

TOWARDS A COMPREHENSIVE & HOLISTIC TRANSITIONAL JUSTICE POLICY FOR UGANDA:

Exploring linkages between transitional justice mechanisms



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ABBREVIATIONS

CAVR	Commission for Reception, Truth and Reconciliation (Timor-Leste)
CEH	Commission for Historical Clarification (Guatemala)
CIVHR	Commission of Inquiry into Violations of Human Rights (Uganda)
CSO	Civil Society Organization
DRC	Democratic Republic of Congo
GoU	Government of Uganda
ICC	International Criminal Court
ICD	International Crimes Division
IHL	International Humanitarian Law
IHRL	International Human Rights Law
JLOS	Justice Law and Order Sector
LRA	Lord's Resistance Army
NGO	Non-Governmental Organization
TJ	Transitional Justice
TJM	Traditional Justice Mechanism
TRC	Truth and Reconciliation Commission
UN	United Nations

FOREWORD

In 2010 Avocats Sans Frontières (ASF) launched a multi-country project “Promoting the Rome Statute system and the effectiveness of the International Criminal Court (ICC)” in Uganda; Burundi; the Democratic Republic of Congo; Colombia; East Timor; and Nepal; with the overall objective of contributing to greater accountability for gross human rights violations and redress for victims.

The Ugandan component of the project seeks to:

- Create a network of actors with a theoretical and practical understanding of international criminal justice principles by enhancing the capacity of legal advocates and civil society organizations working closely with victim communities
- Ensure that Uganda honors its international and domestic obligations to effectively prosecute international crimes through judicial and legal activism

ASF, through this publication, intends to contribute to the transitional justice process in Uganda by making recommendations on the prospective linkages that should to exist between the mechanisms proposed by the draft Transitional Justice Policy of Uganda.

The Justice, Law and Order Sector (JLOS), in May 2013, released the draft Transitional Justice policy – an overarching framework designed by the Government of Uganda (GoU) to address the justice, accountability, and reconciliation needs of post-conflict Uganda.

The overall goal of the policy is to *“enhance legal and political accountability, promote reconciliation, foster social integration and contribute to peace and security.”*

The policy seeks to: Provide guidance for the management and operation of formal and informal justice processes in post-conflict situations; Formalize the use of traditional justice mechanisms in transitional justice processes; Establish a reparations program; Address the gaps in the current amnesty process; and Establish and resource a comprehensive truth telling process.

Ultimately, the cross-purposes of the different mechanisms present the main challenge for Uganda’s legal system that will seek to allow for their simultaneous application.

Consequently a discourse on the prospective relationships that should exist between the different mechanisms is of utmost importance as we move towards realizing lasting peace and justice in post conflict Uganda.

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EXECUTIVE SUMMARY

The Transitional Justice Policy is an important opportunity for the Government of Uganda to provide strategic policy guidance on how it intends to handle justice and accountability for serious crimes and, at the same time, how it plans to balance this with serving the rights of victims to truth, justice and reparations, which together are critical for achieving national reconciliation and long-lasting peace in the region. Presented as a response to a legacy of past injustices, the Transitional Justice Policy seeks to provide a prescription for strengthening stability while diminishing opportunities for impunity, through the application of a combination of justice mechanisms including formal criminal prosecutions, traditional justice, truth telling and reconciliation, reparation and amnesty.

Emphasizing the importance of a comprehensive approach to transitional justice, incorporating the full range of judicial and non-judicial measures or an appropriately conceived combination thereof, the TJ policy lists the principle of complementarity as one of its guiding principle: ““This policy recognizes that the solution to national reconciliation and justice lies in the multiple systems of justice functioning simultaneously and effectively complementing each other”. Later, the Policy also states that “The TJ mechanisms will operate in a complementary manner, with victims/participants approaching the desired mechanism as a first justice option. These mechanisms will where necessary complement one another”.

In the face of the immensity of the task of redressing the legacies of gross violations of human rights and serious violations of international humanitarian law, the limited reach of each of the measures, taken separately, is thus acknowledged from the outset. The five elements of the Policy (Formal Justice, Truth Telling, Traditional Justice, reparation and Amnesty) are not simply a random collection of efforts. They are related to one another, both conceptually and empirically. They complement one another, helping to compensate for the deficits that each faces.

Practice has indeed shown that isolated and piecemeal initiatives failed to bring a sense of justice for victims, promote healing and reconciliation and promote the rule of law. As recalled by the UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff, “piecemeal prosecutorial initiatives have not quelled the claims for forms of justice other than mere prosecution; truth-seeking exercises, even thorough ones, when implemented on their own, are not taken to be coterminous with justice, for adequate redress is not exhausted by disclosure. Justice is not merely a call for insight but also requires action on the truth disclosed. Similarly, reparations in the absence of prosecutions, truth-seeking or institutional reform can easily be seen as an effort to buy the acquiescence of victims”¹. In practice, however, complementarity has also proven to be very complicated and challenging, as evidenced by the experience of post conflict societies such as East Timor, Peru, Rwanda and Sierra Leone and as such, critical thought and deliberation is

¹ General Assembly Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff, A/HRC/21/46, August 9, 2012.

necessary when a country is contemplating the adoption of multiple TJ mechanisms simultaneously.

In this regard, even though the Policy details some challenges associated with each of these TJ mechanisms, it provides only limited recommendations on the prospective problems of and solutions to the simultaneous application of these mechanisms².

Bearing in mind the inherent challenges of complementarity between mechanisms with competing roles, functions, strengths and limitations, ASF undertook a comparative analysis of the proposed transitional justice mechanisms in the draft policy with a view to highlighting the possible linkages that should be further considered in the forthcoming legal framework that will be developed once the policy is adopted. Drawing on lessons learned and best practices from other countries that have simultaneously implemented TJ mechanisms, the Report highlights emerging principles on key considerations when designing a multi-mechanism TJ process so as to avoid overlap, duplication and to ensure that the mechanisms are mutually reinforcing.

In this perspective, one key recommendation is that any comprehensive TJ process must address the root causes of conflict to ensure that each category of persons is handled by the appropriate TJ mechanism and to ensure that underpinning societal problems are addressed. ASF recalls that CSOs working on transitional justice issues in Uganda-ASF inclusive, have opined that formal justice systems are not an appropriate entry-point for participants in the different transitional justice mechanisms. An "independent Transitional Justice Commission" could be the entry-point into the overall transitional justice process with the Investigation and Referral Committee mandated to determine the appropriate forums on a case by case basis.

Based upon the findings, the reports also finds that prosecutions should focus on key perpetrators of grave human rights violations while other mechanisms such as a truth telling body and TJMs should focus on lesser offenders. Should a conflict occur between the Ugandan truth telling commission's mandate and that of the ICD the ICD should retain primacy. There is a need to ensure that the prosecution process is divorced from the truth telling process. Perpetrators and victims alike should be able to testify before the TRC without fear of subsequent prosecution as a result of testimonies and information given as a result of their participation in a truth telling process.

² The policy mentions that

a) Where a matter merit alternative redress, it will be referred from the FJ to the TT or the TJMs. Matters that require healing, forgiveness and reconciliation will be referred to the TT and the TJMs depending on the need.

b) In addition, formerly amnestied persons will be referred to the TT of the TJMs as a strategy to promote healing and reconciliation in the communities. All the results of the processes of these thematic areas may amount to reparation, as illustrated

c) Matters of integration and complementarity of the mechanisms will be elaborately provided for in the transitional Justice Act

Regarding Traditional Justice Mechanisms, the Report recalls that the 2007 Juba Agreement on Accountability and Reconciliation recognized that traditional justice measures and institutions should be promoted alongside formal legal arrangements to ensure justice and reconciliation. The delegates at Juba drew an important conclusion, namely that traditional justice systems should be more appropriately viewed as *parallel* to formal justice, rather than as an alternative. In this perspective, TJMs should play a restorative role that can foster individual and community reconciliation, rehabilitation and reintegration. Community reconciliation agreements should be a part of the transitional justice process and these should include provisions on reparations. While the Ugandan truth telling commission could monitor and facilitate the process, community-based panels made up of traditional leaders and victims could broker the arrangements, and finally the ICD or another national court could approve to waive all criminal and civil liabilities resulting from the crimes committed.

The comparative analysis and the best practices described in the study leads ASF to believe that, in order to meet the immediate needs of victims, and where the ICD may be limited by its Rules of Procedure and Evidence, a Ugandan truth telling commission could provide victims with interim reparations prior to initiating a truth telling process so as to encourage their active participation and address their emergency needs. In addition, material awards of reparations should be recommended following the conclusion of a truth telling process. It is observed that a Truth Commission Report can be publicized and archived at a specific memorial centre as part of the symbolic reparations process.

Finally, the report concludes that amnesty should be reserved for those who are least responsible for committing serious crimes to award of reparations through a special body or branch of Government. As in the case of South Africa, amnesty should only be granted upon one providing accurate facts relevant in the process of providing a record of the truth of atrocities committed sole body for either before a truth commission or a competent Court of Law.

By including specific measures as examples of best practices, the study has no intention to suggest that the countries concerned have achieved overall or even substantial success in achieving truth, justice, accountability and reparations for victims of gross human rights violations and international crimes. Bearing in mind that each transitional justice programme is a unique set of processes and mechanisms, implemented within a specific context, the Report eschews one-size-fits-all formulas and the importation of foreign models. The end result has to be much more than a blue print that can be transferred from country to country. In this regards, the reports only aims at generating debate about the different roles and functions of the envisioned TJ mechanisms in the draft policy and developing innovative ideas of how complementarity can be achieved in a way that is respectful of relevant experience and particular contextual factors, but also of the universality of the underlying obligations.

I: INTRODUCTION

1. TRANSITIONAL JUSTICE: NOTIONS AND APPROACHES

1.1. Defining Transitional Justice

Transitional Justice is a relatively modern concept. Its broader purpose and objectives are embedded in the idea of a "transition", which connotes the "passage from one state, stage... or place to another."³ This transition is a key premise of transitional justice⁴ and recognizes the commencement of a "social transformation".⁵

This is reiterated by the United Nations (UN) in *"The rule of law and transitional justice in conflict and post-conflict societies."* In this report the UN Secretary-General observes that "transitional justice encompasses the wide range of processes and mechanisms associated with a society's attempts to come to terms with their past legacy of large-scale abuses, in order to ensure accountability, serve justice and achieve reconciliation."⁶ These can include both judicial and non-judicial mechanisms, with differing levels of international involvement, as well as a combination of individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals.⁷

Despite numerous definitions, there is consensus among scholars and practitioners that a combination of these mechanisms can help contribute to rebuilding a society's trust in justice, peace and reconciliation. Some academics have highlighted the broader role transitional justice plays in overcoming social division or seeking 'reconciliation' by creating justice systems to prevent future human rights atrocities.⁸ Transitional justice strives not only to deliver justice to victims of mass atrocities, but also to assist societies devastated by conflict achieve sustainable peace and reconciliation.⁹ Peace and reconciliation demand comprehensive societal transformation that must embrace a broad notion of justice, addressing the root causes of conflict and the related violations of all rights.¹⁰

³ "Transition," in *Merriam-Webster*, [Page #], accessed July 30, 2013, <http://www.merriam-webster.com/dictionary/transition?show=0&t=1375174362>

⁴ Joanna R. Quinn, "Whither the 'Transition' of Transitional Justice?" (paper presented at Annual Meeting of the Canadian Political Science Association, University of Western, Waterloo, May 16, 2011), 1.

⁵ Ibid. 20

⁶ United Nations Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies* (n.p.: n.p., 2004), 6.

⁷ Ibid.

⁸ Craig Kauffman, "Transitional Justice in Guatemala: Linking the Past and the Future" (paper presented at ISA-South Conference, Miami, USA, November 3, 2005), 2.

⁹ Benjamin J. Odoki, "A Report and Policy Proposals on the Use of Traditional Justice and Truth Telling Mechanisms in the Promotion of Justice, Accountability, Peace and Reconciliation" (paper presented at Justice Law and Order Sector (JLOS), Kampala, Uganda, July 18, 2012), 3.

¹⁰ Benjamin J. Odoki, "A Report and Policy Proposals on the Use of Traditional Justice," 3

The unifying factor in these definitions lies in the purpose they accord transitional justice as an effective tool that promotes accountability, peace-building and reconciliation. However, often omitted and or lacking from these definitions is the functioning of these various TJ mechanisms when applied concurrently.

Bearing in mind that each mechanism has its own role, specific functions and limitations, and their context specific applicability to a particular transitional society, and that each country has its own history and legacy of human rights abuses, it becomes imperative to further investigate the concurrent and simultaneous implementation of the various TJ mechanisms.

1.2. A Comprehensive Approach to Transitional Justice

The 2012 UN Special Rapporteur's report on the promotion on the right of truth clearly identifies four elements that, when combined in a complementary and mutually reinforcing manner serve to address gross human rights violations or serious violations of international humanitarian law.¹¹ These include truth-seeking, justice initiatives, reparations and guarantees of non-recurrence.¹²

The report suggests that the comprehensive implementation of the four components provides stronger reasons for various stakeholders, particularly victims, to understand these TJ measures as efforts to achieve justice in the aftermath of violations.¹³ Failing to take a comprehensive approach has been shown in practice to result in isolated and piecemeal initiatives that have not served their intended goals of bringing justice and redress to victims.¹⁴

The interaction between TJ mechanisms helps address the needs of different actors and different sectors within society.¹⁵ TJ scholar Joanna Quinn emphasizes that the interaction of mechanisms can allow different people and various groups to "feel" that justice has been done in a way that only an apology, or only a trial, might not be able to do.¹⁶ Quinn argues that "the presence of some instruments can provide the necessary support for others".¹⁷ By adopting a number of mechanisms and adopting an inclusionary process that involves many actors, the "justice" process serves to make the process more robust.¹⁸

It is therefore important that a structure be developed to allow for the interdependence and interplay between these different transitional justice mechanisms.

¹¹ United Nations General Assembly, *Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-recurrence, Pablo de Greiff*, report no. A/HRC/21/46 (New York, USA: n.p., 2012), 1.

¹² *Ibid.*, 1.

¹³ *Ibid.*, 7.

¹⁴ *Ibid.*, 8.

¹⁵ Joanna R. Quinn, "Traditional Justice Mechanisms in Uganda & Interaction with other TJ Mechanisms," e-mail message to Kendra A. Hefti-Rossier, July 31, 2013.

¹⁶ *Ibid.*

¹⁷ Joanna R. Quinn, "1 Chicken and Egg? Sequencing in Transitional Justice: The Case of Uganda," *International Journal of Peace Studies* 14, no. 2 (Fall/Winter 2009): 12.

¹⁸ Joanna R. Quinn, "Traditional Justice Mechanisms in Uganda," e-mail message to Hefti-Rossier.

2. TRANSITIONAL JUSTICE MECHANISMS

Accountability is a key component of peace and reconciliation.¹⁹ According to Cherif Bassiouni, accountability measures fall into the categories of truth, justice and redress.²⁰ Accountability can include a number of interventions including (1) domestic prosecutions (2) international prosecutions (3) traditional justice mechanisms (4) truth commissions (5) reparations. While amnesties do not necessarily foster accountability, they, together with the above-mentioned interventions will be discussed in the context of Uganda. In a bid to address the specific nature of the transitional state, these specific interventions, or transitional justice mechanisms as they are also often referred to, fall under the broad categories of restorative and retributive justice.

Retributive justice focuses on punishing the perpetrator, as well as deterrence and includes more formalized mechanisms such as national and international prosecutions including the International Criminal Court (ICC) and other internationalized courts. Retributive justice neither addresses the social and economic consequences of mass atrocities, nor seeks social transformation or reconciliation at the community or national levels. On the other hand, restorative justice prioritizes social healing and reconciliation and includes traditional justice mechanisms, truth telling, amnesties and reparations. Restorative justice seeks to restore human dignity and good relations between conflicting parties, and seeks to address the root causes of conflict.

While the oppositional contrast between retributive and restorative justice mechanisms has become a permanent feature in the field of transitional justice,²¹ a combined application of the two models in a transitional society is an impetus for peace and justice. This is because retribution alone without reparations or truth telling runs the risk of overlooking victims' needs following the widespread nature of the violations that they have suffered. While, applying restorative justice mechanisms like a truth telling commission without prosecutions can run the risk of perpetuating impunity.

It is this dichotomy that justifies exploring how transitional justice mechanisms falling under these two distinct justice models can be combined to serve the interests of a transitional society. It is widely agreed upon that both models cater for the divergent needs of victims of serious crimes. In any given society, there is a section of victims who prefer retributive justice over restorative justice and vice-versa. The challenge, however, is that in societies that apply these varied justice models, it is often difficult to strike the much needed balance in their application so as to ensure that victims who prefer either mechanism remain satisfied with the process.

¹⁹ Mahmoud Cherif Bassiouni, *Introduction to International Criminal Law*, 2nd rev ed. (Dordrecht, The Netherlands: Martinus Nijhoff Publishers, 2012), 938.

²⁰ Ibid.

²¹ Kathleen Daly, "Revisiting the Relationship between Retributive and Restorative Justice" (paper presented at Restorative Justice and Civil Society Conference, Australian National University, Canberra, February 1999), 3.

Retributive Justice

Traditionally, the underlying notion of retribution is that "criminal behavior constitute(s) a violation of the moral or natural order... and, having offended that order, require(s) payment of some kind."²² Therefore, a criminal is punished because he or she "deserves" it.²³ This model of justice considers that a proportionate sentence is a morally acceptable response to crime, regardless of whether the punishment causes any tangible benefits.²⁴ Since crime is defined as the violation or disturbance of the "right" relationships in the community, the goal of the retributive theory of justice is to reconcile these relationships.²⁵

In the retributive model of justice, because public order is at stake, the victim is represented by the State and, therefore, only plays a secondary role in the accountability process.²⁶ In the face of modern conflicts, and particularly those in which mass human rights violations have taken place, many problems arise from using the Western retributive model. For example, civilians are often caught up in the frontline of the conflict, and most problematically, distinct categories of perpetrators and victims become blurred, as the perpetrators are often victims themselves. This is particularly the case in the conflict between the GoU and the LRA in which the latter abducted many persons who were later forced to commit atrocities.

Oftentimes, a prosecutorial strategy is developed to try only key perpetrators, a move which may be negatively perceived by certain groups of victims. By focusing on the crimes committed by some individuals or a group of individuals, the retributive justice model fails to account for the complexity of the post-conflict situation.²⁷

In addition, court procedures may impose strict evidentiary requirements which are not realistic considering the post conflict situation. For example, it would be difficult to prove that a crime that took place more than two decades prior to a court hearing. Furthermore, the law on retrospectivity which often has a

²² David A. Starkweather, "The Retributive Theory of 'Just Desserts' and Victim Participation in Plea Bargaining," *Indiana Law Journal* 67, no. 3 (1992): 855.

²³ Ibid.

²⁴ Dani Wadada Nabudere, *Comprehensive Research Report on Restorative Systems of Justice and International Humanitarian Law* (n.p.: Marcus-Garvey Pan-Afrikan Institute, n.d.), 161, accessed July 31, 2013, <http://www.unictr.org/Portals/0/English/News/events/Nov2008/EN/challenges-for-international-Justice-in-Africa.pdf>.

²⁵ Starkweather, "The Retributive Theory of 'Just Desserts'," *op. cit.*, 857.

²⁶ Daly, "Revisiting the Relationship between Retributive and Restorative Justice," 6.

²⁷ Hadijah Nabbale, "Retributive Justice and Restorative Justice in Ending the Conflict of Northern Uganda," abstract (master's thesis, University of Innsbruck Austria), 5.

constitutional backing may limit the mandate of a court to try a specific case which is relevant but falls outside its temporal jurisdiction.²⁸

Suffice to conclude that the use of retributive justice alone is in some instances unsuitable as a societal response to mass atrocities since it is largely unable to equally address the broader needs of all the victims in a post-conflict society.

2.1. Prosecutions

2.1.1. Domestic Prosecutions

In helping societies deal with a legacy of past abuses, domestic prosecutions can provide victims with a sense of justice.²⁹ They provide a public forum for the judicial confirmation of historical fact.³⁰ They can also establish a new dynamic in society, an understanding that aggressors and those who attempt to abuse the rights of others will henceforth be held accountable.³¹

Prosecuting international crimes domestically where the crimes occurred can also serve an important function, as victims and society as a whole are able to witness the court process. However, societies emerging from conflict are often unable or unwilling to address such crimes. In such instances, international involvement may be necessary.³²

2.1.2. International Prosecutions

The Nuremberg trials prosecuting the major war criminals responsible for World War II sparked the discourse on international criminal justice.³³ Fifty years later, the Security Council established the world's first ad hoc International Criminal Tribunals for the former Yugoslavia (ICTY) and **Rwanda** (ICTR) under a Chapter VII mandate to restore peace and security.³⁴ The international community has also established "hybrid" courts like the Special Court for **Sierra Leone** or the Special Panels for Serious Crimes in **Timor-Leste**. These will be discussed further in Chapter IV.

²⁸ Note that by virtue of customary international law, one can be charged for committing war crimes even when a country has not adopted implementing legislation. See Jean-Marie Henckaerts and Louise Doswald-Beck, *Rules*, vol. 1, *Customary International Humanitarian Law* (Cambridge, United Kingdom: International Committee of the Red Cross, 2009).

²⁹ Neil J. Kritz, "War Crimes and Truth Commissions: Some Thoughts on Accountability Mechanisms for Mass Violations of Human Rights," *USAID Conference Promoting Democracy, Human Rights and Reintegration in Post-Conflict Societies*, October 30, 1997, 3, accessed July 31, 2013, http://pdf.usaid.gov/pdf_docs/PNACD090.pdf.

³⁰ *Ibid.*

³¹ *Ibid.*

³² "Criminal Justice," International Center for Transitional Justice, accessed July 31, 2013, <http://ictj.org/our-work/transitional-justice-issues/criminal-justice>.

³³ Avocats Sans Frontières and Uganda Coalition on the ICC, *The 2012 International and Transitional Justice Forum: 'Drawing Lessons from Local Processes to Improve Regional and International Perspectives of Justice'* (Kampala, Uganda: n.p., 2012), 5.

³⁴ *Ibid.*

In 1998, the Rome Statute was adopted by an assembly of States to establish the world's first permanent International Criminal Court.³⁵ The ICC's mandate is limited to the period after 1st July 2002 when the Rome Statute came into force.³⁶

Under Article 1 of the Rome Statute, the ICC can exercise jurisdiction over persons for the most serious crimes of international concern. According to Article 5 (1) of the Rome Statute, these include: genocide, crimes against humanity, war crimes and the crime of aggression.³⁷ In accordance with this statutory scheme, the Office of the Prosecutor consolidated a policy of focused investigations and prosecutions, meaning it will investigate and prosecute those who bear the greatest responsibility for the most serious crimes. Thus, the Office will select for prosecution those situated at the highest echelons of responsibility, including those who ordered, financed, or otherwise organized the alleged crimes³⁸. Considering such limitations, the ICC relies on its member states to take steps to ensure that other perpetrators are held accountable for their crimes, and relevant transitional justice mechanisms are established to supplement the Court's efforts in ending impunity. These national measures are seen as promoting the ICC's principle of complementarity³⁹.

The principle of complementarity emphasizes national efforts to combat impunity, and highlights the emphasis on the ICC as "a court of last resort" to complement national criminal jurisdictions.⁴⁰ In post-conflict states where a nation's legal system may have been decimated during the conflict and the State is unable to hold perpetrators accountable, the ICC can step in and claim jurisdiction.⁴¹ The ICC also has jurisdiction where the State is *unwilling* to hold perpetrators accountable⁴², such as is the case in pre-transitional countries where no regime change has taken place, and the government fears prosecution for the human rights violations it perpetrated.

³⁵ ASF and Uganda Coalition on the ICC, *The 2012 International and Transitional Justice Forum*, 5.

³⁶ *Understanding the International Criminal Court* (The Hague, The Netherlands: International Criminal Court, 2011), 4.

³⁷ The Court may only exercise its jurisdiction over crimes of aggression committed after the amendments have entered into force with the support of at least 30 State Parties. Permanent Mission of the Principality of Liechtenstein, Global Institute for the Prevention of Aggression, and International Committee of the Red Cross, *Handbook Ratification and Implementation of the Kampala Amendments to the Rome Statute of the ICC: Crime of Aggression War Crimes* (Princeton, NJ: Liechtenstein Institute on Self-Determination, 2012), 9.

³⁸ See ICC- The Office of the Prosecutor, Prosecutorial Strategy 2009-2012, Available at <http://www.icc-cpi.int/NR/rdonlyres/66A8DCDC-3650-4514-AA62-D229D1128F65/281506/OTPProsecutorialStrategy20092013.pdf>

³⁹ Article 1 of the Rome Statute of the International Criminal Court (1998).

⁴⁰ Open Society Justice Initiative, *Promoting Complementarity in Practice - Lessons From Three ICC Situation Countries* (New York, NY: n.p., 2010), 2.

⁴¹ Ibid.

⁴² Ibid.

Restorative Justice

The restorative justice paradigm looks at the past by analyzing the root causes of the conflict so as to help a society move forward by proposing preventative measures and guarantees of non-repetition. Restorative justice connotes a process of resolving crime by focusing on redressing the harm done to the victims, holding offenders accountable for their actions; and often, engaging the community in the resolution of that conflict.⁴³ This model takes into account transforming the offender and reconciling the offender with the victim and the community.⁴⁴

From a restorative perspective, retributive punishment is seen as insufficient for re-establishing a peaceful social coexistence, as it narrowly seeks to punish the perpetrator. Retributive justice does not focus on the suffering and needs of victims, and does not allow for the adequate reintegration of the offender into the community.⁴⁵ Restorative justice promotes mechanisms that make an offender conscious of the harm he caused instead of evaluating his guilt so that he assumes the responsibility of repairing the harm caused.⁴⁶

The restorative justice model centralizes the role of victims in the justice process, focuses on repairing the harm between an offender and victim, and between an offender and the wider community. Community members or organizations can take a more active role and the process is generally characterized by dialogue and negotiation among the parties.⁴⁷ Solutions are therefore community-owned and more contextually and socially-relevant as they respond to the particular conditions and needs of communities after conflict.

Despite its many benefits, restorative justice may also disadvantage the victims whose interests it seeks to protect. Many victims feel threatened by the idea of meeting the offender and do not feel capable of facing them directly.⁴⁸ A truth telling process can lead to the re-traumatization of victims particularly when not supplemented with adequate psychosocial support.

There may also be issues of personal safety for the victim without adequate security measures in place for testifying victims/witnesses. Victims may fear

⁴³ Yvon Dandurand and Curt T. Griffiths, *Handbook on Restorative Justice Programmes*, Criminal Justice Handbook Series (New York, USA: United Nations, 2006).

⁴⁴ Republic of Uganda Constitution (*Sentencing Guidelines for Courts of Judicature*) (*Practice*) Directions, 2013

⁴⁵ Rodrigo Uprimny and Maria Paula Saffon, "Transitional Justice, Restorative Justice and Reconciliation: Some Insights from the Colombian Case" (working paper, National University of Colombia, Bogotá, Colombia, n.d.), 4.

⁴⁶ Ibid.

⁴⁷ Daly, "Revisiting the Relationship between Retributive and Restorative Justice," 5

⁴⁸ Ministry of Justice of New Zealand, "The Benefits and Risks of Restorative Justice," *Chapter 5: the Benefits and Risks of Restorative Justice*, accessed August 2, 2013, <http://www.justice.govt.nz/publications/publications-archived/1996/restorative-justice-a-discussion-paper-1996/chapter-5-the-benefits-and-risks-of-restorative-justice>

retaliation from the offender or the offender's supporters at the community meeting or after the event. This may increase their anxiety and affect their desire to participate, or cause them to withdraw from the process altogether.

2.2. Traditional Justice

Defining traditional justice mechanisms (TJM) is difficult seeing that they are culturally and context-specific.⁴⁹ The approach used by TJMs includes a number of local practices from relatively formalized customary law to spiritual and religious conciliatory practices.⁵⁰ Based on shared cultural practices and values, these customs invoke binding commitments, assess actions for praise or blame, and activate processes that serve both to punish perpetrators while helping to repair shattered community bonds and relationships.⁵¹ There is a longstanding belief that because TJMs are based on "culture" and "tradition", they enjoy wide support among populations of developing countries and therefore could contribute to more legitimate processes of justice and reconciliation in the transitional phase.⁵²

Traditional justice mechanisms play a key role in dispute resolution and can provide considerable relief to the formal justice system following a period of conflict involving large numbers of perpetrators. In many contexts with multiple legal systems, "traditional" approaches are used to manage the vast bulk of daily conflicts and disputes, while national court processes deal with only a small proportion of cases.⁵³

It is generally agreed upon that traditional justice systems help re-build peace in post-conflict societies because of their restorative nature. The focus on reconciliation throughout the process fosters social and community reintegration, and also helps alleviate the tensions and antagonism between victims and perpetrators.

⁴⁹ Lisbeth C. Dolberg and Anna W. Meeseburg, "'Traditional' Justice? The Role of Traditional Authority in Traditional Justice Mechanisms in Post-conflict Sierra Leone" (master's thesis, Roskilde University, 2012), 7

⁵⁰ Ibid.

⁵¹ Justice Law and Order Sector, Esther Obaikol, and United Nations Development Programme, *Transitional Justice in Northern, Eastern Uganda and Some Parts of West Nile Region* (Kampala, Uganda: Justice, Law and Order Sector, 2008), 45, accessed August 2, 2013, http://books.google.co.ug/books/about/Transitional_Justice_in_Northern_Eastern.html?id=wI_UygAACAAJ&redir_esc=y.

⁵² Dolberg and Meeseburg, "'Traditional' Justice? The Role of Traditional Authority," 49.

⁵³ UNICEF Papua New Guinea, "Traditional' Justice Systems in the Pacific, Indonesia and Timor-Leste," *Justice for Children in the Pacific, Indonesia and Timor-Leste, EAPRO Sub-Regional Workshop*, 2009, 4.

2.3. Truth Telling

Truth telling is recognized as an important transitional justice measure to seek redress for the legacies of abuse, and respond to human rights violations and harms that occurred during repression or conflict.⁵⁴ It plays a critical role in acknowledging the wrongs suffered by victims, fostering reconciliation, community healing, and preventing the recurrence of the past abuses in post-conflict societies.⁵⁵ Establishing the truth about past violations not only helps determine the most appropriate remedies for victims, but it can also help identify the necessary reforms that can prevent such violations from recurring. Truth seeking can be achieved through a wide range of approaches, namely commissions of inquiry, fact-finding missions, ad hoc parliamentary committee hearings, exhumation processes, criminal justice processes and documentation.⁵⁶

2.3.1. The Right to Truth

Truth telling originates in the right to truth.⁵⁷ The right to truth imposes an obligation on States to provide victims, family members and society as a whole with information about the violations and abuses that took place during conflict and also requires that information be preserved for public memory.⁵⁸

The right to truth is enshrined in a number of international instruments and nonbinding resolutions including the UN Updated Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity (Updated Principles on Impunity).⁵⁹ Principle 2 indeed stipulates that “every person has the inalienable right to know the truth about past events concerning the perpetration of heinous crimes and about the circumstances and reasons that led, through massive or systematic violations, to the perpetration of those crimes.”⁶⁰ Furthermore, the UN Commission on Human Rights recognized “the importance of respecting and ensuring the right to the truth so as to contribute to ending impunity and to promote and protect human rights.”⁶¹ Beyond, under Article 24 (2) of the International Convention for the Protection of All Persons from Enforced Disappearances, state parties have an obligation to take appropriate measures to facilitate victims’ access to the truth.⁶²

⁵⁴ Cécile Aptel and Virginie Ladisch, *Through a New Lens: A Child-Sensitive Approach to Transitional Justice* (n.p.: International Center for Transitional Justice, 2011), 1.

⁵⁵ Ibid. 2.

⁵⁶ Ibid.

⁵⁷ United Nations Office of the High Commissioner for Human Rights Resolution 2005/66 (2005).

⁵⁸ International Center for Transitional Justice, *Truth Seeking: Elements of Creating an Effective Truth Commission*, ed. Eduardo González and Howard Varney (New York, USA: International Center for Transitional Justice, 2013), 3, accessed August 2, 2013, <http://ictj.org/sites/default/files/ICTJ-Book-Truth-Seeking-2013-English.pdf>.1.

⁵⁹ Aptel and Ladisch, *Through a New Lens*, 1.

⁶⁰ United Nations Updated Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, E/CN.4/2005/102/Add.1 (February 18, 2005).

⁶¹ Ibid. 2.

⁶² International Convention for the Protection of All Persons from Enforced Disappearance, General Assembly Resolution A/61/177, (December 20, 2006). See also Aptel and Ladisch, *Through a New Lens*, 2.

The right to truth can be derived from the right to a remedy, the right to receive and impartial information, the right to due process and because of this it has progressively turned into an autonomous right. Nevertheless the core elements of the right are well accepted.⁶³ At a regional level, the Inter-American Commission on Human Rights (IACHR) and the Inter-American Court of Human Rights have confirmed that the right to truth is established by the American Convention on Human Rights, under provisions covering the right to a fair trial, freedom of thought and expression, and the right to judicial protection.⁶⁴ The African Charter on Human and People's Rights subsumes the right to truth under the right to an "effective remedy," which includes access to justice and reparation for harm suffered.⁶⁵ The Charter promises victims of violations "access to the factual information concerning the violations."⁶⁶

2.3.2. Truth Commissions and Commissions of Inquiry

Truth-seeking bodies like truth commissions and commissions of inquiry aim to investigate abuses that took place during a particular time period.⁶⁷ A commission of inquiry determines the facts underlying historical abuses and provides recommendations to the executive branch or legislature on how to address them.⁶⁸ A truth commission conducts a much more comprehensive investigation into the past to establish an accurate historical record of what happened.⁶⁹ The goal is generally to foster reconciliation and national unity by acknowledging the past wrongs. Truth commissions can have mandates to grant amnesties, reparations or provide information to the formal court processes. Truth commissions are generally established by the State; however, in the case of **Guatemala** for example, two NGOs conducted their own private truth commissions.

2.4. Reparations

Transitional justice also incorporates the victim's right to a remedy where human rights violations and war crimes have been committed. The duty on the State to repair is well established and a basic human right.⁷⁰

. International law recognizes individual criminal responsibility for crimes against humanity, war crimes, genocide and aggression for which the perpetrators must repair the harm they have caused to their victims.⁷¹ States have also agreed to uphold certain international guidelines such as the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of*

⁶³ International Center for Transitional Justice, *Truth Seeking: Elements of Creating an Effective TC*, 4.

⁶⁴ Ibid. 5.

⁶⁵ Ibid. 2.

⁶⁶ Ibid.

⁶⁷ International Center for Transitional Justice, *Truth Seeking: Elements of Creating an Effective TC*, 4.

⁶⁸ Ibid.

⁶⁹ Ibid. 3.

⁷⁰ See ICC, Trial Chamber I, In the Case of the Prosecutor v. Thomas Lubanga Dyilo, *Decision establishing the principles and procedures to be applied to reparations*, ICC-01/04-01/06, August 7 2012, para 185.

⁷¹ Article 75 of the Rome Statute of the International Criminal Court (1998).

*International Human Rights Law and Serious Violations of International Humanitarian Law.*⁷² These international guidelines also list different forms of reparations such as restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition as possible complementary forms of redress.⁷³

The International Criminal Court's (ICC) Rome Statute indicates that the Court should establish the principles of reparations to be applied to the perpetrators of crimes under its jurisdiction, and that they include restitution, compensation and rehabilitation.⁷⁴ In the case of Thomas Lubanga, the first war criminal to be convicted by the ICC, the Trial Chamber I established gender and ethnic-inclusive principles for providing reparations to victims. One of the key issues is that victims should be treated fairly and equally, irrespective of whether they participated in the trial proceedings and that the needs of all victims should be taken into account with particular attention paid to children, the elderly, those with disabilities and victims of sexual and gender violence.⁷⁵ The Court further found that reparations may be granted to direct and indirect victims including the family members of direct victims and legal entities⁷⁶. The principles highlight the need for reparations to be accessible to all victims using a gender-inclusive approach and that they may be individual and/or collective. Types of reparations can include restitution, compensation, rehabilitation, symbolic reparations, as well as outreach activities and educational programs.⁷⁷ Reparations should also be prompt and proportionate to the harm, injury, loss and damage resulting from the crimes charged.⁷⁸

Nevertheless, providing effective and adequate reparation using these forms of redress remains a complex matter and one to which there is no definitive answer. Some consensus exists to support the idea that adequate reparation in such situations includes the investigation and prosecution of those who committed the crime(s) and their eventual condemnation, but that it should also include a combination of other forms of reparation given the seriousness of the violation, while bearing in mind the particular situation of each victim.

2.5. Amnesty

Amnesties are "a form of forgiveness, granted for governments, for crimes committed against a public interest."⁷⁹ Under this definition, an Amnesty law is a

⁷² United Nations General Assembly. *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*, Res 60/147, NY: UN (2005).

⁷³ Ibid.

⁷⁴ Article 75 of the Rome Statute of the International Criminal Court (1998).

⁷⁵ ICC, Trial Chamber I, In the Case of the Prosecutor v. Thomas Lubanga Dyilo, *Decision establishing the principles and procedures to be applied to reparations*, ICC-01/04-01/06, August 7 2012, para187-191

⁷⁶ Ibid., para 194 -199

⁷⁷ Ibid. para. 217-241

⁷⁸ Ibid. para. 242 and f.

⁷⁹ Bassiouni, *Introduction to International Criminal Law*, Martinus Nijhoff, International Criminal Law Series, 2012, 938.

legal measure barring criminal prosecution and in some cases, civil actions against certain individuals who committed crimes before the amnesty's adoption.⁸⁰ Amnesties also retroactively nullify any legal liability that may previously have been established.⁸¹ It is important to acknowledge that amnesties are largely political processes, not specifically grounded in human rights law, and they are therefore used as a negotiating tool to bring about semblance of peace, or seizure to hostilities in armed conflict situations.

While they give precedence to peace over justice, this is often times necessary to bring an end to periods of prolonged conflict. The United Nations Secretary General noted that "carefully crafted amnesties can help in the return and reintegration" of displaced persons and former fighters in the aftermath of conflict and "should be encouraged".⁸²

2.5.1. Types of Amnesty Laws

There are different types of amnesties including conditional, de facto and blanket amnesties. Conditional amnesties can for example remove the benefits conferred upon recipient former rebels who choose to once again take up arms.⁸³ A conditional amnesty can also remove criminal liability for some offences or offenders whilst allowing prosecutions to remain possible for crimes or offenders excluded from the amnesty's scope.⁸⁴

An amnesty that unilaterally exempts broad categories of serious human rights offenders from prosecution is known as a blanket amnesty.⁸⁵ Blanket amnesties foster impunity. For example, in **Uganda**, the Amnesty Act was enacted in 2000, which granted an amnesty to any rebel who had taken up arms since 1986. It lapsed in May 2012, but was re-enacted in May 2013. As such, no prosecution of war criminals in Uganda has taken place to date. De facto amnesties will not explicitly rule out criminal prosecution or civil remedies, but may have a similar effect by effectively foreclosing prosecutions.⁸⁶ For example, in **Argentina**, the 1986 *Punto Final* ("Full Stop") Law and the 1987 Due Obedience Law shielded certain commanders from prosecution.⁸⁷ These were later annulled. It is important to note however that any national amnesty cannot bar international courts from exercising their jurisdiction.

In a case that later set a precedent for several Latin American countries to strike down blanket amnesty laws, the Inter-American Court declared the Peruvian blanket amnesty invalid in 2001 as it was found to discourage investigations and

⁸⁰ United Nations Office of the High Commissioner for Human Rights, *Rule-of-Law Tools for Post-Conflict States: Amnesties*, HR/PUB/09/1 (New York, NY: UN OHCHR, 2009), 5.

⁸¹ Ibid.

⁸² Ibid. 26.

⁸³ Ibid., 7

⁸⁴ Louise Millender, "Linkages between TJ Mechanisms," e-mail message to Kendra A. Hefti-Rossier, August 1, 2013.

⁸⁵ United Nations Office of the High Commissioner for Human Rights, *Rule-of-Law Tools for Post-Conflict*, 8.

⁸⁶ Ibid.

⁸⁷ United Nations Office of the High Commissioner for Human Rights, *Rule-of-Law Tools for Post-Conflict*, 8.

deny remedy to victims. The Court held that "all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations."⁸⁸

2.5.2. **Amnesties under International Law**

Under international law, there is no customary or treaty rule prohibiting amnesties.⁸⁹ However, at the regional and international level, the trend is to strike down blanket amnesties due to their incompatibility with human rights norms and principles. Under various sources of international law and the UN Policy on Amnesties, amnesties are impermissible if they:

- a) prevent the prosecution of individuals who may be criminally responsible for war crimes, genocide, crimes against humanity or gross violations of human rights, including gender specific violations;
- b) interfere with victims' right to an effective remedy, including reparation; or
- c) Restrict victims' and societies' right to know the truth about violations of human rights and humanitarian law.⁹⁰

Furthermore, the UN Policy states that amnesties that seek to restore human rights must be designed with a view to ensuring that they do not restrict the rights restored or perpetuate the original violations.⁹¹ Jurisprudence from both the Inter-American Human Rights System and the African Commission on Human and Peoples Rights reinforce this generally-accepted rule that amnesties contravene victims' rights to truth, justice and a remedy, and foster impunity⁹².

⁸⁸ *The Amnesty Law (2000) Issues Paper: Review by the Transitional Justice Working Group* (Kampala, Uganda: JLOS, 2012), 10.

⁸⁹ William W. Burke-White, "Reframing Impunity: Applying Liberal International Law Theory to an Analysis of Amnesty Legislation," *Harvard Law School*, 2002, 467.

⁹⁰ United Nations Office of the High Commissioner for Human Rights, *Rule-of-Law Tools for Post-Conflict*, 11.

⁹¹ *Ibid.*

⁹² See *Avocats Sans Frontières, Amnesty: An 'Olive Branch' in Justice? Amnesty Advocacy Tool for Uganda*, Kampala, 2012

Cross-Cutting Issues

2.6. Women and Children in Transitional Justice

The roles of vulnerable groups, particularly women and children is critical in the process of establishing a comprehensive transitional justice process that addresses the underlying needs of a society recovering from conflict. During the past decades, judicial and non-judicial TJ mechanisms pursued in Africa have often failed to adequately tackle the extensive gender-based violence that is prevalent on the continent.⁹³ Despite the extent of human rights violations suffered by children, transitional justice mechanisms have frequently overlooked their interests and perspectives. Furthermore, TJ mechanisms are designed in a way that precludes the involvement of women and children. For example, truth telling and traditional justice processes tend to focus on the harm of a particular event rather than looking at the broader structural inequalities that exist within a given society.⁹⁴ This often limits women's access and also hinders the TJ process as a whole by failing to address root societal problems.⁹⁵ Practitioners have in recent years however begun to acknowledge the significance of women and children's participation in these measures.⁹⁶

2.6.1. Sexual Violence in International Law

Measures to address sexual and gender-based violence are now relatively well-established in the transitional justice and international human rights discourse, and the design of TJ mechanisms.⁹⁷ Sexual violence is considered a crime against humanity under the ICC Rome Statute, and has been introduced in UN Security Council Resolutions 1325 and 1820.⁹⁸ The recently-passed UN Security Council Resolution 2106 recognizes that sexual violence in armed conflict and post-conflict situations disproportionately affects women and girls, as well as particularly vulnerable or specifically-targeted groups, and can also affect men and boys and those secondarily-traumatized as forced witnesses of sexual violence against family members. The Resolution notes that acts of sexual violence in such situations not only severely impede the critical contributions of women to society, but also impede durable peace and security as well as sustainable development.⁹⁹

⁹³ Helen Scanlon and Kelli Muddell, "Gender and Transitional Justice in Africa: Progress and Prospects," *African Journal on Conflict Resolution*, 9.

⁹⁴ Alison Crosby and M. Brinton Lykes, "Mayan Women Survivors Speak: The Gendered Relations of Truth Telling in Postwar Guatemala," *International Journal of Transitional Justice* 5 (2011): 462.

⁹⁵ Ibid. 466.

⁹⁶ Aptel and Ladisch, *Through a New Lens*, 5.

⁹⁷ Alison Crosby and M. Brinton Lykes, "Mayan Women Survivors Speak", 463.

⁹⁸ Ibid. 463.

⁹⁹ United Nations Security Council Resolution 2106 (2013).

2.6.2. Women in TJ

It is often noted that the paucity of domestic prosecutions for crimes of sexual violence, the limited volume of international prosecutions for these crimes, and the worldwide scale of crimes of sexualized violence particularly in situations of armed conflict, continues to create an impunity gap.¹⁰⁰

Countries such as **Sierra Leone** that have pursued transitional justice mechanisms such as the Truth and Reconciliation Commission have been commended for deliberately soliciting suggestions and support from women's organizations and other gender advocacy groups that enabled the Commission to establish a historical record with a gender-sensitive lens.¹⁰¹ The Commission held a special thematic session on women and received submissions from a cross-section of society who had knowledge on the issue.¹⁰² Contrary to the Sierra Leone experience, an analytical trial monitoring report of the **Rwandan** Gacaca process led by Avocats Sans Frontières (ASF) found that Article 38 of the Gacaca Law on the procedure for the prosecution of sexual offences was oftentimes excluded from the beginning of hearings, and in cases where it was mentioned, no explanation was provided regarding the necessity to denounce the authors of these crimes and to encourage the prosecution of such offences.¹⁰³

2.6.3. Children in TJ

A landmark development of involving children in the transitional justice process was seen in **Sierra Leone's** Truth Commission, which included the investigation of the violation of children's rights in its mandate, and conducted children-focused hearings, and ultimately produced a child-friendly version of its report.¹⁰⁴ Other commissions have included children in their focus including in Peru, **Timor-Leste**, **Liberia** and most recently in Canada and Kenya.¹⁰⁵ In criminal justice processes, while the victimization of children is still insufficiently documented and proceedings are seldom child-friendly, there have been some positive developments including two landmark sentences for the crime of forced recruitment issued in 2011 in **Colombia** and in the case of Thomas Lubanga in 2012 by the ICC.¹⁰⁶

Women, children and other vulnerable groups should be provided with the platform to actively participate in a transitional justice process and also advise on any linkages that should exist among the different mechanisms. In Uganda, this

¹⁰⁰ Jane Adong Anywar, "Presentation to United Nations Security Council: Open Debate on Sexual Violence in Conflict" (paper presented at United Nations Security Council, New York, USA, June 24, 2013), 1.

¹⁰¹ Abigail Gyimah, *Gender and Transitional Justice in West Africa: The Cases of Ghana and Sierra Leone*, research report no. 4 (Nairobi, Kenya: African Leadership Centre, 2009), 41.

¹⁰² Ibid.

¹⁰³ Avocats Sans Frontières, *Monitoring of the Gacaca Courts* (Kigali, Rwanda: ASF, 2007), 50.

¹⁰⁴ International Center for Transitional Justice, *Transitional Justice in Post-Conflict and Fragile Settings: Progress and Challenges for Reparations, Truth-Telling, and Children* (n.p.: ICTJ, n.d.), 73, accessed August 7, 2013, http://worldjusticeproject.org/sites/default/files/transitional_justice_in_post-conflict_and_fragile_settings_ictj.pdf.

¹⁰⁵ Ibid.

¹⁰⁶ Ibid.

category of persons has thus far actively participated in the TJ policy and lawmaking process. Their views have therefore informed the current national TJ Policy drafting process. Participation of such groups before a truth telling body must be encouraged, and evidence of the violations committed against them should be used to inform the prosecution process for such crimes. Gender and child-specific reparations should also be awarded for any harm suffered.

2.7. Outreach and Sensitization Initiatives in Transitional Justice

The outreach component must be taken in due consideration in any discourse on linkages of TJ mechanisms. The impact and sustainability of transitional justice processes will depend significantly on ensuring that they are understood and communicated coherently during and after their implementation.¹⁰⁷ Outreach sessions provide an opportunity to enhance engagement and an interactive exchange with war affected communities, reinforcing the credibility and effectiveness of the TJ mechanism.¹⁰⁸ Effective outreach must target both specific groups affected by the work of the TJ mechanisms used, as well as the broader community.¹⁰⁹ This requires careful planning during the design phase and adequate financing.¹¹⁰

Sierra Leone used both a Special Court and Truth Commission, which operated simultaneously. This case study, discussed in Chapter VI, exemplifies the importance of an effective outreach program in a situation where multiple TJ mechanisms are operating. It has been reported that there was confusion about the distinction between Sierra Leone's TRC and the Special Court.¹¹¹ This problem of public perception was compounded by the fact that: (1) both mechanisms were staffed by internationals who were seen together in public; (2) both occupied offices on the same road in Freetown, promoting rumors of a tunnel between the two; and (3) at least one TRC statement-taker went to work for the Court. Academics have noted that outreach initiatives should have been initiated earlier.¹¹²

For the ICC, outreach is one of the ways of establishing sustainable, two-way communication between the Court and communities affected by the situations that are subject to investigations or proceedings, and to promote understanding and support of the judicial process at various stages as well as the different roles

¹⁰⁷ *Guidance Note of the Secretary-General: United Nations Approach to Transitional Justice* (New York, NY: United Nations, 2010), 9.

¹⁰⁸ Margaret Ojok, "Transitional Justice Outreach," Republic of Uganda Justice Law and Order Sector, accessed August 7, 2013, <http://www.jlos.go.ug/index.php/2012-09-25-13-11-16/2012-09-28-06-56-14/transitional-justice/outreach>.

¹⁰⁹ *Ibid.* 9-10.

¹¹⁰ *Ibid.* 10.

¹¹¹ Tom Perriello and Marieke Wierda, *The Special Court for Sierra Leone Under Scrutiny*, Prosecutions Case Studies (n.p.: International Center for Transitional Justice, 2006), 2.

¹¹² Beth K. Dougherty, "Searching for Answers: Sierra Leone's Truth & Reconciliation Commission," *African Studies Quarterly* 8, no. 1 (Fall 2004): 48.

of the organs of the ICC.¹¹³ Outreach aims to clarify misperceptions and misunderstandings and to enable affected communities to follow trials.¹¹⁴

In a society that is pursuing different transitional justice mechanisms, outreach will clarify, among others, the mandate of each transitional justice mechanism such as national courts, international courts, truth telling bodies, traditional justice mechanisms et cetera, the category of persons who should appear before each body, that is, those “most responsible” and “least responsible” for committing serious crimes. Outreach provides the opportunity to explain such thresholds to all parties that are closely following and/or participating in the transitional justice process. Outreach also has a role to play in clarifying the common contentious issues among victim communities such as the process of awarding compensation—who grants it, how it is granted and when it is awarded.

2.8. Victim and Witness Protection

The definition of “witness” may differ according to the legal system under review. For protection purposes, it is the function of the witness—as a person in possession of information important to the judicial or criminal proceedings—that is relevant rather than his or her status or the form of testimony.¹¹⁵ Witnesses can be classified into three main categories: a) justice collaborators; b) victim-witnesses; c) other types of witness (innocence bystanders, expert witnesses and others)

The protection of victims and/or witnesses is an essential part of any process that looks towards establishing a model linkage system among the different transitional justice mechanisms. In this perspective, the UN Guidance Notes on Transitional Justice rightly note that placing victims at the centre of transitional justice requires ensuring that their rights and views are fully respected in the implementation of transitional justice processes, including, as appropriate, through the use of victim-sensitive procedures that guarantee victims’ safety and dignity, and the development of specific capacities to assist, support and protect victims and witnesses.¹¹⁶ It is further pointed out that effective victim and witness protection is vital to ensure victims’ and societies’ right to the truth.¹¹⁷ Beside, the ability of a witness to give testimony in a judicial setting or to cooperate with law enforcement investigations without fear of intimidation or reprisal is essential to maintaining the rule of law.¹¹⁸

¹¹³ “Outreach,” International Criminal Court, accessed August 7, 2013, http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/outreach/Pages/outreach.aspx.

¹¹⁴ Ibid.

¹¹⁵ United Nations Office on Drugs and Crime, *Good Practices For the Protection of Witnesses in Criminal Proceedings Involving Organized Crime* (New York, NY: UNODC, 2008), 19.

¹¹⁶ *Guidance Note of the Secretary-General*, 8.

¹¹⁷ Ibid.

¹¹⁸ United Nations Office on Drugs and Crime, *Good Practices For the Protection of Witnesses*, 1.

In many countries emerging from conflict, the prosecution of serious criminal activity is nevertheless severely hampered by the reluctance of witnesses to testify at trial because of threats to their lives or those of their families by alleged criminal perpetrators or those acting on their behalf.¹¹⁹ This includes witness' self-imposed censorship due to a fear that they will put their lives, or at least livelihood and social standing at risk, even if there are no explicit threats.¹²⁰

The unique Ugandan transitional justice context requires that "victim-witnesses" be prioritized for protection. These may be protected through among others, evidentiary rules of protection measures when testifying in court (anonymity, shielding, and videoconferencing), police protection, temporary protection, temporary relocation in safe areas and provision of moderate financial assistance.¹²¹ The ICD has had the privilege of developing Guidelines on Witness Protection in relation to International Crimes in collaboration with other development partners. These guidelines describe the measures that should be available to protect the security, physical and psychological well-being, dignity and privacy of witnesses, in particular of those who are at increased risk of physical or psychological harm as a result of their interaction with the ICD or the investigation relating to the trials held by the ICD.

Given the TJ context in Uganda, it is therefore important that measures are put in place to guarantee the protection of a witness who appears before any of the relevant bodies to give testimony of atrocities committed. There is a high likelihood that in such contexts, witnesses may fear to appear before either a truth telling body or national court for fear of their identity being revealed and testimony shared with a different body other than the one before which they have testified.

In our current context, the fact that Witness protection legislation has yet to be introduced causes victims' to resist participation in TJ mechanisms to date, and can further compromise the work of future mechanisms as long as such legislation and institutional measures to ensure adequate implementation of the law are not yet in place. Therefore, it is urgent that Uganda finalize the process of drafting and adoption of the Witness Protection bill to enable witnesses and victims to freely engage in the TJ process.

¹¹⁹ Leigh Toomey and Anaïs Slalvin, *Witness Protection in Countries Emerging From Conflict: INPROL Consolidated Response (07-008)* (n.p.: INPROL, 2007), 1.

¹²⁰ Ibid.

¹²¹ United Nations Office on Drugs and Crime, *Good Practices For the Protection of Witnesses*, 21.

II: UGANDA'S HISTORY OF CONFLICT

1. INTRODUCTION

The conflict narrative of Uganda has focused primarily on the 1986-2008 conflict between the Government of Uganda (GoU) and the Lord's Resistance Army (LRA) that was geographically confined to the northern parts of the country.

Within the transitional justice discourse, and particularly the draft TJ Policy, not much attention has been directed towards the other conflicts that took place during the 19th and 20th Centuries, namely during colonial rule, under the regimes of Idi Amin and Okello Lutwa and the Luwero Triangle conflict. This section provides an overview of the conflicts in Uganda in an effort to identify and address the root problems. This will serve to strengthen the draft TJ Policy by designing mechanisms that target larger societal problems.

2. HISTORICAL BACKGROUND

By limiting the historical analysis to matters from 1986 onwards¹²², namely the conflict in the North and failing to account for the systemic causes of conflict in Uganda as a whole, the transitional justice mechanisms implemented may not holistically address the underlying problems. An important lesson to be drawn from the experiences of **Guatemala** and **Liberia** in their attempts to come to terms with their respective legacies of human rights abuses is the need for a transitional justice discourse to comprehensively analyze the historical context and systemic causes of the outbreak of conflict. This is discussed in greater detail in Chapter IV.

Furthermore, the goal of developing a comprehensive account of past human rights violations requires national participation so as to ensure that transitional justice is not a concept known only to those living in the North. This can only be achieved if the population as a whole is included and persons who have suffered during earlier conflicts are not left out. It also necessitates that the national government be included so that an analysis of conflict is not seen to be solely regional, but linked to deeper issues of governance and social marginalization.

A comprehensive account of all of the major conflicts that have occurred in Uganda, therefore, represents the first step towards setting the stage for a holistic and inclusive transitional justice strategy. This is because there is a direct relationship between the type of conflict and the transitional justice approach adopted to address its effects.

¹²² National Transitional Justice Working Group, *Draft National Transitional Justice Policy (3rd Draft)* (Kampala, Uganda: Justice Law and Order Sector, 2013), 28

The preamble of Uganda's 1995 Constitution serves as a reminder of the country's turbulent history.¹²³ The preamble reads "WE THE PEOPLE OF UGANDA: RECALLING our history which has been characterized by political and constitutional instability; RECOGNISING our struggles against the forces of tyranny, oppression and exploitation" This national acknowledgement of instability, which has also been recognized in a number of court cases¹²⁴ illustrates the need to comprehensively address the root causes of conflict in an attempt to ensure that such violence should never reoccur.

The civil conflicts and rebellions that ravaged the country involved a number of armed groups including the Allied Democratic Forces, the West Nile Bank Front, the Uganda People's Democratic Army, the Uganda National Liberation Front, the Holy Spirit Movement of Alice Lakwena and the longest-lasting LRA conflict.¹²⁵ Many of these conflicts arose out of discontent that originated from the unstable and unequal political and economic climate. These conflicts have destroyed the livelihoods of thousands of families across Uganda, and have resulted in the destruction of property, internal displacement of millions and deaths of large numbers of people including women and children.

2.1. Colonialism Sowed the Seeds for Future Conflict

In 1896, two years after the creation of Buganda located in the southern part of Uganda, a British protectorate, Britain extended its control over the western kingdoms of Ankole, Toro and Bunyoro, which became the new Uganda Protectorate.¹²⁶ This marked the beginning of effective colonial occupation in Uganda.

According to transitional justice scholars Doom and Vlassenroot, the seeds for ethnic fragmentation in Uganda were sown during the colonial era.¹²⁷ British colonial rule effectively created a socio-economic division between North and South that consequently led to the economic marginalization of the North and the further development of the South.¹²⁸ Rather than integrating the different ethno-racial groups, the South was favored economically while the North was

¹²³ Steven B.K Kavuma, "Keynote Address" (paper presented at Stakeholder Consensus Building Workshop on the Draft National Transitional Justice Policy, Imperial Royale Hotel, Kampala, Uganda, May 21, 2013), 4.

¹²⁴ Joseph Isanga, "Courts and Separation of Powers: A Comparative Study of the Uganda and South Africa Experiences" (unpublished manuscript, University of Notre Dame, n.d.), 4.

¹²⁵ Hillary Onek, "Opening Remarks" (paper presented at Validation of a Report and Policy Proposals on the use of Traditional Justice and Truth Telling Mechanisms in the Promotion of Justice, Accountability, Peace and Reconciliation, Kampala, Uganda, July 18, 2012), 1-2.

¹²⁶ "History of Uganda," History World, accessed July 31, 2013, <http://www.historyworld.net/wrldhis/plaintexthistories.asp?historyid=ad22#ixzz2aXNs9V1U>.

¹²⁷ David Lanz, *The ICC's Intervention in Northern Uganda: Beyond the Simplicity of Peace vs Justice* (n.p.: The Fletcher School of Law and Diplomacy, n.d.), 2, accessed August 2, 2013, http://reliefweb.int/sites/reliefweb.int/files/resources/EC66215A0071F156C12573910051D06D-Full_Report.pdf.

¹²⁸ Ibid.

discouraged from developing commercial agriculture and was used as a pool for recruitment into the military.¹²⁹

Practices of military recruitment also played a role in creating a divide between the North and South.¹³⁰ To protect the interests of the British colonizing power, the Ugandan military was comprised primarily of northerners.¹³¹ By 1969, although only 19% of the national population came from the north, they represented 61% of the military.¹³² Furthermore, 88% of the 161 officers were from the north.¹³³ The British wanted to ensure that the military was, where possible, "an entirely alien mercenary element that did not have any sentimental attachment to Uganda and could be trusted to be brutal without any reserve or compunction."¹³⁴ Furthermore, the British stifled opposition by empowering the Uganda Rifles Ordinance to take action against any local group in the protectorate that actively opposed the administration.¹³⁵

2.2. Independence and the North-South Battle for Power

The North-South battle for power began when Milton Obote, a Langi from Northern Uganda took power after independence. Following his takeover, he made an executive decision to abolish the Southern Buganda monarchy.¹³⁶ At a later stage, he was overthrown by General Idi Amin, who also originated from Northern Uganda and became renowned for his brutal dictatorship. Amin retaliated against the attempted invasion by Ugandan exiles in 1972 by purging the army of Obote supporters, predominantly those from the Acholi and Lango ethnic groups.¹³⁷ In July 1971, Lango and Acholi soldiers were massacred in the Jinja and Mbarara Barracks, and by early 1972, some 5,000 Acholi and Lango soldiers, and at least twice as many civilians, had disappeared.¹³⁸ The victims soon came to include members of other ethnic groups, religious leaders, journalists, artists, senior bureaucrats, judges, lawyers, students, intellectuals, criminal suspects and foreign nationals. Many people were killed at General Amin's will, and the bodies were often dumped into the Nile River.¹³⁹

¹²⁹ Sabiiti Mutengesha, "From Pearl to Pariah: The Origin, Unfolding and Termination of State-Inspired Genocidal Persecution in Uganda, 1980-85," *How Genocides End*, last modified December 21, 2006, accessed August 8, 2013, <http://howgenocidesend.ssrc.org/Mutengesha/index.html#3>.

¹³⁰ Ibid.

¹³¹ Ibid.

¹³² Ibid.

¹³³ Ibid.

¹³⁴ Ibid.

¹³⁵ Ibid.

¹³⁶ Ibid.

¹³⁷ Mamadou Tall, "Notes on the Civil and Political Strife in Uganda," *Issue: A Journal of Opinion* 12, no. 1/2 (Spring/Summer 1982).

¹³⁸ See e.g.; 'Disappearances' and Political Killings - Human Rights Crisis of the 1990s - A Manual for Action," London: Amnesty International, December 1993.

¹³⁹ "Idi Amin: 'Butcher of Uganda'," CNN, August 16, 2003, available at <http://edition.cnn.com/2003/WORLD/africa/08/16/amin.obituary/index.html>

2.3. Political Tensions Unfold Leading to the Luwero War

Amin was overthrown in 1979 by a Tanzanian-led invasion, which restored Milton Obote's government.¹⁴⁰ In the 1980 election poll, Obote's UPC secured only 12% of the votes in Luwero.¹⁴¹ Across Buganda, Obote consistently gained below 20% of the votes.¹⁴² In a secret memo dating from August 1980, Obote laid out a strategy calling for the intimidation of the Baganda and the elimination of the opposition leaders where necessary.¹⁴³

In the early to mid-1980s, prior to coming into power in 1986, the National Resistance Army (now the NRM), a guerrilla organization began its anarchical operations that lasted five years in the Luwero Triangle area in Central Uganda. The primary goal of the proponents of this conflict was to generate popular support as a means to oust the Uganda People's Congress Government.¹⁴⁴ Luwero district became the nexus of fighting during the 1980s Bush War between the United National Liberation Army and the NRA.¹⁴⁵ The most affected areas during the NRA bush war were Zirobe, Buzibwera, Kikyusa and Nakaseke.¹⁴⁶ The "Luwero Triangle" war claimed the lives of hundreds of combatants on both sides of the conflict as well as thousands of innocent civilians who were either deliberately targeted or were merely caught up in the crossfire between the warring armies.¹⁴⁷ A 2013 documentation of the war found that the NRA government had committed atrocities amounting to crimes against humanity in Burcoro and other villages in Northern Uganda.¹⁴⁸

Almost three decades after the end of the NRA insurgency, women survivors still suffer from the effects of the Luwero War. Despite suffering from their own injuries and displacement, women survivors were forced to assume the roles of their husbands and male relatives who had perished in the conflict.¹⁴⁹ Women survivors of this conflict now call for gender justice and an end of impunity for the violations that were committed during the Luwero War.¹⁵⁰

2.4. Uganda's Root Differences Culminate in the LRA conflict

¹⁴⁰ Sabiiti Mutengesha, "From Pearl to Pariah: The Origin, Unfolding and Termination of State-Inspired Genocidal Persecution in Uganda, 1980-85," *How Genocides End*, last modified December 21, 2006, accessed August 8, 2013, <http://howgenocidesend.ssrc.org/Mutengesha/index.html#3>.

¹⁴¹ Ibid.

¹⁴² Ibid.

¹⁴³ Ibid.

¹⁴⁴ Nelson Kasfir, "Dilemmas of Popular Support in Guerilla War: The National Resistance Army in Uganda, 1981-86" (paper presented at LiCEP 6 UCLA, November 2002), 19.

¹⁴⁵ Refugee Law Project, *NR&TJA 2012: Brief 14 - Luwero District*, Beyond Juba Project (n.p.: Refugee Law Project, 2012), accessed August 2, 2013, <http://www.beyondjuba.org/NRTJA/index.php#>.

¹⁴⁶ Refugee Law Project, *NR&TJA 2012: Brief 14 - Luwero*

¹⁴⁷ Dennis Otim, "Otunnu Turns on Charm Offensive in Luwero," *Uganda Correspondent*, November 22, 2010, accessed August 2, 2013, <http://www.ugandacorrespondent.com/articles/2010/11/otunnu-turns-on-charm-offensive-in-luwero/>.

¹⁴⁸ Justice & Reconciliation Project, *The Beasts at Burcoro: Recounting Atrocities by the NRA's 22nd Battalion in Burcoro Village in April 1991*, publication no. XVII (n.p.: n.p., 2013), 27.

¹⁴⁹ Eastern African Sub-regional Support Initiative for the Advancement of Women, *Women Peace Makers from Uganda, Kenya and South Sudan Meet to Share Post Conflict Coping Experiences* (n.p.: 2013), 10.

¹⁵⁰ Ibid.

The longest-lasting conflict in Uganda spanned over two decades between the Government of Uganda (GoU) and a number of rebel groups, most prominently the Lord's Resistance Army (LRA) in the Greater North. The conflict began in 1986 when the current President Yoweri Museveni ascended to power after defeating General Tito Okello Lutwa. The casualties of the conflict include an estimated 100,000 civilian deaths and 20,000 abducted children.¹⁵¹ Furthermore, by 2005, nearly two million people, which constitute approximately 90% of the Acholi-land population, had been internally displaced.¹⁵²

The conflict began as a popular revolt initiated by Okello's ousted army troops and their numerous civilian supporters who formed the Uganda People's Democratic Army. These rebels and their successors came together to form the Holy Spirit Movement of Alice Auma "Lakwena" and gained massive popular support in the north, as the Acholi population felt increasingly threatened by and angry at Museveni's new regime.¹⁵³

The Museveni rebellion against Obote has often been explained in the context of the North-South divide.¹⁵⁴ For many, the rebellion was merely a continuation of the ethnic competition that has typified Uganda politics - a case of Bantu-speaking Southerners wanting to remove Northerners speaking Nilotic languages from power.¹⁵⁵ The North-South divide can be explained in terms of the economic imbalance, as well as the social and political marginalization entrenched by the colonialists.¹⁵⁶ The British deliberately reserved the introduction of industry and cash crops for the South and regarded the North as a reservoir of cheap manual labour and recruits for the army.¹⁵⁷ This situation was never changed by the successive governments of post-colonial Uganda. The army was continuously and heavily recruited from the North, with the South enjoying relative economic prosperity.¹⁵⁸

The consequences of the conflict have been far-reaching and have severely destabilized the region. This has included the displacement of nearly 1.8 million people, the deaths and mutilations of tens of thousands of civilians and the abduction of children for recruitment into the LRA's forces.¹⁵⁹

¹⁵¹ Will Ross, "Forgiveness for Uganda's Former Rebels," BBC, last modified October 25, 2004, accessed August 16, 2013, http://news.bbc.co.uk/2/hi/programmes/from_our_own_correspondent/3951277.stm.

¹⁵² Uganda Human Rights Commission (UHRC) and United Nations High Commissioner for Human Rights (OHCHR), *The Dust Has Not yet Settled: Victims' Views on the Right to Remedy and Reparation* (n.p., 2011), xvi, accessed August 2, 2013, <http://www.ohchr.org/Documents/Press/WebStories/DustHasNotYetSettled.pdf>.

¹⁵³ Refugee Law Project, "Behind the Violence: Causes, Consequences and the Search for Solutions to the War in Northern Uganda" (working paper, February 2004), 4.

¹⁵⁴ Kasaija Phillip Apuuli, "Amnesty and International Law: The Case of the Lord's Resistance Army Insurgents in Northern Uganda" (2007), 37.

¹⁵⁵ *Ibid.*

¹⁵⁶ *Ibid.*

¹⁵⁷ *Ibid.*

¹⁵⁸ *Ibid.*

¹⁵⁹ Anne Kirstine Iversen, "Transitional Justice in Northern Uganda: A Report on the Pursuit of Justice in Ongoing Conflict" (PhD diss., Roskilde University, 2009), i.

2.5. Religious Conflict in Western Uganda

The Allied Democratic Forces (ADF) is a Ugandan rebel group based along the Rwenzori Mountains of the eastern part of the Democratic Republic of Congo. Most of its members are Islamists who want to establish Shari 'a law in Uganda.¹⁶⁰ The ADF was formed around 1998 through the merging of various streams of discontented sectors of Ugandan society that felt alienated after the overthrow of Idi Amin. The group appears to be receiving external funding from unknown sources. The ADF has inflicted damage and insecurity in the Rwenzori region of Uganda for over a decade and although its strength has diminished, it still constitutes a threat.¹⁶¹

2.6. Addressing the Causes of Uganda's Conflicts

The history of conflict in Uganda makes it clear that the underlying roots can be traced back to the British colonial period. As a means to control and entrench its power, the British Government created the "North-South divide" by militarizing the North and economically empowering the South thus fueling unrest and violent conflict in the country.

Furthermore, as can be seen by the aftermath of the Luwero war, namely that three decades after the conflict, people still feel that they deserve justice for the crimes that were committed, it is clear that the vicious cycle of impunity is also a likely cause of much unrest across the country.

As noted in Chapter I, transitional justice seeks to address the root problems of conflict with the goals of fostering national reconciliation and unity. In Chapter III, the paper will look at the current TJ landscape and mechanisms that have been implemented in Uganda. In Chapter IV, the paper will analyze the GoU's efforts to more comprehensively address the inherent problems of conflict by designing the world's first Transitional Justice Policy. We will address the challenges, and finally propose solutions to the linkage challenges envisaged based on lessons learned from other jurisdictions.

¹⁶⁰ "MONUSCO United Nations Organization Stabilization Mission in the DR Congo," MONUSCO, accessed August 6, 2013, <http://monusco.unmissions.org/Default.aspx?tabid=10727&language=en-US>.

¹⁶¹ Lindsay Scorgie, "Peripheral Pariah or Regional Rebel? The Allied Democratic Forces and the Uganda/Congo Borderland," *The Commonwealth Journal of International Affairs*, The Round Table ser., 100, no. 412 (2011).

III: THE TJ LANDSCAPE IN UGANDA

The GoU has adopted a combined approach towards dealing with post-conflict justice issues by applying both restorative and retributive justice mechanisms. A range of interventions have been used from peace negotiations, commissions of inquiry and implementation of policies like the Internally Displaced Persons Policy to the enactment of laws such as the Amnesty Act 2000 and the ICC Act 2010.¹⁶² These initiatives aim to address the deep-rooted problems that have arisen from the conflicts in Uganda.

It is important to note that despite these efforts, a lack of commitment and national strategy on how Uganda should address the past violations has resulted in a number of disconnected *ad hoc* TJ initiatives that have often led to TJ mechanisms clashing, which has consequently affected their capacity to operate effectively.

Transitional justice mechanisms were first mentioned during the Juba Peace negotiations, which took place between July 2006 and April 2008. These negotiations were the most significant to be held with the LRA.¹⁶³

The Juba Agreement on Accountability and Reconciliation

The transitional justice discourse in Uganda has largely been guided by the Juba Agreement on Accountability and Reconciliation. Article 2.1 provides that “the parties shall promote national legal arrangements, consisting of formal and non formal institutions and measures for ensuring justice and reconciliation with respect to the conflict.”¹⁶⁴ “The conflict” in this respect refers to the conflict in Northern Uganda.

Under Article 5.2 of the Agreement, the parties acknowledged the need for an overarching justice framework that would provide for the exercise of formal criminal jurisdiction and for the adoption and recognition of complementary alternative justice mechanisms.¹⁶⁵

The Agreement specifically noted in Article 5.1 that modifications may be required within the national legal system to ensure a more effective and integrated justice and accountability response.¹⁶⁶ The framers of this Agreement therefore envisaged that the process would require implementing legislation and/or a national policy to prioritize key areas and operationalize the Agreement, and would be particularly important in determining how the various TJ mechanisms would effectively work together.

¹⁶² Hillary Onek, “Opening Remarks” (Kampala, Uganda, July 18, 2012)

¹⁶³ ASF and Uganda Coalition on the ICC, *The 2012 International and Transitional Justice Forum*, 39.

¹⁶⁴ Article 2.1 of the Agreement on Accountability and Reconciliation between the Government of the Republic of Uganda and the Lord’s Resistance Army/Movement (2007).

¹⁶⁵ *Ibid.*, Article 5.2.

¹⁶⁶ *Ibid.*, Article 5.1.

Retributive Justice Elements in Uganda

1. FORMAL JUSTICE

Uganda has adopted a dual approach to the prosecution of serious crimes. Nationally, the International Crimes Division (ICD) of the High Court tries those responsible for serious crimes, which is complementary to the international judicial process of the ICC that focuses on prosecuting those 'most responsible' for serious crimes to the international community.

1.1. Domestic Prosecutions

Domestic prosecutions in Uganda related to the LRA conflict have been limited to prosecuting only those who have committed serious crimes. This is provided for at the national level by the ordinary penal laws and specific laws such as the International Criminal Court Act No. 10 of 2010 and the Geneva Conventions Act Cap. 363.

1.1.1. ICC Act 2010

The 2010 ICC Act was enacted to domesticate the Rome Statute in line with Uganda's international obligations. Specifically, it provides for the punishment of the international crimes of genocide, crimes against humanity and war crimes, as well as other crimes including piracy, human trafficking and terrorism.¹⁶⁷ Furthermore, it aims to enable Uganda to cooperate with the ICC in the performance of its functions including the investigation and prosecution of persons accused of having committed Rome Statute crimes, to provide for the arrest and surrender of those wanted by the ICC and to provide for various forms of requests for assistance to the ICC. The ICC Act strives to enable Ugandan courts to try, convict and sentence perpetrators of Rome Statute Crimes and to enforce any sentence imposed or order made by the ICC.¹⁶⁸

1.1.2. International Crimes Division

In 2008, in line with Agenda Item No. 3 of the Juba Peace Agreement, which called for the accountability of crimes perpetrated during the LRA conflict, Uganda established the War Crimes Division (WCD). The WCD was renamed the International Crimes Division (ICD) and has jurisdiction over crimes of genocide, crimes against humanity, war crimes, terrorism, human trafficking, piracy, and any other crimes as prescribed by law.¹⁶⁹ Thomas Kwoyelo, a mid-level LRA

¹⁶⁷ International Criminal Court Act, Parliament of Uganda (2010).

¹⁶⁸ Ibid.

¹⁶⁹ See Rule 6 (1) of the High Court (International Crimes Division) Practice Directions, Republic of Uganda (2011).

commander, is the only suspect to have been arraigned thus far before the Court.¹⁷⁰ The establishment of this division and the commencement of Kwoyelo's trial in Uganda marked the beginning of a practical application of the principle of complementarity.

Like the ICC, the ICD has opted to try only those "most responsible" for committing serious crimes. This, therefore, warrants the need to think about how other transitional justice mechanisms can deal with other categories of perpetrators and safeguard the needs of victims. The draft transitional justice policy discussed in Chapter IV seeks to address this.

The ICD's record in Uganda illustrates the limitations of retributive justice. The ICD is yet to bring a sense of justice to victims. Since no trials have been concluded and only one perpetrator has been arraigned before it, victims have only participated passively in the process.

1.2. International Prosecutions

The situation concerning the LRA was referred to the ICC's Office of the Prosecutor (OTP) by President Museveni in 2003.¹⁷¹ The ICC has only issued arrest warrants for senior LRA commanders namely Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen and Raska Lukwiya.¹⁷² All other perpetrators will be subject to prosecution by the domestic ICD.

On 13th October 2005, the ICC's Pre-Trial Chamber II unsealed their arrest warrants for crimes against humanity and war crimes committed in Uganda since 1st July 2002.¹⁷³ Despite claims that the Office of the Prosecutor has conducted investigations into violations committed by the government's military, the ICC's OTP has yet to release those results.¹⁷⁴ The ICC has been involved in outreach activities and has provided victims with financial and psycho-social rehabilitation through the Trust Fund for Victims. However, in the absence of judicial developments seeing that no arrests that have been made, the situation in Uganda has become less active.

¹⁷⁰ This case is currently on appeal before the Supreme Court where the Attorney General is challenging the ruling of the Constitutional Court which declared that Thomas Kwoyelo like any other person, is entitled to a grant of amnesty.

¹⁷¹ International Criminal Court, "ICC - President of Uganda refers situation concerning the Lord's Resistance Army (LRA) to the ICC," news release, January 29, 2004.

¹⁷² Prosecutor v. Joseph Kony, Okot Odhiambo, Raska Lukwiya, Dominic Ongwen, ICC-02/04-01/05 International Criminal Court 1 (ICC Pre-Trial Chamber II 2007).

¹⁷³ International Criminal Court, "ICC - President of Uganda," news release.

¹⁷⁴ Patrick Wegner, "Self-Referrals and Lack of Transparency at the ICC – The Case of Northern Uganda," Justice in Conflict, last modified April 4, 2011, accessed August 10, 2013, <http://justiceinconflict.org/2011/10/04/self-referrals-and-lack-of-transparency-at-the-icc-%E2%80%93-the-case-of-northern-uganda/>.

1.3. Current Limitations of Formal Justice

One of the main hindrances to domestic prosecutions is the blanket amnesty that was reinstated in May 2013. Many of the former commanders who may have been of interest to the ICD cannot be prosecuted before domestic courts as they were granted an amnesty certificate. The problem posed by this blanket amnesty manifested itself in the case of Thomas Kwoyelo. In a constitutional appeal filed by Kwoyelo's defence team challenging the Directorate of Public Prosecution's (DPP) decision to grant him amnesty, the Constitutional Court declared that he was entitled to grant of amnesty.¹⁷⁵ Nevertheless, he is yet to receive the amnesty certificate and be released from prison.

Furthermore, another challenge is the mixed perceptions regarding using the ICD and the ICC as a means of attaining justice. While the ICC's Outreach Office based in Kampala conducts regular sensitization initiatives in the North to inform communities of the ICC's progress, there is still a general lack of understanding of the ICC's role and its mandate. Furthermore, the ICD currently has no outreach component and has thus most victims have a limited understanding of its work and the avenues for their potential engagement with the ICD.

The lack of understanding of the ICD and the ICC role and mandate raises other challenges, especially when the formal justice mechanisms are seen as a replacement for traditional justice mechanisms. Many victims believe that this is unfair considering that most perpetrators were also victims. In a 2012 survey on victims' perceptions in Acholi-land, the area from which Joseph Kony is from, some victims were of the view that only those who had willingly joined the LRA should be prosecuted.¹⁷⁶ Many victims also believe that traditional justice can serve as a more appropriate and relevant mechanism.

¹⁷⁵ The Constitutional Court of Uganda, Constitutional Petition No 05/2011 (Reference).

¹⁷⁶ Justice & Reconciliation Project, *To Pardon or to Punish? Current Perceptions and Opinions on Uganda's Amnesty in Acholi-land* (n.p.: n.p., 2011), 2.

Restorative Justice Elements in Uganda

2. TRADITIONAL JUSTICE

Following independence, traditional justice mechanisms (TJM) were prohibited in favor of the British Court System.¹⁷⁷ Despite this however, the practical application of TJMs as a transitional justice tool has been witnessed across Northern Uganda, particularly in an effort to help communities deal with the aftermath of the LRA conflict.¹⁷⁸ The Karamojong, for example, rely on *akiriket* councils of elders to adjudicate disputes according to traditional customs.¹⁷⁹ This forum incorporates various cultural teachings and ritual cleansing ceremonies.¹⁸⁰ In the south, the Baganda are known to sometimes use *kitewuliza*, which is a juridical process with a strong element of reconciliation to bring justice.¹⁸¹ The Lugbara utilize a system of elder mediation in family, clan and inter-clan conflict.¹⁸²

The 2007 Juba Agreement on Accountability and Reconciliation recognized that traditional justice measures and institutions should be promoted alongside formal legal arrangements to ensure justice and reconciliation.¹⁸³ The delegates at Juba drew an important conclusion, namely that traditional justice systems should be more appropriately viewed as *parallel* to formal justice, rather than as an alternative.¹⁸⁴ The Agreement specifically mentioned traditional justice mechanisms such as *Culo Kwor*, *Mato Oput*, *Kayo Cuk*, *Ailuc*, *Tonu ci Koka* and others practiced in communities affected by the conflict.¹⁸⁵

2.1. Current Limitations of Traditional Justice

The geographical location of the conflict has necessarily had an impact on the need and use of TJMs. It is indeed important to note that the use of traditional mechanisms as a conflict resolution tool is pervasive in Northern Uganda. Traditional practices like *mato oput* and *nyono tong gweno* have been adapted to

¹⁷⁷ Joanna R. Quinn, "'The Thing Behind the Thing': The Role and Influence of Religious Leaders on the Use of Traditional Practices of Acknowledgement in Uganda" (paper presented at Annual Meeting of the Canadian Political Science Association, Ottawa, May 28, 2009), 2.

¹⁷⁸ *Ibid.* 3.

¹⁷⁹ Refugee Law Project, Lucy Hovil, and Joanna R. Quinn, "Peace First, Justice Later: Traditional Justice in Northern Uganda" (working paper, July 2005), 24.

¹⁸⁰ *Ibid.*

¹⁸¹ Quinn, "'The Thing Behind the Thing'", *op. cit.*, 3.

¹⁸² *Ibid.*

¹⁸³ Article 2.1 of the Juba Agreement on Accountability and Reconciliation.

¹⁸⁴ Marieke Wierda and Michael Otim, "Justice at Juba: International Obligation and Local Demands in Northern Uganda," in *Courting Conflict? Justice, Peace and the ICC in Africa*, by Royal African Society, ed. Nicholas Waddell and Phil Clark (n.p.: 2008), 24.

¹⁸⁵ *Ibid.*, Article 3.1.

welcome former child combatants back into their communities.¹⁸⁶ While other parts of the country have used traditional mechanisms to deal with community disagreements over land and property for example, they have not been as widely and comprehensively applied.

A report on *mato oput* revealed that 86% of participants believed that it should be used for war-related offences.¹⁸⁷ Despite this support, they also concluded that traditional justice principles needed to be detailed further, for example, how should intra-tribal ceremonies deal with inter-tribal crimes?¹⁸⁸ A concern among delegates at Juba was the actual capacity of traditional structures to take on the large numbers of cases and how they would adapt to deal with different violations.¹⁸⁹ This concern may have arisen because of the prospect of widening the mandate of these structures to allow them to have jurisdiction over broader post-conflict justice issues. The delegates also had to consider how to proceed with unknown perpetrators and how to apply traditional ceremonies to sexual or abduction-related crimes rather than killings.¹⁹⁰

Beside, the inability of most perpetrators to provide compensation to their victims also proves to be an important challenge to the use of *mato oput*.¹⁹¹ It will be difficult, if not impossible, to collect compensation from the perpetrators' clans commensurate to the extent of the violations that took place during the conflict. If attempted, this would likely devastate their livelihoods.¹⁹²

At last, another challenge related to linkages includes the inability of perpetrators or victims to come forward and participate in these processes. This can occur in cases where they may have been killed or are still missing, as well as from a lack of will of both victims and perpetrators to participate in the reconciliatory process in fear or re-traumatization or stigmatization.¹⁹³

¹⁸⁶ Quinn, "The Thing Behind the Thing", 3

¹⁸⁷ Collaborative Transitions Africa, Institute for Global Leadership, Tufts University, and Institute for Peace and Strategic Studies, Gulu University, *Community Perspectives on the Mato Oput Process: A Research Study by the Mato Oput Project* (n.p.: 2009), 17.

¹⁸⁸ Ibid., 24.

¹⁸⁹ Ibid., 24.

¹⁹⁰ Ibid.

¹⁹¹ Ibid.

¹⁹² Ibid.

¹⁹³ Ibid., 18.

3. TRUTH TELLING

There is no specific clause in Uganda's legal framework that directly provides for the "right to truth." There is therefore no direct recognition of truth seeking processes as a means of realizing post-conflict justice. However, the right to truth is implied in the 1995 Constitution, which provides for the establishment and nurturing of institutions and procedures to resolve conflicts fairly and peacefully¹⁹⁴; the respect for international law and treaty obligations;¹⁹⁵ and, the recognition of the mandates of commissions of inquiry that existed prior to the enactment of the Constitution.¹⁹⁶

The 2007 Juba Agreement on Accountability and Reconciliation recognized the need for a comprehensive, independent and impartial analysis of the history of the conflict, as well as the human rights violations that were committed to attain "reconciliation at all levels."¹⁹⁷

There have been two commissions of inquiry established to deal with past human rights violations and disappearances in Uganda. The 1971 Commission of Inquiry was established by President Idi Amin Dada to inquire into the disappearance of people in Uganda.¹⁹⁸ Approximately 308 cases of disappeared people were presented before the Commission; however the report has still not been published.¹⁹⁹ It is currently unclear whether the Government of Uganda has implemented the Commission's recommendations. The Commission of Inquiry into Violations of Human Rights (CIVHR), also known as the *Oder* Commission was established by President Museveni to inquire into the human rights abuses that occurred between December 1962 and January 1986.²⁰⁰ The CIVHR's report, which was published in 1994 detailed arbitrary arrests, detention and imprisonment, and recommended that the law on detention without trial be repealed.²⁰¹ Unfortunately, the report was not widely circulated.

The limited successes of Uganda's truth telling mechanisms and the need to meet victims' expectations of the right to truth suggests that there is an ever important need for truth telling based upon these expectations.

¹⁹⁴ Principle III on National Unity and Stability of the National Objectives and Directive Principles of State Policy, Constitution of the Republic of Uganda (1995).

¹⁹⁵ *Ibid.*, Principle XXVIII on Foreign Policy Objectives.

¹⁹⁶ Article 278 of the 1995 Constitution providing among others that any commission or committee of inquiry in existence immediately before the coming into force of this Constitution may continue in existence until the submission of its report unless otherwise dissolved in accordance with the law.

¹⁹⁷ Article 2.3 of the Juba Agreement on Accountability and Reconciliation.

¹⁹⁸ Justice Law and Order Sector, *Traditional Justice and Telling and National Reconciliation* (Kampala, Uganda: JLOS, 2012), 3.

¹⁹⁹ "Truth Commission in Uganda," TRIAL, last modified July 30, 2013, accessed August 15, 2013, <http://www.trial-ch.org/index.php?id=962&L=5>.

²⁰⁰ Justice Law and Order Sector, *Traditional Justice and Telling*, 3.

²⁰¹ "Truth Commission: Uganda 86," United States Institute of Peace, accessed August 12, 2013, <http://www.usip.org/publications/truth-commission-uganda-86>.

3.1. Current Limitations of Truth Telling

One of the biggest problems with the truth telling commissions that were implemented is that the first 1971-74 Inquiry did not publish its findings and the 1962-94 Inquiry has yet to widely circulate its report. Furthermore, the extent to which recommendations from these Commissions have been implemented is still uncertain.

An early difficulty experienced by the CIVHR was what role it should play in relation to the prosecutions of human rights violators led by the Directorate of Public Prosecutions (DPP). The popular view was that the Commission would gather the evidence that the Government could then use to try human rights violators.²⁰² However, the Commissioners and the Attorney General's office soon realized that such a procedure would deter many people from testifying. They therefore agreed that the police and public prosecutors should not have privileged access to evidence gathered by the Commission, but that the Commission's staff could send the public record of the hearings to the DPP.²⁰³ It was thus decided that police investigations should be pursued independently of those conducted by the Commission. This solution allowed the State to more easily convict human rights violators in Court after a thorough police investigation.²⁰⁴

²⁰² Amnesty International, *Uganda: The Human Rights Record 1986-1989*, publication no. AFR/59/01/89 (London, United Kingdom: Amnesty International, 1989), 11.

²⁰³ Ibid.

²⁰⁴ Ibid.

4. REPARATIONS

Victims in the north have emphasised their right to remedy and reparation for the serious abuses they suffered that qualify as violations of international human rights law and international humanitarian law.²⁰⁵

Reparations, which are envisaged in Article 9 of the Juba Agreement on Accountability and Reconciliation, include rehabilitation, restitution, compensation, guarantees of non-recurrence and other symbolic measures such as apologies, memorials and commemorations.²⁰⁶ The Agreement also stresses the need for individual and collective reparations. In addition, the Juba Agreement envisaged the payment of reparations as a part of the accountability process.²⁰⁷

A survey conducted by the Uganda Human Rights Commission (UHRC) together with the UN Office of the High Commissioner for Human Rights found that of the 2,000 victims surveyed, the majority advocated for the establishment of a fact-finding inquiry to document the serious violations that occurred.²⁰⁸ The victims believed that the violations dated back to before the 1986 LRA conflict and that a broader view of reparations was therefore necessary.²⁰⁹ They believed that remedy should include the right to: equal and effective access to justice; adequate, effective and prompt reparation for harm suffered; access to relevant information concerning violations and reparation mechanisms; and, access to fair and impartial proceedings.²¹⁰ They also highlighted the need to create a national public record, and called for the implementation of witness protection measures to allow them to speak freely about the abuses that had taken place.²¹¹

Reparations for members of vulnerable groups were prioritized in Article 9 of the Juba Agreement on Accountability and Reconciliation.²¹² A 2012 briefing paper by the International Center for Transitional Justice found that some victim groups believed that reparations should be distributed to these vulnerable groups as a priority.²¹³ Two categories of victims are in urgent need of special care and interim reparations as they have lost their source of livelihood and face increased stigma and exclusion.²¹⁴ The first category includes victims who suffer from mental disabilities and deformities and require immediate rehabilitation and surgical treatment.²¹⁵ Some of their injuries include dismemberment, mutilation,

²⁰⁵ UHRC and OHCHR, *The Dust Has Not yet Settled, Victims' Views on the Right to remedy and reparation*, Kampala, 2011, xv.

²⁰⁶ Article 9 of the Juba Agreement on Accountability and Reconciliation.

²⁰⁷ Ibid., Article 9.3.

²⁰⁸ UHRC and OHCHR, *The Dust Has Not yet Settled*, *op. cit.*, xvi.

²⁰⁹ Ibid., xvi.

²¹⁰ Ibid., xvi.

²¹¹ Ibid., xvi.

²¹² Article 9 of the Juba Agreement on Accountability and Reconciliation.

²¹³ International Center for Transitional Justice, *Reparations for Northern Uganda: Addressing the Needs of Victims and Affected Communities* (Kampala, Uganda: ICTJ, 2012), 3.

²¹⁴ Ibid.

²¹⁵ Ibid.

castration, burns, shrapnel, and bullet and bombardment wounds.²¹⁶ The second category includes victims of sexual and gender-based violence (SGBV). As a result of the abduction of thousands of girls and the sexual slavery that they were forced to undergo, SGBV victims need special treatment for a series of physical and mental problems caused including reconstructive surgeries or treatment of acute problems connected to the reproductive system. Many men also suffered sexual abuse and must be catered for as well. Since many of these people suffer social alienation and economic disempowerment, interim reparations have become a pressing concern.²¹⁷

The Trust Fund for Victims (TFV), established under the ICC's Rome Statute,²¹⁸ also has a mandate to award reparations, which is noted in Rule 98 of the ICC Rules of Procedure. The mandate of this body is two-fold, that is, to implement court-ordered reparations; and to provide physical and psychosocial rehabilitation or material support to victims of crimes within the jurisdiction of the ICC.²¹⁹ In a recent decision establishing the principles and procedures to be applied to reparations, the Trial Chamber recognized that the TFV is well-placed to determine the appropriate forms of reparations and to implement them.²²⁰

4.1. Current Limitations of Reparations

The biggest challenge with regard to reparations in Uganda has been the Government's mistaken perception that implementing development programs or monetary awards on an ad hoc basis qualify as reparations.

Over the years, ad hoc monetary awards have been made by the GoU and these have often falsely been labeled as "reparations". An example of such awards is the ongoing compensation to the Acholi War Debt Claimants Association (AWDCA). The association represents Acholi claimants who lost property and livestock during the two decades LRA insurgency.²²¹ The payments made to the association do not constitute reparations because reparations are at the base "a legal entitlement based on an obligation to repair harm", which requires an element of recognition of the harm done, a clear process highlighting the eligibility of beneficiaries and forms of reparations. Furthermore, reparations serve to redress individual harm where the State formally takes responsibility for

²¹⁶ Ibid., 3.

²¹⁷ Ibid., 4.

²¹⁸ Article 79.1 of the Rome Statute of the International Criminal Court (1998) : A Trust Fund shall be established by decision of the Assembly of State Parties for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims.

²¹⁹ "Welcome/ Bienvenue," The Trust Fund for Victims, accessed August 16, 2013, <http://www.trustfundforvictims.org/>.

²²⁰ Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06 International Criminal Court (ICC Trial Chamber I 2012).

²²¹ "Govt Releases Shs5 Billion to Acholi War Debt Claimants," Acholi Times, last modified February 4, 2013, accessed August 15, 2013, <http://acholitimes.com/index.php/news/acholi-news/1186-govt-releases-shs5-billion-to-acholi-war-debt-claimants-association>.

the harm for which it is liable.²²² While these governmental contributions have undoubtedly been beneficial, a targeted policy needs to be implemented.

Similarly, the Peace Recovery and Development Plan (PRDP) for Northern Uganda, which was operationalised in 2007 is a comprehensive development framework that focuses on reconstruction and rehabilitation in Northern Uganda.²²³ PRDP's four strategic objectives include the consolidation of state authority, rebuilding and empowering communities, revitalizing the economy and peace building and reconciliation.²²⁴ This development program is oftentimes mistakenly perceived as a reparations program. In such circumstances, the Government of Uganda has failed to differentiate between its duty to stimulate economic development in the North, which has historically been disadvantaged, and a comprehensive reparations program targeting victims of the human rights violations that occurred. While development projects are important, they should not replace reparation measures, but rather be mutually reinforcing and go hand-in-hand with a government-designed comprehensive reparations program to ensure that victims receive the maximum benefits.

Another challenge is the absence of a national reparations policy or program, including an interim reparations program. A 2013 report by ASF and AYINET found that victims expressed a dire need for urgent measures through an interim reparations program before the finalization of the Transitional Justice Policy.²²⁵ The victims recommended that provisions in the Policy should be designed to deal with this challenge.

To date, there is no mechanism that specifically deals with victims' reparations. The GoU has yet to institute a comprehensive victims' reparations program that addresses their individual and collective needs.

²²² International Center for Transitional Justice, *Reparations for Northern Uganda*, 5.

²²³ PRDP Strategic Objectives," accessed August 16, 2013, http://www.prdp.org.ug/index.php?option=com_content&view=article&id=7&Itemid=106.

²²⁴ Ibid.

²²⁵ Avocats Sans Frontières, *Commentary on Uganda's Draft National Transitional Justice Policy 2013*, comp. Sharon Esther Nakandha and Kendra Alexia Hefti-Rossier (Kampala, Uganda: Avocats Sans Frontières, 2013), 16.

5. AMNESTY

Successive governments in Uganda have used the instrument of amnesty to end various insurgencies.²²⁶ For example, after overthrowing the Obote II Government, the military junta led by General Tito Okello invited all other groups that had been fighting against Obote to join his Government.²²⁷ Implicitly, the military junta amnestied these groups of all the crimes that they had committed during their insurgencies.²²⁸ When President Museveni came to power, he also used an amnesty to lure his political opponents from exile.²²⁹ As a result, people like former military junta leader Tito Okello and his Deputy Wilson Toko ended their exile and returned home.²³⁰ In 1988 when Museveni concluded a peace agreement with the rebel group UPDA/M, an amnesty for the former rebels was a part of the peace deal.²³¹

In 1987, the National Resistance Council (NRC), the Parliament of Uganda at the time, passed the Amnesty Statute which sought to encourage the various fighting groups and their sponsors to end their activities.²³² This statute excluded crimes such as genocide, murder, kidnapping and rape from its ambit.²³³ Similarly, the 1999 amnesty bill sought to exclude those crimes.²³⁴ The Acholi Religious Leaders Peace Initiative (ARLPI) however, rejected this and strongly advocated for the adoption of a blanket amnesty without any limitations.²³⁵ The leaders stated that a blanket amnesty would be in line with the aspirations of the people of Acholi at home and abroad.²³⁶ They justified this assertion by stating that most combatants in the LRA that had committed violations had been forcibly abducted and victimized and therefore deserved amnesty.²³⁷ Furthermore, war-weariness, the prolonged suffering and the diminished trust in a military solution created an environment where peace talks and amnesty were perceived as a more worthy conflict resolution measure.²³⁸

In 2000, the Ugandan Parliament enacted a blanket amnesty through the Amnesty Act, as a tool to end rebellions in Uganda by encouraging rebels to lay down their arms without fear of prosecution.²³⁹ The promise of amnesty and reintegration has played a vital role in motivating fighters to escape or defect

²²⁶ Kasaija Phillip Apuuli, "Amnesty and International Law: The Case of the Lord's Resistance Army Insurgents in Northern Uganda" (2007), 43.

²²⁷ Ibid.

²²⁸ Ibid.

²²⁹ Ibid.

²³⁰ Ibid., 44.

²³¹ Apuuli, "Amnesty and International Law," 44.

²³² B. Afako, "Short of International Obligations? Uganda's Amnesty Act and the Agreement on Accountability and Reconciliation" (PhD diss., University of Pretoria), 105.

²³³ Ibid., 66.

²³⁴ Ibid., 105.

²³⁵ Ibid.

²³⁶ Ibid.

²³⁷ Ibid.

²³⁸ Ibid.

²³⁹ Kasper Agger, "The End of Amnesty in Uganda: Implications for LRA Defections," Enough Project, last modified August 30, 2012, accessed August 10, 2013, <http://www.enoughproject.org/publications/end-amnesty-uganda-implications-lra-defections>.

from the LRA's ranks.²⁴⁰ The Amnesty Act declared amnesty in respect to any Ugandan who "engaged in or is engaging in war or armed rebellion against the government" since January 26th 1986.²⁴¹ According to the law, reporters are issued an amnesty certificate as prescribed in the regulations to the Act after they renounce and abandon their involvement in the war or armed rebellion and surrender any weapons in their possession.²⁴² As a result, over 26,000 persons have benefited from the amnesty process and about 5,000 have been reintegrated into their communities.²⁴³

In 2006, Section 2A of the Amnesty (amendment) Act introduced a new aspect to the amnesty law by giving the Minister the power to declare by statutory instrument and with the approval of Parliament that some individuals are ineligible for amnesty. The inclusion of Section 2A informed the Constitutional Court's decision to declare that Uganda does not offer blanket amnesty.²⁴⁴

The case of Thomas Kwoyelo, a former mid-level commander of the LRA whose trial began before the ICD in 2011, presented the first test case on the legality of amnesties in Uganda.²⁴⁵ In his case, the Constitutional Court declared that he was entitled to a grant of amnesty and to support this conclusion commented that despite Section 2A,

*"The Directorate of Public Prosecutions can still prosecute persons who are declared ineligible for amnesty by the Minister responsible for Internal Affairs or those who refuse to renounce rebellion. He can also prosecute any Government agents who might have committed grave breaches of the Geneva Conventions Act, if any. The Amnesty Act unlike the South Africa Truth and Reconciliation Act did not immunise all wrongdoers..."*²⁴⁶

In 2012, the Minister of Internal Affairs Hilary Oniek passed an instrument in which key sections of the Amnesty Act finally lapsed.²⁴⁷ The decision finds its legal basis in the powers given to the Minister to declare the lapse of Part II of the Act under Section 16(3) of the Amnesty Act (as amended in 2006).²⁴⁸ The Minister decided to allow the amnesty clause to lapse following a JLOS/TJWG review of the law and an opinion given by the Attorney General's office

²⁴⁰ Ibid.

²⁴¹ Amnesty Act, Parliament of Uganda (2000).

²⁴² Ibid.

²⁴³ National Transitional Justice Working Group, *Draft National Transitional Justice Policy*, 20.

²⁴⁴ Avocats Sans Frontières and Sharon Esther Nakandha, *Amnesty: An "Olive Branch" in Justice? Amnesty Advocacy Tool for Uganda* (Kampala, Uganda: ASF, 2012), 20.

²⁴⁵ Thomas Kwoyelo alias Latoni v. Attorney General Constitutional Reference No. 35 (Uganda Constitutional Court 2011).

²⁴⁶ One should nevertheless recall that if the South African amnesty did offer amnesty to offenders from both state and non-state groups, this was an individual and conditional process. Offenders had to apply and comply with conditions and only 1,117 were finally granted amnesty. Avocats Sans Frontières and Nakandha, *Amnesty: An "Olive Branch" in Justice?*, 20.

²⁴⁷ The Amnesty Act (Declaration of Lapse of the Operation of Part II) Statutory Instrument No. 34 of 2012, Republic of Uganda (23 May 2012).

²⁴⁸ The Amnesty (Amendment) Act, 2006, Republic of Uganda (24 May 2006).

stipulating that the amnesty contravened Uganda's international legal obligations.²⁴⁹

The implication of the May 2012 instrument²⁵⁰ was that amnesty in Uganda ceased and hence was non-existent.²⁵¹ Part I, III and IV of the Amnesty Act were extended under Statutory Instrument No. 35 of 2012 for a period of 12 months.²⁵² The extension of Part III means that the Amnesty Commission shall continue discharging its duties of demobilization, reintegration, resettlement of reporters, and sensitization of the general public on the Amnesty Law and promote appropriate reconciliation mechanisms to affected communities.²⁵³

In 2013, following appeals from specific actors, Minister Onek rescinded this decision by passing Amnesty Act (Revocation of Statutory Instrument No. 34 of 2012) Statutory Instrument No. 17 of 2013, which revoked the 2012 Statutory Instrument that had declared the lapse of Part II, thus reinstating the entire Amnesty Act and consequently marking a return to the blanket amnesty regime. This followed a petition submitted to Parliament by traditional leaders and CSOs in the areas affected by the LRA in Uganda, the DRC and the Central African Republic on the lapsing of the operation of Part 11 of the Amnesty Act Cap. 294 (as amended).²⁵⁴ The Committee concluded that the lapsing of Part II of the Act was unnecessary since the conflicts which the Amnesty Act was designed to address still continue but have relocated to other countries²⁵⁵, rebels and captives still seek to return to Uganda²⁵⁶, and, there is strong support for the amnesty in the affected areas.²⁵⁷

The Committee further pointed out the lapse of Part II had begun to have negative effects within affected communities where former LRA combatants, in particular those who had already been amnestied, now lived in fear that despite possessing amnesty certificates, they may be prosecuted.²⁵⁸ In addition, the Committee, upon examining the Act, concluded that the lapse of Part II was unnecessary since the Act already included provisions to ensure the exclusion of individuals deemed unsuitable for amnesty and thus allow for their prosecution.²⁵⁹ In the opinion of the Committee, the Amnesty Act has adequate provisions for promoting alternative reconciliation and accountability measures

²⁴⁹ JLOS Review process, see www.jlos.go.ug

²⁵⁰ The Amnesty Act (Declaration of Lapse of the Operation of Part II) Statutory Instrument No. 34 of 2012.

²⁵¹ "The Status Amnesty in Uganda (Part 2)," Republic of Uganda Justice Law and Order Sector, accessed August 11, 2013, <http://www.jlos.go.ug/index.php/document-centre/news-room/archives/item/211-the-status-amnesty-in-ugandapart2>.

²⁵² Ibid.

²⁵³ Ibid.

²⁵⁴ *Report of the Parliamentary Committee on Defence and Internal Affairs 1.*

²⁵⁵ Ibid., 38.

²⁵⁶ Ibid.

²⁵⁷ Ibid.

²⁵⁸ Ibid., 39.

²⁵⁹ Ibid.

including addressing the needs of victims, but is only hampered by inadequate resources and difficulties in implementation.²⁶⁰

Nevertheless, the Minister's legal authority to rescind his 2012 decision lapsing Part II of the Act is questionable considering that there is no apparent legal basis giving him this power. This has led to legal confusion on the actual status of the Amnesty law in Uganda today. This nonetheless poses serious obstacles to the justice sector in pursuing prosecutions against key war criminals.

5.1. Current Limitations of Amnesty

In Uganda, the primary challenge has been the clash between the formal justice processes conducted by the ICD, as was evidenced in Thomas Kwoyelo's case, which is outlined in detail in section 1.3. In a May 2013 letter to the Ministry of Internal Affairs, ASF pointed out that amnesty has undermined victims' rights to truth and justice for conflict crimes.²⁶¹ To date, the majority of victims have not been adequately honoured, redressed, rehabilitated, and have not played an active role in the national transitional justice process.²⁶²

²⁶⁰ *Report of the Parliamentary Committee on Defence and Internal Affairs*, 39.

²⁶¹ Avocats Sans Frontières, "Consideration of Reintroduction of Blanket Amnesty," letter to Honorable Minister Hilary Onok, May 20, 2013.

²⁶² *Ibid.*

IV: EXPLORING LINKAGE SOLUTIONS IN THE DRAFT TJ POLICY

In May 2013, JLOS' national Transitional Justice Working Group (TJWG) released the third draft of the Transitional Justice Policy to "address justice, accountability and reconciliation needs of post conflict Uganda."²⁶³ This national TJ policy will be the world's first national policy to comprehensively provide for a transitional justice strategy to implement various TJ mechanisms.²⁶⁴

The TJ policy will specifically address issues of accountability and justice for victims of mass atrocities, and assist communities that have been devastated by conflict through a social transformation, as well as achieve a lasting peace. The development of this policy is an attempt to address the root causes of conflict related to the human rights violations that have taken place.²⁶⁵

The TJ policy currently provides for (1) formal justice (2) traditional justice (3) truth telling (4) reparations (5) conditional amnesty. Even though the Policy details some challenges associated with each of these TJ mechanisms, it provides only limited recommendations on the prospective problems of and solutions to the simultaneous application of these mechanisms. Establishing linkages between these mechanisms would promote the GoU's goals of designing a comprehensive policy and help to anticipate the linkage challenges that will arise.

This chapter therefore specifically outlines some linkage problems and draws from the lessons learned of countries that have implemented concurrent TJ mechanisms in an effort to identify specific recommendations for Uganda's situation.

It is important to clarify that the TJ mechanisms should be independent of one another given their specific roles, but can be designed in a complementary manner. The 'linkages' recommended in this chapter therefore specifically relate to creating a complementary TJ framework by drawing informal links between the mechanisms in a way that mutually reinforces their individual mandates.

²⁶³ National Transitional Justice Working Group, *Draft National Transitional Justice Policy*, 3.

²⁶⁴ Ibid.

²⁶⁵ Ibid.

Retributive Justice in the Draft TJ Policy

1. FORMAL JUSTICE

The draft National TJ Policy states that as much as the formal justice system in Uganda has established institutions and processes to administer justice, there are still transitional gaps that need to be addressed.²⁶⁶ The policy identifies the following as most pertinent: the protection of witnesses, the participation of victims in proceedings and access to justice by the vulnerable especially children and women in post conflict situations.²⁶⁷

Draft TJ Policy on the challenges of formal justice

The draft TJ policy recognizes the following challenges with regard to formal justice processes:

- i. There are limitations including; legal constraints in definitions of key terms like reparations, victims, the application of the law in respect to participation of victims in proceedings, protection of witnesses, admissibility of evidence in mass crimes in transitional justice processes given the protracted length of conflict, retrospective application of the law in relation to crimes committed before they were criminalized nationally. An example is illustrated in cases of the ADF and the LRA, where there exists a victim perpetrator dilemma due to the abductions where there is a thin line between who is the perpetrator and who is the victim.”
- ii. The formal justice process currently constrained by lack of mechanisms to enhance victim participation and witness’s protection which are critical aspects for transitional justice.
- iii. Formal justice processes are not designed to promote critical values of reconciliation, restoration and healing which are indispensable in TJ mechanisms. However, consultations by the sector revealed possibility of complementarity between the formal justice processes and alternative justice mechanisms; and most of all promoting peace, stability and security of person and property.

²⁶⁶ National Transitional Justice Working Group, *Draft National Transitional Justice Policy*, 24.

²⁶⁷ Ibid.

The draft TJ policy states that:

"Government shall ensure witnesses are protected and victims participate in proceedings and to the extent possible, remove barriers for access to justice by victims especially the vulnerable."²⁶⁸

In order to realize the above, the GoU plans to expedite the enactment of legislation on witness protection and victim participation and enact a transitional justice Act to address matters of jurisdiction and implementation.²⁶⁹

1.1. Prospective Linkage Challenges Between Formal Justice and Other TJ Mechanisms

1.1.1. Prospective Linkage Challenges Between Formal Justice and Traditional Justice

In a 2012 report by JLOS, 44% of respondents were in favor of integrating TJMs into the formal justice system.²⁷⁰ This complementary relationship is highlighted in the draft TJ policy, which can go a long way in allaying misperceptions of the formal justice sector, enhancing access to justice and most of all promoting peace, stability and security of person and property.²⁷¹ However, while this may indeed be beneficial, strengthening a formal relationship between these mechanisms may be problematic due to their conflicting retributive and restorative purposes, which were highlighted in Chapter I. Furthermore, the draft TJ Policy does not clearly spell out the limited jurisdiction of TJMs in handling mass conflict crimes.²⁷² This is necessary to provide clarity on the kinds of disputes that are likely to be resolved through the traditional justice system, and prevent conflicting jurisdictions.²⁷³

1.1.2. Prospective Linkage Challenges Between Formal Justice and Truth Telling

There is no overlap between truth telling processes and formal justice mechanisms per se since the two serve distinct purposes – the former provides the background to any conflict and the latter focuses on accountability. However, in the event that the two processes are not properly implemented, a number of challenges may arise.

The work of a truth commission may influence proceedings against indicted individuals before the ICC and the ICD respectively. For example, if a report is

²⁶⁸ National Transitional Justice Working Group, *Draft National Transitional Justice Policy*, 25.

²⁶⁹ *Ibid.*, 24.

²⁷⁰ Justice Law and Order Sector, *Traditional Justice and Telling*, 104.

²⁷¹ *Ibid.*, 16-17.

²⁷² *Avocats Sans Frontières, Commentary on Uganda's Draft TJ Policy*, 12.

²⁷³ *Ibid.*

released by the truth commission, it may impact the work of the ICD by providing evidence of one of the defendant's culpability. This could prove problematic considering that a truth commission may not apply the ICD's same standard of burden of proof.

Transitional justice scholar Priscilla Hayner also argues that it would be nonsensical for a truth commission to write the history of a conflict without commenting on the role of senior officials.²⁷⁴ In that regard, the current demarcation of the most responsible and less responsible raises a problem because the truth telling process could be limited in its scope.

Lastly, a further challenge could arise when the truth commission completes its work and releases its report. Should it be made public without appropriate witness protection measures such as confidentiality, the report may jeopardize the safety of witnesses and victims.²⁷⁵ This challenge has already been experienced by Uganda's CIVHR.²⁷⁶ In addition, it is necessary to ensure that the mandates of the truth commission and formal justice processes are precisely defined so that no overlap exists.

²⁷⁴ Priscilla B. Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions* (Madison Avenue, NY: Routledge, 2011), 111.

²⁷⁵ Hayner, *Unspeakable Truths: Transitional Justice*, 113.

²⁷⁶ Amnesty International, *Uganda: The Human Rights Record*, 11.

1.2. Exploring Linkage Solutions Based on Case Studies

The Situation in Sierra Leone

Sierra Leone is a post-transitional state that experienced a coordinated international military intervention by a UN peacekeeping force and British troops in an effort to end the conflict, which was followed by a peace agreement and elections.

The TJ process was initiated after an eleven-year civil war that became known for the acts of mutilation and sexual violence that were perpetrated, as well as for targeting children. The conflict emerged within a context of poor governance, economic and political marginalization of rural areas and widespread injustice. The conflict was perpetuated by the exploitation of natural resources, namely the illegal diamond trade.

The warring factions including the Revolutionary United Front (RUF), the Armed Forces Revolutionary Council (AFRC), and the Civil Defense Forces (CDF) signed numerous tenuous peace agreements, which they subsequently broke to resume fighting. The conflict ended with the signing of the Abuja Protocols in 2001, and the elections of 2002. Abuja marked the end of the RUF's involvement in the government and led to an immediate cease-fire and cessation of hostilities.

The SCSL and TRC were the main TJ mechanisms adopted to deal with the aftermath of conflict.

1.2.1. Sierra Leone's Hybrid Tribunal

The Special Court for Sierra Leone (SCSL) was a hybrid tribunal that incorporated national and international elements. The Court was created following UN Resolution 1315 which recognized that in the particular circumstances of Sierra Leone, a "credible system of justice and accountability for the very serious crimes committed there would end impunity and would contribute to the process of national reconciliation and to the restoration and maintenance of peace."²⁷⁷

The SCSL was established through a negotiated agreement between the UN and Sierra Leone and was to be funded by voluntary contributions.²⁷⁸ The SCSL's mandate was to try crimes against humanity, war crimes and other serious violations of humanitarian law.²⁷⁹ As of late 2012, the SCSL has indicted 13 individuals and tried 9 people including Charles Taylor, the first sitting African head of state. The Court has also convicted eight persons.²⁸⁰

The SCSL faced challenges including inadequate funding and concerns about government manipulation of the selection of key officials.²⁸¹ Furthermore, there was a concern that the Court had not brought "true justice" by failing to address poverty and other root causes of the conflict.²⁸²

²⁷⁷ ATLAS and Alex Bates, *Transitional Justice in Sierra Leone: Analytical Report* (n.p.: n.p., 2010), 37, accessed July 30, 2013, http://projetatlas.univ-paris1.fr/IMG/pdf/ATLAS_SL_Final_Report_FINAL_EDITS_Feb2011.pdf.

²⁷⁸ Ibid.

²⁷⁹ Patrick Vinck, Phuong Pham, and Tino Kreutzer, *Talking Peace: A Population-Based Survey on Attitudes About Security, Dispute Resolution, And Post-Conflict Reconstruction in Liberia* (Berkeley, CA: University of California, Berkeley School of Law, 2011), 10.

²⁸⁰ "Exploring the Legacy of the SCSL," International Center for Transitional Justice, last modified February 2013, accessed July 30, 2013, <http://scsl-legacy.ictj.org/about-project>.

²⁸¹ International Crisis Group, *Sierra Leone's Truth and Reconciliation Commission: A Fresh Start?* (Freetown, Sierra Leone: ICG, 2002), 1.

²⁸² Chandra Lekha Sriram et al., eds., *Transitional Justice and Peace building on the Ground: Victims and Ex-Combatants* (New York, NY: Routledge, 2013), 171.

A) LINKAGES BETWEEN FORMAL JUSTICE AND TRUTH TELLING

Sierra Leone's Truth and Reconciliation Commission (TRC) originated in Article 26 of the Lomé Peace Agreement of 1999.²⁸³ The original 1999 proposal was for a "Truth, Justice and Reconciliation Commission" that would focus solely on the RUF with powers to recommend prosecutions for the worst perpetrators.²⁸⁴ However, the reference to justice was removed, as was the restriction limiting the investigations to the RUF alone.²⁸⁵

The TRC was established to create an impartial historical record of violations and abuses of human rights and international humanitarian law related to the armed conflict in Sierra Leone from the beginning 1991 until the signing of the Lomé Accords; to address impunity, to respond to the needs of the victims, to promote healing and reconciliation and to prevent repetition of the violations and abuses suffered.²⁸⁶

Linkages with SCSL:

The UN Secretary General's Report of the Planning Mission on the Establishment of the SCSL specified that the new Court and the TRC would "perform complementary roles" that are "mutually supportive" and "in full respect for each other's mandate."²⁸⁷ The biggest challenge of pursuing both a retributive and a restorative justice process simultaneously was the incompatibility of the SCSL and TRC's mandates, owing partially to the different historical moments in which they were established.²⁸⁸ The TRC was established following the Lomé Accords to allow for both victims and perpetrators to voice their stories. The SCSL, however, was established to try the criminals who were most responsible including those signatories who had failed to uphold their obligations.²⁸⁹ The two institutions operated in parallel to each other for about 18 months without any major incidents.²⁹⁰ However, a conflict between the two did emerge when the TRC attempted to schedule public hearings for those in the SCSL's custody. In that case, the SCSL retained primacy.²⁹¹

The two mechanisms operated from different perspectives; both attempted to investigate and understand the complex conflict that brought Sierra Leone to its

²⁸³ ATLAS and Alex Bates, *Transitional Justice in Sierra Leone: Analytical Report*, op. cit., 13.

²⁸⁴ Ibid.

²⁸⁵ Ibid.

²⁸⁶ Section 6(1) of The Sierra Leone Truth and Reconciliation Commission Act, Parliament of Sierra Leone (2000).

²⁸⁷ ATLAS and Bates, *Transitional Justice in Sierra*, 68.

²⁸⁸ Vinck, Pham, and Kreutzer, *Talking Peace: A Population-Based Survey on Attitudes*, 10.

²⁸⁹ Ibid.

²⁹⁰ William A. Schabas, "A Synergistic Relationship: The Sierra Leone Truth and Reconciliation Commission and the Special Court for Sierra Leone," in *Truth Commissions And Courts: The Tension Between Criminal Justice and the Search for Truth*, ed. William Shabas and Shane Darcy (n.p.: Springer Netherlands, 2004), 4-5.

²⁹¹ Vinck, Pham, and Kreutzer, *Talking Peace: A Population-Based Survey on Attitudes*, 10.

knees during the 1990s.²⁹² In the end, they never clarified the relationship between the two bodies, at least in a formal sense.²⁹³

Despite the fact that it was repeatedly explained to the Sierra Leonean people that there was no connection between the two bodies, and each institution respected and appreciated the other's contribution to post-conflict justice,²⁹⁴ many believe that the TRC is an investigative arm of the Special Court.²⁹⁵ Perpetrators feared prosecution and did not trust that the TRC would not reveal information to the Court.²⁹⁶

In late 2003, in the final months of the TRC's activities, three prisoners who had been indicted by the Court asked to testify in a public hearing before the TRC.²⁹⁷ The Prosecutor opposed the request, and ultimately the issue was litigated before the Court.²⁹⁸ On 28 November 2003, the President of the Appeals Chamber gave each side "half a loaf", ruling that the accused could testify, but not publicly.²⁹⁹ His judgment now represents the principle judicial examination of the relationship between truth commissions and criminal prosecutions and will undoubtedly influence future efforts at transitional justice where truth commissions and courts operate simultaneously.³⁰⁰

B) LINKAGES BETWEEN FORMAL JUSTICE AND REPARATIONS

Despite having brought a sense of justice to victims, the SCSL has been criticized for failing to provide reparations to victims and their families.³⁰¹ Neither the Special Court nor the TRC had any power to award reparations, yet the killing and amputations had robbed families of their main breadwinners and created tens if not hundreds of thousands of people dependent on aid and in need of material assistance.³⁰² Victims were resentful of the fact that many of the original perpetrators received handouts in the early DDR programmes of 2002 and 2003.³⁰³ Suffice to note that in December 2010, an additional US\$ 7 million was granted by the UN Peace Building Fund for Sierra Leone's Priority Plan 2011-2013 which included reparations for war victims.³⁰⁴ The Peace Building Fund included a Reparations Unit within the National Commission for Social Action (NaCSA) and a Special Fund for War Victims.³⁰⁵ It registered more than 32,000

²⁹² Schabas, "A Synergistic Relationship: The Sierra," in *Truth Commissions And Courts*, 5.

²⁹³ Ibid.

²⁹⁴ Ibid.

²⁹⁵ International Crisis Group, *Sierra Leone's Truth and Reconciliation Commission: A Fresh Start?*, 4.

²⁹⁶ Smith, "From Truth to Justice: How Does Amnesty Factor In?," 54.

²⁹⁷ Schabas, "A Synergistic Relationship: The Sierra," in *Truth Commissions And Courts*, 5.

²⁹⁸ Ibid.

²⁹⁹ Ibid.

³⁰⁰ Ibid.

³⁰¹ "Sierra Leoneans Reflect on SCSL in 'Seeds of Justice,'" International Center for Transitional Justice, last modified July 11, 2013, accessed August 15, 2013, <http://ictj.org/news/seeds-of-justice>.

³⁰² ATLAS and Alex Bates, *Transitional Justice in Sierra Leone: Analytical Report*, op. cit, 74.

³⁰³ Ibid.

³⁰⁴ "Sierra Leone," United Nations Peace Building Fund, accessed August 16, 2013, <http://www.unpbf.org/countries/sierra-leone/>.

³⁰⁵ Ibid.

war victims and funded micro-grants and educational activities that have benefited 20,000 victims.³⁰⁶ In addition, 235 victims of sexual violence have been provided with assistance and 40 community symbolic reparations have been implemented.³⁰⁷

C) LINKAGES BETWEEN FORMAL JUSTICE AND AMNESTY

The Lomé Peace Agreement between the government and the RUF included a provision to “grant absolute and free pardon and reprieve to all combatants and collaborators in respect of anything done by them in pursuit of their objectives” and to “ensure that no official or judicial action is taken against any member” of specified forces.³⁰⁸ The Government enacted a law ratifying it one week later. This curtailed accountability processes for serious crimes.

The Special Court was later established through an amendment to the Lomé Peace Accord, specifically because a UN-disclaimer added to the agreement stated that blanket amnesty granted to combatants did not cover offenses in violation of international humanitarian law.³⁰⁹ The information gathered by the TRC was limited in scope and comprehensiveness because of the failure to award amnesty.³¹⁰ The South African TRC unlike the Sierra Leone TRC was able to subpoena witnesses and perpetrators would then want to testify in exchange for amnesty and in order to avoid punishment.³¹¹

1.3. Recommendations for Formal Justice Linkages Based on Lessons Learned

General Recommendations

- ✓ Any TJ Law enacted in Uganda following the adoption of the TJ policy should clearly stipulate the mandate of each TJ mechanism and, to this extent, clearly specify the relationship that is to exist between the different mechanisms so as to avoid overlap, duplication and ensure that mechanisms are mutually reinforcing. This is especially important if the ICD is to focus on key perpetrators while a truth commission deals with lesser offenders. This will help avoid friction and clashes when the TJ mechanisms carry out their respective work.
- ✓ A Ugandan truth commission should preferably deal with addressing the root causes of conflict. The SCSL failed to address the key factors leading to the war, which many victims believe failed to bring “true justice”.

³⁰⁶ "Sierra Leone," United Nations Peace Building Fund.

³⁰⁷ Ibid.

³⁰⁸ Peace Agreement Between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone, Article IX, available at <http://www.sierra-leone.org/lomeaccord.html>

³⁰⁹ Sesay and Suma, *Transitional Justice and DDR: The Case of Sierra Leone*, 29.

³¹⁰ Rachel W. Smith, "From Truth to Justice: How Does Amnesty Factor In? A Comparative Analysis Of South Africa and Sierra Leone's Truth and Reconciliation Commissions" (honor's thesis, University of Connecticut, 2010), 73.

³¹¹ Ibid.

Lessons Learned from Sierra Leone

- ✓ There is a need to ensure that the prosecution process is divorced from the truth telling process. Perpetrators and victims alike should be able to testify before the TRC without fear that their information is shared with the Ugandan Directorate of Public Prosecutions (DPP). Therefore, in dealing with linkages between formal justice and truth telling for example, Uganda could apply the Appeals Chamber's decision in Sierra Leone so that ICD indictees may testify before the Ugandan TRC, albeit not publicly. The DPP should have no direct relationship with the TRC.
- ✓ In some instances where the safety of victims and witnesses may be jeopardized, a measure for confidentiality should be envisaged. In Sierra Leone, there were doubts about the TRC's capacity to provide security for witnesses or guarantee confidentiality, which discouraged many victims from participating in the truth telling process. Confidentiality of testimony is therefore paramount.
- ✓ Should a conflict occur between the Ugandan truth telling commission's mandate and that of the ICD, similar to the way in which the Sierra Leonean conflict between the TRC and SCSL was handled, the ICD should retain primacy.
- ✓ Outreach components of transitional justice mechanisms are crucial to address the cross-cutting problem faced by most TJ mechanisms, namely that victims and witnesses can be confused by their individual mandates. This was illustrated by the belief that the TRC was an investigative arm of the SCSL. In the same vein, each body should conduct outreach separately to avoid confusion among the population about their respective roles.
- ✓ Neither the SCSL nor the TRC had a mandate to implement recommendations, which severely hindered victims' beliefs that justice had been achieved. It would be necessary for the Rules of Procedure and Evidence of the ICD to allow for reparations to be awarded to victims either through a court decision or a separate entity. This would help address the challenges the TRC and the SCSL faced.

Restorative Justice in the Draft TJ Policy

2. TRADITIONAL JUSTICE

The draft TJ policy notes that traditional justice systems play an invaluable function in conflict and dispute resolution especially among disadvantaged populations in conflict and post-conflict environments.³¹² This is because the formal justice systems are often inoperative or inaccessible in such situations.³¹³ TJMs provide advantages including speed, accessibility and cost effectiveness among others. However, they lack formal recognition and regulation.³¹⁴

The draft policy states that TJMs play a crucial role in restorative justice and recommends that they be recognized as tools of conflict resolution.³¹⁵ They “continue to bridge the justice gap especially in relation to selected community issues” like land justice, communal and family conflicts.³¹⁶

Draft TJ Policy on the challenges of traditional justice mechanisms

The challenges identified in the draft TJ policy include:

- i. The lack of formal recognition as a complementary arm of administering justice. As such, they are also not regulated and lack proper mechanisms for accountability,
- ii. They provide less room for women as decision makers and process facilitators in dispute resolution hence side-lining and or missing out on the valuable contribution the women. This is because they are male dominated and construed,
- iii. Human rights observance and victim sensitivity are also key concerns that need to be addressed. This is manifested by the various questions surrounding TJMs that touch on issues of admissibility, practicability, implementation structures, conformity and complementarity,

³¹² National Transitional Justice Working Group, *Draft National Transitional Justice Policy*, 17.

³¹³ Ibid.

³¹⁴ Ibid., 24.

³¹⁵ Ibid., 18.

³¹⁶ National Transitional Justice Working Group, *Draft National Transitional Justice Policy*, 17.

The draft TJ policy states that:

"Government shall recognize traditional justice mechanisms as a tool for conflict resolution."³¹⁷

2.1. Prospective Linkage Challenges Between TJMs and Other TJ Mechanisms

The draft TJ Policy recognizes TJMs as tools for conflict resolution. Accordingly, it proposes that this will be achieved through the development of legislation that will delineate the jurisdiction of TJMs, provide for checks and balances in their implementation, sensitize the roles of TJMs in the community and provide for the use of TJMs as the point of first contact for specific concerns.³¹⁸ The draft TJ policy further provides for the empowerment and capacity building of traditional leaders and traditional institutions in basic fundamental principles and in relation to cross-cutting issues.³¹⁹ In this way, the policy document recognizes that challenges will likely arise particularly in determining whether the formal courts or TJMs should have jurisdiction over a particular case. This needs to be addressed to prevent the problem of an offender being punished by both the formal justice system and traditional justice system, as well as determine appropriate sanctions to be pursued by these respective justice systems.³²⁰

There are also concerns that certain international and national human rights instruments require that the role and scope of traditional justice is limited to ensuring that the fundamental right to due process is upheld.³²¹

³¹⁷ Ibid.

³¹⁸ Ibid., 25.

³¹⁹ Ibid.

³²⁰ "Traditional Justice in Afghanistan," United Nations Development Programme, last modified May 2010, accessed August 16, 2013, <http://www.undp.org.af/Projects/Justice/FactSheetTraditional%20Justice.pdf>.

³²¹ Ibid.

2.2. Exploring Linkage Solutions Based on Case Studies

The Situation in Rwanda

Rwanda's TJ process was initiated after the end of an ethnically motivated genocide in 1994 where over 800,000 to 1,000,000 citizens of Rwanda were massacred.

Immediately following the genocide, the government began imprisoning suspects. By 1996, approximately 120,000 suspects were incarcerated and overcrowding was causing severe problems. By 1999, only 5,000 suspects had been tried and it was clear that Rwanda's civil courts would not be capable of expeditiously adjudicating these cases...

The State was in disarray and the judicial system had disintegrated, as many judges and members of the legal fraternity had either been killed or fled the country for safety. The government therefore faced a dilemma, which needed a more efficient and comprehensive solution than the traditional criminal justice system – the Gacaca courts were the answer.

The Gacaca courts presented an avenue for participative justice.

TJ Mechanisms

- Gacaca courts
- International tribunal

2.2.1. Rwanda's Gacaca Courts

Out of a dire need to deal with the mass numbers of perpetrators, the Gacaca court system was adopted as the main TJ mechanism in Rwanda.³²² The international community also established the International Criminal Tribunal for Rwanda (ICTR).³²³

The country instituted the *Gacaca* courts in 2001.³²⁴ The Gacaca courts were administered by respected local leaders, typically elders,³²⁵ and traditionally resolved property disputes, including land and cattle ownership, marital conflicts, questions of inheritance rights, loans, and accusations of petty theft.³²⁶ When Gacaca addressed minor criminal matters, these were resolved not by imprisonment but by compensation from the perpetrator to the victim, often in the form of livestock.³²⁷ Such fines were imposed not on the individual perpetrator but upon his entire family.³²⁸ The Gacaca courts lost much of their "traditional" character in order to address the large-scale abuses.³²⁹

During the official closing of the participative justice of Gacaca courts in 2012, President Kagame of Rwanda noted that despite imperfections, and many challenges including criticism from both within and outside Rwanda, Gacaca had allowed for truth telling, national healing, reconciliation and soul-searching.³³⁰ The President pointed out that the success of Gacaca should be measured against the success of other courts such as the ICTR.³³¹

³²² Megan M. Westberg, "Rwanda's Use of Transitional Justice After Genocide: The Gacaca Courts and the ICTR," *Kansas Law Review* 59, no. 2 (January 2011): 332, accessed August 16, 2013, http://www.stinson.com/uploadedFiles/Content/Publications/Image_Files/Westberg_KULaw_Rwanda.pdf.

³²³ Ibid.

³²⁴ Amy Senier, "Traditional Justice as Transitional. Justice: A Comparative Case Study of Rwanda and East Timor," *Praxis, Fletcher School Journal of Developmental Studies* XXIII (2008): 72.

³²⁵ Ibid.

³²⁶ Ibid.

³²⁷ Ibid.

³²⁸ Ibid.

³²⁹ Sriram et al., *Transitional Justice and Peace building*, 166.

³³⁰ Jean-Christophe Nsanzimana, "Kagame Commends Gacaca Courts," *The Rwanda Focus*, last modified June 19, 2012, accessed June 16, 2013, <http://focus.rw/wp/2012/06/kagame-commends-gacaca-courts/>.

³³¹ Ibid.

He noted that at a significantly lesser cost, Gacaca had delivered justice and reconciliation at a very high rate-close to 2 million cases -against the ICTR which, with US\$ 1.7 billion, tried only 60 cases.³³²

The Gacaca courts faced challenges including the perception that the trials did not adhere to due process guarantees and were corrupt, that genocide survivors who testified before the courts faced increased violence without adequate protection,³³³ and a decline of public participation in the processes.³³⁴

A) LINKAGES BETWEEN TRADITIONAL JUSTICE AND DOMESTIC PROSECUTIONS

In August 1996, Rwanda adopted Organic Law No. 09/96 on the Organization of Prosecutions for Offences constituting the Crime of Genocide or Crimes against Humanity committed since October 1, 1990.³³⁵ Six years after the adoption of this law, the ordinary courts had only been able to try only around 6000 suspects, while more than 100,000 defendants were still awaiting trial.³³⁶ This led to the establishment of the Gacaca system of participatory and community justice.³³⁷

Linkages with Gacaca Courts:

The relationship between Gacaca and national prosecution structures was determined by the jurisdiction of the Gacaca courts, which was based on the gravity of the crimes committed by the suspects.³³⁸ While under Article 48 of the *Organic Law* the Public Prosecution Department would continue to receive denunciations and complaints and would investigate, they would first have to ensure that the Gacaca courts had not begun examining the case so as to avoid unnecessary overlap.³³⁹

³³² Jean-Christophe Nsanzimana, "Kagame Commends Gacaca Courts".

³³³ Christopher J. Le Mon, *Rwanda's Troubled Gacaca Courts*, 17, accessed August 16, 2013, <http://www.wcl.american.edu/hrbrief/14/2lemon.pdf>.

³³⁴ Ibid., 18.

³³⁵ "Rwanda's Organic Law No. 08/96 of August 30, 1996 on the Organization of Prosecutions for Offences Constituting the Crime of Genocide or Crimes Against Humanity Committed Since October 1, 1990," Prevent Genocide International, accessed August 16, 2013, <http://www.preventgenocide.org/law/domestic/rwanda.htm>.

³³⁶ Avocats Sans Frontières, *Monitoring of the Gacaca Courts*, 10.

³³⁷ Ibid.

³³⁸ Chiseche Mibenge, "Enforcing International Humanitarian Law at the National Level: The Gacaca Jurisdictions of Rwanda," Centre for International & European Law, accessed August 7, 2013, http://www.asser.nl/default.aspx?site_id=9&level1=13337&level2=13363.

³³⁹ For a copy of the legal text see "Organic Law No 16/2004 of 19/6/2004 Establishing the Organisation, Competence and Functioning of Gacaca Courts Charged with Prosecuting and Trying the Perpetrators of the Crime of Genocide and Other Crimes Against Humanity, Committed Between October 1, 1990 and December 31, 1994, (O.G special No of 19/06/2004)," Legal Information Portal, accessed August 16, 2013, <http://lip.alfaxp.com/lip/AmategekoDB.aspx?Mode=r&pid=7522&iid=1262&rid=30692970>.

The Gacaca courts exercised jurisdiction over categories 2, 3 and 4, which included lesser crimes. Category 4 dealt with those who had committed offences against property.³⁴⁰

However, some crimes fell outside of the jurisdiction of Gacaca. Article 2 of the *Organic Law* categorized perpetrators based on their acts of participation.³⁴¹ Category 1 offenders included those who had planned, organised and instigated the crime of genocide or crimes against humanity, as well as those who had committed acts of sexual torture.³⁴² These offenders fell outside the jurisdiction of Gacaca. However, it is important to note that investigations and categorization of all case files was the responsibility of Gacaca.³⁴³ Once sufficient facts and evidence were established would the Gacaca general assembly determine the category of the perpetrator and transfer them to the ordinary courts for trial.³⁴⁴ This in effect meant that victims and witnesses of sexual violence, torture and other Category 1 offences had to testify at the Gacaca level to ensure that their allegations were investigated and categorized before they were transferred to the ordinary courts for trial.³⁴⁵

However, a new *Organic Law No. 10/2007* modified the categorization of defendants. Some defendants who were previously to be tried by ordinary courts and whose cases had not yet been transmitted to these courts were now subjected to Gacaca courts.³⁴⁶ These included well-known murderers, persons who committed acts of torture and authors of dehumanising acts on dead bodies who were transferred to the second category.³⁴⁷ The reason for this transfer was due to the slow pace of the national courts.³⁴⁸ Most genocide cases were transferred to the Gacaca system in 2008, and conventional courts presided over only a handful of cases in 2009, including that of Minister of Justice in the Interim Government Agnes Ntamabyariro who was sentenced to a lifetime of solitary confinement.³⁴⁹

³⁴⁰ "Rwanda's Organic Law No. 08/96," Prevent Genocide International.

³⁴¹ Ibid.

³⁴² Ibid.

³⁴³ Mibenge, "Enforcing International Humanitarian Law at the National," Centre for International & European Law.

³⁴⁴ Ibid.

³⁴⁵ Ibid.

³⁴⁶ Avocats Sans Frontières, *Monitoring of the Gacaca Courts*, 11.

³⁴⁷ Ibid.

³⁴⁸ Shannon E. Powers, "Rwanda's Gacaca Courts: Implications for International Criminal Law and Transitional Justice," American Society of International Law, last modified June 23, 2011, accessed August 16, 2013, <http://www.asil.org/insights110623.cfm>.

³⁴⁹ "World Report: Rwanda," Human Rights Watch, accessed August 16, 2013, <http://www.hrw.org/world-report-2010/rwanda>.

B) LINKAGES BETWEEN TRADITIONAL JUSTICE AND REPARATION

From 1996 up to the establishment of Gacaca courts in 2001, survivors participated as civil parties in approximately two-thirds of all criminal cases before specialized chambers in ordinary courts.³⁵⁰ Approximately 50% of survivors who lodged complaints for compensation against individual perpetrators were awarded generous amounts of compensation for material prejudice and/or moral grief.³⁵¹ Civil claimants also lodged claims for compensation against the Rwandan State.³⁵² Even though the State was declared jointly liable with the accused in several cases, and compensation awards were made against the State, none of these civil verdicts against the State were enforced. To date, none of the compensation awards by national courts against individual perpetrators and/or the State have been fully enforced.³⁵³

2.3. Recommendations for Traditional Justice Linkages Based on Lessons Learned

General Recommendations

- ✓ Participation in traditional justice processes should be voluntary since not everyone subscribes to them.
- ✓ TJMs should play a restorative role that can foster individual and community reconciliation, rehabilitation and reintegration.
- ✓ TJMs should complement the more predominant TJ mechanisms such as prosecutions and truth telling processes.

Lessons Learned from Rwanda

- ✓ Adapt and strengthen traditional justice systems to deal with post-conflict justice issues across the country. Note that the Gacaca proceedings bore little resemblance to their traditional structure of communal gatherings. Similarly, traditional justice mechanisms outlined in the draft TJ Policy can be adapted to meet the needs of post-conflict Uganda.
- ✓ Embed symbolic and collective reparations in traditional justice models so as to ensure that victims are not left without a remedy and frustrated.
- ✓ Clearly delineate the mandate of each system to deal with a specific case. In Rwanda, national public prosecution organs had to first ensure that the Gacaca courts had not already examined a case before proceeding with the examination of the case. While this would not work in the same way in Uganda as it is unlikely that TJMs will take precedence over formal justice mechanisms, it is still important to take from the Rwandan example its clear procedure in deciding which process should deal with particular crimes and suspected perpetrators.

³⁵⁰ IBUKA, "Right to Reparation for Survivors: Recommendations for Reparation for Survivors of the 1994 Genocide Against Tutsi" (discussion paper, IBUKA, Kigali, Rwanda, October 2012), 7, accessed August 16, 2013, http://www.redress.org/downloads/publications/121031right_to_rep.pdf.

³⁵¹ Ibid.

³⁵² Ibid. 7.

³⁵³ Ibid.

3. TRUTH TELLING

The draft TJ policy notes that truth telling is important in all aspects of dispute resolution and is instrumental in establishing the necessary facts.³⁵⁴ The draft TJ Policy also recommends establishing a structure to facilitate truth telling processes at all levels to document human rights violations, recommend actions for redress and facilitate conflict prevention and dispute resolution.³⁵⁵

Draft TJ Policy on the challenges of truth telling

The draft TJ policy notes that although truth telling efforts in Uganda have registered some successes, challenges have included:

- i. To-date, the extent to which the findings of the truth commissions have either been made public or officially implemented is not easy to ascertain;
- ii. There have been several conflicts post 1986 but no commission of inquiry or truth commission has been established to address the outstanding questions that pertain to those conflict situations;
- iii. There is no concerted effort to establish the types and magnitude of human rights violations that took place, their impact and the perpetrators, post 1986; and,
- iv. There is no consolidated agenda to address victims' reparative needs. This has led to distrust by members of the public of truth telling

The draft TJ Policy notes that:

"Government shall establish and resource a national truth telling process through the Transitional Justice Act."³⁵⁶

3.1. Prospective Linkage Challenges Between Truth Telling and Other TJ Mechanisms

The current draft TJ Policy focuses on the timeframe after 1986. This temporal restriction neither prevents the truth commission from addressing the root causes of conflict discussed in Chapter II nor from undertaking a comprehensive historical and socio-political analysis.

The draft TJ Policy does not mention how the new Ugandan truth telling commission will rely on the reports of the two truth telling commissions, namely

³⁵⁴ National Transitional Justice Working Group, *Draft National Transitional Justice Policy*, 18.

³⁵⁵ Ibid.

³⁵⁶ Ibid., 25.

the CIVHR and 1971-74 Commission of Inquiry³⁵⁷ We will see below how other truth commissions like those in **Guatemala** and **Sierra Leone** used the data and information from prior truth commissions to enrich their historical records, and prevent the duplication of work.

3.2. Exploring Linkage Solutions Based on Case Studies

The Situation in Guatemala

Guatemala would be considered a post-transitional state, as the TJ process was initiated after a political transition and shift from almost four decades of armed conflict to peace. The internal civil conflict resulted in the massacre, killings and disappearances, specifically targeted at the indigenous Mayan population. The Guatemalan government was responsible for 93% of the violations.

The 1994 peace accords provided for retributive and restorative justice tools including the establishment of a truth commission and military and judicial reform.

Strengths of the TJ Process

- Creating a collective memory
- Analysing structural roots
- Report released
- Memorialisation

Challenges of the TJ Process

- Blanket amnesty
- No naming of names
- Government's non-cooperation

3.2.1. Guatemala's Commission for Historical Clarification (CEH)

Guatemala's truth commission, the Commission for Historical Clarification (CEH), was the main transitional justice mechanism adopted in Guatemala. It was established to "formulate specific recommendations to encourage peace and national harmony in Guatemala" and clarify past human rights violations related to the 36 year internal conflict (1960-1996).³⁵⁸ The CEH was established by the Oslo Accord in March 1994, and began its work in 1997.³⁵⁹ The CEH's report "Guatemala: Memory of Silence" was publicly released in 1999. Funding was provided by a number of countries, particularly the US and the Scandinavian countries.³⁶⁰

Strengths of the TJ Process

One of the first steps in any effort made to confront impunity is to establish a documentation of the past.³⁶¹ The CEH's final report, which was released two years after the final peace accords were signed, successfully documented the human rights violations that were perpetrated in Guatemala.³⁶² The CEH managed to visit almost 2,000 communities and registered 7,228 testimonies, which provided a rich documentation of evidence and testimony from the conflict.³⁶³ Every case

³⁵⁷ Avocats Sans Frontières, *Commentary on Uganda's Draft TJ Policy*, 13.

³⁵⁸ Comisión para el Esclarecimiento Histórico (CEH), *Guatemala Memory of Silence*, 46.

³⁵⁹ Craig Kauffman, 'Transitional Justice in Guatemala: Linking the Past and the Future' Prepared for the ISA-South Conference, November 3-5, 2005, 13. Accessed September 5, 2013, at http://www6.miami.edu/maia/ISAS05/papers/Craig_Kauffman.pdf

³⁶⁰ "Press Conference By Members of Guatemalan Historical Clarification Commission," United Nations Press Briefing, last modified March 1, 1999, accessed August 5, 2013, <http://www.un.org/News/briefings/docs/1999/19990301.guate.brf.html>.

³⁶¹ Raúl Molina Mejía, "The Struggle Against Impunity in Guatemala," *Social Justice* 26, no. 4 (Winter 1999): 60.

³⁶² Mejía, "The Struggle Against Impunity," 60.

³⁶³ Joanna R. Quinn and Mark Freeman, "Lessons Learned: Practical Lessons Gleaned from Inside the Truth Commissions of Guatemala and South Africa," *Human Rights Quarterly* 25 (2003): 1122.

that was presented to the Commission was described in a few lines and 86 "illustrative or paradigmatic" cases were described in detail.³⁶⁴ Furthermore, the Commission identified 630 sites of massacres perpetrated by the government, and prepared a legal study that involved a team of national and international experts who concluded that acts of genocide had been perpetrated in Guatemala.³⁶⁵

The CEH's broad mandate included documenting the historical reasons behind the violations; more specifically, the reasons why these violations had taken place.³⁶⁶ The CEH examined the systemic causes and specifically noted that the armed forces had targeted indigenous peoples through the institutionalised racism that plagued the State's institutions.³⁶⁷ In this way, it differed from past truth commissions in Argentina, Chile and El Salvador that had exclusively focused on the juridical interpretation of human rights violations, namely focusing on who did what to whom.³⁶⁸ This historical focus was important in that it marked a break from the governmental discourse of the time and resulted in an apology made by the Government.³⁶⁹

Challenges to the TJ Process

Despite its strengths, the CEH is considered one of the weakest truth commissions to have been created. It was indeed established after the enactment of the *National Reconciliation Law (NRL)*, which offered a blanket amnesty for all but the most serious crimes. This, therefore, meant that perpetrators had no incentive to appear before the commission since no additional amnesty could be given.³⁷⁰ It was further hindered by the fact that unlike the South African TRC, it could not subpoena witnesses or records.³⁷¹

Due to the nature of the peace accords, the CEH could not "individualise responsibility."³⁷² The military feared a repetition of the purging of military officers that had taken place following the release of El Salvador's Truth Commission report in 1993.³⁷³ However, a recent report notes that individualizing guilt presents an opportunity to destroy atrocity myths among victims which

³⁶⁴ "Press Conference By Members of Guatemalan Historical Clarification Commission," op. cit.

³⁶⁵ Ibid.

³⁶⁶ Greg Grandin, "Chronicles of a Guatemalan Genocide Foretold: Violence, Trauma, and the Limits of Historical Inquiry," review of *Comisión para el Esclarecimiento Histórico (CEH). Memoria del silencio, Nepantla: Views from South 1*, no. 2 (2000): 392.

³⁶⁷ Jeff Corntassel and Cindy Holder, "Who's Sorry Now? Government Apologies, Truth Commissions, and Indigenous Self-Determination in Australia, Canada, Guatemala, and Peru," *Human Rights Review* 9, no. 4 (December 2008)

³⁶⁸ Ibid.

³⁶⁹ Ibid.

³⁷⁰ Kauffman, "Transitional Justice in Guatemala," op. cit., 18.

³⁷¹ Grandin, "Chronicles of a Guatemalan," review of *Comisión para el Esclarecimiento Histórico (CEH). Memoria del silencio*, 396.

³⁷² Ibid

³⁷³ Ibid

keep alive the idea that all the members of a rival group are actual or potential perpetrators.³⁷⁴

The restricted timeframe in which the CEH was to conduct its work also created a challenge. The Commission was given six months to investigate human rights violations that had occurred over three decades of conflict, with a possible extension of six additional months.³⁷⁵ Some scholars have argued that this was done to ensure that the CEH could only write a superficial report.³⁷⁶ Ultimately, the CEH required 19 months.³⁷⁷

While one of the CEH's successes was that it was free and independent from government influence and pressure, there were problems with governmental cooperation.³⁷⁸ On a number of occasions, the Guatemalan government refused to collaborate with the CEH and did not provide the necessary data and documents or simply denied the existence of information.³⁷⁹ Because the CEH could not subpoena records, this hindered its ability to gain access to necessary information.

Following the completion of the CEH's work, even though the President did appoint the CEH's former Commissioner Otilia Lux de Coti to his cabinet, few of the commission's recommendations were actually implemented by the government.³⁸⁰

A) LINKAGES BETWEEN TRUTH TELLING AND FORMAL JUSTICE

The CEH did not have a justice-seeking component, and the government made an effort to ensure that domestic prosecutions did not take place.³⁸¹ The mandate of the CEH purposefully prohibited the naming of names. Since the CEH's work "would not have any judicial aim or effect"³⁸², this meant that few prosecutions have taken place at the domestic level to date.³⁸³ In June 2011, a former general in the Guatemalan army was the first person to be arrested in Guatemala on charges of genocide.³⁸⁴ However, the CEH did recommend that the

³⁷⁴ David Bloomfield, Teresa Barnes, and Luc Huyse, eds., *Reconciliation After Violent Conflict: A Handbook*, Handbook Series (Stockholm, Sweden: IDEA, 2003), 20.

³⁷⁵ Hayner, *Unspeakable Truths: Transitional Justice*, 32.

³⁷⁶ Elizabeth Oglesby, "Historical Memory and the Limits of Peace Education: Examining Guatemala's 'Memory of Silence' and the Politics of Curriculum Design" (unpublished working paper, University of Arizona, Tucson, AZ, June 2004), 9.

³⁷⁷ Joanna Crandall, "Truth Commissions In Guatemala And Peru: Perpetual Impunity And Transitional Justice Compared" (working paper, University of Bradford, Bradford, UK, April 2004), 5.

³⁷⁸ "Press Conference By Members," United Nations Press Briefing.

³⁷⁹ Mejía, "The Struggle Against Impunity," 61.

³⁸⁰ Hayner, *Unspeakable Truths: Transitional Justice*, 35.

³⁸¹ Crandall, "Truth Commissions In Guatemala," op. cit. 10.

³⁸² Hayner, *Unspeakable Truths: Transitional Justice*, 32.

³⁸³ Ibid., 35.

³⁸⁴ Paige Arthur et al., *Strengthening Indigenous Rights through Truth Commissions: A Practitioner's Resource* (New York, NY: ICTJ, 2012), 37, accessed August 16, 2013, <http://ictj.org/sites/default/files/ICTJ-Truth-Seeking-Indigenous-Rights-2012-English.pdf>.

government comply with the *National Reconciliation Law* (NRL) by prosecuting and punishing those crimes not eligible for amnesty.³⁸⁵ The Guatemalan courts were in charge of ruling on applications for amnesty.³⁸⁶

B) LINKAGES BETWEEN TRUTH TELLING AND TRADITIONAL JUSTICE

During the collection of testimony for the CEH, many victims feared testifying before the CEH. However, many victims also agreed that community leaders had been important in encouraging them to testify.³⁸⁷

The peace accords had included the 1995 Accord on Identity and Rights of Indigenous Peoples that recognised and promoted indigenous beliefs and practices, and provisions for reparations.³⁸⁸ The CEH specifically recommended that the government recognise the recommendations of the Commission on the Strengthening of the Justice System, which advocated for the encompassing of "traditional methods of conflict resolution and the state judicial system."³⁸⁹

C) LINKAGES BETWEEN TRUTH AND RECONCILIATION COMMISSION AND ALTERNATIVE TRUTH TELLING PROCESSES

Guatemala provides an interesting case study because two NGOs had conducted 'private' (non-State actor led) truth telling initiatives. These projects were conducted several years prior to the CEH's establishment and had collected thousands of audio taped and transcribed testimonies.³⁹⁰ The Catholic Church sponsored the *Recovery of Historical Memory (REMHI) Project*, one of the most comprehensive CSO-led truth commissions that facilitated the work of the CEH by working outside the official peace process.³⁹¹ This was particularly important as the church had an extensive reach into local communities, and documented the stories of 55,000 victims.³⁹²

The CEH's report was strengthened by incorporating into its report the evidence from two private truth commissions led by NGOs.³⁹³ By incorporating the collected data, detailed reports and recorded witness testimony, the CEH created a rich documentation of the Guatemalan conflict.³⁹⁴

³⁸⁵ Margaret Popkin and Nehal Bhuta, "Latin American Amnesties in Comparative Perspective: Can the Past Be Buried?," *Ethics & International Affairs* 13, no. 1 (March 1999): 118.

³⁸⁶ *Ibid.*, " 116.

³⁸⁷ Anita Isaacs, "At War with the Past? The Politics of Truth Seeking in Guatemala," *International Journal of Transitional Justice* 4 (May 2010): 261.

³⁸⁸ Kauffman, "Transitional Justice in Guatemala," 15.

³⁸⁹ Comisión para el Esclarecimiento Histórico (CEH), *Guatemala Memory of Silence: Report of the Commission for Historical Clarification Conclusion and Recommendations* (Guatemala City, Guatemala: Government of Guatemala, 1999), 59.

³⁹⁰ Quinn and Freeman, "Lessons Learned: Practical Lessons," 1122.

³⁹¹ Kauffman, "Transitional Justice in Guatemala," 18.

³⁹² *Ibid.*, " 19.

³⁹³ Quinn and Freeman, "Lessons Learned: Practical Lessons," 1122.

³⁹⁴ Hayner, *Unspeakable Truths: Transitional Justice*, 34.

D) LINKAGES BETWEEN TRUTH TELLING AND REPARATIONS

The CEH's mandate did not include reconciliation or reparations.³⁹⁵ Nevertheless, the CEH recommended that the government provide individual and collective reparations for victims.³⁹⁶ One of its first recommendations included the construction of monuments and public parks in memory of the victims.³⁹⁷ The CEH's report also specifically noted that the government implements a policy to exhume the remains of victims and locate hidden cemeteries as "an act of reparation".³⁹⁸

The CEH further noted that the government "urgently create and put into effect a National Reparation Programme for the victims, and their relatives," and specifically detailed a series of measures that the government must implement including economic compensation and psychosocial rehabilitation.³⁹⁹ This ambitious programme proposed by the CEH was approved by executive decree in 2003, but due to a lack of political will, was only implemented in 2005.⁴⁰⁰

The *Programa Nacional de Resarcimiento* (PNR)'s design provided for material restitution, financial reparations, psychosocial reparation and rehabilitation, honouring civilian victims and cultural reparation.⁴⁰¹ Considering the strong demand for individual reparations, the PNR established a compensation scheme for survivors of torture and sexual assault and relatives of victims of illegal executions, massacres and forced disappearances. By 2009, more than 30,000 beneficiaries had been compensated by the PNR.⁴⁰² One of the main recommendations for the PNR was that it should move towards collective reparations.⁴⁰³ Guatemala's case is also notable in that it is where the largest efforts to conduct exhumations of the dead has taken place to date, this was seen to be an important form of symbolic reparation for victims who emanated predominantly from indigenous communities wishing to perform last burial rights according to their custom and local tradition.

E) LINKAGES BETWEEN TRUTH TELLING AND AMNESTY

The CEH could not grant amnesty to witnesses; however, it was still important that the CEH's report highlighted the need to prohibit a blanket amnesty in line with Guatemala's international obligations.⁴⁰⁴ Since the CEH could not grant amnesty to witnesses, the *National Reconciliation Law* (NRL) provided that Guatemalan courts should rule on applications for amnesty for political or

³⁹⁵ Quinn and Freeman, "Lessons Learned: Practical Lessons," 1124.

³⁹⁶ Popkin and Bhuta, "Latin American Amnesties in Comparative," 118.

³⁹⁷ Comisión para el Esclarecimiento Histórico (CEH), *Guatemala Memory of Silence*, 49.

³⁹⁸ Ibid. 54

³⁹⁹ Ibid. 50

⁴⁰⁰ Liselotte Viaene, "Life Is Priceless: Mayan Q'eqchi' Voices on the Guatemalan National Reparations Program," *International Journal of Transitional Justice* 4:4.

⁴⁰¹ Viaene, "Life Is Priceless: Mayan," 5.

⁴⁰² Ibid., 6.

⁴⁰³ Ibid., 16.

⁴⁰⁴ Popkin and Bhuta, "Latin American Amnesties in Comparative," 118.

common crimes.⁴⁰⁵ The NRL explicitly prohibited the use of amnesty in cases of forced disappearance, torture and genocide in accordance with international law.⁴⁰⁶ However, one of the weaknesses of the NRL was that while amnesty would not be granted in such cases, there was no clear assurance that those who had committed these serious crimes would be prosecuted.

3.2.2. **Sierra Leone's TRC**

Although a detailed analysis of Sierra Leone's TRC and its linkages with the SCSL is provided for in subsection 1.2.1. of this chapter, it is helpful to discuss specific linkages between the TRC and other mechanisms including the alternative truth telling process, reparations and traditional justice mechanisms.

The TRC held 90 public hearings where 350 individual witnesses testified from different target groups.⁴⁰⁷ The body constructed a database, which gave the commissioners a rough idea of the commanders and locations, particularly for the RUF and AFRC.⁴⁰⁸ Further, it emphasized the contributions of four key "stakeholder" groups: women and girls, children, amputees and former combatants.⁴⁰⁹

It is interesting to note that alongside the testimonies collected by Sierra Leone's TRC, it also held thematic hearings, event-specific hearings and institutional hearings. The thematic hearings included the role of civil society and immigrant communities, the management of mineral resources and corruption, and women and girls. The event specific hearings covered pivotal points in the conflict such as the 1992 and 1997 coups and the hostage-taking of UN peacekeepers in 2000. The institutional hearings looked at the roles of various actors including the armed forces, police and the media.⁴¹⁰

A) LINKAGES BETWEEN TRUTH TELLING AND TRADITIONAL JUSTICE

The truth commission itself received mixed reactions in Sierra Leone.⁴¹¹ Anthropologists have suggested that the truth-telling mechanism adopted was a poor fit for the Sierra Leonean context, as Sierra Leoneans tend towards the more traditional and cultural "forgive and forget" approach and do not believe in the public confessions utilized by the TRC.⁴¹² The relevancy of the TRC is thus questioned in comparison to traditional justice mechanisms.

⁴⁰⁵ Ibid. 116.

⁴⁰⁶ Ibid., " 116.

⁴⁰⁷ Migyikra, "Truth and Reconciliation Commissions," 77.

⁴⁰⁸ Ibid.

⁴⁰⁹ Ibid.

⁴¹⁰ Erasmus Ndemole Migyikra, "Truth and Reconciliation Commissions: A Comparative Study of South Africa, Ghana and Sierra Leone" (master's thesis, European University Centre for Peace Studies, 2008), 77.

⁴¹¹ Sriram et al., *Transitional Justice and Peace building*, 170.

⁴¹² Sriram et al., *Transitional Justice and Peace building*, 170.

B) ALTERNATIVE TRUTH TELLING PROCESSES

A private truth commission collected 8,000 statements, and received an additional 1500 statements from a local NGO, the Campaign for Good Governance.⁴¹³

C) REPARATIONS

Since both of the main TJ mechanisms in Sierra Leone, namely the TRC and SCSL did not have any power to award reparations, no reparations were awarded to victims through these mechanisms.⁴¹⁴ The TRC's report clearly stipulated that the Government of Sierra Leone should provide reparations.⁴¹⁵ The TRC's report proposed a variety of mechanisms to raise money for reparations including taxes on diamonds and government budgetary allocations.⁴¹⁶ To date, victims have mainly received funding through the international UN Peace building Fund (PBF), which was given \$3 million in 2008.⁴¹⁷

Despite the fact that the Human Rights Commission of Sierra Leone was to oversee the implementation of the TRC's recommendations, the government enacted legislation in 2009 giving the National Commission for Social Action (NaCSA) the responsibility for administering reparations.⁴¹⁸ NaCSA created a register of 30,000 victims and provided micro-grants of approximately \$100 to 20,000 victims paid for primarily through the UN PBF.⁴¹⁹

D) AMNESTY

The information gathered by the TRC was limited in scope and comprehensiveness because of the failure to award amnesty.⁴²⁰ Further, the South African TRC unlike the Sierra Leonean TRC was able to subpoena witnesses and perpetrators who were required to testify in exchange for amnesty and in order to avoid punishment.⁴²¹

⁴¹³ Migyikra, "Truth and Reconciliation Commissions," 77.

⁴¹⁴ Mohamed Gibril Sesay and Mohamed Suma, *Transitional Justice and DDR: The Case of Sierra Leone* (n.p.: International Center for Transitional Justice, 2009), 30.

⁴¹⁵ Sierra Leone: Compensating War Victims," IRIN, last modified December 9, 2009, accessed August 5, 2013, <http://www.irinnews.org/report/87380/sierra-leone-compensating-war-victims>.

⁴¹⁶ Ibid.

⁴¹⁷ Sriram et al., *Transitional Justice and Peace building*, 171.

⁴¹⁸ Ibid.

⁴¹⁹ Ibid.

⁴²⁰ Smith, "From Truth to Justice: How Does Amnesty Factor In? ," 73.

⁴²¹ Ibid.

3.2.3. Timor-Leste's Commission for Reception, Truth and Reconciliation

The Situation in Timor-Leste

In Timor-Leste, which is formerly known as East Timor, the TJ process was initiated following 24 years of conflict. In August 1999, Timor-Leste finally held elections where the country voted in favor of independence. This led to outbreaks of violence initiated by Indonesian-backed militias.

At the international level, transitional justice in Timor-Leste generally refers to the measures implemented to address the violence that occurred in connection with this 1999 referendum. However, domestically, the TJ process extends as far back as the civil conflict that preceded the invasion of Timor-Leste. The mechanisms primarily employed included a hybrid internationalized tribunal and a truth commission.

During the transitional period, the UN governed Timor-Leste through UN Transitional Administration in East Timor (UNTAET). In 2000, UNTAET passed Regulation 2000/11 granting the Court of Appeal in Dili exclusive jurisdiction over a range of crimes and "genocide" committed including "crimes against humanity" from January 1st to October 25th, 1999.

TJ Mechanisms

- Truth Commission
- Special Panels for Serious Crimes
- Ad Hoc Human Rights Court
- Reparations
- Amnesty

Timor-Leste's Commission for Reception, Truth and Reconciliation (CAVR) was set up as an independent authority, not subject to the control or direction of any member of Cabinet appointed pursuant to UNTAET Regulation No. 2000/23 on the Establishment of the Cabinet of the Transitional Government in East Timor or office holder of the East Timor Transitional Administration.⁴²² UNTAET facilitated an inclusive process to discuss the establishment of CAVR.⁴²³

The CAVR's terms of reference were refined through a national consultative process led by a committee of representatives of human rights, women's and other civil society actors, politicians and religious leaders, and it was established in 2001.⁴²⁴ The CAVR, an all-Timorese process was presided over by East Timorese National Commissioners, but financed by donors and staffed with international advisors.⁴²⁵ The Commission was originally established for two years, but the East Timorese government extended the Commission's mandate by six months until October 2004.⁴²⁶

The objectives of the Commission revolved around inquiring into human rights violations that had taken place in the context of the political conflicts in East Timor, establishing the truth regarding past human rights violations, reporting the nature of the human rights violations that have occurred and identifying the factors that may have led to such violations, identifying practices and policies, whether of State or non-State actors

⁴²² Section 2.2 of United Nations Transitional Administration in East Timor Regulation 2000/10.

⁴²³ Hayner, *Unspeakable Truths: Transitional Justice*, 39.

⁴²⁴ Hayner, *Unspeakable Truths: Transitional Justice*, 39.

⁴²⁵ Taina Järvinen, "Human Rights and Post-Conflict Transitional Justice in East Timor" (working paper, UPI, 2004), 40.

⁴²⁶ Ibid., 56.

which needed to be addressed to prevent future recurrences of human rights violations, the referral of human rights violations to the Office of the General Prosecutor with recommendations for the prosecution of offences where appropriate, assisting in restoring the human dignity of victims, promoting reconciliation, supporting the reception and reintegration of individuals who had caused harm to their communities through the commission of minor criminal offences and other harmful acts through the facilitation of community based mechanisms for reconciliation and the promotion of human rights.⁴²⁷

“

UNTAET used lessons learned from other post-conflict countries and incorporated elements from the South African Truth and Reconciliation Commission, indigenous East Timorese conflict resolution practices and regular legal practices.⁴²⁸

...

A- Linkages Between Formal Justice Mechanisms & CAVR:

The Commission for Reception, Truth and Reconciliation (CAVR) proceedings were initiated by voluntary statements from alleged perpetrators that detailed the relevant acts, admitted responsibility for such acts, and requested participation in a community reconciliation procedure.⁴²⁹ However, the Office of the General Prosecutor (OGP) and Special Crimes Unit (SCU) retained exclusive prosecutorial authority over serious crimes,⁴³⁰ and thus deponents' statements to CAVR were subject to state review if they contained information suggestive of serious crimes.⁴³¹ Therefore, prior to the Commission accepting a statement, it was mandatory to inform the deponent that a copy of the statement would be sent to the Office of the General Prosecutor and that its contents might be used against him or her in a court of law should the Office of the General Prosecutor choose to exercise jurisdiction.⁴³² Deponents would not be prosecuted for their less serious crimes once they had participated in CAVR process but instead would be engaged in an act of reconciliation such as community service, reparation, public apology and/or other acts of contrition⁴³³

⁴²⁷ Section 3.1 of United Nations Transitional Administration in East Timor (UNTAET) Regulation No. 2001/10 on the Establishment of a Commission for Reception, Truth and Reconciliation in East Timor, UNTAET/REG/2001/10 (13 July 2001) accessed August 15, 2013, <http://www.un.org/en/peacekeeping/missions/past/etimor/unttaetR/Reg10e.pdf>.

⁴²⁸ Ibid., 56.

⁴²⁹ Section 23.1 of United Nations Transitional Administration in East Timor (UNTAET) Regulation No. 2001/10.

⁴³⁰ Ibid., Section 22.2.

⁴³¹ Ibid., Section 24.5.

⁴³² Ibid., Section 23.3.

⁴³³ Ibid., Section 27.

By November 2003, the SCU had received over 1,115 statements from the Commission.⁴³⁴ In over 70 of these cases the SCU stopped the community reconciliation process in order to press charges.⁴³⁵

B- TRADITIONAL JUSTICE

One of CAVR's strengths was its relationship with the local justice mechanisms. CAVR facilitated the return and reintegration of low-level perpetrators if they admitted to and apologized for the crimes they committed.⁴³⁶ Through this process, the perpetrator would have to agree to undertake community service or make symbolic reparatory payments or public apology to if they wished to return to their communities.⁴³⁷

While the CAVR facilitated and monitored this process, community-based panels organized by regional commissioners with the involvement of traditional leaders and victims brokered the arrangements.⁴³⁸ The final agreements were further approved by a court that would waive all criminal and civil liabilities resulting from the crimes committed.⁴³⁹ This integrative example is illustrative of the practical linkages that can be made between TJ mechanisms in post-conflict countries.

In the community reconciliation process, hearings were presided over by a panel of local leaders, including a Regional Commissioner of the CAVR who would act as the chairperson.⁴⁴⁰ At the hearing, the perpetrator was required to make a formal public admission, and could be asked questions by victims and community members. Traditional *lisan* procedures and the participation of spiritual leaders were incorporated into the process in accordance with local custom.⁴⁴¹

The CRP was not intended to impinge on the jurisdiction of the Serious Crimes Unit or the Special Panels.⁴⁴² Rather, it was a mechanism designed to deal with "less serious crimes" and to run in tandem with the serious crimes process.⁴⁴³ This was in accordance with the principle that there could be no reconciliation without justice for those who had committed serious offences.⁴⁴⁴ At the same time, the procedure recognized the inability of the formal justice system to deal with "less serious" violations and the need to provide an achievable solution

⁴³⁴ Taina Järvinen, "Human Rights and Post-Conflict Transitional Justice in East Timor," 60.

⁴³⁵ Ibid., 60.

⁴³⁶ Hayner, *Unspeakable Truths: Transitional Justice*, 40.

⁴³⁷ Ibid.

⁴³⁸ Ibid.

⁴³⁹ Hayner, *Unspeakable Truths: Transitional Justice*, 40.

⁴⁴⁰ Comissão de Acolhimento, Verdade e Reconciliação de Timor Leste (CAVR), *Chega! The CAVR Report Part 9: Community Reconciliation* (Dili, Timor-Leste: Government of Timor-Leste, 2005), 10, accessed August 16, 2013, <http://www.cavr-timorleste.org/chegaFiles/finalReportEng/09-Community-Reconciliation.pdf>.

⁴⁴¹ Ibid.

⁴⁴² Ibid., 11

⁴⁴³ Ibid.

⁴⁴⁴ Ibid.

while promoting reconciliation.⁴⁴⁵ This approach was confirmed by Schedule 1 of the Regulation which provided that in principle serious criminal offences, in particular murder, torture and sexual offences, shall not be dealt with in a community reconciliation procedure.⁴⁴⁶

REPARATIONS

The CAVR received funding from the World Bank to administer an urgent reparations program that connected 700 victims to counseling and support services, and provided them with a one-off grant of \$200.⁴⁴⁷ Specifically, the CAVR recommended implementing a national reparations program involving national memorialization and material reparations for the most vulnerable victims.⁴⁴⁸ However, there has been little progress on implementing their respective recommendations.⁴⁴⁹

In terms of process, after hearing from all parties the panel of the CAVR would decide what appropriate “acts of reconciliation” the perpetrator should perform in order to be accepted back into the community.⁴⁵⁰ These acts might include community service, an apology or the payment of reparations.⁴⁵¹ If the perpetrator accepted the panel’s decision, an agreement would be drafted in simple terms.⁴⁵² It would then be forwarded to the appropriate District Court, where it would be finalized as an Order of the Court. On completion of all required “acts of reconciliation” the perpetrator was automatically entitled to civil and criminal immunity for all actions covered in the agreement.⁴⁵³

3.2.4. Liberia’s TRC

Liberia’s TRC made recommendations for the establishment of an “Extraordinary Criminal Tribunal for Liberia” to fight impunity and promote justice and reconciliation.⁴⁵⁴ The TRC named individuals who had violated IHRL, IHL and GHRV and who should be prosecuted by this tribunal. The TRC also specifically named those perpetrators who cooperated with the TRC, admitted to the crimes and expressed remorse and should not therefore be prosecuted.⁴⁵⁵ Also, the TRC named individuals who should be subject to public sanctions including being

⁴⁴⁵ Comissão de Acolhimento, Verdade e Reconciliação de Timor Leste (CAVR), *Chega! The CAVR Report*, 11.

⁴⁴⁶ *Ibid.*

⁴⁴⁷ International Center for Transitional Justice, *Unfulfilled Expectations Victims’ Perceptions*, 6.

⁴⁴⁸ *Ibid.*, 3.

⁴⁴⁹ *Ibid.*, 6.

⁴⁵⁰ Comissão de Acolhimento, Verdade e Reconciliação de Timor Leste (CAVR), *Chega! The CAVR Report*, 10.

⁴⁵¹ *Ibid.*

⁴⁵² Comissão de Acolhimento, Verdade e Reconciliação de Timor Leste (CAVR), *Chega! The CAVR Report*, 10.

⁴⁵³ *Ibid.*

⁴⁵⁴ Republic of Liberia Truth and Reconciliation Commission, *Truth and Reconciliation Commission Volume II: Consolidated Final Report* (Monrovia, Liberia: TRC, 2009), 268.

⁴⁵⁵ Republic of Liberia Truth and Reconciliation Commission, *Truth and Reconciliation Commission*, 268.

barred for a period of 30 years from holding public offices, being elected or appointed.⁴⁵⁶

Liberia provides us with an example of sequencing. In Liberia, the TRC was allowed to conclude its work before prosecutions were undertaken.⁴⁵⁷ The TRC noted that any person who had committed egregious domestic violations that were lesser than serious international violations would face domestic prosecutions. No names were specified in the final report.⁴⁵⁸ Under section 30 of the Act, where the TRC granted immunity to a person or group of persons based on evidence given before the TRC to advance the public interest, could not be used against that person in a court of law.⁴⁵⁹

3.3. Recommendations for Truth Telling Linkages Based on Lessons Learned

General Recommendations

- ✓ Like the CEH and Sierra Leone's TRC, Uganda should incorporate the information and evidence that has already been gathered by NGOs in the north. Several NGOs have collected much evidence on the violations that have taken place that can contribute to a more comprehensive truth.

Lessons Learned from Timor-Leste

- ✓ Timor-Leste's TRC provides a unique example of the practical linkages that can be made between TJMs and the formal justice system. While the Ugandan truth telling commission could monitor and facilitate the process (like CAVR), community-based panels made up of traditional leaders and victims could broker the arrangements, and finally the ICD or another national court could approve to waive all criminal and civil liabilities resulting from the crimes committed. This integrative approach is important in establishing linkages.
- ✓ Another linkage between formal justice systems and TJMs that can be applied to Uganda's situation is to specify, like in Timor-Leste, which crimes should be dealt with by traditional mechanisms and which should be left to the national courts.
- ✓ To meet the immediate needs of victims, and where the ICD may be limited by its Rules of Procedure and Evidence, a Ugandan truth telling commission could draw from the success of CAVR's immediate reparations scheme for those who are in urgent need of care.

⁴⁵⁶ Ibid., 272-3.

⁴⁵⁷ Hayner, *Unspeakable Truths: Transitional Justice*, 111.

⁴⁵⁸ Republic of Liberia Truth and Reconciliation Commission, *Truth and Reconciliation Commission*, 270.

⁴⁵⁹ TRC Act of Liberia, Liberia National Transitional Legislative Assembly (2005).

Lessons Learned from Guatemala

- ✓ The CEH examined the systemic causes of conflict, which would be beneficial to Uganda, which needs to address the root causes of conflict to prevent the recurrence of conflict
- ✓ Similarly to the CEH, a truth commission can suggest priorities for the justice system. The CEH emphasised the need to try those most responsible in the chain of command.
- ✓ A Ugandan truth commission should consider public hearings coupled with an effective outreach campaign. One of the CEH's weaknesses was that so few Guatemalans had heard about its recommendations and work. An effective outreach campaign would allow the entire country to follow the truth commission's proceedings thus fostering a national memory of what happened and contributing to national unity and reconciliation. In order to achieve its goals, the body should establish a robust witness protection programme.
- ✓ If a Ugandan truth commission is to be established, its mandate should allow for the involvement of traditional and religious leaders to help sensitise local communities and encourage victims to testify before the commission.
- ✓ Amnesty applications should be dealt with by competent courts of law.

Lessons Learned from Sierra Leone

- ✓ Victims should be provided with interim reparations prior to initiating a truth telling process so as to encourage their active participation. The interim reparations could be awarded by a special body or branch of Government. Otherwise, given Uganda's case where perpetrators continue to benefit through various reintegration programs, it is highly likely that problems similar to those witnessed in Sierra Leone will arise.
- ✓ The Ugandan truth telling mechanism should have the mandate to recommend the award of reparations by a special body or branch of Government. While the role of truth commissions is often restricted to making recommendations, this was ineffective in the case of Sierra Leone where such recommendations were not implemented. The Ugandan truth commission could in partnership with select NGOs publicize by all means possible the need to implement the recommendations. The special body or branch of Government should have procedures in place to ensure that such awards are implemented.
- ✓ In dealing with cross-cutting issues, Uganda should adopt the thematic model applied by the Sierra Leone TRC, which dealt with certain types of hearings. This allowed the TRC to gain an in-depth understanding of experiences of vulnerable groups like women and children, which contributed to a more comprehensive historical record.

Lessons Learned from Liberia

- ✓ A comprehensive outreach strategy must be enacted to avoid the problems encountered by the Liberian TRC.
- ✓ Uganda should enact its own Truth and Reconciliation Act which would lay out the mandate requirements of Uganda's TRC. More specifically and similarly to the Liberian TRC, it is important that this Act specify the areas in which the TRC must make recommendations to the GoU, for example, prosecutions, reparations, etc.
- ✓ Uganda should similarly enact a Witness Protection Statute to protect victims testifying before its truth commission. While Liberia's TRC recommended this in its report to the government following the completion of the TRC's work, it may be in Uganda's interest to enact this within its Truth and Reconciliation Act to ensure that victims do not fear testifying before a domestic truth telling commission.
- ✓ As was the case in Liberia, efforts should be made by the truth telling body to integrate traditional justice reconciliation practices in its work.

Recommendations from Ugandan CSOs⁴⁶⁰

- ✓ Specific CSOs working on transitional justice issues in Uganda-ASF inclusive, have opined that formal justice systems are not an appropriate entry-point for participants in the different transitional justice mechanisms, as currently proposed by the policy linkages.⁴⁶¹ They have, therefore, recommended that the "independent Transitional Justice Commission" be the entry-point into the overall transitional justice process with the Investigation and Referral Committee mandated to determine the appropriate forums on a case by case basis.⁴⁶² The Transitional Justice Commission should have independent investigative powers to be able to refer individuals to either the truth-telling mechanism, traditional justice mechanism or formal justice mechanism.⁴⁶³ The latter three mechanisms should then be able to refer individuals to reparation and reintegration mechanisms.⁴⁶⁴

Recommendation from the Ugandan Justice Law and Order Sector

- ✓ In terms of addressing cross-cutting issues in the truth telling commission, it is imperative that women and children are involved at all levels of the truth telling commission in line with the provisions of UN Security Council Resolution 1325.⁴⁶⁵

⁴⁶⁰ Transitional Justice Civil Society Platform, *Civil Society Recommendations on the Draft JLOS Transitional Justice Policy 2013* (Kampala, Uganda: n.p., 2013).

⁴⁶¹ Ibid., 10.

⁴⁶² Ibid.

⁴⁶³ Ibid.

⁴⁶⁴ Ibid.

⁴⁶⁵ Ibid.

4. REPARATIONS

The TJ Policy recommends that the Government establishes and implements a reparations program for victims affected by conflict.⁴⁶⁶ In order to achieve this, legislation to provide for comprehensive reparations will be enacted, a fund to be drawn from the consolidated fund will be established to implement the reparations program and a structure to implement reparations shall be established and a reparations program shall be designed.⁴⁶⁷

Draft TJ Policy on challenges of reparations

- i. The absence of a comprehensive Government policy to address reparations needs of communities affected by conflict;
- ii. The absence of a comprehensive Government policy on children born while their mothers were in captivity of the armed groups;
- iii. There are unaddressed medical, physical, mental, social, psychological and psychosocial problems among the affected communities as a result of conflict. Trauma and stigma especially among the abducted. Thus adversely affecting the reintegration of these persons.
- iv. Land conflict has emerged as a post conflict issue and will need to be addressed within a reparations programme.
- v. There are also challenges related to mainstreaming of cross cutting issues, limited participation of intended beneficiaries, lack of outreach programmes and matters of access and evidentiary thresholds. In addition, there is a lack of credible information/database on issues of intended beneficiaries such as: victims' categories and time frame for reparations. As a result, beneficiary communities have not obtained satisfactory benefits from the development programmes.
- vi. The various processes and programmes which would qualify as reparations, have been met with several shortcomings including; failure to conceptualize reparations in post conflict initiatives, disjointed and irregular administration of programmes which are often times region specific and lack of clarity between development initiatives and reparations, lack of technical expertise on reparations, misappropriation of inadequate resources, absence of legislative initiatives and institutional

The draft TJ Policy notes that:

Government shall establish and implement a reparations programme for victims affected by conflict.⁴⁶⁸

⁴⁶⁶ National Transitional Justice Working Group, *Draft National Transitional Justice Policy*, 26.

⁴⁶⁷ Ibid.

⁴⁶⁸ Ibid.

The draft TJ Policy states that legislation should provide for comprehensive reparations, the establishment of a fund to implement reparations, and a structure should be implemented to allow for the design and implementation of a reparations program.⁴⁶⁹ The draft TJ Policy states that this will be achieved by undertaking a mapping exercise to identify victims, define categories of violations, as well as the periods during which these violations occurred to determine who should receive reparations.⁴⁷⁰ Finally, public participation should be ensured in the design and implementation of reparations including involving communities, local governments and traditional leaders and civil society organizations. The Policy also provides for outreach activities for information dissemination of government reparations programmes.⁴⁷¹

4.1. Prospective Linkage Challenges Between Reparations and Other TJ Mechanisms

There have not been direct linkage challenges between reparations and other mechanisms because a government reparations policy or law is yet to be enacted. Therefore, comprehensive reparations have not been made to victims thus far. However, it is important to note that any reparations policy that is not linked to other transitional justice mechanisms, namely the International Crimes Division, traditional justice or truth telling initiatives will face challenges as many victims will believe that justice has not been achieved.⁴⁷² A reparations policy that is completely disconnected from the violations committed would essentially not be perceived as reparations. In the absence of prosecutions, truth-seeking or institutional reform, reparation programs may easily be seen as an effort to buy the acquiescence of victims.⁴⁷³

A key point to note is that many of the existing laws do not provide for reparation awards for mass crimes. The High Court (International Crimes Division) Practice Direction, 2011 neither contains a provision allowing the Court to grant victims the right to participate in the criminal trial process nor one that entitles victims of crime to apply for reparations. Rule 8 (1) of this Practice Direction mandates the Division to apply rules of procedure and evidence applicable to criminal trials in Uganda, which rules do not provide for a progressive recognition of victims rights in their entirety.

Similarly, the ICC Act 2010, which was enacted to domesticate the ICC's Rome Statute does not contain any provision on victim participation and does not also provide for victim reparations before national courts. This Act only guarantees protection for victims when they appear in court as witnesses⁴⁷⁴ and provides for

⁴⁶⁹ National Transitional Justice Working Group, *Draft National Transitional Justice Policy*, 26.

⁴⁷⁰ Ibid.

⁴⁷¹ Ibid.

⁴⁷² Sylvia Opina, "Reparations, Not Handouts," Justice and Reconciliation Project, last modified September 12, 2012, accessed July 30, 2013, <http://justiceandreconciliation.com/2012/09/reparations-not-handouts/>.

⁴⁷³ United Nations General Assembly, *Report of the Special Rapporteur on the Promotion of Truth, Justice, 8*.

⁴⁷⁴ Section 46 & 58 of the International Criminal Court Act, Parliament of Uganda (2010).

reparations only to the extent that Uganda is enforcing a request by the International Criminal Court.⁴⁷⁵ Section 68 of the Act mandates the Minister to refer a matter on victim reparations to an appropriate Ugandan agency which until now has not been established.⁴⁷⁶ In addition, the Act does not provide for a specialized unit that can deal with victims' concerns-such as offering material and psychosocial support.

A thorough reading of the TJ policy gives the impression that the reparations process provided for will be separate from any court process. In as much as the draft TJ policy proposes a mapping exercise, no mention is made on whether this process will complement formal justice processes. Courts should, to the extent possible, be able to make recommendations for reparations to special body or Government Department to implement.

The recently enacted Sentencing Guidelines provide that the Prosecution may apply for ancillary, compensatory and confiscation orders in all appropriate cases.⁴⁷⁷ Questions still loom on whether such compensation as envisaged in the guidelines is equivalent to reparations.

⁴⁷⁵ Section 64 of the International Criminal Court Act, Parliament of Uganda (2010).

⁴⁷⁶ Ibid., Section 68.

⁴⁷⁷ Republic of Uganda Constitution (*Sentencing Guidelines for Courts of Judicature*) (*Practice*) Directions, 2013.

4.2. Exploring Linkage Solutions Based on Case Studies

4.2.1. Colombia's National Commission for Reparations and Reconciliation

The Situation in Colombia

TJ mechanisms have been implemented in Colombia against a backdrop of continuing armed conflict and no obvious political transition. The goal of implementing these TJ mechanisms is to achieve a partial peace with paramilitary groups.

Attempts in the early 2000s to enact an amnesty for all demobilised armed actors met resistance from the Inter-American Human Rights Commission and NGOs, and was ultimately not enacted by Congress. Instead, the Law of Justice and Peace (Law 975) was enacted in 2004, which mandated the implementation of a reintegration process for former combatants and simultaneously promised reparations for victims.

The Comisión Nacional de Reparación y Reconciliación (CNRR) or National Commission for Reparations and Reconciliation established by Law 975 was the main TJ mechanism adopted in Colombia. The CNRR functioned with a limited mandate to analyse, evaluate, and report on the processes of disarmament, demobilisation, and reintegration from 1964.⁴⁷⁸ Its functions also included helping victims have access to justice, truth and reparations.⁴⁷⁹ The CNRR was also in charge of outreach to disseminate information to local communities across the country.⁴⁸⁰

The Presidential Agency for Social Action and International Cooperation functioned as the CNRR's technical secretariat and was mandated to administer the Victims Reparations Fund.⁴⁸¹ The fund consists mainly of funds that were obtained by the paramilitaries to provide remedy to the victims.⁴⁸² International donor contributions were also envisaged.⁴⁸³ Following pressure from CSOs and victims, in 2010-11, the administration of President Santos promoted legislation to provide victims with reparations of human rights violations under the *Victim's Law* ("*Ley de Víctimas*"). Interestingly, although it gained popularity, it is also important to note that the CNRR's mandate had run from 1964, and this law only provided reparations for human rights violations committed after 1985.⁴⁸⁴

It was estimated that 8,000 - 14,000 children were linked to illegal armed groups in Colombia, and 2,824 were recruited by paramilitary groups between 1990 and

⁴⁷⁸ U.S. Office on Colombia, *Summary of the May 2007 CNRR Report* (n.p., 2007)

⁴⁷⁹ Carla Koppel and Jonathan Talbot, *Strengthening Colombia's Transitional Justice Process by Engaging Women* (Washington, DC: Institute for Inclusive Security, 2011), 1.

⁴⁸⁰ Jemima García-Godos and Knut Andreas O. Lid, "Transitional Justice and Victims' Rights before the End of a Conflict: The Unusual Case of Colombia," *Journal of Latin American Studies* 42: 500.

⁴⁸¹ *Ibid.*, 499.

⁴⁸² *Ibid.*, 500.

⁴⁸³ *Ibid.*

⁴⁸⁴ Arthur et al., *Strengthening Indigenous Rights through Truth Commissions*, 25.

2004.⁴⁸⁵ The Constitutional Court issued orders for ministries, welfare programmes and other governmental institutions to adopt measure to protect and reintegrate children; however, this has not had much success to date.⁴⁸⁶

The CNRR has helped victims directly by assisting in the identification and registration of victims' legal status and indirectly by providing logistical, financial and moral support to other victims' organisations.⁴⁸⁷ Another weakness was the CNRR's definition of a victim. While it was relatively broad, it only included those who had been victimised by illegal armed groups and not those victimised by official state agents.⁴⁸⁸

A) LINKAGES BETWEEN REPARATIONS AND FORMAL JUSTICE

Following the enactment of the *Law of Justice and Peace*, Law 975, sentences were reduced in exchange for truth-telling.⁴⁸⁹ Those demobilised combatants who omitted a crime they had committed would be passed over to the domestic courts for prosecution.⁴⁹⁰ The High Courts of Judicial Districts also dealt with the sentencing of paramilitary leaders, and assisted in the process of settling reparations claims.⁴⁹¹

B) LINKAGES BETWEEN REPARATIONS AND TRUTH TELLING

Since the CNRR operated during the on-going conflict, it did not have a mandate to analyse the political, economic and social elements of the Colombian conflict.⁴⁹² However, it helped set the stage for the establishment of a truth and reconciliation commission in the future.⁴⁹³

Article 33 of Law 975 established the National Unit for Justice and Peace (UNFJP) to deal with the truth-telling aspect of the demobilisation of paramilitaries. Specifically, its mandate was to collect reports of abuses ensuring that paramilitaries confess, and criminal investigations were carried out.⁴⁹⁴ These reports were based on victim registrations and denunciations.⁴⁹⁵

⁴⁸⁵ Salvador Herencia Carrasco, "Transitional Justice and the Situation of Children in Colombia and Peru" (working paper, UNICEF, June 2010), 13.

⁴⁸⁶ Carrasco, "Transitional Justice and the Situation of Children," 13.

⁴⁸⁷ García- Godos and O. Lid, "Transitional Justice and Victims' Rights Before the End of a Conflict," 499.

⁴⁸⁸ Ibid., 501.

⁴⁸⁹ Hayner, *Unspeakable Truths: Transitional Justice*, 115.

⁴⁹⁰ Carrasco, "Transitional Justice and the Situation of Children," 11.

⁴⁹¹ García- Godos and O. Lid, "Transitional Justice and Victims' Rights Before the End of a Conflict," 499.

⁴⁹² Carrasco, "Transitional Justice and the Situation of Children," 10.

⁴⁹³ Ibid.

⁴⁹⁴ García- Godos and O. Lid, "Transitional Justice and Victims' Rights Before the End of a Conflict," 499.

⁴⁹⁵ Ibid.

4.3. Recommendations for Reparations Linkages Based on Lessons Learned

- ✓ There should be a link between the truth process and reparations. For example, a Truth Commission Report may be publicized and archived at a specific memorial centre as part of the symbolic reparations process. This would address a major past challenge in Uganda where such reports have been shelved at the expense of the needs of victims. In Argentina, a link was created between the truth commission and the reparations process when President Nestor Kirchner created the National Archive for Historical Memory to house documents related to human rights violations, including documents produced by the Truth Commission and by the investigations that followed the end of the regime.⁴⁹⁶
- ✓ Material awards of reparations should be made following the conclusion of a truth telling process. With regard to linkages between truth telling and reparations, one of the flaws of Colombia's victim law was that it did not span the CNRR's mandate thus leaving many victims out. TJ mechanisms should be able to recommend reparations that a specific entity can flexibly apply without leaving any persons out. It should also be able to deliver collective, symbolic and individual reparations to indemnify victims.
- ✓ Victims should be provided with interim reparations prior to initiating a truth telling process so as to encourage their active participation and address their emergency needs. As outlined in the UN report on victims' needs in Uganda, many victims require immediate care. Given Uganda's case where perpetrators continue to benefit from various reintegration programs, it is highly likely that problems similar to those witnessed in Sierra Leone where victims remained frustrated will arise.
- ✓ Community reconciliation agreements should be a part of the transitional justice process and these should include provisions on reparations as was the case in Timor Leste. CRPSs were concluded by the drafting of community reconciliation agreements (CRA). Panelists could choose from community service, reparation, public apology, and/or some other act of contrition as possible sentences.⁴⁹⁷ If the deponent agreed to the terms of the sentence, the panel wrote the terms into a CRA and submitted the document to the relevant district court to be registered as an order of the court.⁴⁹⁸

⁴⁹⁶ Aguilar, "Transitional Justice in the Spanish," 10.

⁴⁹⁷ United Nations Transitional Administration in East Timor Regulation 2000/10, Section 27.7.

⁴⁹⁸ Ibid., Section 28.1.

5. AMNESTY

The draft transitional justice policy notes that amnesty needs to be contextualized in light of transitional justice and should be considered as an accountability tool⁴⁹⁹ to promote justice, peace and reconciliation.⁵⁰⁰ Over 26,000 former combatants have benefited from the amnesty and approximately 5,000 have been reintegrated into their communities.⁵⁰¹ In light of the policy, persons formerly amnestied will be encouraged to participate in truth telling, traditional justice and reparations to the extent that they promote reconciliation, healing, reintegration and accountability.⁵⁰²

Draft TJ Policy on the challenges of amnesty

The challenges with the current blanket amnesty include:

- i. It focused on the needs of the perpetrators and did not take any consideration of the needs and concerns of the victims. As such, GoU has been criticized for facilitating the reintegration of perpetrators at the expense of their victims, who continue to have no livelihood options with which to fend for themselves;
- ii. Special needs of women and children were not considered especially in the reintegration process/packages;
- iii. The amnesty law did not take into consideration the nature of crimes committed by perpetrators; require the perpetrator to confess to the atrocities/crimes they committed, to admit or to apologize; and it did not take into consideration those who had not voluntarily abandon rebellion;
- iv. The lack of alignment to transitional justice mechanisms in Uganda is/ a threat to peace and stability. It is an impediment to communal reconciliation, acceptance and reintegration. As such, communities with amnestied persons and the amnestied persons themselves face immense

The draft TJ Policy notes that:

“There shall be no blanket amnesty and Government shall encourage those amnestied, to participate in truth telling and traditional justice processes”⁵⁰³

⁴⁹⁹ Note that Bassiouni does not view amnesty as an accountability tool since it plays an opposite role. See Bassiouni, *Introduction to International Criminal Law*, 972.

⁵⁰⁰ National Transitional Justice Working Group, *Draft National Transitional Justice Policy*, 21.

⁵⁰¹ *Ibid.*, 20.

⁵⁰² *Ibid.*, 21

⁵⁰³ *Ibid.*, 25.

The Policy states that in order to realize this, the Government must provide for a conditional amnesty in the Transitional Justice Act. For instance, amnesties could be considered after a truth telling or traditional justice process, they should not be considered for international crimes and children should not be subject to the process.⁵⁰⁴ In addition, avenues should be established for those amnestied to participate in truth telling and traditional justice processes through dialogue and sensitization.⁵⁰⁵

5.1. Prospective Linkage Challenges Between Amnesty and Other TJ Mechanisms

The prospect of creating linkages between amnesties and other TJ processes is particularly problematic since over the years a number of persons have received amnesties without necessarily participating in the other transitional justice processes, that is, without telling their victims the truth of crimes committed or participating in the traditional justice processes. Questions on the retrospective application of a new law of this nature will therefore need to be addressed.

⁵⁰⁴ National Transitional Justice Working Group, *Draft National Transitional Justice Policy*, 25.

⁵⁰⁵ Ibid.

5.2. Exploring Linkage Solutions Based on Case Studies

5.2.1. Argentina's De Facto Amnesty

Argentina adopted two laws that constituted a *de facto* amnesty. The *Punto Final* ("Full Stop") law adopted in 1986 established a 60-day limit on the initiation of new criminal complaints related to Argentina's "dirty war."⁵⁰⁶ The Obediencia Debida ("Due Obedience") law enacted in 1987 prevented most military officials from being prosecuted on the basis that they had been coerced into committed human rights abuses.⁵⁰⁷ These were later annulled. In assessing the validity of amnesty laws, the Inter-American Commission on Human Rights found that the *Punto Final* and Due Obedience Laws adopted by Argentina violated the American Convention on Human Rights.⁵⁰⁸

In 1989 and 1990, President Menem issued two pardons, one to a handful of officers who were still facing trials and another to those who had already been convicted. This was a blow for victims and their families, and foreclosed many options to continue pursuing justice for past crimes.⁵⁰⁹

The combination of this pardon and the Full Stop and Due Obedience laws had an important impact. No new case could be filed against person suspected of crimes committed during the "Dirty War," except for the excluded crimes indicated above; all persons but former top commanders were protected from prosecution, and former officers, who could not benefit from the Due Obedience law and who had been tried and convicted, had been issued pardons.⁵¹⁰ Civil society rejected the blanket amnesty and pardons justified to maintain the fragile civilian rule, and legal developments insisted upon justice for victims including holding perpetrators accountable.

5.2.2. South Africa's Amnesty

South Africa enacted an amnesty to incentivize former members of the Government to participate in its truth commission.⁵¹¹ For more than forty years, South Africans lived under apartheid, the official Government policy of segregation and oppression.⁵¹² The apartheid system heavily favored Caucasians, leaving those of other races and ethnicities with few rights, which included limits on where they could live.⁵¹³ Moreover, during the apartheid era, police

⁵⁰⁶ United Nations Office of the High Commissioner for Human Rights, *Rule-of-Law Tools for Post-Conflict*, 8.

⁵⁰⁷ Ibid.

⁵⁰⁸ Ibid., 9.

⁵⁰⁹ Rebecca Lichtenfeld, *Accountability in Argentina: 20 Years Later, Transitional Justice Maintains Momentum*, Case Study (New York, NY: International Center for Transitional Justice, 2005), 2.

⁵¹⁰ Human Rights Watch, *Reluctant Partner: The Argentine Government's Failure to Back Trials of Human Rights Violators* (n.p.: Human Rights Watch, 2006).

⁵¹¹ Elizabeth Ludwin King, "Amnesties in a Time of Transition," *George Washington International Law Review* 41 (January 1, 2010): 589

⁵¹² Ibid.

⁵¹³ King, "Amnesties in a Time," 589.

brutalization was common, as was the torture of prisoners.⁵¹⁴ During the negotiations to end the apartheid regime, the ANC, the main opposition political party, refused to accept any proposal that provided a blanket amnesty for individuals who committed politically motivated crimes.⁵¹⁵ Instead, the interim 1993 Constitution gave the South African Parliament the power to decide whether and how amnesties should be applied.⁵¹⁶ Under this authority, it established the Truth and Reconciliation Commission (TRC) in July 1995, and included amnesty as an integral part of the truth-telling process.⁵¹⁷

5.2.3. **Colombia's Amnesty**

Prior to the enactment of Law 975, the Pardon Law (Law 782) that was enacted in 2002 permitted an amnesty or pardon for individuals from armed groups who had committed political crimes such as rebellion.⁵¹⁸ However, following the enactment of the Law 782, demobilised combatants were required to confess to the crimes they committed. If they omitted to admit to a crime they had committed, they would be passed over to the domestic courts for prosecutions.⁵¹⁹ In 2006, Constitutional Case No C-37/06, the Plenary Chamber of Colombia's Constitutional Court stated among others that the prohibition of criminal action or punishment must not be imposed for serious crimes which constitute crimes against humanity under international law and must not take place during a period when there is no effective remedy.⁵²⁰

5.2.4. **Chile's Amnesty**

In Chile, during the military government, the Decree-Law on General Amnesty (1978) extended an amnesty to:

all persons who have been the authors, accomplices, or accessories of unlawful deeds during the period in which the state of siege was in force, between 11 September 1973 and 10 March 1978, unless they are currently being tried or have been sentenced and to those persons who as of the date that this decree-law took effect have been sentenced by military tribunals since 11 September 1973.⁵²¹

In its decision in the Victor Raul Pinto case in 2007, Chile's Supreme Court stated among others that amnesties may not be used in cases of war crimes committed under the protection of...official agents or State officials....if these war crimes

⁵¹⁴ King, "Amnesties in a Time," 589.

⁵¹⁵ Ibid.

⁵¹⁶ Ibid., 589-590.

⁵¹⁷ Ibid., 590.

⁵¹⁸ Carrasco, "Transitional Justice and the Situation of Children," 11.

⁵¹⁹ Ibid.

⁵²⁰ "Colombia: Practice Relating to Rule 159. Amnesty," International Committee on the Red Cross, accessed August 7, 2013, http://www.icrc.org/customary-ihl/eng/docs/v2_cou_co_rule159_sectionb.

⁵²¹ Ibid.

were subject to severe penalties under domestic law and international law when they were committed.⁵²² In the same decision, the Court critiqued the so-called amnesty law because it had the effect of exonerating perpetrators from criminal responsibility for serious human rights violations since it was drafted after these acts took place and by those in power during and after the acts, thereby guaranteeing the impunity of those responsible for these acts and consequently violating Article 148 of the 1949 Geneva Convention IV.⁵²³

5.3. Recommendations for Amnesty Linkages Based on Lessons Learned

- ✓ As in the case of South Africa, amnesty should only be granted upon one providing accurate facts relevant in the process of providing a record of the truth of atrocities committed sole body for either before a truth commission or a competent Court of Law.
- ✓ Though Chile's President Aylwin created the truth commission, he believed that more mechanisms were needed to discover "the truth" of what happened during the Pinochet dictatorship. In what has come to be known as the "Aylwin Doctrine", he required that the Courts conduct a full judicial investigation of those seeking amnesty under the 1978 amnesty law. Similarly, in Uganda, while ensuring that investigations do not result in the formal punishment of applicants, investigating each case thoroughly can ensure that each person is eligible for amnesty. It will also help establish an accurate historical record of what took place.
- ✓ In line with the TJ policy, amnesty should be reserved for those who are the least responsible for committing serious crimes considering that many former combatants were actually forcibly recruited, abused, tortured and forced to commit atrocities by their leaders.
- ✓ Amnestied persons should be released from paying compensation. This will serve to encourage long lasting reconciliation between the parties. To foster reconciliation in South Africa, an individual who received amnesty was not only free from criminal prosecution, but he was also exempt from civil damages.⁵²⁴ A national reparations program was instead set up to address the compensation needs of victims.

⁵²² "Colombia: Practice Relating to Rule 159. Amnesty," International Committee on the Red Cross.

⁵²³ Ibid.

⁵²⁴ Ibid., 590.

CONCLUSION

In conclusion, given the different objectives of the TJ mechanisms, it is important that steps are taken to ensure that there is no clash in their application. Albeit their varying mandates, the mechanisms may be applied in a complementary and mutually reinforcing manner. Based upon the findings, prosecutions should focus on key perpetrators of grave human rights violations while other mechanisms such as a truth telling body and TJMs should focus on lesser offenders. Reparations play a central role for victims and should therefore be open to all.

The TJ process should be inclusive of both perpetrators and victims and should account for the special needs of vulnerable groups such as women and children. Participation in the TJ process and particularly in TJMS must be gender and age-sensitive, and in relation to the latter, to the extent possible, participation should be voluntary. The various TJ mechanisms should interact in such a manner that they are mutually reinforcing, and can work towards achieving the broader transitional justice goals of peace, justice and accountability.

Ultimately, the Government of Uganda must focus on fostering national reconciliation and addressing the root problems that have triggered so many conflicts in Uganda's history.

Avocats Sans Frontières

