TOWARDS A COMPREHENSIVE & HOLISTIC TRANSITIONAL JUSTICE POLICY FOR UGANDA:

Exploring linkages between transitional justice mechanisms

AUGUST 2013

With the financial support of:

The European Union

Avocats Sans Frontières
Avocats Sans Frontières (ASF) is an international non-governmental organisation committed to enhancing access to justice for the most vulnerable persons in society. ASF’s primary goal is to contribute to the establishment of institutions and mechanisms that allow for access to independent and impartial justice; capable of guaranteeing the protection of fundamental rights.

With over six (6) years presence, the ASF Mission in Uganda continues to fulfill its mandate by implementing activities aimed at;

- Promoting access to justice for vulnerable communities
- Supporting the Transitional Justice process in Uganda
- Promoting the application and fulfillment of International Justice Principles and obligations of the Government of Uganda

ASF promotes and defends victims’ rights in conflict situations. Therefore, ASF is committed to supporting victim communities by enhancing their voice and individual/collective agency to influence decision making; and policy and lawmakers processes.

For more information, please visit our website www.asf.be or directly contact our offices:

KAMPALA OFFICE
Plot 832 Old Kira Road, Bukoto,
P.O. Box 36710 Kampala
Tel. +256 (0) 312 265 842
Ismene Nicole Zarifis, ASF Head of Mission: OUG-cm@asf.be

HEADQUARTERS
Rue de Namur 72 Naamsestraat
1000 Brussels - Belgium
Tel. +32 (0)2 223 36 54
Jean-Philippe Kot, ASF International and Transitional Justice Expert:
jp kot@asf.be

Copyright © 2013 Avocats Sans Frontières - All rights reserved.
Printed in Kampala, Uganda.
Cover picture: Rural communities in Northern Uganda affected by war crimes are being sensitized about transitional justice © ASF.

Avocats Sans Frontières thanks Sharon Esther Nakandha and Kendra Alexia Hefti-Rossier, the authors of this publication; and the team of researchers Jesse Mugero & Alice Etam.
ACKNOWLEDGMENTS

Avocats Sans Frontières would like to thank Ismene Zarifis, Jean-Philippe Kot and Luc Meissner for their generous and excellent feedback on earlier drafts. Any subsequent errors or omissions are the sole responsibility of the authors alone.

This publication has been produced with the assistance of the European Union. The contents of this publication are the sole responsibility of Avocats Sans Frontières and can in no way be taken to reflect the views of the European Union.
## TABLE OF CONTENT

**ABBREVIATIONS** ........................................................................................................................................................................ 7

**FOREWORD** .................................................................................................................................................................................. 8

**EXECUTIVE SUMMARY** .................................................................................................................................................................... 9

### I: INTRODUCTION TO TRANSITIONAL JUSTICE .................................................................................................................. 12

1. *Transitional Justice Notions and Approaches* ......................................................................................................................... 12
   1.1. Defining Transitional Justice .................................................................................................................................................... 12
   1.2. A Comprehensive Approach to Transitional Justice ............................................................................................................ 13
2. *Transitional Justice Mechanisms* ................................................................................................................................................ 14

**RETRIBUTIVE JUSTICE** .................................................................................................................................................................. 15

2.1. Prosecutions .................................................................................................................................................................................. 16
   2.1.1. Domestic Prosecutions ....................................................................................................................................................... 16
   2.1.2. International Prosecutions .................................................................................................................................................. 16

**RESTORATIVE JUSTICE** .............................................................................................................................................................. 18

2.2. Traditional Justice ...................................................................................................................................................................... 19
2.3. Truth Telling ................................................................................................................................................................................. 20
   2.3.1. The Right to Truth ............................................................................................................................................................. 20
   2.3.2. Truth Commissions and Commissions of Inquiry ............................................................................................................... 21
2.4. Reparations .................................................................................................................................................................................... 21
2.5. Amnesty .......................................................................................................................................................................................... 22
   2.5.1. Types of Amnesty Laws .................................................................................................................................................... 23
   2.5.2. Amnesties under International Law ..................................................................................................................................... 24

### CROSS-CUTTING ISSUES ........................................................................................................................................................... 25

2.6. Women and Children in Transitional Justice ........................................................................................................................ 25
   2.6.1. Sexual Violence in International Law .................................................................................................................................... 25
   2.6.2. Women in TJ ......................................................................................................................................................................... 26
   2.6.3. Children in TJ ....................................................................................................................................................................... 26
2.7. Outreach and Sensitization Initiatives in Transitional Justice ................................................................................................ 27
2.8. Victim and Witness Protection .................................................................................................................................................. 28

### II: UGANDA’S HISTORY OF CONFLICT ............................................................................................................................. 30

1. *Introduction* .................................................................................................................................................................................. 30
2. *Historical Background* ................................................................................................................................................................. 30
   2.1. Colonialism Sowed the Seeds for Future Conflict ................................................................................................................... 31
   2.2. Independence and the North-South Battle for Power ............................................................................................................... 32
   2.3. Political Tensions Unfold Leading to the Luwero War .......................................................................................................... 33
   2.4. Uganda’s Root Differences Culminate in the LRA conflict .................................................................................................. 33
   2.5. Religious Conflict in Western Uganda ...................................................................................................................................... 35
   2.6. Addressing the Causes of Uganda’s Conflicts ........................................................................................................................ 35

### III: THE TJ LANDSCAPE IN UGANDA .................................................................................................................................. 36

**RETRIBUTIVE JUSTICE ELEMENTS IN UGANDA** .................................................................................................................... 37

1. *Formal Justice* ................................................................................................................................................................................ 37
   1.1. Domestic Prosecutions ............................................................................................................................................................. 37
      1.1.1. ICC Act 2010 ................................................................................................................................................................. 37
      1.1.2. International Crimes Division ......................................................................................................................................... 37
   1.2. International Prosecutions ....................................................................................................................................................... 38
   1.3. Current Limitations of Formal Justice .................................................................................................................................. 39

**RESTORATIVE JUSTICE ELEMENTS IN UGANDA** .................................................................................................................... 40

2. *Traditional Justice* ...................................................................................................................................................................... 40
   2.1. Current Limitations of Traditional Justice ................................................................................................................................ 40
3. Truth Telling ............................................................................................................. 42
3.1. Current Limitations of Truth Telling ................................................................. 43

4. Reparations ............................................................................................................. 44
4.1. Current Limitations of Reparations ..................................................................... 45

5. Amnesty ................................................................................................................. 47
5.1. Current Limitations of Amnesty .......................................................................... 50

IV: EXPLORING LINKAGE SOLUTIONS IN THE DRAFT TJ POLICY .................. 51

Retributive Justice in the Draft TJ Policy ................................................................. 52
1. Formal Justice ........................................................................................................ 52
  1.1. Prospective Linkage Challenges Between Formal Justice and Other TJ Mechanisms... 53
      1.1.1. Prospective Linkage Challenges Between Formal Justice and Traditional Justice .. 53
      1.1.2. Prospective Linkage Challenges Between Formal Justice and Truth Telling ...... 53
      1.2. Exploring Linkage Solutions Based on Case Studies ........................................ 55
          1.2.1. Sierra Leone’s Hybrid Tribunal ................................................................. 55
      1.3. Recommendations for Formal Justice Linkages Based on Lessons Learned ........ 58

Restorative Justice in the Draft TJ Policy ................................................................. 60
2. Traditional Justice ................................................................................................ 60
  2.1. Prospective Linkage Challenges Between TJMs and Other TJ Mechanisms .......... 61
  2.2. Exploring Linkage Solutions Based on Case Studies ........................................ 62
      2.2.1. Rwanda’s Gacaca Courts ........................................................................... 62
  2.3. Recommendations for Traditional Justice Linkages Based on Lessons Learned ...... 65

3. Truth Telling ........................................................................................................... 66
  3.1. Prospective Linkage Challenges Between Truth Telling and Other TJ Mechanisms ... 66
  3.2. Exploring Linkage Solutions Based on Case Studies ........................................ 67
      3.2.1. Guatemala’s Commission for Historical Clarification (CEH) ....................... 67
      3.2.2. Sierra Leone’s TRC ................................................................................. 72
      3.2.3. Timor-Leste’s Commission for Reception, Truth and Reconciliation .......... 74
      3.2.4. Liberia’s TRC ......................................................................................... 77
  3.3. Recommendations for Truth Telling Linkages Based on Lessons Learned .......... 78

4. Reparations ............................................................................................................ 81
  4.1. Prospective Linkage Challenges Between Reparations and Other TJ Mechanisms .... 82
  4.2. Exploring Linkage Solutions Based on Case Studies ........................................ 84
      4.2.1. Colombia’s National Commission for Reparations and Reconciliation ........ 84
  4.3. Recommendations for Reparations Linkages Based on Lessons Learned ............ 86

5. Amnesty ................................................................................................................. 87
  5.1. Prospective Linkage Challenges Between Amnesty and Other TJ Mechanisms .......... 88
  5.2. Exploring Linkage Solutions Based on Case Studies ........................................ 89
      5.2.1. Argentina’s De Facto Amnesty ................................................................... 89
      5.2.2. South Africa’s Amnesty ........................................................................... 89
      5.2.3. Colombia’s Amnesty .............................................................................. 90
      5.2.4. Chile’s Amnesty .................................................................................... 90
  5.3. Recommendations for Amnesty Linkages Based on Lessons Learned ............... 91

CONCLUSION ......................................................................................................... 92
<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>CAVR</td>
<td>Commission for Reception, Truth and Reconciliation (Timor-Leste)</td>
</tr>
<tr>
<td>CEH</td>
<td>Commission for Historical Clarification (Guatemala)</td>
</tr>
<tr>
<td>CIVHR</td>
<td>Commission of Inquiry into Violations of Human Rights (Uganda)</td>
</tr>
<tr>
<td>CSO</td>
<td>Civil Society Organization</td>
</tr>
<tr>
<td>DRC</td>
<td>Democratic Republic of Congo</td>
</tr>
<tr>
<td>GoU</td>
<td>Government of Uganda</td>
</tr>
<tr>
<td>ICC</td>
<td>International Criminal Court</td>
</tr>
<tr>
<td>ICD</td>
<td>International Crimes Division</td>
</tr>
<tr>
<td>IHL</td>
<td>International Humanitarian Law</td>
</tr>
<tr>
<td>IHRL</td>
<td>International Human Rights Law</td>
</tr>
<tr>
<td>JLOS</td>
<td>Justice Law and Order Sector</td>
</tr>
<tr>
<td>LRA</td>
<td>Lord’s Resistance Army</td>
</tr>
<tr>
<td>NGO</td>
<td>Non-Governmental Organization</td>
</tr>
<tr>
<td>TJ</td>
<td>Transitional Justice</td>
</tr>
<tr>
<td>TJM</td>
<td>Traditional Justice Mechanism</td>
</tr>
<tr>
<td>TRC</td>
<td>Truth and Reconciliation Commission</td>
</tr>
<tr>
<td>UN</td>
<td>United Nations</td>
</tr>
</tbody>
</table>
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 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.

_________________
Ismene N. Zarifis
Head of Mission, ASF Uganda
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 complimentarity 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 complimenting 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”. 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

---

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 mechanisms.2

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 t the 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 too 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 justice\(^4\) 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 its 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.\(^10\)

\(^5\) Ibid. 20
\(^7\) 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.
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. These include truth-seeking, justice initiatives, reparations and guarantees of non-recurrence.

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. 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.

The interaction between TJ mechanisms helps address the needs of different actors and different sectors within society. 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. Quinn argues that "the presence of some instruments can provide the necessary support for others". 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.

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

---

12 Ibid., 1.
13 Ibid., 7.
14 Ibid., 8.
16 Ibid.
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. According to Cherif Bassiouni, accountability measures fall into the categories of truth, justice and redress. 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, 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.

---
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

23 Ibid.
26 Daly, "Revisiting the Relationship between Retributive and Restorative Justice," 6.
constitutional backing may limit the mandate of a court to try a specific case which is relevant but falls outside its temporal jurisdiction.\textsuperscript{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.

\textbf{2.1. Prosecutions}

\textbf{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.\textsuperscript{29} They provide a public forum for the judicial confirmation of historical fact.\textsuperscript{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.\textsuperscript{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.\textsuperscript{32}

\textbf{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.\textsuperscript{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.\textsuperscript{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.

\textsuperscript{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, \textit{Rules}, vol. 1, \textit{Customary International Humanitarian Law} (Cambridge, United Kingdom: International Committee of the Red Cros, 2009).


\textsuperscript{30} Ibid.

\textsuperscript{31} Ibid.


\textsuperscript{33} Avocats Sans Frontières and Uganda Coalition on the ICC, \textit{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.

\textsuperscript{34} Ibid.
In 1998, the Rome Statute was adopted by an assembly of States to establish the world’s first permanent International Criminal Court. The ICC’s mandate is limited to the period after 1st July 2002 when the Rome Statute came into force.

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. 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 crimes.

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 complementarity.

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. 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. The ICC also has jurisdiction where the State is unwilling to hold perpetrators accountable, 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.

---

41 Ibid.
42 Ibid.
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. This model takes into account transforming the offender and reconciling the offender with the victim and the community.

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. 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.

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. 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. 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


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

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. The approach used by TJMs includes a number of local practices from relatively formalized customary law to spiritual and religious conciliatory practices. 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. 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.

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.

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.

---

50 Ibid.
52 Dolberg and Meesenburg, “Traditional Justice? The Role of Traditional Authority,” 49.
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.\(^{62}\)


\(^{55}\) Ibid. 2.

\(^{56}\) Ibid.


\(^{59}\) Aptel and Ladisch, Through a New Lens, 1.


\(^{61}\) 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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{65} The Charter promises victims of violations “access to the factual information concerning the violations.”\textsuperscript{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.\textsuperscript{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.\textsuperscript{68} A truth commission conducts a much more comprehensive investigation into the past to establish an accurate historical record of what happened.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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...*
International Human Rights Law and Serious Violations of International Humanitarian Law.\textsuperscript{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 repress.\textsuperscript{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.\textsuperscript{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.\textsuperscript{75} The Court further found that reparations may be granted to direct and indirect victims including the family members of direct victims and legal entities.\textsuperscript{76} 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.\textsuperscript{77} Reparations should also be prompt and proportionate to the harm, injury, loss and damage resulting from the crimes charged.\textsuperscript{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.

\section*{2.5. Amnesty}

Amnesties are “a form of forgiveness, granted for governments, for crimes committed against a public interest.”\textsuperscript{79} Under this definition, an Amnesty law is a

\begin{thebibliography}{99}
\item \textsuperscript{73} Ibid.
\item \textsuperscript{74} Article 75 of the Rome Statute of the International Criminal Court (1998).
\item \textsuperscript{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
\item \textsuperscript{76} Ibid., para 194-199
\item \textsuperscript{77} Ibid. para. 217-241
\item \textsuperscript{78} Ibid. para. 242 and f.
\end{thebibliography}
legal measure barring criminal prosecution and in some cases, civil actions against certain individuals who committed crimes before the amnesty’s adoption. Amnesties also retroactively nullify any legal liability that may previously have been established. 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”.

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. 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.

An amnesty that unilaterally exempts broad categories of serious human rights offenders from prosecution is known as a blanket amnesty. 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. For example, in Argentina, the 1986 Punto Final (“Full Stop”) Law and the 1987 Due Obedience Law shielded certain commanders from prosecution. 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

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.
86 Ibid.
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 impunity. 92

91 Ibid.
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.\(^99\)


\(^{95}\) 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.

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

---


\(^{102}\) Ibid.


\(^{105}\) 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

---

109 Ibid. 9-10.
110 Ibid. 10.
of the organs of the ICC. Outreach aims to clarify misperceptions and misunderstandings and to enable affected communities to follow trials.

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. 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. It is further pointed out that effective victim and witness protection is vital to ensure victims’ and societies’ right to the truth. 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.

---

114 Ibid.
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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.

\textsuperscript{120} Ibid.
\textsuperscript{121} United Nations Office on Drugs and Crime, \textit{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 onwards, 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.\textsuperscript{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 cases\textsuperscript{124} 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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{128} Rather than integrating the different ethno-racial groups, the South was favored economically while the North was

\textsuperscript{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.
\textsuperscript{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.
\textsuperscript{128} Ibid.
discouraged from developing commercial agriculture and was used as a pool for recruitment into the military.\textsuperscript{129}

Practices of military recruitment also played a role in creating a divide between the North and South.\textsuperscript{130} To protect the interests of the British colonizing power, the Ugandan military was comprised primarily of northerners.\textsuperscript{131} By 1969, although only 19\% of the national population came from the north, they represented 61\% of the military.\textsuperscript{132} Furthermore, 88\% of the 161 officers were from the north.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{135}

\textbf{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{139}

\begin{thebibliography}{99}
\bibitem{130} Ibid.
\bibitem{131} Ibid.
\bibitem{132} Ibid.
\bibitem{133} Ibid.
\bibitem{134} Ibid.
\bibitem{135} Ibid.
\bibitem{136} Ibid.
\bibitem{137} Mamadou Tall, "Notes on the Civil and Political Strife in Uganda," \textit{Issue: A Journal of Opinion} 12, no. 1/2 (Spring/Summer 1982).
\end{thebibliography}
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. In the 1980 election poll, Obote’s UPC secured only 12% of the votes in Luwero. Across Buganda, Obote consistently gained below 20% of the votes. 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.

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. Luwero district became the nexus of fighting during the 1980s Bush War between the United National Liberation Army and the NRA. The most affected areas during the NRA bush war were Zirobe, Buzibwera, Kikyusa and Nakaseke. 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. 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.

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. 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.

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

141 Ibid.
142 Ibid.
143 Ibid.
146 Refugee Law Project, NR&TJA 2012: Brief 14 - Luwero
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. Furthermore, by 2005, nearly two million people, which constitute approximately 90% of the Acholi-land population, had been internally displaced.

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.

The Museveni rebellion against Obote has often been explained in the context of the North-South divide. 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. 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. 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. 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.

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.

---

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.
155 Ibid.
156 Ibid.
157 Ibid.
158 Ibid.
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. 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.

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.

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. 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.

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.” “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.

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. 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)
165 Ibid., Article 5.2.
166 Ibid., Article 5.1.
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. 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.

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. Thomas Kwoyelo, a mid-level LRA

---

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. 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. The ICC has only issued arrest warrants for senior LRA commanders namely Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen and Raska Lukwiya. 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. 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. 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.
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.
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. 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. 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).
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.


\(^{180}\) 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.


\(^{185}\) Ibid., Article 3.1.
welcome former child combatants back into their communities. 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. 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? 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. 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.

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*. 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.

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.

---

186 Quinn, "The Thing Behind the Thing", 3
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 peacefully\(^{194}\); 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.

---


\(^{195}\) 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.


\(^{200}\) Justice Law and Order Sector, *Traditional Justice and Telling*, 3.

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. 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. 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.

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.

\(^{206}\) Ibid., Article 9.3.

\(^{207}\) Ibid., Article 9 of the Juba Agreement on Accountability and Reconciliation.

\(^{208}\) UHRC and OHCHR, *The Dust Has Not yet Settled, op. cit.*, xvi.

\(^{209}\) Ibid., xvi.

\(^{210}\) Ibid., xvi.

\(^{211}\) Ibid., xvi.

\(^{212}\) Ibid., Article 9 of the Juba Agreement on Accountability and Reconciliation.


\(^{214}\) 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.
220 Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06 International Criminal Court (ICC Trial Chamber I 2012).
the harm for which it is liable.\textsuperscript{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.\textsuperscript{223} PRDP’s four strategic objectives include the consolidation of state authority, rebuilding and empowering communities, revitalizing the economy and peace building and reconciliation.\textsuperscript{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.\textsuperscript{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.

\textsuperscript{222} International Center for Transitional Justice, \textit{Reparations for Northern Uganda}, 5.


\textsuperscript{224} Ibid.

5. **Amnesty**

Successive governments in Uganda have used the instrument of amnesty to end various insurgencies. 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. Implicitly, the military junta amnestied these groups of all the crimes that they had committed during their insurgencies. When President Museveni came to power, he also used an amnesty to lure his political opponents from exile. As a result, people like former military junta leader Tito Okello and his Deputy Wilson Toko ended their exile and returned home. 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.

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. This statute excluded crimes such as genocide, murder, kidnapping and rape from its ambit. Similarly, the 1999 amnesty bill sought to exclude those crimes. The Acholi Religious Leaders Peace Initiative (ARLPI) however, rejected this and strongly advocated for the adoption of a blanket amnesty without any limitations. The leaders stated that a blanket amnesty would be in line with the aspirations of the people of Acholi at home and abroad. 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. 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.

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. The promise of amnesty and reintegration has played a vital role in motivating fighters to escape or defect.

---

227 Ibid.
228 Ibid.
229 Ibid.
230 Ibid., 44.
231 Apuuli, "Amnesty and International Law," 44.
233 Ibid., 66.
234 Ibid., 105.
235 Ibid.
236 Ibid.
237 Ibid.
238 Ibid.
from the LRA’s ranks. 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. 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. As a result, over 26,000 persons have benefited from the amnesty process and about 5,000 have been reintegrated into their communities.

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.

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. 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..."

In 2012, the Minister of Internal Affairs Hilary Onek passed an instrument in which key sections of the Amnesty Act finally lapsed. 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). 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.
stipulating that the amnesty contravened Uganda’s international legal obligations.\textsuperscript{249}

The implication of the May 2012 instrument\textsuperscript{250} was that amnesty in Uganda ceased and hence was non-existent.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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 II of the Amnesty Act Cap. 294 (as amended).\textsuperscript{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 countries\textsuperscript{255}, rebels and captives still seek to return to Uganda\textsuperscript{256}, and, there is strong support for the amnesty in the affected areas.\textsuperscript{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.\textsuperscript{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.\textsuperscript{259} In the opinion of the Committee, the Amnesty Act has adequate provisions for promoting alternative reconciliation and accountability measures

\textsuperscript{249} JLOS Review process, see www.jlos.go.ug  
\textsuperscript{250} The Amnesty Act (Declaration of Lapse of the Operation of Part II) Statutory Instrument No. 34 of 2012.  
\textsuperscript{252} Ibid.  
\textsuperscript{253} Ibid.  
\textsuperscript{254} Report of the Parliamentary Committee on Defence and Internal Affairs 1.  
\textsuperscript{255} Ibid., 38.  
\textsuperscript{256} Ibid.  
\textsuperscript{257} Ibid.  
\textsuperscript{258} Ibid., 39.  
\textsuperscript{259} Ibid.
including addressing the needs of victims, but is only hampered by inadequate resources and difficulties in implementation.\textsuperscript{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.\textsuperscript{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.\textsuperscript{262}

\textsuperscript{260} Report of the Parliamentary Committee on Defence and Internal Affairs, 39.
\textsuperscript{261} Avocats Sans Frontières, "Consideration of Reintroduction of Blanket Amnesty," letter to Honorable Minister Hilary Onen, May 20, 2013.
\textsuperscript{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.

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 complementarily between the formal justice processes and alternative justice mechanisms; and most of all promoting peace, stability and security of person and property.

---


\(^{267}\) 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


\(^{269}\) 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. 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. This challenge has already been experienced by Uganda’s CIVHR. 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.

275 Hayner, Unspeakable Truths: Transitional Justice, 113.
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

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

---


\(^{284}\) Ibid.

\(^{285}\) Ibid.

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


\(^{289}\) Ibid.


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

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, many believe that the TRC is an investigative arm of the Special Court. Perpetrators feared prosecution and did not trust that the TRC would not reveal information to the Court.

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. The Prosecutor opposed the request, and ultimately the issue was litigated before the Court. 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. 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.

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. 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. Victims were resentful of the fact that many of the original perpetrators received handouts in the early DDR programmes of 2002 and 2003. 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. The Peace Building Fund included a Reparations Unit within the National Commission for Social Action (NaCSA) and a Special Fund for War Victims. It registered more than 32,000

293 Ibid.
294 Ibid.
296 Smith, "From Truth to Justice: How Does Amnesty Factor In?", 54.
298 Ibid.
299 Ibid.
300 Ibid.
303 Ibid.
305 Ibid.
war victims and funded micro-grants and educational activities that have benefited 20,000 victims.\textsuperscript{306} In addition, 235 victims of sexual violence have been provided with assistance and 40 community symbolic reparations have been implemented.\textsuperscript{307}

**C) **\textbf{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.\textsuperscript{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.\textsuperscript{309} The information gathered by the TRC was limited in scope and comprehensiveness because of the failure to award amnesty.\textsuperscript{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.\textsuperscript{311}

**1.3. Recommendations for Formal Justice Linkages Based on Lessons Learned**

**General Recommendations**

\checkmark 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.

\checkmark 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".

\textsuperscript{306} “Sierra Leone,” United Nations Peace Building Fund.
\textsuperscript{307} Ibid.
\textsuperscript{308} Peace Agreement Between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone, Article IX, available at \url{http://www.sierra-leone.org/lomeaccord.html}
\textsuperscript{309} Sesay and Suma, \textit{Transitional Justice and DDR: The Case of Sierra Leone}, 29.
\textsuperscript{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.
\textsuperscript{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.\textsuperscript{312} This is because the formal justice systems are often inoperative or inaccessible in such situations.\textsuperscript{313} TJMs provide advantages including speed, accessibility and cost effectiveness among others. However, they lack formal recognition and regulation.\textsuperscript{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.\textsuperscript{315} They “continue to bridge the justice gap especially in relation to selected community issues” like land justice, communal and family conflicts.\textsuperscript{316}

\textit{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,

\textsuperscript{312} National Transitional Justice Working Group, \textit{Draft National Transitional Justice Policy}, 17.
\textsuperscript{313} Ibid.
\textsuperscript{314} Ibid., 24.
\textsuperscript{315} Ibid., 18.
\textsuperscript{316} National Transitional Justice Working Group, \textit{Draft National Transitional Justice Policy}, 17.
The draft TJ policy states that:

“Government shall recognize traditional justice mechanisms as a tool for conflict resolution.”

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. 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. 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.

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.

---

317 Ibid.
318 Ibid., 25.
319 Ibid.
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.\(^{331}\)

---


\(^{323}\) Ibid.

\(^{324}\) Ibid.


\(^{326}\) Ibid.

\(^{327}\) Ibid.

\(^{328}\) Ibid.

\(^{329}\) Sriram et al., Transitional Justice and Peace building, 166.


\(^{331}\) 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.  

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, and a decline of public participation in the processes.

**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. 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. This led to the establishment of the Gacaca system of participatory and community justice.

**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. 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.

---

332 Jean-Christophe Nsanzimana, "Kagame Commends Gacaca Courts".
334 Ibid., 18.
337 Ibid.
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.
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. 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. Civil claimants also lodged claims for compensation against the Rwandan State. 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.

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.

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. 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.

---

**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 processes.

The draft TJ Policy notes that:

"**Government shall establish and resource a national truth telling process through the Transitional Justice Act.**"\(^\text{356}\)

---

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

---


\(^{355}\) Ibid.

\(^{356}\) Ibid., 25.
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

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

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

---

357 Avocats Sans Frontières, Commentary on Uganda’s Draft TJ Policy, 13.
358 Comisión para el Esclarecimiento Histórico (CEH), Guatemala Memory of Silence,46.
362 Mejía, “The Struggle Against Impunity,” 60.
that was presented to the Commission was described in a few lines and 86 “illustrative or paradigmatic” cases were described in detail.\textsuperscript{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.\textsuperscript{365}

The CEH’s broad mandate included documenting the historical reasons behind the violations; more specifically, the reasons why these violations had taken place.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{369}

\textbf{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 \textit{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.\textsuperscript{370} It was further hindered by the fact that unlike the South African TRC, it could not subpoena witnesses or records.\textsuperscript{371}

Due to the nature of the peace accords, the CEH could not “individualise responsibility.”\textsuperscript{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.\textsuperscript{373} However, a recent report notes that individualizing guilt presents an opportunity to destroy atrocity myths among victims which

\begin{thebibliography}{99}
\bibitem{364} "Press Conference By Members of Guatemalan Historical Clarification Commission," op. cit.
\bibitem{365} Ibid.
\bibitem{368} Ibid.
\bibitem{369} Ibid.
\bibitem{370} Kauffman, "Transitional Justice in Guatemala," op. cit., 18.
\bibitem{372} Ibid
\bibitem{373} Ibid
\end{thebibliography}
keep alive the idea that all the members of a rival group are actual or potential perpetrators.\textsuperscript{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.\textsuperscript{375} Some scholars have argued that this was done to ensure that the CEH could only write a superficial report.\textsuperscript{376} Ultimately, the CEH required 19 months.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{380}

\section*{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.\textsuperscript{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”\textsuperscript{382}, this meant that few prosecutions have taken place at the domestic level to date.\textsuperscript{383} In June 2011, a former general in the Guatemalan army was the first person to be arrested in Guatemala on charges of genocide.\textsuperscript{384} However, the CEH did recommend that the

\begin{thebibliography}{99}
\bibitem{375} Hayner, \emph{Unspeakable Truths: Transitional Justice}, 32.
\bibitem{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.
\bibitem{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.
\bibitem{379} Mejia, “The Struggle Against Impunity,” 61.
\bibitem{380} Hayner, \emph{Unspeakable Truths: Transitional Justice}, 35.
\bibitem{381} Crandall, "Truth Commissions In Guatemala," op. cit. 10.
\bibitem{382} Hayner, \emph{Unspeakable Truths: Transitional Justice}, 32.
\bibitem{383} Ibid., 35.
\end{thebibliography}
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., p. 116.


\(^{390}\) Quinn and Freeman, "Lessons Learned: Practical Lessons," 1122.


\(^{392}\) Ibid., p. 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. Nevertheless, the CEH recommended that the government provide individual and collective reparations for victims. One of its first recommendations included the construction of monuments and public parks in memory of the victims. 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.”

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. 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.

The Programa Nacional de Resarcimiento (PNR)’s design provided for material restitution, financial reparations, psychosocial reparation and rehabilitation, honouring civilian victims and cultural reparation. 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. One of the main recommendations for the PNR was that it should move towards collective reparations. 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. 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
402 Ibid., 6.
403 Ibid., 16.
404 Popkin and Bhuta, "Latin American Amnesties in Comparative," 118.
common crimes. The NRL explicitly prohibited the use of amnesty in cases of forced disappearance, torture and genocide in accordance with international law. 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. The body constructed a database, which gave the commissioners a rough idea of the commanders and locations, particularly for the RUF and AFRC. Further, it emphasized the contributions of four key “stakeholder” groups: women and girls, children, amputees and former combatants.

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.

A) Linkages Between Truth Telling and Traditional Justice

The truth commission itself received mixed reactions in Sierra Leone. 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. The relevancy of the TRC is thus questioned in comparison to traditional justice mechanisms.

405 Ibid. 116.
406 Ibid. 
408 Ibid.
409 Ibid.
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.
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, Unspokeable Truths: Transitional Justice, 39.

\(^{424}\) Hayner, Unspokeable 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.

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.\footnote{Ibid., 56.}

\[\ldots\]

**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.\footnote{Section 23.1 of United Nations Transitional Administration in East Timor (UNTAET) Regulation No. 2001/10.} However, the Office of the General Prosecutor (OGP) and Special Crimes Unit (SCU) retained exclusive prosecutorial authority over serious crimes,\footnote{Ibid., Section 22.2.} and thus deponents’ statements to CAVR were subject to state review if they contained information suggestive of serious crimes.\footnote{Ibid., Section 24.5.} 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.\footnote{Ibid., Section 23.3.} 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 contrition.\footnote{Ibid., Section 27.}
By November 2003, the SCU had received over 1,115 statements from the Commission. In over 70 of these cases the SCU stopped the community reconciliation process in order to press charges.

**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. 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.

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. The final agreements were further approved by a court that would waive all criminal and civil liabilities resulting from the crimes committed. 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. 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.

The CRP was not intended to impinge on the jurisdiction of the Serious Crimes Unit or the Special Panels. Rather, it was a mechanism designed to deal with “less serious crimes” and to run in tandem with the serious crimes process. This was in accordance with the principle that there could be no reconciliation without justice for those who had committed serious offences. 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.

---

435 Ibid., 60.
437 Ibid.
438 Ibid.
441 Ibid.
442 Ibid., 11
443 Ibid.
444 Ibid.
while promoting reconciliation. 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.

Reparations

The CAVR received funding from the World Back 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. Specifically, the CAVR recommended implementing a national reparations program involving national memorialization and material reparations for the most vulnerable victims. However, there has been little progress on implementing their respective recommendations.

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. These acts might include community service, an apology or the payment of reparations. If the perpetrator accepted the panel’s decision, an agreement would be drafted in simple terms. 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.

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

Liberia provides us with an example of sequencing. In Liberia, the TRC was allowed to conclude its work before prosecutions were undertaken.\textsuperscript{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.\textsuperscript{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.\textsuperscript{459}

3.3. Recommendations for Truth Telling Linkages Based on Lessons Learned

General Recommendations

\begin{itemize}
  \item 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.
\end{itemize}

Lessons Learned from Timor-Leste

\begin{itemize}
  \item 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.
  \item 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.
  \item 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.
\end{itemize}

\textsuperscript{456} Ibid., 272-3.
\textsuperscript{457} Hayner, \textit{Unspeakable Truths: Transitional Justice}, 111.
\textsuperscript{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 CSOs

✓ 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. 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. 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. The latter three mechanisms should then be able to refer individuals to reparation and reintegration mechanisms.

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.

---

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. 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.

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.

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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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 witnesses\textsuperscript{474} and provides for

\textsuperscript{470} Ibid.
\textsuperscript{471} Ibid.
\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{477} Questions still loom on whether such compensation as envisaged in the guidelines is equivalent to reparations.

\begin{footnotesize}
\textsuperscript{475} Section 64 of the International Criminal Court Act, Parliament of Uganda (2010).
\textsuperscript{476} Ibid., Section 68.
\end{footnotesize}
4.2. Exploring Linkage Solutions Based on Case Studies

4.2.1. Colombia’s National Commission for Reparations and Reconciliation

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. Its functions also included helping victims have access to justice, truth and reparations. The CNRR was also in charge of outreach to disseminate information to local communities across the country.

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. The fund consists mainly of funds that were obtained by the paramilitaries to provide remedy to the victims. International donor contributions were also envisaged. Following pressure from CSOs and victims, in 2010-11, the administration of President Santos promoted legislation to provide victims with reparations for 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.

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

---

481 Ibid., 499.
482 Ibid., 500.
483 Ibid.
2004. The Constitutional Court issued orders for ministries, welfare programmes and other governmental institutions to adopt measures to protect and reintegrate children; however, this has not had much success to date.

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. 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.

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. Those demobilised combatants who omitted a crime they had committed would be passed over to the domestic courts for prosecution. The High Courts of Judicial Districts also dealt with the sentencing of paramilitary leaders, and assisted in the process of settling reparations claims.

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. However, it helped set the stage for the establishment of a truth and reconciliation commission in the future.

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. These reports were based on victim registrations and denunciations.

---

488 Ibid., 501.
489 Hayner, Unspeakable Truths: Transitional Justice, 115.
493 Ibid.
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.\(^{496}\)

- 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.\(^{496}\)

- 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.\(^{498}\)


\(^{497}\) 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 tool\(^{499}\) 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 challenges of acceptance and reintegration;

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.


\(^{501}\) 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.\textsuperscript{504} In addition, avenues should be established for those amnestied to participate in truth telling and traditional justice processes through dialogue and sensitization.\textsuperscript{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.

\textsuperscript{504} National Transitional Justice Working Group, \textit{Draft National Transitional Justice Policy}, 25.

\textsuperscript{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

\(^{507}\) Ibid.
\(^{508}\) Ibid., 9.
\(^{512}\) Ibid.
\(^{513}\) King, "Amnesties in a Time," 589.
brutalization was common, as was the torture of prisoners.\textsuperscript{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.\textsuperscript{515} Instead, the interim 1993 Constitution gave the South African Parliament the power to decide whether and how amnesties should be applied.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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

\footnotesize{\textsuperscript{514} King, "Amnesties in a Time," 589.  
\textsuperscript{515} Ibid.  
\textsuperscript{516} Ibid., 589-590.  
\textsuperscript{517} Ibid., 590.  
\textsuperscript{518} Carrasco, "Transitional Justice and the Situation of Children," 11.  
\textsuperscript{519} Ibid.  
\textsuperscript{521} Ibid.}
were subject to severe penalties under domestic law and international law when they were committed.\textsuperscript{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.\textsuperscript{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.\textsuperscript{524} A national reparations program was instead set up to address the compensation needs of victims.

\textsuperscript{522} "Colombia: Practice Relating to Rule 159. Amnesty,” International Committee on the Red Cross.
\textsuperscript{523} Ibid.
\textsuperscript{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