the NTJP 2019 the respective mechanisms of reparations to include social services for the affected communities.[382]

There can be legitimate propositions for the consideration of the provision of social services as a valid reparative intervention. The Azapo case highlighted some of these propositions indicating that prevalent resource constraints complicated efforts to settle claims of individuals. In a bid to optimise the resources, it was necessitated that they are rather deployed to 'reconstruct society' through granting access to education opportunities to the disadvantaged, free medical assistance and housing support to the affected communities.[383]

However, the problem in Uganda is that the government seems to lack a consolidated agenda to address victim's reparative needs[384] and also tends to resist reparation initiatives that involve public acknowledgement to escape connotations of admissibility and responsibility for atrocities

[377]Lawry-White M 'The reparative effect of Truth-seeking in Transitional Justice' (2015) 64 *The International and Comparative Law* Quarterly 141 177
[378]Amani Institute Uganda 2020 – 'Cul Pi Bal Reparations for Northern Uganda Conflict' (2020) 14
[379]Amani Institute Uganda 2020 – 'Cul Pi Bal Reparations for Northern Uganda Conflict' (2020) 14
[380]Amani Institute Uganda 2020 – 'Cul Pi Bal Reparations for Northern Uganda Conflict' (2020) 14
[381]Avocats Sans Frontieres 2013 – Towards a Comprehensive and Holistic Transitional Justice Policy for Uganda: Exploring linkages between Transitional Mechanisms (2013) 1-94
[382]Macdonald A 'Somehow this Whole Process became Artificial: Exploring the Transitional Justice Implementation Gap in Uganda' (2019) 13 *International Journal of Transitional Justice* 225 248
[383] *Azapo v. President of the Republic of South Africa*, 1996 Z.A.C.C. 16 (1996)
[384]Macdonald A 'Somehow this Whole Process became Artificial: Exploring the Transitional Justice Implementation Gap in Uganda' (2019) 13 *International Journal of Transitional Justice* 225 248

committed.[385] Yet, even in the Azapo case, court recognized the need for symbolic reparative measures that involved public acknowledgement of the plight of others.

In transitioning societies, the reality of poverty and destitution tends to overshadow the significance of fixing the structural and institutional issues that are crucial for social stability. Therefore resources get allocated to repair the physical infrastructure at the expense of the social infrastructure.[386] This is quite the reality in Uganda where programs such as PRDP I and II and NUSAF I, II and III aimed at addressing the people's poverty and destitution have been prioritised over addressing the rights of victims.[387] Following the ravages of war, victims seem to be more concerned about getting out of poverty and have been easily convinced to surrender their rights for the sake of meeting their material needs.[388]

While the enticement of shifting from reparation to development has the benefit of avoiding complex issues of accountability and the problematic categorization of people as victims and perpetrators, it ignores the justice and reparative needs of the victims which are not met.[389] Moreover, this development approach to post-conflict social reconstruction is in tandem with the government's dubious aspirations to keep donors focused on recovery and assistance projects for victims at the expense of more critical engagement on the human rights issues that arose during and after periods of conflict.[390]

In a survey done on the views on social reconstruction and justice in Northern Uganda, respondents were asked for conditions necessary for there to be lasting peace. Only a few respondents defined peace in terms of development. However, an overwhelming majority of respondents (97%) wanted victims to receive reparations to meet their material needs and as a means through which their suffering could be acknowledged or recognized.[391]

Another survey done by UNHCHR and the UHRC found that there was a desire to establish a fact-finding initiative for documenting the atrocities committed during the Northern Uganda Conflict with a broader view of reparations.[392] The respondents also indicated that they were dissatisfied

[385]Amani Institute Uganda 2020 – 'Cul Pi Bal Reparations for Northern Uganda Conflict' (2020) 18
[386]Quinn JR 'Constraints the undoing of the Uganda Truth Commission' (2014) 26 *Human Rights Quarterly* 401-427
[387]Amani Institute Uganda 2020 – 'Cul Pi Bal Reparations for Northern Uganda Conflict' (2020) 13-23
[388]Quinn JR 'Constraints the undoing of the Uganda Truth Commission' (2014) 26 *Human Rights Quarterly* 401 427
[389]Van Boven T 'Victim-oriented perspectives: Rights and realities' in Bonacker T and Safferling T (ed) *Victims of international crimes: an interdisciplinary discourse* (2013) 17-27
[390]Amani Institute Uganda 2020 – 'Cul Pi Bal Reparations for Northern Uganda Conflict' (2020) 18
[391]Vinck P and Pham PN 'Transitioning to Peace: A population-based survey on attitudes about social reconstruction and justice in Northern Uganda' (2010) 1-5
[392]Uganda Human Rights Commission and Office of United Nations High Commissioner for Human Rights 2011 – *"The dust has not yet settled" victims' views on the right to remedy and reparation* (2011) 59-70

with the government's unwillingness to engage and admit the truth about the past. They indicated that most of them did not know the truth about harms suffered during the insurgency.[393]

The survey documented the harms that the UPDF imposed upon the people during the Northern Uganda conflict which included torture and killing prisoners of war, use of child soldiers, sexual violence against women, forced displacement of communities, looting of people's property and pillage.[394] Yet, the government continues to maintain a stance of official denial and is still disinclined to take responsibility for these well documented atrocities.[395] The official denials and the disinclination to make armed forces account for their actions violations is partly due to the government's need to perpetuate a narrative of the conflict as a war between irrational groups of individuals versus the beneficial state. As a result, conversations on armed conflict in Uganda continue to be dominated by the 'official discourse' where the Government of Uganda is portrayed as the benevolent albeit under-resourced provider of the human needs who extended an olive branch to the various groups of insurgents as those without legitimate grievances or a cogent agenda through amnesties, brought forth peace, and is now improving the livelihoods of the victims through various development programmes.[396]

It is therefore regrettable that the government has resisted the truth based approach to reparations in favour of the development based approach to serve its political needs and has in effect neglected the truth and justice concerns of the victims.

4.4 CHAPTER CONCLUSION

There are significant flaws in Uganda's amnesty laws, which hopefully shall be amended when effect is given to the Transitional Justice Policy and actual legislative reform follows the enactment of the policy. Although amnesties continue to be a disputed avenue of truth-seeking, it is illustrated here that with some safeguards they can still be a vital truth-seeking tool. It is also shown that Uganda's reparative measures which appear to neglect the victims' demands for truth and justice must be revised.

[393]Uganda Human Rights Commission and Office of United Nations High Commissioner for Human Rights 2011 – *"The dust has not yet settled" victims' views on the right to remedy and reparation* (2011) 59-70

[394]Uganda Human Rights Commission and Office of United Nations High Commissioner for Human Rights 2011 – *"The dust has not yet settled" victims' views on the right to remedy and reparation* (2011) 37-58

[395]De Yeaza C and Fox N 'Role of memory and memorialization in addressing Human Rights Violations in Post Conflict Rwanda and Uganda (2013) 8 *Society without borders* 344 372

[396]Sebastian M *Expectations of Peace, Documentation, Memorialization and Construction of the Archive in Northern Uganda* (Unpublished MA Thesis De Paul University, 2014) 26

CHAPTER 5

RECOMMENDATIONS AND CONCLUSION

5.1 RECOMMENDATIONS

5.1.1 Expedite enactment of the Transitional Justice Act to enable formal use of traditional justice mechanisms in truth-seeking initiatives

Truth commissions are usually fronted as being a necessity in transitional societies. However as demonstrated, in the case of Uganda the circumstances necessary for the success of a truth commission are non- existent and it is more prudent that Uganda looks at alternatives in reforming its Transitional Justice legal and policy framework on truth-seeking. Accordingly, it is submitted that the best opportunities for reforming Uganda's Transitional Justice legal and policy provisions on truth-seeking lie in incorporating traditional justice mechanisms into formal justice processes.[397]

Whereas traditional justice mechanisms may be resisted by courts as exemplified by the Kanyamunyu case,[398] the evidence suggests that traditional justice mechanisms have tended to attract less political resistance in Uganda. For instance, although there was political resistance to the inclusion of truth commissions in the Transitional Justice policy framework on the one hand and which led to their eventual exclusion from the NTJP 2019,[399] on the other hand the Policy embraced traditional justice mechanisms as one of the key policy priorities.[400]

As result, traditional justice mechanisms must be viewed as a viable policy option for truth-seeking but they must also overcome the judicial scepticism that questions their legitimacy. To overcome that resistance, the hope lies in legislative reform as it appears that judges will be more inclined to recognize traditional justice practices when they are backed up with legislative provisions.[401]

Likewise, the Policy recognizes traditional justice mechanisms as a viable tool for conflict resolution but calls for them to be backed up with formal recognition.[402] Further the Policy proposes legislation for traditional justice mechanisms to provide for inter alia the guiding principles and jurisdiction of traditional justice mechanisms, the respective checks and balances,

[397]Oola S 'A conflict sensitive justice: Adjudicating Transitional Justice in transitional contexts' in Okell MC et al (eds) Where law meets reality: Forging African Transitional Justice (2012) 53-63 Oola argues that the current Transitional Justice discourse offers new opportunities for the espoused African values to contribute to the reformation of the criminal justice administration.

[398]*Kanyamunyu Mathew v Uganda* (Criminal Miscellaneous Application-2020/151) [2020] UGHCCRD 144

[399]Macdonald A 'Somehow this whole process became artificial: Exploring the Transitional Justice implementation gap in Uganda' *International Journal of Transitional Justice* (2019) 13 225 248

[400]Ministry of Internal Affairs National Transitional Justice Policy (2019) 18

[401]*Kanyamunyu Mathew v Uganda* (Criminal Miscellaneous Application-2020/151) [2020] UGHCCRD 144: Justice Mubiru suggested that the 'confusion' likely to be caused by traditional justice mechanisms could be addressed through legislation

[402]Ministry of Internal Affairs National Transitional Justice Policy (2019) 18

and for the empowerment of traditional leaders and institutions to effectively dispense traditional justice[403] Particularly, the Policy calls for the enactment of the Transitional Justice Act to provide for the incorporation of traditional justice in truth-seeking initiatives.[404]

Unfortunately, there seems to have been a period of stasis that followed the enactment of the Transitional Justice Policy 2019 with no follow up action to implement the recommendations of the policy. For instance it was recently reported that the policy has never been tabled for discussion in Cabinet from the time it was passed by Parliament in June 2019.[405] Yet without discussion in Cabinet, the implementation of recommended actions still seems to be a far off call for the country.

It is therefore recommended that the government expedites the enactment of the Transitional Justice Act as it is expected to enable the incorporation of traditional justice mechanisms into the formal justice processes which will then enhance their truth-seeking capability.

5.1.2 Revise exhumation laws to exhibit afro- cultural consciousness

The current laws on exhumations in Uganda are opposed to the traditional customs and tend to prioritise their evidentiary value over customary concerns.[406] It is therefore proposed that the laws are revised to reflect a cultural consciousness which is generally observed to be lacking.[407] The enactment of the Transitional Justice Act should be used as an opportunity to incorporate detailed provisions on exhumations into the country's legal framework. The provisions should elaborate of the processes of exhumation following mass violations of human rights and should be supportive rather than disregard the traditional customs of the people. This, if implemented will be in line with the NTJP 2019 reconciliation and nation building objectives which require the use of varied truth-seeking initiatives that may include exhumations to support the ascertainment and documentation of human rights violations in local communities.[408]

5.1.3 Amend Judicature (Plea Bargain) Rules 2016 to allow traditional restorative justice mechanisms in the plea bargain processes

There have previously been calls for amendment of the Judicature (Plea Bargain) Rules 2016 to reflect restorative justice values. In this vein, Gray advocates for a range of restorative measures that include mediations, community conferencing and sentencing circles to be incorporated in the formal justice plea bargain proposes. She argues that restorative justice measures entail the value of being community and victim oriented, harmonious and collaborative. She provides examples of

[403]Ministry of Internal Affairs National Transitional Justice Policy (2019) 18
[404]Ministry of Internal Affairs National Transitional Justice Policy (2019) 19
[405]Nakirigya S 'Northern leaders urge government on Transitional Justice policy' available at https://www.monitor.co.ug/uganda/news/national/northern-leaders-urge-govt-on-transitional-justice-policy-3384806 (Accessed 7 August 2021)
[406]Kim J and Hepner RT 'Of Justice and the Grave. The role of the Dead in Post Conflict Uganda' (2019) 19 *International Criminal Law Review* 819 84
[407]S. 5 Inquests Act Cap 11 allows exhumations to be carried out regardless of contrary customs
[408]Ministry of Internal Affairs National Transitional Justice Policy (2019) 19

the successful application of the stipulated measures in countries such as New Zealand and the US.[409]

Although Gray's propositions are quite commendable, she seems not to be cognisant of African traditional justice mechanisms which are as well restorative and entail similar qualities to those of other restorative measures in the other countries she mentions. Therefore, since it is recognized that incorporating restorative justice values in the plea bargain processes can help improve the plea bargain efficiency and as well as enable courts to attend to the needs of the victims in the plea bargain process, it is only prudent that the guidelines should reflect these values. However, this should be done by making provision for incorporating traditional justice practices in the plea bargain processes rather than adopting Gray's proposed foreign measures used in the US and New Zealand which may not reflect the cultural values of Ugandans.

5.1.4 Give equal recognition and attention to the plight of PWDs as those of children of war and their mothers

This paper illustrates an anomaly in which the Policy has given less recognition to the plight of the PWDs. As stated the effects of any war are always embodied in the disabilities of those on whom violent conflict inflicts permanent injuries and disfigurements and they are a constant reminder of the suffering brought upon them by war.[410] It is therefore essential that their plight is given the same prominence that is given to the plight of the children of war and their mothers and not made to appear as though it is of less significance. It is required that during the enactment of the Transitional Justice Act, more elaborate provisions be made to address the needs and concerns of PWDs.

5.1.5 Shift the mandate to check excesses of the security agencies from the Inspectorate of Government to the UHRC

This research has provided examples of countries where Permanent Human Rights Commissions have been vital in truth-seeking initiatives in various countries. However, in the case of Uganda, whereas it would be expected that the mandate to check the excesses of security organs lies with the UHRC which has the mandate to investigate human rights violations and identified as a key implementing institution for some aspects of the AAR and the NTJP 2019, the mandate is instead imposed upon the Inspectorate of Government. However, the Inspectorate of Government is already burdened with the function of being the government's principal anti-corruption agency and is therefore constrained to effectively bring security agencies to book. It is also not included among the ministries, departments and agencies of government that are considered necessary for the implementation of the NTJP 2019. It is therefore recommended that this mandate is shifted to the

[409]Gray H 'Can restorative justice processes help improve plea bargaining in Uganda's criminal justice system?' (2019) 19 Pepperdine *Dispute Resolution Law Journal* 215 230

[410]Hollander T and Gill B 'Every day the war continues in my body: Examining the marked body in post conflict Northern Uganda' (2014) 8 *International Journal of Transitional Justice* 217 234

UHRC as it is in a better position to effectively utilize the mandate since it is already required to investigate violations of human rights and is as well highlighted as a key implementing institution for some aspects of the AAR and the NTJP 2019.

5.1.6 Adopt a truth based approach to reparations

The Government of Uganda should heed to the reparative justice needs of the victims and develop tailored schemes of reparations in conflict-affected communities. Whereas the development initiatives may appear necessary to reconstruct the economy following violent conflict they are not tailored to the needs of the victims and they must not be used as reparative measures. Instead, the government should develop a streamlined agenda to extend reparations to victims of conflict. The reparations should preferably be accompanied with initiatives of the UPDF to reach out to the communities with apologetic messages for the atrocities that soldiers of UPDF committed during the conflict in Northern Uganda. This will be a powerful and symbolic gesture of remorse and will demonstrate the reparative effect that truth telling can have on community, as it is likely to enable healing in the conflict-affected communities.

5.2 CONCLUSION

This mini thesis highlights that contrary to the scholarly propositions for Uganda to prioritize establishment of a truth commission as a Transitional Justice measure, a truth commission may not necessarily be a viable policy option in Uganda's current political context. Following a more comprehensive study of the other truth-seeking options, this research concludes that the best opportunities to enhance the efficacy of the legal and policy measures on truth-seeking lie in incorporating traditional justice mechanisms into formal justice processes. However, the traditional justice practices still have to overcome the scepticism of the judicial officers, some of whom unjustifiably continue to challenge their legitimacy and resist their incorporation into the formal justice processes. Likewise, the research identifies other key problems in the existing legal and policy provisions on truth-seeking such as the tendency to accord less recognition to the plight of PWDs in the policy prioritisations, the absence of restorative justice mechanisms in plea bargain processes, the lack of cultural consciousness in the laws on exhumations, the questionable grant of the mandate to check excesses of security agencies to the Inspectorate of Government rather than the UHRC and the prioritization of development over reparative justice needs of the victims. Therefore, the research recommends that the enactment of the Transitional Justice Act is expedited to give effect to the Policy propositions of formalizing the use of traditional justice practices in formal justice processes and the revision of legislative provisions on exhumations to make them more cultural conscious and better suited for their truth-seeking role. The research also recommends the shifting of the mandate to check excesses of the security agencies from the Inspectorate of Government to the UHRC, the incorporation of traditional justice practices in plea bargain processes, the prioritization of the plight of PWDs and the development of a streamlined agenda for reparations coupled with apologies from the UPDF for the atrocities committed during the conflict in Northern Uganda.

WORD COUNT: 30261

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