



**SECURING POST CONFLICT JUSTICE, FOR
VICTIMS OF SEXUAL VIOLENCE, IN ARMED
CONFLICTS. A CASE STUDY OF NORTHERN
UGANDA**

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**LLM HUMAN RIGHTS THESIS
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EXECUTIVE SUMMARY

Sexual violence, committed during situations of armed conflicts, has been recognized as one of the gravest crimes under international law. The United Nations in Security Council resolution 1820 of 2008 recognized sexual violence to be a weapon of war. Like many other armed conflicts, the conflict in Northern Uganda has witnessed its share of widespread perpetration of sexual violence, in the form of rape, sexual slavery, forced impregnation and forced prostitution. Following the end of the armed conflict in Northern Uganda, the most challenging issue that needs to be addressed is the question of justice for victims. Justice for victims of gross human rights violations is recognized as fundamental right in a number of human rights instruments.

This thesis explores how the recognised accountability mechanisms in Northern Uganda, such as the International Criminal Court, national courts, truth commissions, traditional justice mechanisms and reparation schemes can be tailored to offer justice to victims of sexual violence. Justice for victims of sexual violence is to be achieved if the various accountability mechanisms pay special attention to the gender dimensions of the conflict and also adopt a victim centred approach to justice, which , focuses on the interests of victims and enables them to participate effectively in the whole process. A victim centred approach to justice is also restitutionary in nature in the sense that it offers remedies that facilitate the rehabilitation and reintegration of victims.

A single justice mechanism is incapable of offering a comprehensive form of justice to victims; there is therefore need for a holistic approach to justice which encompasses both retributive justice in the form of criminal prosecution by either the international courts or the domestic courts and restorative justice in the form of truth and reconciliation commissions, traditional justice mechanisms and reparation schemes.

Non legal interventions by both civil society and government in the form of psycho social support, improved infrastructure and access to vital services such as schools and health facilities are also vital for the full rehabilitation and reintegration of victims.

DEDICATIONS

This thesis is dedicated to my parents Mr. Christopher Kihika and Mrs Margaret Kihika; and my siblings, Elizabeth, Lillian, Emily Angela and John, who have always supported, and believed in me. You have inspired and encouraged me to pursue my dreams. For selflessly supporting all my academic endeavours, I dedicate this thesis to you.

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LIST OF ACRONYMS

ACHPR :	African Commission on peoples and Human Rights
ARLPI:	Acholi Religious Leaders Peace Initiative
CEDAW:	Convention on the elimination of all forms of discrimination against Women
CICC:	Coalition for the International Criminal Court.
DRC	The Democratic Republic of Congo
GOU:	Government of Uganda
ICC:	International Criminal Court
ICJ:	International Court of Justice
ICTR:	International Criminal Tribunal for Rwanda
ICTY:	International Criminal Tribunal for the Former Yugoslavia
IDP:	Internally Displaced Persons
JLOS:	Justice Law and Order Sector
LC:	Local Council
LRA:	Lord's Resistance Army
NRA:	National Resistance Army
OTP:	Office of the Prosecutor of the International Criminal Court
PRDP:	Peace Recovery and Development Plan
RPE	Rules of Procedure and Evidence
SCSL:	Special court for Sierra Leone
SPLA:	Sudan's People's Liberation Army
TRC:	Truth and Reconciliation Commission
UPDF:	Uganda People's Defence Force

INTRODUCTION

i. BACKGROUND TO THE STUDY

The armed conflict in Northern Uganda has been characterized by appalling, widespread and systematic human rights violations, including mass killings, rape and the destruction of property on an unimaginable scale. Mr. Jan Egeland, the United Nations Under-Secretary General (USG) for Humanitarian Affairs and Emergency Relief Coordinator, stated that 'Northern Uganda remains the world's greatest neglected emergency'.¹ It is estimated that approximately two million people in Northern Uganda were forced out of their homes by the conflict and are living in internally displaced Camps.² It is also estimated that more than 20,000 children and women have been abducted by the Lord's Resistance Army LRA to serve as soldiers and sex slaves and thousands more have been killed or maimed.³

The 20 year war was started by self styled Rebel leader known as Joseph Kony in 1997, who claimed to have been endowed with spiritual powers to cleanse the people of northern Uganda of their sins and to displace the government of President Museveni.⁴ He obtained initial funding and support for the war from the Sudanese government which at the time, believed that the Kampala government was funding the Sudanese People Liberation Movement (SPLM) in

¹ Mr. Jan Egeland, Briefing Notes to the UN Security Council, USG for Humanitarian Affairs and Emergency Relief Coordinator 21 October 2004 'Humanitarian Emergencies in Africa' (on file with the author).

² Relief Web, Uganda Seeks Aid for 1.6 Million Internally Displaced People, 18 November 2004; and J. Motlagh, Analysis: Northern Uganda's Invisible Crisis (2002)

³ Phuong Pham Patrick Vinck Et.al; 'When the War ends: A population based survey on attitudes about peace justice and social reconstruction in Northern Uganda', International Centre for Transitional Justice ,December (2005)

⁴ Human Rights Watch Report, Abducted and Abused, Vol. 15, No. 12 (A) – July 2003

Southern Sudan.⁵ Despite the absence of a clear political motive the LRA engaged in a series of violence and;

“Established a pattern of ‘brutalization of civilians’ by acts including murder, abduction, sexual enslavement, mutilation, as well as mass burnings of houses and looting of camp settlements; abducted civilians, including children, are said to have been forcibly “recruited” as fighters, porters and sex slaves to serve the LRA and to contribute to attacks against the Ugandan army and civilian communities.”⁶

Having failed to put an end to the atrocities committed by the LRA, the government of Uganda in December 2003 referred the situation of the LRA in northern Uganda to the ICC.⁷

Like many other conflicts, Sexual violence, particularly rape and sexual slavery, have both been methodically used as a tool of war and as an instrument of terror in Northern Uganda.⁸ Many girls and women have been brutally raped, forced into sexual slavery, in order to provide relatively safe, cheap, and convenient sexual services to the fighters.⁹

According to Human Rights Watch, most of the abducted girls aged fourteen or fifteen, were forced to work long hours and walk long distances in search for water and food for the rebels¹⁰. It is established that a sizeable number of the victims of sexual violence have either been infected with HIV/AIDS or are single parents.¹¹ The children born as a result of sexual violence have been rejected by the community. Women who were married before their abduction have been rejected by their husbands, upon their return, due to fear that they may infect them

⁵ ibid

⁶ Situation in Uganda, The Prosecutor V Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen Case No. ICC-02/04-01/05, Decision on the Prosecutor's Application for Unsealing of the Warrants of Arrest, 4-27 (Oct. 13, 2005).

⁷ ICC Press Release, 'President of Uganda refers situation concerning the Lord's Resistance Army (LRA) to the ICC', ICC20040129-44-En, 29 February 2004

⁸ Report by Citizens for Global Solutions , ‘In Uncharted Waters: Seeking Justice before the atrocities have stopped in Uganda and the Democratic Republic of Congo’, June 2004

⁹ The Daily Monitor of the 13 may 2004

¹⁰ Human rights watch report Supra note 4

¹¹ The New Vision Tuesday, Sad October for Aboke Girls and Ombaci College, 26th October, 2004

with HIV.¹² The failure to hold perpetrators of sexual violence accountable has created impunity and a continuous cycle of sexual violence.

In the eastern part of the neighbouring country, the Democratic Republic of Congo (DRC), tens of thousands of women and girls have suffered crimes of sexual violence¹³. It is estimated that there have been over 40,000 cases of sexual violence since 2003.¹⁴ The United Nations officials have called it the worst sexual violence in the world. Many of these rapes have been marked by a level of brutality that is twisted and unimaginable¹⁵. Many have referred to the scale of sexual violence in the Democratic Republic of Congo (DRC) as an “epidemic.” This thesis is not going to explore how to offer redress to victims in the DRC, however it is important to highlight the fact that sexual violence in armed conflicts, is a regional concern.

ii. STATEMENT OF THE RESEARCH PROBLEM

The right to justice for victims of gross human rights violations during war or armed conflict has been provided for in a number of international instruments, ranging from the International Covenant on Civil and Political Rights to 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 of 2005.¹⁶

¹² Human Rights Watch Report, ‘Abducted and Abused,’ Vol. 15, No. 12 (A) – July 2003

¹³ Human Rights Watch, ‘Seeking Justice: The Prosecution of Sexual Violence in the Congo War’, (March 2005)

¹⁴ Brian Sage, International Rescue Committee Coordinator, quoted in Nordland, R. (13 November 2006).

¹⁵ Jeffrey Gettleman, ‘Rape Victims’ Words Help Jolt Congo Into Change’. The New York times Published: October 17, 2008

¹⁶ Fionnuala Ni Eigearthaigh, ‘Justice for Women: Seeking accountability for sexual crimes in post conflict situations’, FRIDE, May 2008. Available at <http://www.fride.org/publication/454/seeking-accountability-for-sexual-crimes-in-post-conflict-situations>

However despite the existence of the above provisions, many challenges still remain that have made justice elusive to a number of victims of sexual violence.¹⁷ Illaria Botiglierro attributes this to “A general climate of impunity for gender crimes under international and national law¹⁸” where by many perpetrators of sexual violence get away with their crimes without being prosecuted and punished. Many victims of sexual violence face enormous legal economic, educational, and socio-cultural challenges while trying to seek justice. In most societies, they are stigmatized, and ostracised by both their families and their communities.

As a result, very few of them are able to seek the prosecution of the perpetrators.¹⁹ The unfavourable legal regime coupled with the barely functioning justice system in Northern Uganda has also served as a barrier to justice for many victims. Amnesty laws which shield perpetrators from being prosecuted and punished for gross human rights violations constitute a violation of the victims’ right to a remedy. The former UN Special Rapporteur on the right to reparation Van Boven observed that:

“Large categories of victims of gross violation of human rights, as a result of the actual contents of the national laws or because of the manner in which these laws are applied, fail to receive reparations which are due to them. Limitation in time, including the application of statutory limitation, restrictions in the definition of the scope and nature of the violation, the operation of amnesty laws, the restrictive attitudes of courts the incapability of certain groups of victims to present and pursue their claims; lack of economic and financial resources: the consequence of all these factors individually and jointly; is that the principle of equality of rights and due reparations of all victims are not implemented.”²⁰

¹⁷ Katie Zoglin, Symposium: ‘Women and War: A Critical Discours’e: Panel One –Tools of War’, 20 BERKELEY J. GENDER L. & JUST. 322, 327 (2005) (Noting that, in 1998, the Rwanda tribunal was the first international tribunal to state that rape is a war crime);

¹⁸ Illaria Bottiglierro, ‘Redress and International Criminal Justice in Asia and Europe’, Lecture delivered in Hanoi, Phnom Penh, At the Vietnam national University August 2005.

¹⁹ Alex C. Lakatos, ‘Evaluating the Rules of Procedure and Evidence for the International Tribunal for the Former Yugoslavia: Balancing Witnesses Needs Against Defendants’ Rights’, 46 HASTINGS L.J. 909, 918 (1995), (explaining that the International Criminal Tribunal for the former Yugoslavia includes rape as a crime against humanity)

²⁰ Van Boven T, Special Rapporteur of the United Nations, Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms: Final Report, UN Doc. E/CN. 4/Sub.2/1993/8, 2 July 1993, 7

Many victims of sexual violence are also afraid of pursuing the prosecution of the perpetrators due to fear of retribution and re-victimisation. The justice and law enforcement organs are in most cases incapable of offering them protection from renewed abuse after they have testified against the offenders.²¹

Furthermore, the formal criminal justice mechanisms at both the domestic and international criminal court focus mainly on the prosecution and punishment of the perpetrators and pay little attention to the rehabilitation and restitution of victims. In most cases, the victims are disengaged from the criminal process. Consequently, they are not capable of ensuring that their interests are protected during the criminal justice process.

iii. HYPOTHESES AND RESEARCH QUESTIONS

It is the assertion of this thesis that justice for victims of sexual violence can only be achieved if a victim centred approach is adopted. This requires examining what victims of sexual violence perceive to be justice and thereafter identifying how the various justice mechanisms can be tailored to offer this justice. This calls for an analysis of whether the justice interests of victims can be met through retributive justice, which is obtained through the criminal prosecution and punishment of perpetrators of sexual violence by an international criminal tribunal or the national court and which also serves as a deterrent for future crimes of sexual violence and prevents impunity; or is it restorative justice which is obtained through the existing traditional justice mechanisms truth commission and a reparations schemes. Are there other social interventions which meet the justice interests of victims of sexual violence for example by meeting their economic needs and also addressing the socio cultural stigma they have suffered

²¹ Timothy Longman, 'The Domestic impact of the International Criminal Tribunal for Rwanda'. A Paper presented at the International conference held at the University of Texas School of Law November 6-7 2003

enabling them reintegrate into their communities? Could Justice for victims be met by a combination of restorative and retributive forms of justice as well as the non legal responses? What is of utmost importance is that the decision to adopt a particular justice mechanism, to address the human rights violations, should be guided by the interests of the victims.

It is the assertion of this thesis that the criminal justice process alone cannot adequately offer justice to victims due to its inherent weakness. The Justice interests of victims of sexual violence can only be met through the adoption of a holistic approach to justice which comprises of both restorative and retributive justice. As Mark Drumble observes, “justice transcends the court or jail house.”²² This thesis argues that there are other factors that contribute towards the full enjoyment of victims’ rights to justice. They include victim social reintegration, rehabilitation, reconciliation, and reparation. As Drumble observes many victims in post conflict states prefer the restorative forms of justice to the retributivist form of justice.²³

Martha Minnow has observed that:

“Retributive approaches may reinforce anger and a sense of victim hood; reparative approaches instead can help victims move beyond anger and beyond a sense of powerlessness. Reparative or restorative justice can secure public acknowledgment and condemnation of the wrong, although through mechanisms that differ from prosecution, conviction, and punishment of wrongdoers. Restorative justice can also afford victims the position of relative power represented by the capacity to forgive--whether or not the individual victims proceed then to forgive particular perpetrators. Where victims do forgive, it is as much for their own healing and embrace of a future without rage as it is for the benefit of the offender.”²⁴

There are non- legal responses such as psychosocial support for victims of sexual violence and their children born as a result of rape, education and training in basic skills, which

²² Mark Drumble ‘Atrocity, Punishment, and International Law’ ,Cambridge University Press, 2007pg 20.

²³ ibid pg 44

²⁴ Martha Minow, ‘Between Vengeance and forgiveness: Feminist responses to violent Injustice’, 32 New Eng. L. Rev. 967

may be of immediate importance and long term benefit to victims of sexual violence than the prosecution and punishment of their assailants. As Naomi Cahn²⁵ points out,

“It is important to adopt an approach that ensures that most victims of sexual violence are able to move on with their lives, reintegrate into their communities and families, socially and economically, and develop measures that protect against recurrences of similar violence so that women feel secure.”²⁶

This thesis is going to explore how the retributive and the restorative forms of justice can complement each other .in order to offer victims a comprehensive form of justice. It will also identify the various accountability strategies to be adopted for example having the international criminal court hold trials for those who bear the greatest responsibility, while the national courts hold trials for the middle level perpetrators and finally the truth commissions and traditional justice mechanisms hold the low level perpetrators accountable. The thesis willl also propose the various institutional and legal reforms that need to be made and the measures to be adopted in order to offer justice to victims of sexual violence. It will also discuss the non-legal responses that could be adopted to improve the social economic conditions of victims of sexual violence.

iv. METHODOLOGY

The research will be mainly based on secondary sources such as Non Governmental Organization reports, books, scholarly articles , reliable internet sources and the Jurisprudence of various court.

v. LIMITATIONS OF STUDY.

This study has not been based on interviews from primary sources and is mostly based on secondary sources.

²⁵ Naomi Cahn, ‘Beyond Retribution and Impunity: Responding to War Crimes of Sexual Violence’, 1 Stan. J. Civ. Rts. & Civ. Liberties 217

²⁶ *ibid*

vi. DEFINITION OF KEY TERMS AND CONCEPTS

Victim

The term victim mostly refers to a person who has been the object of crime or tort.²⁷ The Rome statute of the International criminal court recognizes a victim as “anyone who has suffered harm as a result of the commission of any crime within the definition of genocide war crimes and crimes against humanity”²⁸. The United Nations Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of power defines victims of abuse of power as “[p]ersons who individually or collectively have suffered harm including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights through acts or omissions that do not constitute violations of national criminal laws but of internationally recognized norms relating to human rights.”²⁹

The declaration also defines a victim of crime as “[a] person who individually or collectively has suffered ham including physical or mental injury emotional suffering, economic loss or substantial impairment of their fundamental rights through the acts or omissions that are in violation of criminal law operative within member states including those laws proscribing the abuse of power”.³⁰

In some situations the term “Victim” of human rights or humanitarian law violations may encompass the dependants, members of the immediate family and persons who have been subjected to mental and psychological anguish as a result of assisting the victim.³¹

²⁷ Ilaria Botigliero, ‘Redress for victims of crimes under International law’, Martinus Nijhoff publishers, Leiden Boston 2004 at page 6

²⁸ The Rome statute of the International Criminal Court 2002 Article 85

²⁹ UN Declaration of Basic Principles of Justice for victims of Crime and Abuse of power .Adopted by the UN General Assembly Resolution A/RES/40/34of 29 November 1985.

³⁰ ibid

³¹ Ilaria Botigliero, ‘Redress for victims of crimes under International Laws’ Martinus Nijhoff publishers Leiden Boston 2004 at page 6

For purposes of this thesis the above definitions of the term victim will apply.

Sexual violence

Most scholars agree that sexual violence takes many forms and has a number of definitions under international law and domestic law. In 2003 The Reproductive health in Conflict Consortium and the inter Agency Standing Committee (IASC) Task force on Gender and Humanitarian Assistance published a manual titled Gender Based Violence Tools and manual which was to be used in assessing the scope and nature of Gender based violence in conflict areas. The IASC in 2005 in its “Guidelines for Gender based Violence interventions in humanitarian Settings: Focusing on Prevention and Response to Sexual Violence in Emergencies”³² defines Sexual Violence as:

“Any act, attempt to obtain a sexual act, unwanted sexual comments or advances or acts to traffic a person’s sexuality using coercion threats of harm or physical force by any person regardless of relationship to the victim in any setting”³³

It includes sexual slavery, forced prostitution, rape, gang rape, forced pregnancy, abortion and sterilization. The most common form of sexual violence committed during conflict is rape.³⁴ The International Criminal Tribunal for Rwanda ICTR broadly defined rape as “[a] physical invasion of a sexual nature, committed on a person under circumstances which are coercive penetration of the anus or vagina by the penis or another object, or of the mouth by the penis”.³⁵

Armed Conflict

There are a number of definitions of armed conflict. This has been attributed to the criteria used to determine the type of violence that would constitutes armed conflict since the nature of armed conflicts is constantly changing with different players getting involved. The

³² IASC Task Force on Gender and Humanitarian Assistance Guidelines for Gender based violence interventions in Humanitarian setting : focusing on prevention and response to sexual violence in Emergencies, 2005

³³ Ibid, par 7

³⁴ See UNESCO 1998; HRW 2003: 2

³⁵ Prosecutor v. Jean-Paul Akayesu ICTR-96-4-T Delivered on September 1998

Uppsala conflict data program (UCDP) at the department of peace and conflict studies Uppsala University³⁶ states that “[a]n armed conflict is a contested incompatibility which concerns government and or territory where the use of force between two parties of which one is the government of a state in at least 25 battle deaths”³⁷

According to the Geneva Convention of 1949, armed conflicts take two forms; international armed conflict, and armed conflict of a non international nature. An international armed conflict occurs between "two or more of the High Contracting Parties"³⁸. In the Tadic case, The Appeal Chamber of the International Criminal Tribunal for the former Yugoslavia Tribunal stated that; “[a]n armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.”³⁹

Definitions of armed conflicts of a non international nature are provided for in Common Article 3 to the Geneva Conventions of 1949 and Article 1 of Additional Protocol II to the Geneva Conventions. Such conflicts are described as “armed conflicts not of an international character occurring in the territory of one of the High Contracting Parties.” These armed conflicts may take place between one or two nongovernmental organizations and the government or amongst the two nongovernmental organizations.⁴⁰ Non-international armed conflicts are to be distinguished from "internal disturbances and tensions [or] isolated and sporadic acts of

³⁶ UCDP/PRIO Armed conflict dataset conflict list 196-2005 Code book v.4-2006 September 2006, http://www.prio.no.cwp/armedconflic/current/Codebook_v.42006b.pdf

³⁷ UCDP/PRIO Armed conflict dataset Code book v.4-2006 September 2006. http://www.prio.no.cwp/armedconflic/current/Codebook_v.42006b.pdf.

³⁸ Fourth Geneva Conventions of 1949, Common Article 2

³⁹ The Prosecutor v. Dusko Tadic, ICTY, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-A, 2 October 1995, para. 70.

⁴⁰ The Fourth Geneva conventions , Protocol II Article 1.

violence”.⁴¹ In its decisions, the ICTY identified two criteria of distinguishing armed conflicts on a non international nature from other forms of sporadic violence and banditry.⁴² It stated that

“In establishing the existence of an armed conflict of an internal character the Chamber must assess two criteria: (i) the intensity of the conflict and (ii) the organization of the parties. These criteria are used “solely for the purpose, as a minimum, of distinguishing an armed conflict from banditry, unorganized and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law.”⁴³

The court also stated that in order for non-governmental groups involved in the conflict to be considered as "parties to the conflict"; they should have a command structure, have headquarters, designated zones of operation, and the ability to procure, transport, and distribute arms.⁴⁴

The ICC statute specifically provides that it also applies to armed conflicts that are not of an international nature as long as they are not sporadic acts of violence or banditry. It provides that

“Paragraph 2 (e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.”⁴⁵

The conflict in Northern Uganda has been between the Government of Uganda and the Lord’s Resistance Army which is an organized rebel faction which has a chain of command and has consistently engaged in acts of violence with the aim of toppling the governments. It is therefore in order to refer to the conflict in Northern Uganda as an armed conflict within the meaning of the provisions of the Geneva Convention and its additional protocols as described above.

Transitional Justice.

⁴¹ Additional protocol II of the Geneva convention of 1949, Article 1(2) provides that (“This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts”)

⁴² The Prosecutor v. Dusko Tadic, ICTY Judgment, IT-94-1-T, 7 May 1997, para. 561-568; see also ICTY, The Prosecutor v. Fatmir Limaj, Judgment, IT-03-66-T, 30 November 2005, para. 84.

⁴³ The Prosecutor v. Fatmir Limaj, Judgment, IT-03-66-T, 30 November 2005, para. 84

⁴⁴ Ibid par 94 – 134

⁴⁵ The Rome Statute of the ICC statute Article 8 paragraph 2(f) of the

Transitional justice refers to “[a] response to systematic or widespread violations of human rights. It seeks recognition for victims and to promote possibilities for peace, reconciliation and democracy”⁴⁶ Transitional Justice has also been defined as: “[t]he wide range of activities, judicial and otherwise, that address human rights abuses and mass atrocities perpetrated on societies in transition from conflict to peace”.⁴⁷It includes, Criminal prosecutions, truth commissions, reparations and gender justice.⁴⁸

i. Thesis Structure,

This thesis is divided into five chapters. The first Chapter will examine the legal framework governing sexual violence under international criminal law and the historical developments that led to the recognition and prosecution of sexual violence as a war crime, as a Crime against humanity and as Genocide. It will also critically analyse the status and rights of victims of sexual violence under the international criminal justice and the various protective measures in place. The second Chapter will examine the domestic legal framework governing sexual violence in of Uganda. It will also critically analyse the status of victims and their rights and interests as protected there under.

The third Chapter shall examine the alternative forms of justice comprising of the traditional justice mechanisms, Truth commissions and reparations schemes which are restorative in nature. The chapter will also critically analyse their ability to offer justice to victims of sexual violence.

⁴⁶ International Centre for Transitional justice, ‘ Reparations’ <http://ictj.org/en/tj/782.htm> accessed on the 3rd of October 2009.

⁴⁷ The Rule of Law and transitional justice in conflict and post-conflict societies: United Nations Report to the Secretary General, (United Nations Security Council, 2004).

⁴⁸ Supra note 46

The fourth Chapter will articulate the non legal interventions that need to be taken by the state and civil society to address the socio economic needs of victims of sexual violence. It will also examine the role of civil society organisations such as Women’s NGO’s in the rehabilitation and reintegration process of victims of sexual violence. The fifth and final chapter shall contain recommendations and conclusions.

CHAPTER 1: SEXUAL VIOLENCE UNDER INTERNATIONAL LAW, AND VICTIMS' STATUS AND RIGHTS TO JUSTICE THEREUNDER

Rape and other forms of sexual violence are prohibited under international human rights law and international humanitarian Law.⁴⁹ Many perpetrators of rape and other forms of sexual violence have been tried and convicted under these provisions. The *ad hoc* tribunals, the International Criminal Court for the former Yugoslavia (“ICTY”) and the International Criminal Court for Rwanda (“ICTR”), have convicted individuals of crimes against humanity and war crimes for various acts of sexual violence including rape, sexual mutilation, and sexual slavery enslavement. They have also, in their jurisprudence, acknowledged rape and other forms of sexual violence as constituting; genocide, torture, cruel treatment, and outrages upon personal dignity⁵⁰

Initially sexual violence, with the exception of rape, was not regarded as a serious breach of international law, however over the years this has changed. This has partly been attributed to the Feminist movement of the 1970’s in the United States and Western Europe. The movement focused on the status of victims of rape, and brought to the forefront the demand for the recognition of the rights of victims of sexual violence during war⁵¹. Others have attributed the recognition of rape as a war crime by the ICTY and ICTR to the advocacy and persistent lobbying of international and domestic Non Governmental Organizations.

⁴⁹ The 1949 Geneva Conventions Common Article 3, and Additional protocols, Article 27(2) of the 4th Geneva conventions 1949, Statute of the International Criminal Court Articles 7 (1) (c), (g) and 8(2) (e).

⁵⁰ Prosecutor v. Kvočka, Case No. IT-98-30/1, Judgment at para. 145 (Nov. 2, 2001) [hereinafter Kvočka Trial Judgment]; see also. Prosecutor v. Kunarac, Kovac, Vukovic, Case No. IT-96-23&23/1, Judgment at para. 118 (June 12, 2002) hereinafter Foca Appeals Judgment.

⁵¹ Nora V. Demleitner, Witness Protection in Criminal Cases: Anonymity, Disguise or Other Options, 46 AM. J. COMP. L. 641, 642 (1998).

The Criminal prosecution of perpetrators of sexual violence at the supranational level gives a sense of justice to victims of sexual violence and contributes significantly in restoring their dignity.⁵² The trials of perpetrators serve as a social acknowledgment and condemnation of the brutality that victims of sexual violence have experienced at the hands of the perpetrator⁵³. The absence of judicial condemnation is said to be taken by a number of victims as a failure on the part of the society to acknowledge the evil that perpetrators of sexual violence have inflicted on them.⁵⁴

As Brower correctly observes that

“No ICC, ICTY or ICTR treaty can remedy the suffering of victims of rape, sexual slavery, forced pregnancy or any other form of sexual violence taking place as a constituent of genocide, crimes against humanity or war crimes. Yet the explicit criminalisation in the ICC statute of rape, sexual slavery, enforced prostitution, forced pregnancy and other forms of sexual violence as crimes against humanity and war crimes [...] provides another step of ending impunity for sexual violence on the supranational criminal law level.”⁵⁵

This chapter is going to examine the development of sexual violence as a crime under international law. It shall also examine the status of victims of sexual violence under international criminal law and how far it goes in offering justice to victims

1.1 HISTORICAL DEVELOPMENTS OF SEXUAL VIOLENCE IN INTERNATIONAL LAW

Following the Civil war in 1863, the United States codified international law under what is known as the Leiber code. Article 44 prohibited rapes by a belligerent and made it punishable by death. This made Rape a serious war crime.⁵⁶ The Leiber code was subsequently adopted as international law at the 1907 International Peace Conference in Copenhagen and formed the

⁵²Navanethem Pillay, ‘Protection Of The Health Of Women Through International Criminal Law: How Can International Criminal Law Contribute to Efforts to Improve The Health Of Women’? *Law 22 Emory Int'l L. Rev.* 15

⁵³ Jamie O'Connell, ‘Gambling with the psyche: Does prosecuting human rights violators console their Victims’?, 46 *Hard. Int'l L.J.* 295.

⁵⁴ *Ibid.*

⁵⁵ Anne Marie De Brower, ‘Supranational Criminal Prosecution of sexual violence: The ICC and the practice of the ICTY and ICTR’, *Intersentia*, 2005 p 427

⁵⁶ Tina R. Karkera , ‘International Criminal Court’s protection of women: Hands of justice at work’, 12 *Am. U.J. Gendr Soc. Pol’y & L*

basis for Hague Convention IV respecting the laws and customs of war on land. Under Article 46 of The Hague convention of 1907, Sexual violence was prohibited. The Article stipulates that: “[f]amily honour and rights, the lives of persons, and private property, as well as religious convictions and practice must be respected.” A violation of family honour was construed to mean sexual violence⁵⁷ The Geneva Conventions (1949) and the Additional Protocols of (1977) contained express prohibition of sexual violence. Common Article 3 which is common to all four Geneva Conventions, and applies to non-international armed conflicts and prohibits “outrages upon personal dignity, in particular humiliating and degrading treatment” against protected persons (i.e. those not taking active part in the hostilities).

Article 27 of the Fourth Geneva Convention, relating to the protection of civilian persons in time of war, provides that “[w]omen shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.” Article 75 of the Additional protocol I and Article 4 of Protocol II, which deals with internal armed conflict, prohibits: “outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault.”

1.2 PROSECUTING SEXUAL VIOLENCE AT THE INTERNATIONAL CRIMINAL TRIBUNALS FOR RWANDA (ICTR) AND THE FORMER YUGOSLAVIA (ICTY)

As a result of the wide spread systematic rape and ethnic cleansing in the former Yugoslavia, the international criminal tribunal for the former Yugoslavia was created. It was

⁵⁷ Ibid.

mandated to “[p]rosecute all persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991.”⁵⁸

Similarly, following the genocide that was perpetrated in Rwanda in 1994 in which over 600,000 people were killed and “rape was the rule and its absence the exception”⁵⁹ the United Nations Security Council established the International Criminal Tribunal for Rwanda. The tribunal was mandated to “[p]rosecute all persons responsible for Genocide and Other serious violations of international humanitarian law committed in the territory of Rwanda.”⁶⁰

The Statutes of the ICTY and ICTR list rape and other forms of sexual violence among the Crimes against humanity within the tribunals’ jurisdictions.⁶¹ However, they did not classify them among the grave breaches of international humanitarian law. Rape and other forms of sexual violence could not therefore be charged as a free standing crimes but could and could only be charged and tried as Genocide, crime against humanity and War crimes⁶². Through the jurisprudence of the ICTY and ICTR tribunals in the cases of Akayesu, Kunarac, Kvočka, Butare, Nyiramasuhuko & Ntahobali Furundzija, Tadic, Musema, Nikolic, Krajisnik & Plavsic,⁶³ rape and other forms of sexual and gender violence became recognized as the most serious of offenses and have been charged and prosecuted as serious violations of international law. The aforementioned cases also recognized rape and other forms of sexual violence to constitute genocide, torture and other inhumane acts.

⁵⁸ United Nations Security Council, Resoluion 827/ 29. UN Doc. S/827/1993(1993).

⁵⁹ Mr René Degni-Ségui, Special Rapportuer of the Commission of Human Rights. Report on the situation of Human rights in Rwanda U.N Doc E/CN.4/1996/68

⁶⁰ United Nations Security Council Resolution 935/ 29 UN Doc S/935/1995(1995)

⁶¹ The ICTY statute Article 5, and the ICTR statute Article 3.

⁶² Catherine . A. Mackinnon, ‘Defining rape internationally: a comment on Akayesu’ 43/03 Colum. J. Transnat’l L.

⁶³ Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment (Sept. 2, 1998), Prosecutor v. Furundzija, Case No. IT-95-17/1, Judgment (Dec. 10, 1998) Prosecutor v. Kunarac, Kovac, Vukovic, Case No. IT-96-23&23/1, Judgment Prosecutor v. Kvočka, Case No. IT-98-30/1, Appeals Judgment; Prosecutor v. Tadic, Case No. IT-95-1-A, Judgment (July 15, 1999; Prosecutor v. Musema, Case No. ICTR-96-13-A, Judgment (Nov. 16, 2001), Prosecutor v. Nikolic, Case No. IT-94-2, Sentencing Judgment (Dec. 18, 2003).

The ICTR Trial Chamber in its decision in the land mark Akayesu case ⁶⁴ broadly defined rape as “a physical invasion of a sexual nature committed on a person under circumstances which are coercive⁶⁵” The tribunal further noted that “coercive measures need not be evidenced by a show of physical force but may be inherent in certain circumstances such as armed conflict.”⁶⁶ Importantly the Chamber held that the collective rape of Tutsi women, which was aimed at humiliating them constituted an act of genocide.”⁶⁷ The ICTR chamber found Akayesu individually criminally liable for crimes against humanity for ordering, instigating and abetting sexual violence. The Chamber also pointed out that, rape is used as a tool for “intimidation, degradation, humiliation, discrimination, punishment, control or destruction of the person and is similar to torture in the sense that it constitutes a violation of personal dignity of the individual who is raped.⁶⁸” The Tribunal also acknowledged that “sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact – such as the case in point where a woman had been forced to undress and do gymnastics naked in a public courtyard in front of a crowd”⁶⁹

In the Ntegyeka⁷⁰ decision the ICTR reiterated that Rape as was carried out in Rwanda, constituted Genocide. The Trial Chamber held that:

“Ordering Interahamwe to undress a Tutsi woman, and to insert a sharpened piece of wood into her genitalia, after ascertaining that she was of the Tutsi ethnic group” and leaving the body “with the piece of wood protruding from it, in plain view on a public road for some three days thereafter” helped establish the Accused’s intent to destroy the Tutsi ethnic group”.⁷¹

⁶⁴ Ibid.

⁶⁵ Prosecutor v. Jean-Paul Akayesu ICTR-96-4-T Delivered on September 1998

⁶⁶ *ibid* Par. 688

⁶⁷ Prosecutor v. Jean-Paul Akayesu ICTR-96-4-T Delivered on September 1998

⁶⁸ *ibid*

⁶⁹ *Ibid.*, par 688.

⁷⁰ Prosecutor v. Niyitegeka, Case No. ICTR-96-14-T, Judgment & Sentence at para. 416 (May 16, 2003)

⁷¹ *ibid*

The Akayesu⁷² Furundžija⁷³ and Celebić⁷⁴ decisions of the ICTR and ICTY have contributed significantly on how rape and other forms of sexual violence are to be regarded in international criminal law.⁷⁵ In the Furundžija decision, the trial chamber noted that

“Rape is resorted to either by the interrogator himself or by other persons associated with the interrogation of a detainee, as a means of punishing, intimidating, coercing or humiliating the victim, or obtaining information, or a confession, from the victim or a third person. In human rights law, in such situations the rape may amount to torture, as demonstrated by the finding of the European Court of Human Rights in Aydin and the Inter-American Court of Human Rights in Mejía”.⁷⁶

The Trial Chambers of the ICTR and ICTY in Kayishema, Musema, Krstić, Kamuhanda, Stakic, Kajelijeli, and Gacumbitsi have held that rape and other forms of sexual violence inflict serious mental and bodily harm on their victims.⁷⁷ The ICTR Chamber stated in the *Musema* decision that

“The Chamber understands the words ‘serious bodily or mental harm’ to include, but not limited to, acts of bodily or mental torture, inhumane or degrading treatment, rape, sexual violence, and persecution. The Chamber is of the opinion that ‘serious harm’ need not entail permanent or irremediable harm.”⁷⁸

1.3 PROSECUTING SEXUAL VIOLENCE AT THE INTERNATIONAL CRIMINAL COURT.

The International Criminal Court came into force in 2002 following the adoption of the Rome Statute in 1998. Building on the experience on the ICTY and ICTR the Rome statute tried to address some of the issues that adversely affected the rights of victims. Significantly, unlike the statutes of the ICTR and ICTY, the Rome Statute recognised sexual violence as a self

⁷² Supra note 61

⁷³ Prosecutor v. Furundžija, Case No. IT-95-17/1, Judgment (Dec. 10, 1998)

⁷⁴ Prosecutor v. Delalic, et al., Case No. IT-96-21-Abis, Judgment on Sentence Appeal at para. 412 (Apr. 8, 2003)

⁷⁵ Kelly D Askin, Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan Tribunals: Current status, 93 Am. J. Int'l 97

⁷⁶ Prosecutor v. Furundžija, Case No. IT-95-17/1, Judgment (Dec. 10, 1998) par 163, also see Raquel Martí de Mejía v. Perú, Case 10.970, Report No. 5/96, Inter-Am.C.H.R., OEA/Ser.L/V/II.91 Doc. 7 a 157 (1996). the decision of the Inter American court of human rights where rape was construed to constitute torture

⁷⁷ Prosecutor v. Kayishema & Ruzindana, Case No. ICTR-95-1-T, Judgment & Sentence at para. 108; Prosecutor v. Musema, Case No. ICTR-96-13, Judgment & Sentence at para. 156, Prosecutor v. Krstić, Case No. IT-98-33, Judgment at paras. 509.); Prosecutor v. Kamuhanda, Case No. ICTR-97-23-S, Judgment & Sentence at para. 634 (Sept. 4, 1998) Prosecutor v. Stakic, Case No. IT-97-24, Judgment at 516 (July 31, 2003); Prosecutor v. Kajelijeli, Case No. ICTR-98-44A-T, Judgment & Sentence at para. 815 (Dec. 1, 2003) Prosecutor v. Gacumbitsi, Case No. ICTR-2001-64-T, Judgment at para. 291 (June 17, 2004)

⁷⁸ Prosecutor v. Musema, Case No. ICTR-96-13, Judgment & Sentence at para. 156

standing crime. Article 7(1) g) of the Rome statute specifically prohibits all forms of sexual violence such as “rape, sexual slavery, enforced prostitution, forced pregnancy, and enforced sterilization” and classifies them as crimes against humanity. Article 8(2)(b)(xxii) and Article 8(2)(e)(vi) classifies the aforementioned forms of sexual violence as War Crimes in both international and non international armed conflict. There are already a number of cases involving Rape and of sexual violence before the International criminal court⁷⁹.

The prosecution and punishment of individuals responsible for committing war crimes against humanity and genocide by the International Criminal Court could help deter ongoing and future atrocities. It shall also enable victims to see their persecutors held accountable

1.4 STATUS AND RIGHTS OF VICTIMS OF SEXUAL VIOLENCE UNDER INTERNATIONAL CRIMINAL LAW

The preamble of United Nations Resolution on 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 Points out that there are a number of international instruments that provide for the right to a remedy for victims of international human rights violations. They include:

“Article 8 of the Universal Declaration of Human Rights, Article 1 and 2 of the International Covenant on Civil and Political Rights, article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination, article 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and article 39 of the Convention on the Rights of the Child, and of international humanitarian law as found in article 3 of the Hague Convention respecting the Laws and Customs of War on Land of 18 October 1907 (Convention IV), article 91 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977, and articles 68 and 75 of the Rome Statute of the International Criminal Court,”⁸⁰

⁷⁹ The Prosecutor v. Ahmad Muhammad Harun ("Ahmad Harun") and Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb") ICC-02/05-01/07rape is included as count 13 of the indictment ; The Prosecutor v. Omar Hassan Ahmad Al Bashir ICC-02/05-01/09; The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui ICC-01/04-01/07; The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen; icc 02/04

⁸⁰ 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, G.A. Res. 60/147, U.N.Doc. A/RES/60/147 (Mar. 21, 2006), preamble. and para 1

Basic Principles and Guidelines on the Right to a Remedy further provides that

“Victims should be treated with humanity and respect for their dignity and human rights, and appropriate measures should be taken to ensure their safety, physical and psychological well-being and privacy, as well as those of their families”.⁸¹

The Rome statute of the ICC provides for the protection and respect of privacy of victims.⁸²

The Basic principles and guidelines also provide that Remedies for gross violations of international human rights law and serious violations of international humanitarian law include “[e]qual 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 justice.”⁸³

1.4.1 STATUS AND RIGHTS OF VICTIMS OF SEXUAL VIOLENCE UNDER THE ICTY AND ICTR

The statutes and rules of procedure of the ICTY and ICTR did not provide for the protection of the rights and interests of victims. Victims were not permitted to participate in the proceedings and were disengaged from the ICTR and ICTY. As a result their legitimate interests and concerns were not protected. It has been argued that this was due to the fact the mission of the two tribunals was to prosecute and punish the offenders and violators of international humanitarian law. The Resolutions of the security council establishing the two tribunals provide that the tribunals are set up to “[p]rosecute all persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991⁸⁴” and “[p]rosecute all persons

⁸¹ *ibid*

⁸² Rome Statute, of the International Criminal Court (2002) Article, 68(1).

⁸³ *Supra* note 76

⁸⁴ United Resolution 827(1993), which establishes the International Criminal Tribunal for the Former Yugoslavia (ICTY)

responsible for Genocide and Other serious violations of international humanitarian law committed in the territory of Rwanda.”⁸⁵ To this end it is no surprise that in the execution of their mandate the two tribunals paid little interest to the rights of victims. Having adopted an adversarial system, the main objective of the tribunals was to ensure that the fair trial rights of the accused persons were protected and it was believed that enabling a more effective participation of the victims or their lawyers would undermine the rights of the accused to an expeditious and fair trial.⁸⁶ As a result the legitimate interests of victims were not taken into account during the trials.

Carla Del Ponte, the prosecutor of the ICTY and ICTR, on a number of occasions argued in favour of victim participation in the proceedings of the ICTY. She is quoted as having stated that:

“The fact the (victims) are not represented in this trial troubles me a lot. I feel that something is missing. Of course the prosecutor is to get defendants convicted and that his or her chief task. In the current system there is little time and space left to plea in favour of victims [...] A system of criminal law that does not take into account the victims of crimes is fundamentally lacking.”⁸⁷

The only means of protection accorded to victims in the statutes are found in Article 20 of the ICTY and Article 19 of the ICTR statutes which provide that “The trial Chamber shall ensure that a trial is fair and expeditious, with "full respect for the rights of the accused and due regard for the protection of victims and witnesses".

Article 22 and 19 of the ICTY and ICTR respectively enumerate the protective measures to be adopted to protect victims, they include the conducting of proceedings in camera, which is aimed protecting the privacy of victims and also shield them from stigmatisation by their

⁸⁵ United Nations Security Council Resolution 935/ 29 UN Doc S/935/1995(1995) establishing the International Criminal Tribunal for Rwanda (ICTR)

⁸⁶ Charles P. Trumbull , ‘The Victims Of Victim Participation In International Criminal, Proceedings’ , Michigan Journal of International Law 2008 29 Mich. J. Int'l L. 777

⁸⁷ Carla del Ponte ‘Compensating victims with guilt money’ Chief prosecutor of the two international criminal tribunals, in *Judicial Diplomacy : Chronicles and Report on International Criminal justice* , the Hague 9 June 2000, also see Illaria Bottigliero , ‘Redress for victims for crimes under international law’, Martinus Nijhoff publishers(2004) p 202

communities. Such proceedings provided a safe environment for victims to come forward and testify against their perpetrators without fear of stigmatization and re-victimization.

The Statutes of the two tribunals did not provide for reparations for victims of international human rights and humanitarian law violations and deferred the matter of reparation to the national courts.⁸⁸ According to rule 105 Rules of Procedure and Evidence, upon application of an ex officio or prosecutor the trial chamber may hold a special hearing to consider the issue of restitution on cases where taking of property was involved. This provision does not cover restitution for victims who had been subjected to sexual violence. Carla Del Ponte the prosecutor for the ICTR and ICTY advocated for victims compensation. She is quoted as having stated that:

“It is regrettable that the tribunals’ statute makes no provision for victim participation during trial and makes only provisions for compensation and restitution to people whose lives have been destroyed. And yet my office is having considerable success in tracing and freezing large amounts of money in personal accounts of the accused. Money that could very properly be applied by the courts to the compensation of victims who deserve it. We should therefore give victims the right to express themselves and allow their voice to be heard during the proceeding and in event of a conviction that should create a legal basis for the judges to decide upon the confiscation of monies sequestered from the accused.”⁸⁹

1.4.2 STATUS AND RIGHTS OF VICTIMS UNDER THE ICC AND THE PROTECTIVE MEASURES IN PLACE

The drafters of the ICC statute took a different path from that of the drafters of the ICTY and ICTR statutes by providing victims with the right to participate effectively through their legal representative in both the pre-trial and trial stages⁹⁰

As Charles Trumbull notes,

⁸⁸ United Nations Security Council Resolution 935/ 29 UN Doc S/935/1995(1995) establishing the International Criminal tribunal for Rwanda rule 106

⁸⁹Carla del Ponte, Address to the UN Security Council by, Prosecutor of the international Criminal Tribunals for the former Yugoslavia and Rwanda, 21 November 2000. ICTY Doc. JL/PIS 542-e of 24 November 2004. See I Bottigliero , Redress for victims for crimes under international law, Martinus Nihoff publishers(2004) p. 205

⁹⁰ The Rome statute of the ICC , Articles 15 (3) and 19 (3)

“The drafters of the Rome Statute generally agreed that the two *ad hoc* tribunals had elevated the international community's desire for retribution over the legitimate interests of the victims in ascertaining the truth, seeking reparations, and reconciliation. The drafters also believed that international criminal law had hitherto objectified victims considering them primarily instruments in securing convictions against defendants.”⁹¹

The ICC statute permits victims to participate in the proceedings after obtaining judicial authorization and as long as their participation not prejudicial to the due process rights of the accused. Article 68 (3) stipulates that

“Where the legal interests of victims are affected, the court shall permit their views and concerns to be presented at stages of the proceedings determined to be appropriate by the court [...] Such views may be presented by the Legal representatives of victims where the court considers it appropriate”.

Under Article 75 (3) and 82(4), victims are authorized to present their concerns before the court prior to the issue of reparation orders. They are also entitled to appeal against the reparation orders. Article 65 permits the court to reject a guilty plea if it is against the interests of the victims. Victims who are authorized to participate in the proceedings have a right to receive information about the proceedings such as the hearing dates, the date of issue of judgment or decisions and they are also entitled to access the record of proceedings⁹². In order to be eligible to participate in the proceedings the victims need to satisfy the requirements of Rule 85 of the Rules of Procedure and evidence (RPE) of the ICC. Rule 85 defines “Victims” as: Natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the ICC”.⁹³ The Rules also provide that: "Victims may include organizations or institutions that have sustained direct harm to any of their property, which is dedicated to religion, education, art or science or charitable purposes and to their historic monuments, hospitals and other places and objects for humanitarian purposes".⁹⁴

⁹¹ Charles P. Trumbull, ‘The Victims Of Victim Participation In International Criminal Proceedings’ , Michigan Journal of International Law 2008 29 Mich. J. Int'l L. 777

⁹² Rules of procedure and evidence of the international criminal court, ICC/2002, rule 92 (5) and Rule 131(2)

⁹³ Rules of procedure and evidence of the international criminal court, ICC/2002, rule 85

⁹⁴ Rules of Procedure and Evidence of the International criminal court, ICC/2002, rule 85 (1)

The court in its pre-trial decision in the case of Lubanga has spelled out three conditions that need to be met in order to satisfy the requirements of rule 85: “The victim must be a natural person; the victim must have suffered harm; the crime from which the harm resulted must fall within the jurisdiction of the Court; and there must be a causal link between the crime and the harm”⁹⁵. The court has also ruled that a single instance of harm is sufficient to give an individual victim status.⁹⁶

According to Rule 85 of the Rules of procedure and evidence of the ICC, Individuals can only obtain victim status after lodging an application with the victim’s Participation and Reparation Unit of the Court Registry. However, their participation should not be “prejudicial to or inconsistent with the rights of the accused to a fair and impartial trial”.⁹⁷

In its pre trial decision in the Lubanga case, the Pre-trial chamber of the ICC ruled that. “Victims may participate in the confirmation hearing by presenting their views and concerns in order to help contribute to the prosecution of the crimes from which they allegedly have suffered and to, where relevant, subsequently be able to obtain reparations for the harm suffered.”⁹⁸ The Pre trial chamber further noted that “victim participation has relevant consequences on the judgment since the degree of harm caused by the offender to the victims constitutes one of the major criteria in assessing the punishment to be imposed.”⁹⁹

Unlike the Statutes of the Rules of procedure and Evidence of the ICTY or ICTR the Rules of procedure of the ICC permit victims to provide information that could lead to the investigation and prosecution of perpetrators. Rule 16 of the ICC RPE requires the Registrar of

⁹⁵ Lubanga case, Pre-Trial Chamber Decision of 20th October 2006, ICC-01/04-01/06,

⁹⁶ *ibid*

⁹⁷ Rome Statute of the international criminal court (2002) Article 68(3) also see Carla Ferstman, ‘The Role of the Victims at the International Criminal Court: Key Prospects’, in E. Vetere & D. Pedro (eds), *Victims of Crime and Abuse of Power* (2005), at 161

⁹⁸ *Supra* note 91

⁹⁹ *ibid*

the court to provide victims with information “for the purpose of protecting their rights during the trial and for enabling them participate effectively in the Pre-trial stages and also during the trial”. The participation of victims in proceedings before the ICC will go a long way in protecting the right to justice of many victims.

Like the statute of the ICTR and ICTY and their Rules of Procedure and Evidence, the ICC statute and its Rules of Procedure and Evidence provide for protective measures for victims and witnesses. Article 43 of the Rome Statute of the ICC provides for the establishment of the Witness protection unit whose function is to provide “protective measures and security arrangements counselling and other appropriate assistance for witnesses and victims who appear before the court and others who are at risk on account of testimony given by such witnesses.”¹⁰⁰

Article 68(2) and Rule 87 of the ICC rules of Evidence and procedure provide for in camera proceedings *or* the presentation of evidence by electronic or other special means. These protective measures are aimed at ensuring that victims and witnesses are not subjected to risks and harm that could arise if they were to testify publicly. They also ensure that there isn’t an unnecessary invasion into their privacy and dignity. The protective measures are more relevant for victims of sexual violence who are likely to be stigmatised by the community for publicly admitting that they were raped. Some communities, as was evidenced in Rwanda, still tend to blame the victims of rape and other forms of sexual violence instead of the perpetrator¹⁰¹ Maria Ingabira a women’s rights activist in her report to the ICTR stated that:

“Sexuality is a taboo in Rwandan culture. Being raped is a major socio cultural problem for a Rwandan Girl or woman. In normal times the Rwandan society does not usually consider a raped woman as a victim who requires compassion and rehabilitation. Society rather looks at her as if she was partly responsible for what happened to her.

¹⁰⁰ The Rome statute of the ICC 2002 Article 43 (6)

¹⁰¹ Anne Marie De Brower, ‘Supranational criminal prosecution of sexual violence: The ICC and the practice of the ICTY and ICTR’, *interesentia*, 2005 p 233

This is part of the mentality of Rwandans and the women who were raped during the genocide are aware of it. They therefore know that it is as if they were marked with red Iron.”¹⁰²

Therefore the protective measures adopted by the ICC statute and the rules of procedure will contribute significantly in protecting victims of sexual violence from stigmatization and reprisals. They will also encourage more victims to seek the prosecution of their perpetrators. The protective measures will also shield victims of sexual violence from secondary victimization which would occur if they had to recount their experience in detail before a public court room and in the presence of the accused.

The Trial Chamber of the ICTY In its ruling, in the Tadic case, noted that: “Rape and sexual assault have particularly devastating consequences. Traditional court practices and procedures have been known to exacerbate the victims ordeal during trial which resulted in general feeling of being raped a second time.”¹⁰³

Other protective measures provided for include the special evidentiary rules that are enumerated in Rule 70, 71 and 72 of the Rules of Procedure and Evidence of the International Criminal Court. Rule 70 provides for principles of Evidence in cases of sexual violence, rule 71 deals with evidence of other sexual conduct and Rule 72 deals with in camera proceedings when evaluating relevance and admissibility of evidence. The foregoing rules prohibit the parties from asking questions regarding the victims past sexual conduct, and consent to the sexual violence. Rule 63 waives corroboration as a legal requirement to prove crimes falling within the jurisdiction of the court. These provisions in the rules and procedures of the ICC have been attributed to the fact that:

¹⁰² Marie Imaculee Ingabire, ‘The rape of Tutsi Women: A weapon of the 1994 Genocide’. Submitted to the ICTR in the Muhimana case, as quoted by Anne Marie De Brower, in *Supranational criminal prosecution of sexual violence The ICC and the practice of the ICTY and ICTR*, Intersentia, 2005 p 233

¹⁰³ Prosecutor V Tadic, Decision on the prosecutors motion Requesting protective measures for victims and Witnesses, Case No IT-94, 10 August 1995 para 46

“When crimes of a sexual nature under force coercion, or coercive circumstances as part of genocide, crimes against humanity or war crimes, issues as consent or evidence of prior or subsequent sexual conduct do not seem relevant.... In addition due to fear of reprisal re-traumatisation and feelings of shame witnesses are reluctant to appear before the tribunal which formed another reason for having special evidentiary rule on sexual violence.”¹⁰⁴

Rule 97 (1) of the Rules of evidence and procedure of the ICC provides that the court will award the victim reparation “[t]aking into account the scope and extent of any damage, loss or injury, the Court may award reparations on an individualized basis or, where it deems it appropriate, on a collective basis or both”

Article 75 of the ICC Statute provides for reparations for victims of human rights violations, the Article states that: “[t]he Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.” The ICC Statute in Article 79 provides for the establishment for a trust fund which is to be managed by an assembly of states for the benefit of victims of crime within the jurisdiction of the Court, and the families of such victims. Article 79 further provides that where appropriate, the Court may order the award for reparations be made through the Trust Fund provided to Victims

1.4.3 LIMITATIONS OF INTERNATIONAL CRIMINAL LAW IN PROVIDING JUSTICE TO VICTIMS OF SEXUAL VIOLENCE

It has been argued by critics of international criminal law that it does not go far enough in providing justice to victims.¹⁰⁵ Additionally it often fails to meet its objectives of deterrence and retribution the prosecution of a handful of perpetrators while there were thousands involved is not likely to serve as deterrence or offer retribution to victims whose perpetrators have not been

¹⁰⁴ Anne Marie De Brower, *Supranational criminal prosecution of sexual violence The ICC and the practice of the ICTY and ICTR*, Intersentia 2005 p 261

¹⁰⁵ Mark Drumble ‘Atrocity, Punishment, and International Law’ (Cambridge University Press, 2007) at pg 12

prosecuted.¹⁰⁶ Other critics argue that it is significantly detached from the people it claims to serve and that it tends to objectify them and treat them as a means to secure convictions against perpetrators without paying due regard to their particular needs and interests .¹⁰⁷

Taking the example of Rwanda, when asked about the ICTR and its impact on their communities, many victims and survivors of the genocide stated that they were aware of its existence, however, they did not know what it was meant to achieve.¹⁰⁸ This has been attributed to the fact that the statutes creating the ICTR and the ICTY did not provide for the participation of victims and in the proceeding and did not avail them with information pertaining to the proceedings.

As much as the ICC has attempted to prioritize victims' rights to redress by providing for their participation in criminal trials and some form of restitution through payment of reparations, there are some inherent weaknesses of international criminal law in terms of securing the rights and interests of victims. Illaria Botligerio argues that these weaknesses are as a result of the fact that the "system of international human rights implementation was never specifically designed to address crimes under international law."¹⁰⁹

The retributive nature of criminal justice has also made it unpopular in most post conflict societies who prefer a transitional justice mechanism that is restorative in nature and fosters peace and reconciliation. It is believed that the prosecution and punishment of perpetrators serves to further divide the war torn communities and threatens the fragile peace. Critics also argue that the ICTR and ICTY "placed primacy and emphasis on the abstract principles of

¹⁰⁶ Ibid,

¹⁰⁷ Samantha Power, 'Rwanda the forces of Justice', N.Y REV of Books, Jan, 16 2003 at 47

¹⁰⁸ Timothy Langman, 'The Domestic Impact of the International Criminal Tribunal for Rwanda' :Proceedings of The international conference held at the University of Texas School of Law Nov, 2003

¹⁰⁹ Illaria Bottigliero , 'Redress for victims for crimes under international law', Matinus Nihoff publishers(2004)

international criminal justice rather than the social reconstruction of the communities affected by the war crimes.”¹¹⁰

The *Ratione Temporis* of the international criminal court which is restricted to events that occurred after 2002 means that perpetrators cannot be tried from crimes that were committed prior to that date¹¹¹. Consequently victims in Northern Uganda who were subjected to gross human rights violations between the periods of 1986 to 2002 would not have access to a remedy under the international criminal justice system.

Although Uganda referred the LRA case to the ICC,¹¹² many of the victims in Northern Uganda have scoffed at the warrants of arrest issued by the ICC against the Rebel leaders of the LRA, who was indicted for committing gross violations of human rights. They have indicated a preference for seeking justice through the traditional mechanisms of justice which are restorative in nature as opposed to international criminal prosecution. A number of elders and leaders representing victims are said to have travelled to The Hague to oppose the ICC investigation. They argued that International criminal justice process was differs substantially from their idea of justice.¹¹³

The intimidating nature of the criminal justice process has also discouraged many victims from participating effectively in the criminal justice process. Furthermore, the language in which the proceedings are carried out is either English or French and yet a sizeable number of victims are unable to understand the language. This will definitely hinder the effective participation of victims. Additionally the absence of guarantees and credible protection from reprisals by the

¹¹⁰ Jose E. Alvarez, ‘Crimes of States, Crimes of hate: Lessons from Rwanda’, 21 Yale J. Int’l 305 1999

¹¹¹ Rome Statute of the ICC Article 11

¹¹² ICC Press Release, ‘President of Uganda refers situation concerning the Lord’s Resistance Army’ (LRA) to the ICC’, ICC20040129-44-En, 29 February 2004

¹¹³ Mark A. Drumbl ‘Atrocity , Punishment, and International Law’, Cambridge University press.2007 pg 144

perpetrators once they return home after testifying has discouraged victims from participating in the trial process.¹¹⁴

As mentioned above, the statute and Rules of Procedure and Evidence of the ICTY and ICTR did not provide for reparation for victims of human rights violations. Restitution of victims was designated to the national authorities and is limited to property that was appropriated illegally.¹¹⁵ In an attempt to deal with the issue of compensation for victims, Article 75 of the ICC Statute provides for reparations for victims of human rights violations, the provision mandates the Court where appropriate to order the award for reparations which are to be made through the Trust Fund provided for in Article 79. The ICC Statute in article 79 provides for the establishment for a trust fund which it to be managed by an assembly of states for the benefit of victims of crime within the jurisdiction of the Court, and the families of such victims. However, what remain unresolved is how the trust fund will be managed and the possible sources of its finances¹¹⁶.

The light sentences imposed on the convicts by the tribunals have left a number of victims disillusioned. In some cases perpetrators would enter into plea agreements with the prosecutor to testify against their leader in exchange for lenient in their sentences. As a result many of them returned to the same communities as their victims.¹¹⁷

¹¹⁴ Timothy Langman: 'The Domestic Impact of the International Criminal Tribunal for Rwanda'. Proceedings of the international conference held at the University of Texas School of Law Nov, 2003

¹¹⁵ The ICTY and ICTR statutes, Article 24(1) and 23 (1) respectively.

¹¹⁶ Illaria Bottiglierio, 'Redress for victims for crimes under international law', Martinus Nihoff publishers(2004) pg 226

¹¹⁷ Kelly Askin, 'International tribunals and their impact on victims': Proceedings of the international conference held at the University of Texas School of Law Nov, 2003

It is a commonly held view within the victimised communities that the international criminal justice process promotes what has been described as “[f]ive star justice.”¹¹⁸ The prisons conditions in The Hague and Arusha are much better than those of the national prisons in Rwanda and Uganda which are overcrowded. To some victims, it is an injustice for them to languish in poverty in their war ravaged communities while the perpetrators who are convicted leave Cushy prisons with plush suites, containing Color Televisions Sauna, horseback riding, and solariums.”¹¹⁹

1.5 CONCLUSION

Remarkable progress has been made in international criminal law with regard to providing redress for victims of sexual violence and other gross violations of human rights. The Rome statute of the ICC has incorporated restorative components which are aimed at addressing the needs of victims. However, it is also important to acknowledge that the limited jurisdiction of the ICC prevents it from offering adequate remedies to victims. Many victims in Northern Uganda are sceptical about the capability of the Hague based court to offer them justice. They believe that the prosecution of the LRA perpetrators in the Hague will not contribute to peace. It needs to be complemented by other justice mechanisms that provide restorative measures.

¹¹⁸ International Refugee Rights Initiative, ‘In the interests of Justice’? Prospects and challenges for international Justice in Africa , 2008 at pg 18

¹¹⁹ *ibid*

CHAPTER 2 : SEXUAL VIOLENCE UNDER THE DOMESTIC LEGAL FRAME WORK OF UGANDA AND VICTIMS’ STATUS AND RIGHT TO JUSTICE THERE UNDER

A significant number of girls and women in northern Uganda have been subjected to sexual violence committed both by the combatants of the LRA and state actors such as the soldiers of the UPDF and Local defense units. These victims of sexual violence face enormous challenges when trying to seek justice. In this Chapter, I am going to examine the legal framework on Sexual violence in Uganda and thereafter I shall explore the status of victims and the remedies available to them under the national legal framework.

2.1 DOMESTIC LEGAL FRAMEWORK

Uganda is a common law country with a dualist system and an adversarial criminal justice system. It has ratified a number of international treaties that prohibit violence and discrimination against women. These include the UN International Covenant on Civil and Political Rights,¹²⁰ The African Charter on Human and People’s rights, the UN Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment,¹²¹ the UN Convention on the Rights of the Child and the UN Convention on the Elimination of All Forms of Discrimination against Women. These international treaties require Uganda to adopt measures that protect women from discrimination or violence. However, a number of these instruments have not been internalized; but since some of them, contain principles of customary international law they are automatically applicable without the need of a law incorporating them.

The UN CEDAW committee in its general recommendation 19 stated that

¹²⁰ Ratified in September 1995

¹²¹ Ratified in June 1987

"[T]he definition of discrimination includes gender-based violence. This is, violence that is directed at a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty."¹²²

The CEDAW Committee has also stressed that states are required

"To take appropriate and effective measures to overcome all forms of gender-based violence, whether by public or private actors; [and to] ensure that laws against family violence and abuse, rape, sexual assault and other gender-based violence, give adequate protection to all women, and respect their integrity and dignity."¹²³

The constitution of Uganda 1995 contains a number of provisions that protect the rights of women. Article 33 (1) stipulates that "women shall be accorded full and equal dignity of the person with men" Article 33(2) further requires the state to "provide the facilities and opportunities necessary to enhance the welfare of the women to enable them to realize their full potential and advancement." Article 33(6) of the Constitutions outlaws all "cultures, customs or traditions which are against the dignity, welfare or interest of women or which undermine their status."

The children and women of northern Uganda who have been subjected to sexual violence have been deprived of the aforementioned rights as guaranteed in the constitution of Uganda and the various international human rights treaties that Uganda has ratified.

The norms prohibiting rape and other forms of sexual violence against women can be found in the Penal Code of Uganda cap 120 Laws of Uganda. These provisions criminalize rape, indecent assault, elopement, defilement and incest. According to section 123 of the penal code

Rape is defined as

"Having of unlawful carnal knowledge of a woman or a girl without her consent or with her consent if the consent is obtained by force or means of threat or intimidation of any kind or by fear or bodily harm or by means of false representation as to the nature of the act or in the case of a married woman impersonating her husband."

¹²² General Recommendation 19 of the CEDAW committee , UN Doc A/47/38 at 1 (1993) paragraph 6

¹²³Ibid Para 24 (t).

Section 124 prescribes the death penalty as the maximum penalty for rape. In order to secure a conviction for rape, the state, needs to prove that the accused man had carnal knowledge of the complainant using his penis, without her consent or her consent was vitiated by the circumstances mentioned in section 123 of the penal code. It is important to note that the penetration recognized here is vaginal penetration and not anal or oral. Furthermore penetration by use of objects such as weapons, sticks, guns, etc. are not covered and would not amount to rape. Marital rape is not covered by the provision as well. This means that the sexual acts committed against women during the armed conflict which involved penetration by use of objects cannot be prosecuted under the current legal provisions on rape, hence denying justice to a significant number of victims of sexual violence.

Section 129 of the penal code as amended prohibits defilement. The section provides that: “Any person who performs a sexual act with another person who is below the age of 18 commits a felony known as defilement and on conviction is liable to life imprisonment.”

It is important to note that following the amendment of this provision in 2007 the definition of the criminalized sexual act is broader than that of the offence of Rape under 123 of the penal code . According to section 129(6) of the penal code as amended, “sexual act” refers to: “The penetration of the vagina, mouth or anus however slight of any person by a sexual organ, or the unlawful use of any object or organ by a person on another person.” This amendment also incorporates all forms of sexual penetration by either the penis or objects.

The section on defilement provides for two categories of defilement. The first is aggravated defilement, which is provided for in Section 129 (3) of the penal code. This offence is said to occur when the victim of the said sexual act is under the age of 14; or where the offender is infected with the Human Immunodeficiency Virus (HIV); or where the offender is a parent or guardian of the victim and/or when the victim is with a disability. Anyone convicted of aggravated defilement is liable to suffer death. The second category is that of Defilement of a

child who is above the age of 14 but is under the Age of 18. A person convicted of this kind of defilement shall be liable to imprisonment not exceeding 18 years. The section provides that upon conviction the court may order the payment of compensation to the victim by the convicted person. When ordering the payment of compensation. The court is required to take into account the extent of harm suffered by the victim of the offence, the degree of force used by the offender and medical and other expenses incurred by the victim as a result of the offence. There is no similar provision for victims of rape.

The other offence prohibited in the penal code is indecent assault. The offence is said to take place when “a person with the intention to insult the modesty of a woman or girl utters any word or makes any sound or gesture or exhibits any object intending that such words or sounds shall be heard or such gesture shall be seen by such woman or girl or intrudes upon the privacy of such woman or girl.”¹²⁴

There are a number of sexual crimes that are provided for in the Rome statute of the International Criminal court, which are not provided for in the penal code of Uganda. These include; sexual slavery, forced prostitution and forced pregnancies. Uganda has ratified the ICC statute¹²⁵. However being a dualist country, the provisions of the statute cannot be applied by the domestic courts until an enabling law is enacted to domesticate the statute within the legal order of Uganda.

Presently, there is an ICC Bill of 2006,¹²⁶ which seeks to domesticate the provisions of the statute of the International Criminal Court. Unless this Bill is passed into law, the national

¹²⁴ The Penal Code Act Cap 120 Laws of Uganda , section 128

¹²⁵ Ratified the Rome statute of the ICC on June 14 2002

¹²⁶ However the Bill was subsequently shelved by the parliamentarians following some disagreement over some of the provisions contained therein. See Barney Afako, Case Study Uganda, ‘Unable or Unwilling’? in Max Du Plessis and Jolyon Ford , Case studies on domestic implementation of the ICC Statute in selected African Countries, , ISS Monograph series . No 141 March 2008

courts in Uganda will not have jurisdiction to try perpetrators of a number of forms of sexual violence which aren't catered for in the Penal code hence denying many victims a remedy under the domestic laws. However, some of the prohibitions of these forms of sexual violence have become part of customary international law, which makes them automatically applicable without the need of a domesticating law but it would take a proactive judge to do so.

The Government of Uganda, recognizing the numerous inadequacies that would hinder it from effectively prosecuting the crimes committed by the LRA combatants relied on Article 14 of the Rome statute of the ICC and on the principle of complementarity¹²⁷, to become the first state party to make a referral by referring the case against the belligerents to the ICC in 2003.¹²⁸ In July 2004 the Office of The Prosecutor of the ICC commenced investigations against the top commanders of the ICC. In July the ICC issued warrants of arrest against the top commanders of the LRA. The warrants, which were unsealed in October of the same year contained 33 counts of War Crimes and Crimes against humanity¹²⁹.

The referrals made by the Government of Uganda are now perceived as more of a strategic move on the government of Uganda to protect officers of the UPDF from being investigated for committing crimes against humanity and war crimes rather than a gesture of genuine interest to have the LRA combatants prosecuted. The request by the Government of Uganda, to the ICC to suspend the warrants issued against the combatants reinforces this belief.

The Government of Uganda under the June 2007 Juba Agreement on Accountability and Reconciliation, resolved to establish a Special Division of the High Court commonly known as

¹²⁷ Rome Statute of the ICC 2002,, Preamble, para. 11 and Art. 17.

¹²⁸ Situation in Uganda; ICC-01/05 President of Uganda Refers Situation Concerning The Lord's Resistance Army (LRA) To The ICC ICC-20040129-44

¹²⁹ Situation in Uganda, The Prosecutor V Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen Case No. ICC-02/04-01/05, Decision on the Prosecutor's Application for Unsealing of the Warrants of Arrest, 4-27 (Oct. 13, 2005).

the War crimes division of the High court which would be charged with holding trials for the perpetrators of gross human rights violations, during the armed conflict.¹³⁰ In a report to the ICC on the status of the execution of the Arrest warrants against Kony, the Government of Uganda stated that

The special division of the High Court is not meant to supplant the work of the International Criminal Court and accordingly those individuals who were indicted by the International Criminal Court will [sic] have to be brought before the special division of the High Court for trial¹³¹

The establishment of the Special division of the High Court would enable the Government of Uganda to raise an admissibility challenge under Article 19 of the ICC Statute. However the pretrial Chamber of the ICC in its ruling in an admissibility challenge brought under Article 19 of the Court by the defense counsels ruled that

“Pending the adoption of all relevant texts and the implementation of all practical steps, the scenario against which the admissibility of the Case has to be determined remains therefore the same as at the time of the issuance of the Warrants, that is one of total inaction on the part of the relevant national authorities; accordingly, there is no reason for the Chamber to review the positive determination of the admissibility of the Case made at that stage.”¹³²

The decision of the pre-trial Chamber was confirmed by the Appeal chamber of the ICC.¹³³

2.2 STATUS OF VICTIMS OF SEXUAL VIOLENCE UNDER THE CRIMINAL JUSTICE SYSTEM OF UGANDA AND THEIR RIGHTS AS PROTECTED THERE UNDER.

Uganda’s criminal justice system is adversarial in nature. All criminal prosecutions are initiated by the Director of public prosecution on behalf of the state. Victims are referred to as

¹³⁰ ‘Annexure to the Agreement on Accountability and Reconciliation’, February 2008. Clause 7,

¹³¹ Annex 2 to "Report by the Registrar on the Execution of the 'Request for Information from the Republic of Uganda on the Status of Execution of the Warrants of Arrest'" 28 March 2008 (ICC-02/04-01/05-286), p3

¹³² ""The Prosecutor V. Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen .Decision on the admissibility of the case under article 19 (1) of the Statute' dated 10 March 2009" (ICC-02/04-01/05-379),

¹³³ The Prosecutor V. Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen Judgment On The Appeal Of The Defence Against The "Decision On The Admissibility Of The Case Under Article 19 (1) Of The Statute" Of 10 March 2009

complainants and serve as prosecution witnesses. They have a limited role in the prosecution and their interests are wholly vested in the prosecutor. There are a number of procedural and evidentiary requirements which are unfavorable to victims'. These procedural and evidentiary requirements during the trial subject victims of sexual violence to re-victimization.

In the prosecution of sexual violence cases, the law requires the corroboration of evidence provided by the victim of sexual violence. This corroboration may take the form of a medical report and witness testimony. In the case of **Republic v Manilal Ishwerlal Purohit**¹³⁴ the court described Corroboration as:

"The independent testimony which affects the accused by connecting or tending to connect him with the crime, confirming in some material particular not only the evidence that the crime has been committed but also that the accused committed it"

The justification for corroborated evidence was elaborated in the case of **Maina v Republic**¹³⁵

where Mwendwa CJ and Madan JA *in noted* that

*"It has been said again and again that in cases of alleged sexual offences it is really dangerous to convict on the evidence of the woman or girl alone. It is dangerous because human experience has shown that girls and women sometimes tell an entirely false story which is very easy to fabricate, but extremely difficult to refute. Such stories are fabricated for all sorts of reasons and sometimes for no reason at all".*¹³⁶

Due to the condition of secrecy in which rape and other forms of sexual violence are committed it is nearly impossible to obtain witnesses to testify in corroboration. A medical report by a government is also considered to be corroborating evidence by the courts. A woman or girl who has been raped or defiled is required to report the crime to the police and also obtain Police form 3 (PF3) which is to serve as a medical report, once it is completed by a government doctor upon carrying out a medical examination to verify that the complainant

¹³⁴ [1949] 9 EACA 58

¹³⁵ [1970] EA 370.

¹³⁶ Ibid.

was indeed sexually abused by the accused. The process of obtaining medical evidence to corroborate the testimony of the victim of sexual violence is filled with enormous challenges and is traumatic for many victims. It is viewed by some victims as double victimization¹³⁷. The very first challenge is the fact that very few victims are aware of the importance of this procedure. Most of them after being sexually abused, rush to take a shower to get rid of all the filth and thereafter report the case to the police. By the time the medical examination is carried most of the evidence will have been washed away. If the victim is lucky there shall be some bruises, however this may not be the case always.

The other challenge is the limited number of government doctors available. Amnesty International reports that in some districts in northern Uganda there are only three government doctors who are charged with the responsibility of examining the large number of victims of sexual violence and filling in the PF3 form. In most cases, victims of rape are examined by the government doctor, days months or even years after the incident of sexual violence has taken place. As a result crucial evidence such as bruises, semen that is needed to prove rape may no longer be obtainable.¹³⁸ The cost involved in getting the medical examination has also served a barrier for many victims of sexual violence who cannot afford the fee levied by the government doctor in order for him to carry out the examination.

The challenges above are aggravated by the various taboos that shroud sex and make it impossible for victims of sexual violence to confide in someone immediately after they have been sexually abused. Most of them are usually ashamed of their predicament and due to fear

¹³⁷ Amnesty International, 'Uganda: Doubly traumatized. Lack of access to justice for female victims of sexual violence and gender based violence in Uganda', 30th November 2007 AFR/59/005/2007

¹³⁸ Ibid.

of the stigma that comes with being raped they never report the crime as soon as possible. As a result most of the crucial evidence required to prove rape is destroyed.

The examination of the victims' sexual history and moral character, as relevant and admissible evidence by the court, also deters many victims of sexual violence from seeking justice from the courts. Section 154 (d) of the Evidence Act ¹³⁹ of Uganda provides that "The credibility of a victim of sexual violence may be impeached by the accused by showing that the victim was generally of a moral character." Ironically the moral character and sexual history of the accused is not relevant at all. As a matter of fact the only time the character of the accused is examined by the court is when he adduces evidence to show that he is of a good character.¹⁴⁰ A number of rape victims have been subjected to the most intrusive and humiliating cross examination in court under this provision.

Another challenge faced by many victims of sexual violence is the insensitivity, and incompetence of the police when dealing with victims of sexual violence which has discouraged many victims from reporting cases of sexual violence. Most of the police officers have cultural prejudices towards women and these prejudices affect the way they deal with victims of sexual violence. In most cases they do not take the victim seriously, and may refuse to register the complaint. In a number of occasions they accuse the victims of having enticed the accused or having not resisted the abuse. They also inquire as to what the victim was dressed at the time and how she conducted herself.¹⁴¹ This is an invasion of the victims' privacy and has the effect of undermining her dignity. In cases where they do record the complaint they are at times bribed into not carrying out investigations effectively and they most often end up releasing the suspect.

¹³⁹ The Evidence Act Chapter 6 Laws of Uganda

¹⁴⁰ The Evidence Act Cap 6 laws of Uganda, Section 50

¹⁴¹ Amnesty International, 'Uganda Doubly traumatized: Lack of access to justice for female victims of sexual and gender based violence in Uganda' , 30th November 2007 AFR/59/005/2007

A number of victims have stated that they have been ridiculed and insulted by police officers. In some instances the absence of female police officers to whom the victims can comfortably narrate their ordeal, deters many victims from lodging complaints.¹⁴²

The courts, which are predominantly occupied by men, are also less sensitive towards how traumatic it is for many victims of sexual violence to relive the incident of sexual violence they were subjected to. Most rape trials in Uganda are known to place the victim in a position of proving that she was not responsible for her victimization. They tend to inquire about the victims sexual history, moral background and what she was wearing at the time she was sexually assaulted. The police are most often not alive to the cultural backgrounds of most of the victims, which make it a taboo for them describe their sexual experience in graphic details. Hereunder is an example of how the courts in Uganda can be totally insensitive to the trauma experienced by victims of sexual violence. One of the Ugandan dailies reported that “A woman called Regina Awor was raped by one Stephen Apia, Awor sought justice in the Uganda High Court. At the trial, Awor described what happened to her as: **‘He made me his wife and worked on me.’** The prosecutor wanted her to be more explicit, to provide a detailed account of what had the accused had done to her. However the court was filled to the brim with strangers and Awor being too traumatized was unable to graphically describe what she had experienced which was necessary, if the prosecutor was to prove the essential ingredients of rape — penile/vaginal penetration and lack of consent “beyond any reason of doubt.”

In his decision acquitting, the accused Justice Lugayizi described the testimony of the victim as “vague and meaningless.” He further noted that: “The complainant has only herself to

¹⁴² Amnesty International, ‘Uganda Doubly traumatized. Lack of access to justice for female victims of sexual violence and gender based violence in Uganda’ , 30th November 2007 AFR/59/005/2007

blame for the fact that this case collapsed. She stubbornly refused to say exactly what took place inside the hut of the accused, on the day in issue.”¹⁴³

The other challenge faced by victims is the fact that the Judiciary does not have adequate funds to facilitate the holding of regular criminal sessions to deal with case backlog. According a report by Amnesty international¹⁴⁴, the numbers of criminal sessions held in a year are determined by the availability of funds. Northern Uganda, has one high court based in Gulu district It is responsible for five districts. The High Court has a single judge. During the criminal sessions, victims are required to travel hundreds of kilometers to get to Gulu to give testimonies in support of their cases. The cost of transportation and accommodation alone deters many of the victims from attending the court sessions. As a result the cases end up getting dismissed due to insufficient evidence to prove the case

The criminal justice system doesn't have protective measures in place for witnesses and victims. Most of the proceedings are conducted in public; victims are not offered protection from re victimization by the accused or his family after they have testified against them.

2.3 AMNESTY.

In 2000 , The Government of Uganda in a bid to end the 20 year war and prepare for the reconciliation process between the people of Northern Uganda and the LRA combatants, enacted the Amnesty Act. According to the preamble of the act, the objective of the Act is

“To provide for an Amnesty for Ugandans involved in acts of a warlike nature in various parts of the country and for other connected purposes”.

¹⁴³ The New Vision September 17th September, 2007

¹⁴⁴ Amnesty International, 'Uganda Doubly traumatized. Lack of access to justice for female victims of sexual violence and gender based violence in Uganda' , 30th November 2007 AFR/59/005/2007

Amnesty is defined in the Act as: "Pardon, forgiveness, exemption or discharge from criminal prosecution or any other form of punishment by the State"¹⁴⁵ According section 3 of the Amnesty Act, any combatant who reports to the nearest police or army barracks and renounces, abandons his or her involvement in the armed conflict; and surrenders the weapons in his or her possession shall be issued with an Amnesty certificate. Section 3 (2) further provides that "[w]here a reporter is a person charged with or is under lawful detention in relation to any offence mentioned in section 3, the reporter shall also be deemed to be granted the Amnesty if the reporter declares to a prison officer or to a judge or magistrate before whom he or she is being tried that he or she has renounced the activity referred to in section 3; and declares his or her intention to apply for the Amnesty under this Act." Ex combatants who are granted Amnesty are provided with resettlement assistance and are assisted by the Amnesty commission in their reintegration with their societies. The Amnesty provided for in the above provisions is a blanket Amnesty. It is extended to all combatants irrespective of their age, rank and gravity of the crimes they committed. It covers all the war crimes and crimes against humanity committed by the combatants during the armed conflict including sexual violence. It is reported that over 15, 000 combatants have so far received Amnesty from the government and have been resettled. A number of them are living in the same communities as their victims¹⁴⁶.

The granting Amnesty is widely perceived as a form of restorative justice and is in consonance with the traditional justice mechanisms, which foster reconciliation and in contrast with criminal prosecutions which are retributive in nature.¹⁴⁷ Some scholars have argued that

¹⁴⁵ The Amnesty act Cap 294 of Uganda Article 2

¹⁴⁶ Refugee Law Project, Working paper No 15, 'Whose Justice: Perceptions of Uganda's Amnesty Act 2000: The Potential for Conflict Resolution and Long-Term Reconciliation,' 7-8 2005 Available at <http://www.refugeelawproject.org/papers/workingpapers/RLP.WP15.pdf>

¹⁴⁷ Ibid.

‘criminal prosecutions prolong conflicts and that more flexible restorative measures might be more appropriate in situations involving mass atrocities with thousands of perpetrators’¹⁴⁸

The National Amnesty granted by the government of Uganda to the combatants has been widely criticized by a number of scholars who consider it to foster impunity. Richard Decker argues that the granting of amnesty to perpetrators “undermines the rule of law and slights the victims of injustice”.¹⁴⁹ Other scholars argue that it is inconsistent with Uganda’s obligations under international law¹⁵⁰. It contravenes a number of international provisions that grant victims of gross human rights violations the right to an effective remedy.¹⁵¹

In the case of **Rodriguez v. Uruguay**¹⁵² the Human rights committee concluded that the granting of Amnesty by governments to individuals who violate the human rights of others is a violation by the state, of its obligation to provide victims with an effective remedy.

The committee stated that Amnesty laws,

“Effectively excludes in a number of cases the possibility of investigation into past human rights abuses and thereby prevents the state party from discharging its responsibility to provide effective remedies to the victims of those abuses”¹⁵³

In the case of **Prosecutor v. Kamara and Prosecutor v Kallon**¹⁵⁴ the defendants lodged an appeal before the appeals chamber of the special court for Sierra Leone, in which they challenged the jurisdiction of the special court to try them for crimes they committed, on the

¹⁴⁸ H. Moy, ‘The International Criminal Court’s Arrest Warrants and Uganda’s Lord’s Resistance Army: Renewing the Debate over Amnesty and Complementarity,’ 19 Harvard Human Rights Journal (2006) 267–273 at 272

¹⁴⁹ Richard Dicker, ‘When peace talks undermine justice’, The international Herald Tribunal , July 2008

¹⁵⁰ Payam Akhavan, ‘Developments at the International Criminal Court: The Lord’s Resistance Army, Case: Uganda’s. Submission of the First State Referral to the International Criminal Court’ , 99 Am. J. Int’l L Pg 409 (2005). Also see K Phillip Apuuli ‘Amnesty and International Law: The case of the Lord’s Resistance Army insurgents in Northern Uganda’, available on <www.accord.org.za/ajcr/2005-2/AJCRvol5no2_pg33-61.pdf

¹⁵¹The International Covenant on Civil and Political Rights (ICCPR) Article 2 (3)

¹⁵² Communication No. 322/1988

¹⁵³ Communication No. 322/ 1988

¹⁵⁴ Prosecutor v. Kallon, Case No. SCSL-2003-07-PT, (16 June 2003); Prosecutor v. Kamara, Case No. SCLS-2003-10-PT (16 June 2003

ground that they had been granted amnesty by the government of Sierra Leone under the Lome agreement the chamber noted that

“Whether to prosecute the perpetrators of rebellion for their act of rebellion and challenge to the constituted authority of the state as a matter of internal law is for the state authority to decide there is no rule against rebellion in international law the state concerned may decide to prosecute the combatants , it may decide to pardon them , generally or partially, conditionally or unconditionally. It is where , and in this case because , the conduct of the participants in the armed conflict is alleged to amount to international crime that the question arises whether the state has the same choice to dispense with the prosecution of the alleged offenders, does this conclusively bar prosecution for the alleged commission of grave crimes against humanity in an international tribunal or for that matter by any other state claiming universal jurisdiction to prosecute.”¹⁵⁵

The Appeals Chamber of the Special Court for Sierra Leone concluded that

“The grant of amnesty or pardon is undoubtedly an exercise of sovereign power which, essentially, is closely linked, as far as crime is concerned, to the criminal jurisdiction of the State exercising such sovereign power. Where jurisdiction is universal, a State cannot deprive another State of its jurisdiction to prosecute the offender by the grant of amnesty. It is for this reason unrealistic to regard as universally effective the grant of amnesty by a State in regard to grave international crimes in which there exists universal jurisdiction. A State cannot bring into oblivion and forgetfulness a crime, such as a crime against international law, which other States are entitled to keep alive and remember.”¹⁵⁶

The above decision of the appeals Chamber of the special court of Sierra Leone if applied to the Ugandan situation implies that the principle of universal jurisdiction renders the amnesties granted to ex combatants nugatory, and cannot protect them from criminal prosecution for committing war crimes and crimes against humanity.

On the other hand, some have found it problematic to have combatants who were abducted as children and forced to serve as child soldiers or wives of the LRA rebels, prosecuted for international crimes. These combatants are perceived as victims in their own right¹⁵⁷ . It is therefore preferable to only prosecute and hold accountable the top commanders of the LRA who were responsible for the recruitment of child soldiers and perpetration of crimes against

¹⁵⁵ Ibid paragraph 20

¹⁵⁶ Ibid paragraph 67

¹⁵⁷ Payam Akhavan, ‘Developments at the International Criminal Court: The Lord's Resistance Army Case: Uganda's Submission of the First State Referral to the International Criminal Court’ , 99 Am. J. Int'l L. Pg 409 (2005) 409-10

humanity.¹⁵⁸ In 2006 the Amendment to the Amnesty Act granted powers to the minister of internal affairs the mandate to declare a combatant leader ineligible for Amnesty.¹⁵⁹ It is believed that this provision was aimed at excluding the top LRA combatant leaders from being eligible for Amnesty.

The failure by Kony to sign the peace agreement, and the resumed rebel attacks indicates that the leaders of the LRA do not genuinely seek peace and therefore jettisoning justice for the sake of peace may not be a reasonable venture in Uganda. Richard Dicker rightly argues that “Turning a blind eye to justice only undercuts durable peace”¹⁶⁰ He gives the example of Sierra Leone where amnesty was granted to Foday Sankoh the leader of the Revolutionary United front, after the signing of the Lome peace agreement. Sankoh was even rewarded with the control of a government commission. However shortly after, he resumed his attacks against the government. The amnesty had given him time to remobilize, get more troops and weapons.¹⁶¹ The same applies to Uganda; Joseph Kony indicated his willingness to participate in peace talks and to sign the peace agreement in exchange for amnesty. He even convinced the Ugandan government to request the UN Security council to lift the ICC warrants against him. However on the day of signing the peace accord he did not show up. The time frame of the negotiations of the peace agreement had given him time to regroup and obtain weapons. It is important to note that during the negotiations his emissaries’ received funds to facilitate their participation in the peace talks in Juba.

Additionally, victims of crimes committed by the combatants upon learning of that crimes committed against them and their relatives have been pardoned may resort to violence in

¹⁵⁸ Ibid.

¹⁵⁹ The Amnesty (Amendment) Act, 2006 section 2A

¹⁶⁰ Richard Dicker, ‘When peace talks undermine justice’, The international Herald Tribunal , July 2008

¹⁶¹ ibid

the pursuit for justice that the state and international law has denied them. Either way the much sought after peace is not achieved

2.4 CONCLUSION

The Current state of the criminal justice system in Uganda poses a number of challenges to victims of sexual violence who approach it for justice. Some of these challenges include the obsolete criminal laws and evidentiary requirements, which are too technical and traumatizing to many victims. There are insufficient police and prison facilities. There is widespread corruption within the police which deters many victims who cannot afford to pay the required bribe, from lodging their complaints. A majority of the victims of sexual violence are faced with cultural biases and stigma associated with being a victim of sexual violence this also deters many of them from lodging complaints with the police.

Justice for victims of sexual violence can be achieved domestically if the necessary legal and institutional reforms are put in place. The passing of the ICC Bill into law is one of the ways of ensuring that there are adequate laws to cover the crimes committed during the armed conflict. There is also a need for institutional reform to ensure that the members of the administration of justice institutions such as the police, prosecutors and judges are sensitive to the peculiar needs of victims of sexual violence and have the necessary expertise and skills to conduct effective investigations and prosecutions of perpetrators of war crimes and crimes against humanity. The trials must be fair and credible and the penalties imposed should be adequate and should reflect the gravity of the crimes committed. There is a need to put in place comprehensive witness protection and support measures to encourage victims and witnesses to testify. It is acknowledged that there are many perpetrators of crimes during the armed conflict and the Justice system of Uganda may not be equipped to prosecute all of them. Therefore it is preferable

to prosecute those greatly responsible for committing the most serious crimes, while those low level perpetrators should be held accountable by the traditional justice mechanisms or truth commissions.

CHAPTER 3: ALTERNATIVE MECHANISMS OF JUSTICE FOR VICTIMS OF SEXUAL VIOLENCE

3.1 INTRODUCTION

Most Post conflict states are often faced with the challenge of identifying the most suitable mechanism of transitional justice to address the gross human rights violations that were committed during the conflict. The transitional justice mechanism that would be ideal is one that holds perpetrators accountable, renders justice to victims while at the same time maintaining the fragile social cohesion and harmony currently in place. As a result, these states have explored a variety of transitional justice mechanisms to supplement the formal justice mechanisms of accountability. These accountability mechanisms have ranged from “truth commissions, reparations, and traditional confession and reintegration rituals, to other non-penal means.”¹⁶² In this Chapter, I am going to focus on the traditional / indigenous mechanisms of Justice in Uganda , Truth Commissions and reparations as alternative mechanisms of accountability and justice . I focus on the three alternative mechanisms of justice because they have been recognized under the Juba agreement on accountability and reconciliation as the accountability mechanisms to be applied in Northern Uganda

3.2 TRADITIONAL/INFORMAL JUSTICE MECHANISMS

A number of post conflict states such as Rwanda, Sierra Leone, Mozambique and Uganda have opted for the indigenous mechanism of accountability as a preferred transitional justice

¹⁶² Eric Blumenson ‘The Challenge of a Global Standard of Justice: Peace, Pluralism, and Punishment at the International Criminal Court’. *Columbia Journal of Transnational Law*, Vol. 44, 2006

mechanism¹⁶³. After the devastation caused by the Genocide, Rwanda resorted to the indigenous mechanism of justice known as *Gacaca* as a transitional justice mechanism, to render justice to victims. The *Gacaca* system has been widely acclaimed for holding thousands of perpetrators of genocide accountable.¹⁶⁴ The *Gacaca* courts were established in 2001 by the Government of Rwanda to hold perpetrators of genocide and crimes against humanity accountable and to ease the burden on the struggling judicial system.¹⁶⁵ The *Gacaca* courts conducted hearings at the village level where members of the court would sit on grass and listen and consider cases brought to them.¹⁶⁶ During the hearings most of the perpetrators confessed and sought forgiveness from the victims. Being restorative in nature, the *Gacaca* process reconciled victims and perpetrators.¹⁶⁷

The Juba Peace Agreement of 2007 on accountability and reconciliation provides for formal and non formal mechanisms of justice¹⁶⁸. In Northern Uganda, the traditional justice mechanisms which include *Culo Kwor*, *Mato Oput*, *Kayo Cuk*, *Ailuc* and *Tonu ci Koka* comprise a central part of the framework for accountability.¹⁶⁹ These traditional mechanisms of justice enjoy grass root support and have been promoted by the local leaders and elders as the most suitable mechanism of accountability because they are in conformity with the community's idea of justice.¹⁷⁰ Furthermore, the complexities involved in the formal justice mechanisms and their institutional shortcomings, such as corruption and inefficiency, have also contributed to the

¹⁶³ Luc Huyse, 'Tradition-based approaches in peacemaking, transitional justice and reconciliation policies. Published in Traditional justice and reconciliation after conflict: Learning from African Experiences', IDEA 2008

¹⁶⁴ Ibid.

¹⁶⁵ William A Schabas, 'Post Genocide Rwanda: A spectrum of options'. In Phil Clark and Zachary D Kaufman, 'After Genocide: Transitional justice, post conflict reconstruction and reconciliation in Rwanda and Beyond'. Hurst & Company, 2008 pg 221

¹⁶⁶ Ibid pg 223

¹⁶⁷ ibid

¹⁶⁸ The Juba Peace Agreement on Accountability and reconciliation. June 2007 Article 2

¹⁶⁹ The Juba Peace Agreement on Accountability and reconciliation. June 2007 Article 3.1

¹⁷⁰ Fionnuala Ní Aoláin, and Michael Hamilton, 'Gender and The Rule of Law In Transitional Societies'. Minnesota Journal Of International Law Summer 2009

victims preference for the traditional mechanisms. The basic premises of the traditional justice mechanism include trust, voluntariness, truth telling, compensation and restoration.¹⁷¹ These indigenous justice mechanisms are considered to be restorative in nature and contribute significantly to the restoration of the social cohesion in the communities devastated by the armed conflict, by reconciling the victims and perpetrators.¹⁷²

The traditional justice mechanisms in Northern Uganda are conducted at the community level by a council of elders who are perceived as guardians of the society.”¹⁷³ They involve several processes which include mediation, confession by the perpetrators, solicitation of forgiveness from victims, reconciliation, payment of compensation, and finally the reintegration of both the victim and the perpetrator into the community.¹⁷⁴

The most prominent and widely used traditional justice mechanism is “*Mato Oput*” which is performed regularly in the Acholi community in Northern Uganda. *Mato Oput* is the traditional ritual of „drinking of the bitter root from a common cup”. with the aim of cleansing the perpetrator and reconciling him/her with the victims that he/she abused.¹⁷⁵ It promotes reconciliation and forgiveness. According to a Ugandan Scholar John Latigo¹⁷⁶, *Mato Oput* is “predicated on full acceptance of one’s responsibility for the crime that has been committed or the breaking of a taboo. In its practice, redemption is possible, but only through this voluntary admission of wrongdoing, the acceptance of responsibility”¹⁷⁷

¹⁷¹ James Ojera Latigo, Northern Uganda: Tradition-based practices in the Acholi region, IDEA, 2008, published in Traditional justice and reconciliation after conflict , Learning from African Experiences IDEA, 2008

¹⁷² Ibid.

¹⁷³ Ibid

¹⁷⁴Refugee law project, working paper 17 ‘Peace first Justice later’, 2005. See also Mr. Onyango John Francis, ‘The International Criminal Court and Its Role in the Northern War Conflict Paralleled to the Acholi Traditional Techniques of Conflict Management [Mato Oput]’ UICC 2007

¹⁷⁵ Liu Institute for Global Issues, ‘Restoring Relationships in Acholi land: Traditional Approaches to Justice and Reconciliation’, (September 2005

¹⁷⁶ James Ojera Latigo, ‘Northern Uganda: tradition-based practices in the Acholi region’, IDEA, 2008, published in Traditional justice and reconciliation after conflict , Learning from African Experiences IDEA, 2008 IDEA, 2008

¹⁷⁷ Ibid .

One of the Acholi elders¹⁷⁸ emphasized that forgiveness in Acholi culture is the bedrock for reconciliation and the reintegration of perpetrators and victims. *Mato Oput* is therefore tailored to foster forgiveness and reconciliation. The *Mato Oput* process as follows:

“When a crime is committed against humanity with impunity, the accused or perpetrator must be the first witness against himself or herself. He/she must stand outside the ‘Gate of the Village’ and tell the people his/her name and names of his/her parents and uncle. He/she also talks about the crime he/she committed and why he/she committed it the way he/she did. After his/her testimony, the elders of the Village immediately take collective responsibility on his/her behalf. After the confession and the culprit’s community taking collective responsibility, the elders then perform the rituals of the self-confessed culprit.....Their public apologies are also subjected to acceptance by religious leaders as witnesses. Thereupon, the two parties shall be required to ‘bend spears’ and formally declare an end to hostilities. They will also be required to drink the juice from the root of the Mato put tree as a form of cleansing”.¹⁷⁹

The use of indigenous justice mechanisms as a method of accountability has been supported by a number of scholars who argue against what they refer to as the “homogeneity of justice”¹⁸⁰ which requires every method of justice to resemble the criminal justice process which is retributive punished. Mark Drumbl has argued against he calls a “fundamentalist pursuit of criminal justice” because it prevents the consideration and application of alternatives methods of justice and in most cases goes against the identified goal of transitional justice, which is to facilitate healing, reconciliation and reintegration.¹⁸¹

What is preferred is a more pluralistic approach to justice, which would incorporate all the alternative forms of justice, such as the traditional justice mechanisms and truth commission.

It has been asserted that “[t]he decision, on the one hand, to seek justice through punishment or, on the other, to forgo punishment in favor of justice through reconciliation, is a

¹⁷⁸ B. Ochola, ‘The Acholi Traditional Justice is not Enough for Kony’ Sunday Vision, 27 August 2006

¹⁷⁹ Ibid

¹⁸⁰ Mark A Drumbl: ‘Atrocity, punishment and international law’ , Cambridge University press.,2007 pg5

¹⁸¹ Ibid.

decision that must be made by the concrete community that is the victim of the crimes and that will have to live with the consequences of the decision.”¹⁸²

The former secretary General of the United Nations Kofi Annan is quoted as having stated that:

“Due regard must be given to indigenous and informal traditions for administering justice or settling disputes, to help them to continue their often vital role and to do so in conformity with both international standards and local tradition.”¹⁸³

In that regard, the traditional justice mechanisms in Northern Uganda have a key role to play in holding perpetrators accountable and offering justice to victims.

3.2.1 TRADITIONAL JUSTICE MECHANISMS, AS AVENUES OF JUSTICE FOR VICTIMS OF SEXUAL VIOLENCE.

The competence and capability of traditional justice mechanisms in providing justice to victims of sexual violence is yet to be established given the fact that they do not have experience in handling such cases, which have always fallen under the realm of the formal criminal justice system. One of the biggest criticisms of the traditional justice mechanisms is that they are predicated on cultures and practices which are discriminatory and denigrating to women and as a result they reinforce cultural stereotypes that are prejudicial to the rights of women.¹⁸⁴ These traditional justice mechanisms have been developed and implemented with little or no regard to the special and complex needs of women victims and have been tailored to maintain the gender hierarchies in a patriarchal society.¹⁸⁵ As a result, the victimization of women is in most cases trivialized and women are not usually given an opportunity to share their experiences as victims.

¹⁸² Adam Branch, ‘International Justice, Local Injustice: The International Criminal Court Northern Uganda’, *Dissent Magazine*, Summer 2004, page 5

¹⁸³ UN Security Council: Report of the Secretary-General on the rule of law and transitional justice in conflict and post-conflict societies, 2004

¹⁸⁴ Rama Mani , ‘Beyond Retribution Seeking justice in the shadows of war’ , Oxford Polity press, 2002 pg 68

¹⁸⁵ Fionnuala Ní Aoláin, Michael Hamilton, ‘Gender and The Rule Of Law In Transitional Societies’, *Minnesota Journal of International Law* Summer 2009

Most women get to participate in the traditional justice process in their capacities as wives, mothers or sisters of the victim but not as victims.¹⁸⁶

It is important to note that the Juba Agreement on Accountability; calls upon the traditional justice institutions to adopt a gender sensitive approach when dispensing justice¹⁸⁷. The agreement also calls for the recognition of the special needs of women and girls and requires that measures be adopted to address those needs. It also requires that special measures be put adopted to protect the dignity and privacy of women, in order to encourage them to participate effectively and shield them from stigmatisation. Finally, it emphasises the need to have the experiences of women and children documented and taken in to account.¹⁸⁸

However, the above provision requires be enforced if the government has the political will to do so. It requires continuous monitoring by government and civil society organisations to ensure that the gender concerns are taken into consideration and human rights are infused in the operations of the traditional justice institutions. Experience in Uganda has shown that there is a gap between law and practice. Much as the Ugandan constitution contains a number of provisions that prohibit discrimination and outlaw cultural practices that are detrimental to women, those cultures and traditions are still practiced and reinforced in many parts of the country.¹⁸⁹

In most cultures in Uganda female sexuality is shrouded in taboos and is not considered to be part of public discourse. Women who talk about their sexuality or report being raped are often branded as women of lose morals. Consequently, many victims of sexual violence are

¹⁸⁶ Ibid.

¹⁸⁷ The Juba Agreement on Accountability and Reconciliation between the Government of Uganda and the Lords Resistance movements. June 2007 Clause 10

¹⁸⁸ Ibid.

¹⁸⁹ Constitution of Uganda 1995, Article 33

reluctant to seek redress from the cultural institutions, which are predominantly male. Experience in other post conflict states such as in Sierra Leone and South Africa indicate that women are more comfortable testifying before a women panel or in cases where the panel is mixed, the female member of the panel is the only one permitted to question the victim¹⁹⁰.

The most prominent challenge facing the application of traditional justice mechanisms is that they are not well documented. Having not been practiced for a considerable period of time, it is likely that few elders might remember the exact procedures to be complied with when performing the rituals. The war displaced a number of the elders forcing them to migrate to other areas hence weakening the availability of those who are knowledgeable in the customary practices¹⁹¹.

According to the Rome Statute of the ICC, jurisdiction to try crimes against humanity can only be deferred to national justice mechanisms, if it is shown that they are capable of effectively dealing with the grave violations and are not trying to shield perpetrators.¹⁹² Many critics have observed the traditional justice mechanisms are incapable of offering sufficient accountability for mass atrocities¹⁹³. They argue that the traditional justice methods were tailored to deal less serious crimes such as theft; while grave offences such as rape, murder and mutilations were always deferred to the formal criminal justice system¹⁹⁴. A Ugandan Judge, Justice Dan Nsereko of the International Criminal Court, noted that

¹⁹⁰ Beth Goldblatt and Shiela Meintjes, 'Gender and the truth and reconciliation commission', a submission to the South Africa Truth and reconciliation commission. May 2006

¹⁹¹ Scott Worden, The Justice Dilemma in Uganda, USIPS peace briefing 2008

¹⁹² The Rome Statute of the ICC Article 17

¹⁹³ Kasaija Philip Apuuli, 'Looking beyond amnesty and traditional justice and reconciliation mechanisms in northern Uganda. A proposal for Truth telling and reparations'. 28 B.C. Third World L.J. 345 2008

¹⁹⁴ *ibid*

“Traditional justice system, locally known as *mato-oput*, cannot be applied to suspects of crimes against humanity. Crimes against humanity, genocide, aggression against other states and war crimes are internationally condemned and cannot be tried by traditional courts but by the ICC,”¹⁹⁵

Compensation is a key element in most traditional justice mechanisms, perpetrators are expected to compensate their victims. However, the war having decimated most of the livestock and property makes it impossible for the perpetrator to compensate their victims¹⁹⁶

Other scholars have argued that the capacity of the victims in Northern Uganda to forgive their perpetrators as required by the *Mato Oput* system may be overestimated and could result in a covered up deep hatred within the victimised community that could result in another civil war.¹⁹⁷ A survey conducted by some NGOs’ indicates that a number of victims they interviewed preferred to have the perpetrators punished by the formal criminal justice system.¹⁹⁸

The traditional justice mechanisms place an onerous burden on victims to forgive the perpetrators, and yet some the victims may not be willing to forgive the perpetrators. Victims who do not forgive are perceived as obstacles to peace. This leaves most victims with no option but to forgive¹⁹⁹.

3.3 TRUTH AND RECONCILIATION COMMISSIONS

Truth and reconciliation commissions have been identified, by a number of post conflict societies, as alternative methods of justice in which past injustices are to be dealt with. The United Nations High commissioner for human rights has defined truth commissions as an “[o]fficial, temporary, non-judicial fact-finding bodies that investigate a pattern of abuses of

¹⁹⁵ Josephine Maseruka, ‘Traditional justice not applicable to war suspects’, The New Vision June 30th 2009 <http://www.newvision.co.ug/D/8/13/686419>

¹⁹⁶ *ibid*

¹⁹⁷ Cecil Rose , ‘Looking beyond amnesty and traditional justice and reconciliation mechanisms in northern Uganda: A proposal for truth telling and Reparations’ 28 B.C Third World L.J 345

¹⁹⁸ Phuong Pham et al. ‘Forgotten voices A population bases survey on attitudes about peace and justice in Northern Uganda’ International centre for transitional justice 16-17 (2005)

¹⁹⁹ *Ibid*.

human rights or humanitarian law, usually committed over a number of years.”²⁰⁰ A truth commission has also been defined as “[a]n official body, often created by a national government, to investigate, document, and report upon human rights abuses within a country over a specified period of time.”²⁰¹

The most prominent truth commissions in Africa have been the South African Truth and Reconciliation Commission, which was established 1995 to deal with the atrocities that had been committed during the forty five years of apartheid.²⁰² Its mandate included investigation, granting of amnesty, seizing of property and subpoenaing of witnesses.²⁰³

The second most popular truth commission in Africa is the Sierra Leone Truth and Reconciliation Commission, which was established following the Lome Peace Agreement of 1999, to address the atrocities that were committed during the Sierra Leonean civil war, the Truth commission had a similar mandate like its South African predecessor.²⁰⁴

Truth commissions have been preferred due to the numerous roles attached to them which include inter alia; fostering national reconciliation, ending impunity and preventing a future reoccurrence of atrocities.²⁰⁵ They have also been preferred due to their “ability to offer a broader historical perspective, rather than mere judgments in isolated cases”²⁰⁶. Imbeleau argues that although the truth telling process is painful for many victims and survivors’, the recording

²⁰⁰ Diane Orentlicher, Addendum to the Report of the Independent expert, to update the Set of principles to combat impunity, UN Doc.E/CN.4/2005/102/Add.1, 8 February 2005, Definitions, page 6.

²⁰¹ Ruti G. Teitel; ‘Transitional Justice Genealogy’, Harvard Human Rights Journal, 2003

²⁰² Hayner B Priscilla, ‘Unspeakable Truths: Confronting state terror and atrocity’, Routledge 2001, pg40

²⁰³ Ibid. 40

²⁰⁴ William A Schabas, ‘A synergistic relationship: The Sierra Leone Truth and Reconciliation commission and the special court for Sierra Leone’; In William A Schabas et. Al, ‘Truth commissions and Courts’ Kluwer Academic Publishers 2004 pg 2

²⁰⁵ Supra n.41

²⁰⁶ Ruti G. Teitel, ‘Transitional Justice Genealogy’. Harvard Human Rights Journal, 2003

the history of the atrocities and violations, enables the people to remember the atrocities that took place and prevent them from reoccurring.²⁰⁷

Hayner argues that the truth telling process is cathartic for many survivors and victims who are given the opportunity to tell their stories in an environment that does not have strict and rigid evidentiary requirements as a court of law²⁰⁸. The truth telling process enables perpetrators to own up to their actions and seek the forgiveness of victims. The Truth commissions also help in identifying the perpetrators of crimes during the conflict while at the same time vindicating the experience of victims and survivors.²⁰⁹

The Attorney General of Sierra Leone upon the enactment of the TRC legislation stated that:

“Far from being fault finding and punitive, it [the TRC] is to serve as the most legitimate and credible forum for victims to reclaim their self worth and a channel for the perpetrators of atrocities to expiate their guilt and chasten their consciences. The process has been likened to a national catharsis involving truth telling, respectful listening and above all compensation for victims in deserving cases”²¹⁰

Uganda has had two Truth commissions, which unfortunately did not succeed in their mission. The first was established in 1974 by the then dictator Idi Amin, to investigate the numerous disappearances of citizens which occurred after he assumed power.²¹¹ The commission was as a result of pressure mounted on the Amin government by the international community, to investigate the numerous disappearances.²¹² The commission had the discretion to compel witnesses to testify and order various organs of government to produce evidence. However since the establishment of the commission was a charade, the TRC’ report, which held the intelligence

²⁰⁷ Martin Imbeleau, ‘Initial truth Establishment’. in William A Schabas et. al Truth commissions and Courts Kluwer Academic Publishers 2004

²⁰⁸ Supra n41

²⁰⁹ William A Schabas et al, ‘Truth Commissions and Courts’ , Kluwer Academic Publishers, 2004, pg 4

²¹⁰ Ibid.

²¹¹ Established by a Presidential Legal notice under the Commission of Inquiries Act of 1914

²¹² Hayner B Priscilla, ‘Unspeakable truths: Confronting state terror and atrocity’ , Routldge 2001 pg 51

organs responsible for 308 disappearances, was not and disappearances continued at a grander scale.²¹³

The second Truth commission was established in 1986 after the Guerrilla movement of President Museveni took power. The mandate of the commission was to investigate grave human rights violations that took place from 1962, when Uganda attained its independence, to 1986 when the Museveni government took power.²¹⁴ Unfortunately, like its predecessor, the government did not have the political will to ensure that the commission executed its mandate effectively. The commission lacked institutional capacity to deal with the sizeable number of complaints it received and had few competent people to execute its mandate, since most of the educated elites of Uganda had flown into exile. It was always faced with financial problems which would prevent it from holding sessions for long periods of time. As a result after 5 years of its existence, the TRC came to an end and its ninety page report was not widely published and victims were not compensated.

The government responded by establishing a human rights commission to address the human rights violations in the country.²¹⁵ The two TRC's failed because of lack of commitment and genuine interest on the part of government to implement their recommendations.²¹⁶

The National Reconciliation bill provides for the establishment of a Truth forum.²¹⁷ However, the bill has faced stiff opposition from the current government because the Truth forum it proposes to establish would have the jurisdiction to investigate gross human rights violations that occurred from 1962 ,when Uganda got its independence , to date. This would

²¹³ Cecil Rose, 'Looking beyond amnesty and Traditional Justice and reconciliation mechanisms in Northern Uganda : A proposal for truth telling and Reparations' 28 B.C Third World L.J 345

²¹⁴ Supra n.208 pg 56

²¹⁵ The Constitution of Uganda 1995 Article 52

²¹⁶ Cecil Rose , 'Looking beyond amnesty and traditional justice and reconciliation mechanisms in northern Uganda: A proposal for truth telling and Reparations' 28 B.C Third World L.J 345

²¹⁷ The Bill is still a work in progress and is yet to be opened to public debate

mean the current regime would be held accountable for atrocities it committed during the guerrilla war that brought it in power.²¹⁸ It is important to note that although the Truth forum wouldn't have the jurisdiction to grant amnesty, under Clause 12 of the National Reconciliation Bill it, may refer to the Amnesty Commission, perpetrators or witnesses for a determination of their entitlement to amnesty.

3.3.1 TRUTH COMMISSIONS AS MECHANISMS OF JUSTICE FOR VICTIMS OF SEXUAL VIOLENCE.

Some of the truth commissions that have existed so far have documented few cases of sexual violence.²¹⁹ Most of them have not fully addressed issues of gender, particularly the gender dimensions of the conflict.²²⁰ It is argued that the relegation of women to secondary citizens by society tends to devalue their experiences as victims of gross human rights violations. This accounts for why there were few women who reported cases of sexual violence to the South African TRC.²²¹ Many women have been indoctrinated into believing that their experiences are less significant compared to the experiences of their male relatives and friends.²²² They find it easier to testify in their capacities as mothers or wives of victims and not as victims themselves.²²³ The truth commission for South Africa is said to have documented very few cases of sexual violence and as a result its report did not reflect the scale at which sexual violence was

²¹⁸ Jackee Budesta Batanda, 'The role of Civil Society in advocating for Transitional Justice in Uganda'. Institute for Justice and Reconciliation 2009

²¹⁹ Hayner B Priscilla, 'Unspeakable truths: Confronting state terror and atrocity', Routledge 2001

²²⁰ Vasuki Nesiah, et al. 'Truth Commissions and Gender: Principles, Policies, and Procedures,' International Center for Transitional Justice, July 2006

²²¹ Beth Goldblatt and Sheila Meintjes, 'South African Women Demand the Truth', in Meredith Turshen and Clotilde Twagiramariya, 'What Women Do in Wartime' (London: Zed Books, 1998): 27-61

²²² Kelli Muddell Capturing Women's Experiences Of Conflict: Transitional Justice In Sierra Leone, Michigan State Journal of International Law 15 Mich. St. J. Int'l L 85)

²²³ Beth Goldblatt and Sheila Meintjes, South African Women Demand the Truth, in Meredith Turshen and Clotilde Twagiramariya, What Women Do in Wartime (London: Zed Books, 1998): 27-61

perpetrated during the apartheid era.²²⁴ Statistics indicate that of the 8000 recorded testimonies of human rights violations, only 300 of these dealt with sexual assault of which only 80 related to women and of the 80 only 17 were of rape.²²⁵ This figure is said to under represent the number of women who had been subjected to political and sexual violence. The underreporting of rape and other forms of sexual violence is due to the cultural norms and social stigma that many rape victims are subjected to.²²⁶ Sex is considered to be a private matter and women who publicly report being violent sexual experience publicly are most often stigmatized.²²⁷ Many victims of sexual violence in South Africa felt embarrassed and were uncomfortable while giving testimony of sexual abuse at public hearing or have their abuse published in the report.²²⁸ Meinjeites has described violence against women in South Africa as “One of the hidden stories of our past because there were very few brave women who could narrate the sexual violence they suffered, to the truth and reconciliation commission.”²²⁹

The failure of victims of sexual violence to give testimony before the truth commission of South Africa compelled the civil society organizations to demand for an environment that is conducive for victims of rape and other forms of sexual violence to share their experiences.²³⁰ The TRC acquiesced to the requests and held three women-only hearings in which women recorded their testimony of sexual violence.

The Sierra Leonean Truth commission, on the other hand, learning from the experiences of the South African TRC, took several measures to ensure victims of sexual violence could

²²⁴ Beth Goldblatt and Sheila Meintjes ‘Dealing with the Aftermath: Sexual Violence and the Truth and Reconciliation Commission’, Agenda, No. 36, No to Violence (1997), pp. 7-18

²²⁵ Ibid.

²²⁶ Hayner B Priscilla, ‘Unspeakable truths . confronting state terror and atrocity’ , Routldge 2001

²²⁷ Supra n.63

²²⁸ Ibid

²²⁹ Ibid.

²³⁰ Beth Goldblatt and Sheila Meintjes ‘Dealing with the Aftermath: Sexual Violence and the Truth and Reconciliation Commission’ Agenda, No. 36, No to Violence (1997), pp. 7-18

document their experiences.²³¹ This included gender trainings for commissioners, who did not have previous experience in dealing with victims of sexual violence, to make them sensitive to the needs of such victims.

Taking a leaf from its South African predecessor, the Sierra Leonean TRC held three women only sessions. They also recorded the testimony of victims of sexual violence in camera.²³² Furthermore only female commissioners questioned victims. The TRC also collaborated with Nongovernmental organizations to ensure that victims of sexual violence were provided with the necessary support and were encouraged to testify before the TRC.²³³ In its final report the Sierra Leonean Truth Commission included a separate section which gave a detailed account of the gender crimes committed during the armed conflict and also gave recommendations on the necessary measures that need to be taken to protect the victims.²³⁴

Despite the failure of the past truth commissions, in Uganda, it is my firm belief that the establishment of a truth commission would facilitate reconciliation in northern Uganda. The truth commission would complement the formal courts. This would be similar to the accountability process in Sierra Leone where we have a special court and a truth commission addressing the crimes committed during the conflict simultaneously. Given the staggering number of perpetrators and the limited resources that the formal courts have access too, The truth commission would ease the burden of the formal courts.

The documentation and recording of witness and victim testimonies would help in identifying those responsible for the gross human rights violations in Northern Uganda and their

²³¹ Binaifer Nowrojee, 'Making The Invisible War Crime Visible: Post-Conflict Justice For Sierra Leone's Rape Victims', *Havard Human Rights Journal*, 2005

²³² *Ibid.*

²³³ *Ibid.*

²³⁴ *Ibid.*

motivation for doing.²³⁵ A truth commission would also bring to light the various atrocities that were committed during the armed conflict. The granting of amnesty to perpetrators of gross human rights violations without having them publicly confess and seek the forgiveness of victims, before a truth commission or any other body with a similar mandate, has been considered to be “burying the past instead of illuminating it.”²³⁶ This is likely to sabotage any chance of reconciliation within the community and especially the victimized population, who are likely to harbor animosity against the perpetrators and might eventually seek vengeance against them resulting in another civil war.²³⁷

A truth commission in Northern Uganda would also contribute to justice and accountability by presenting a platform where experiences of victims are validated. It would also contribute in identifying the institutional shortcomings and the necessary reforms. The report of the commission would catalogue the sequence of events that led to the atrocities and how the atrocities happened. This will enable the authorities to identify the causes of conflict and consequently how to prevent future reoccurrence.

A truth commission would also serve as a platform for many victims to testify and speak about their experiences. As already mentioned above it is part of a healing process for many victims, who need to narrate their experiences and have them acknowledged formally by the society. According to Aryeh Neier, “Acknowledgement implies that the state has admitted its

²³⁵ Cecil Rose , ‘Looking beyond amnesties and traditional justice and reconciliation mechanisms in Northern Uganda. A proposal for truth telling and Reparations’ 28 B.C Third World L.J 345

²³⁶ Ibid.

²³⁷ Refugee Law Project Working paper No 15 , ‘Whose Justice? Perceptions of the Uganda Amnesty act , the potential for conflict resolution’ 2005

misdeeds and recognized that it was wrong.”²³⁸ This contributes to healing the wounds of victims and enables them reclaim their dignity.²³⁹

The TRC would also give the Victimized populations an opportunity to know the truth about the conflict and what led to their victimisation. Principle 2 of the updated Set of principles to combat impunity by states provides that;

“Every people have 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. Full and effective exercise of the right to the truth provides a vital safeguard against the recurrence of violations”²⁴⁰.

Furthermore, the Basic principles on the right to a remedy and reparation provide that

“Victims and their representatives should be entitled to seek and obtain information on the causes leading to their victimization and on the causes and conditions pertaining to the gross violations of international human rights law and serious violations of international humanitarian law and to learn the truth in regard to these violations”²⁴¹.

The South African and Sierra Leonean Truth commissions have been exemplary in serving this purpose however they have also raised debates as to whose truth was actually documented. The nature of truth is determined by a number of factors which include; the scope and flexibility of its mandate Hayner asserts that a “[f]uller picture of the truth would immerge if a commission has a flexible mandate”.²⁴² A broad and flexible mandate for a truth commission would enable it document human rights violations that were not envisaged by the legislation establishing and granting jurisdiction to the commission. A narrow and limited mandate will prevent the commission from receiving testimony of victims who were victims of human rights violations not covered by the mandate of the commission. Some scholars for example have

²³⁸ Aryier Neier, ‘What should be done about the guilty’?, New York review of books, February 1 1990, 34

²³⁹ Hayner B Priscilla, ‘Unspeakable truths: Confronting state terror and atrocity’, Routledge 2001

²⁴⁰ Diana Orentlicher, Report of the independent expert to update the Set of principles to combat impunity Updated Set of principles for the protection and promotion of human rights through action to combat impunity, E/CN.4/2005/102/Add. 18 February 2005

²⁴¹ of 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 UN General Assembly resolution 60/147 of 16 December 2005, Principle 24

²⁴² Hayner B Priscilla, ‘Unspeakable truths. Confronting state terror and atrocity’, Routledge 2001 pg.73

criticized the inability of the South African Truth commission to document some of the apartheid practices and have described the report produced by the South African Truth commission as “compromised truth”²⁴³

If a Truth commission is established in Northern Uganda, special regard should be paid to its composition. The composition of the commission would determine the nature of truth that would emerge. For instance a commission that is comprised of men only would not be able to examine truth through a gendered lens which is necessary for the encouragement of victims of sexual abuse and other forms of gender based violence to testify, and also for the understanding and dealing with the testimony of such victims²⁴⁴

If established, the Truth Commission would also need to have a flexible mandate and should adopt a victim centered approach which would enable it record testimony from victims, who have been subjected to forms of sexual violence that are not been provided for in the instrument defining the commission’s mandate.

It should also adopt some of the best practices from the Sierra Leonean Truth commission. This includes providing gender trainings for the commissioners to enable them adopt a gender sensitive approach when dealing with cases of sexual violence. The testimony of victims needs to be recorded in camera, to encourage victims who would like to remain anonymous, due to fear of stigmatization, the opportunity to testify. This could include having female commissioners question victims and record their testimonies. The Truth commission could hold women only sessions which, as has been evidenced in Sierra Leone and South Africa, are safe spaces for testifying without fear of being stigmatized by the patriarchal societies. The

²⁴³ Mahmood Mamdani, ‘Reconciliation without justice’, South African review of books , 46, (1996)3-6

²⁴⁴ Hayner B Priscilla, ‘Unspeakable truths. Confronting state terror and atrocity’ , Routledge 2001, pg74

commissioners could also encourage women who come to testify on behalf of other victims to talk about the various forms of abuse, if any, they have been subjected to.²⁴⁵

The instrument granting and defining the jurisdiction of the TRC needs to recognize sexual violence as a specific violation rather than consider it as being covered by the broad definition of gross human rights violation.²⁴⁶ This will prevent the TRC from being blind to some of the forms of sexual abuse experienced by women. The South African TRC acknowledged that:“The definition of gross human rights violation adopted by the commission resulted in blindness to the types of abuse predominantly experienced by women.”²⁴⁷. This could be avoided by specifically providing for and defining the various types of sexual violence in the instrument establishing and granting jurisdiction to the TRC.

The truth commission in collaboration with NGO’s needs to publicize its activities through various media channels such as Television and radios. This is aimed at informing victims of their rights, the procedures involved and the various protective measures in place. This will encourage victims to testify before the commission.

3.4 REPARATION.

Many victims of human rights abuses in Northern Uganda and particularly those of sexual violence have experienced and some continue to experience physical and emotional anguish, psychological trauma and are stigmatized by their communities.²⁴⁸ In an interview with Amnesty international a victim of sexual violence is reported to have stated that:

²⁴⁵ Beth Goldblatt and Shiela Meintjes, ‘Gender and the Truth and Reconciliation Commission’, A submission to the Truth and Reconciliation Commission 1996

²⁴⁶ Hayner B Priscilla, ‘Unspeakable truths . Confronting state terror and atrocity’ 2001 pg 78

²⁴⁷ Ibid.

²⁴⁸ Cecil Rose, ‘Looking beyond amnesty and traditional justice and reconciliation mechanisms in Northern Uganda. A proposal for Truth telling and reparations’. 28 B.C. Third World L.J. 345 2008

“...Even though I am back to the community and my life is normal, I still hallucinate and dream a lot about what happened. I dream about my forced marriage and the people I was made to kill and others who were killed during our time with the LRA...Because of my experience, I sometimes find myself shouting uncontrollably.”²⁴⁹

In addition vital community infrastructure such as schools, health centers police stations and roads were destroyed during the war. According to a survey conducted by the international centre for transitional justice, a significant number of the victims interviewed recommended that reparations should be made to the victimized communities²⁵⁰. While some preferred monetary compensation, the majority preferred the rebuilding of their villages and basic infrastructure.²⁵¹

The Juba Agreement on Accountability and Reconciliation signed between the LRA and the Government of Uganda in June 2007, and an Annexure signed in February 2008 imposes an obligation on government to establish a reparations scheme for Victims.²⁵² In 2007 the government put in place the Peace Recovery and Development Plan for Northern Uganda PRDP.²⁵³ The PRDP’s objective is to rebuild the war torn districts. It also seeks to strengthen the law enforcement agencies and the judiciary. However to date, the PRDP has not been implemented.²⁵⁴

The award of reparations to victims is considered to be important in order to achieve justice to victims.²⁵⁵ The United Nations’ Basic Principles and Guidelines on the Right to a

²⁴⁹ Amnesty International , ‘Left to their Own Devices: The continued sufferings of victims of the conflict in Northern Uganda and the need for reparations ‘, AFR 59/009/2008, 17 November 2008

²⁵⁰ Phuong Pham Et Al., *Forgotten Voices: A Population-Based Survey On Attitudes About Peace And Justice In Northern Uganda* , Int’l Ctr. For Transitional Justice, 16-17 (2005), available at <http://www.ictj.org/images/content/1/2/127.pdf>

²⁵¹ *ibid*

²⁵² Annex to June Agreement (between the GoU and LRA) on Accountability and Reconciliation, Paras 16-17)

²⁵³ Peace Recovery and Development Plan for Northern Uganda, 2007-2010

²⁵⁴ Amnesty International : *Left to their Own Devices: The continued sufferings of victims of the conflict in northern Uganda and the need for reparations* AFR 59/009/2008, 17 November 2008

²⁵⁵ Anne-Marie de Brouwer, *Supranational criminal prosecution of sexual violence : The ICC and the practice of the ICTY and ICTR* pg 384

Remedy and Reparations for Victims (of) Gross Human Rights Violations, requires states to make available to victims “Adequate, effective and prompt reparation for harm suffered”²⁵⁶

According to the Basic Principles of Justice and Guidelines to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law of 2000 (Basic Principles), Reparations include restitution, compensation and rehabilitations as well as other forms of remedy.²⁵⁷ The Basic principles further provide that

“Restitution should whenever possible restore the victims to the original situation before the gross violation of international human rights or serious violations of international humanitarian law occurred. Restitution includes as appropriate: restoration of liberty, enjoyments of human rights, identity, family life, and citizenship, return to one’s place of residence restoration of employment and the return of property.”²⁵⁸

The Basic principles also stipulate that:

“compensation should be provided for any economically assessable damage as appropriate and proportional to the gravity of the violation and the circumstances of each case resulting from gross violations of international human rights law and serious violations of international humanitarian law such as Physical harm or mental harm; lost opportunities including employment education and social benefits; material damages and loss of earnings including the loss of earning potential ; moral damage; costs required for legal or expert assistance, medicine and medical services and psychological services [...] Rehabilitation should include medical psychological care as well as legal and social services.”²⁵⁹

Although the reparations awarded to victims may not be of significant value, the symbolism attached to them is of vital importance. Ann Marie Debrower argues that victims of sexual violence need special and separate attention when it comes to reparations.²⁶⁰ She argues that:

“In addition to the devastating physical psychological social and economic consequences women and girls generally face, they often contract sexually transmitted diseases including HIV AIDS, they face unwanted pregnancies, and health complications resulting from botched abortions and suffer sexual mutilation and other injuries such as fistula and injuries to reproductive organs. The unavailability of proper health care and counseling during and in the

²⁵⁶ 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. General Assembly resolution 60/147 of 16 December 2005

²⁵⁷ Basic principles of justice and guidelines to a remedy and reparation for victims of violations of international human rights and Humanitarian law of 2000

²⁵⁸ The Basic principles of justice and guidelines to a remedy and reparation for victims of violations of international human rights and Humanitarian law of 2000 Principle 19

²⁵⁹ The Basic principles of justice and guidelines to a remedy and reparation for victims of violations of international human rights and Humanitarian law of 2000 principle 20 and 21

²⁶⁰ Anne-Marie de Brouwer, ‘Supranational criminal prosecution of sexual violence : the ICC and the practice of the ICTY and ICTR’, Intersentia, 2005 pg 384

aftermath of mass sexual violence has left many women to deal with their traumas alone As a consequence those women continue to suffer”²⁶¹.

The reparations should be capable of restoring the victims to their condition prior to their victimization, as Cecily Rose observes:

“Reparations could encompass an expansive definition, including restitution (the restoration of the victim to the original situation before the violations occurred), compensation (for economically assessable damage), rehabilitation (medical and psychological care and legal and social services), and satisfaction and guarantees of non-repetition (to acknowledge the violations and prevent their recurrence”²⁶²

The Juba peace agreement on accountability and reconciliation provides for the award of reparations to victims it stipulates that “Reparations may include a range of measures such as: rehabilitation; restitution; compensation; guarantees of non-recurrence and other symbolic measures such as apologies, memorials and commemorations. Priority shall be given to members of vulnerable groups”²⁶³.

It also provides that “Reparations may be ordered to be made by perpetrators as part of penalties and sanctions in accountability proceedings.”²⁶⁴ It is important to note that the war left both perpetrators and victims in a worsened economic condition. This may make it impossible for the perpetrators to pay reparations to the victims as required under the Juba agreement. Furthermore, compensation by perpetrators may be impossible to effect given that the victims do not know the exact identities of their perpetrators and the perpetrators do not know the exact identities of their victims²⁶⁵. The only viable alternative is to require perpetrators to provide symbolic compensation to the victimized communities. This could include performance of

²⁶¹ Ibid. pg 385

²⁶² Cecil Rose , ‘Looking beyond amnesty and traditional justice and reconciliation mechanisms in northern Uganda. A proposal for truth telling and Reparations’ 28 B.C Third World L.J 345

²⁶³ The Juba Agreement on Accountability and reconciliation between the government of Uganda and the Lords Resistance movements. June 2007 Clause 9.2

²⁶⁴ The Juba Agrrement opn Accountability and reconciliation between the government of Uganda and the Lords Resistance movements. June 2007 Clause 9.3

²⁶⁵ Refugee Law Project Working paper No 17, ‘Peace first Justice later, Traditional justice in Northern Uganda’, July 2005

community service, such as building village schools, making roads, and most important of all talking about their experience, what motivated them to commit the atrocities and how they can be prevented.²⁶⁶

Much as some victims have indicated preference for financial compensation²⁶⁷, the Governments is also incapable of providing compensation to victims due to the staggering number of victims *viz a viz* the limited resources available. Any monetary compensation scheme put in place is likely to dent the finances of the country and make it difficult for it to deliver the vital social services such as health care, education and the maintenance of infrastructure. Furthermore, no amount of monetary compensation can adequately cover the horrendous experiences that victims, especially those of sexual abuse, have been subjected to. Attaching a monetary value that is insignificant to their experience may amount to diminishing their experience hence subjecting them to further victimization. It has been observed that,

“The process of healing does not occur through the delivery of an object (eg pension, a monument etc) but through the process that takes place around the object. It is how the individual processes the meaning of reparations that is critical”²⁶⁸

The government may need to resort to offering symbolic reparations as was done in South Africa.²⁶⁹ The symbolic compensation may take the form of improved infrastructure, easy access to social amenities such as schools and hospitals. It could also entail subsidized and where possible free education, free housing, free health care and counseling services for victims and

²⁶⁶ Refugee Law Project, Working paper No 17 ‘Peace first Justice later, Traditional justice in Northern Uganda’, July 2005

²⁶⁷ Phuong Pham Et Al., ‘Forgotten Voices: A Population-Based Survey On Attitudes About Peace And Justice In Northern Uganda’ 16-17 (2005), Int'l Ctr. For Transitional Justice, Available At [Http://www.Ictj.Org/Images/Content/1/2/127.Pdf](http://www.Ictj.Org/Images/Content/1/2/127.Pdf)

²⁶⁸ Brandon Hamber, ‘Repairing the irreparable,’ CSVR, Johannesburg, 1997

²⁶⁹ Cecily Rose , ‘Looking beyond amnesty and traditional justice and reconciliation mechanisms in northern Uganda. A proposal for truth telling and Reparations’ 28 B.C Third World L.J 345

children born as a result of rape.²⁷⁰ Health care is of significant importance especially for victims of sexual violence who as a result were infected with sexually transmitted diseases HIV/AIDS, or developed complications such as fistula due to the absence of proper maternal care in the bush where they were forcefully impregnated.

The government could put in place training to equip the victims with the necessary skills to make them competitive in the job market. The education curriculum could be reformed to incorporate a deep analysis of the consequences of sexual violence and why it should not be tolerated by the communities. The curriculum could be tailored to contain an acknowledgment of the experiences of victims and what could be done to prevent the reoccurrence of such atrocities. Due to the stigma attached to victims of sexual violence, very few organizations and companies may be willing to employ them in order to address this, the government could give incentives to organizations and companies to employ victims of sexual violence these could take the form of tax cuts, and government subsidies where possible. The governments could set aside a special day to commemorate the experiences of victims whereby all victims are encouraged to assemble and talk about their experiences and how they have overcome their past and what additional measures need to be adopted by the government to improve their lives.

Through the prioritization of social service delivery to victims, the state would be providing symbolic compensation which would have a lasting positive impact for the victims. It is important to note that although victims of sexual violence during war experience more trauma and victimization, due to the use of rape as a tool of war, governments should avail the same social services to victims of sexual violence in normal and peaceful circumstances.

²⁷⁰ Beyond Juba, Report on the proceedings of the JLOS Transitional Justice working group Roundtable discussion , February 2009

3.5 CONCLUSION.

The importance of traditional justice institutions in offering accountability for crimes committed while at the same time reconciling and reintegrating victims into their communities cannot be over emphasized. As mentioned above the restorative nature of these mechanisms is important in the peace building and reconciliation process of the post conflict societies. However, for this mechanism to remain relevant in the global justice discourse, they need to be engendered and should incorporate human rights principles in their operations.

A truth commission is also an important transitional justice mechanism. It offers a more favorable environment for victims to testify about the atrocities compared to the restricting and at times hostile environment of the Courts. As observed in this chapter the truth telling process is cathartic for many victims who feel vindicated after they narrate about their ordeal and have the perpetrator confess. Their history recording feature is also important for communities in transition. However for the truth commission to achieve its objective, there shouldn't be predetermined truths, as the case was in South Africa, where victims were advised to give a certain set of facts which did not necessarily reflect what they witnessed or how they were affected.

Reparations are an important feature in the rehabilitation and reintegration process of victims. The non monetary reparations which consist of schools, psycho-social support centers, health centers and building of roads contribute to the rebuilding of the of the post conflict communities.

CHAPTER 4: NON LEGAL RESPONSES TO NEEDS OF VICTIMS OF SEXUAL VIOLENCE: THE ROLE OF CIVIL SOCIETY

4.1 INTRODUCTION

In most post conflict states, civil societies play a significant role in the transitional justice process. Civil society has been defined as:

“Voluntary associational groupings in a society, and the public expression of the interests, priorities, grievances, and values around which those associations are based.”²⁷¹

It has also been defined by the Institute for Development Studies (IDS) as

“An intermediate realm situated between state and household, populated by organized groups or associations which are separate from the state, enjoy some autonomy in relations with the state, and are formed voluntarily by members of society to protect or extend their interests, values or identities”²⁷²

Civil society consists of Non Governmental organizations (NGO’s), social political parties, advocacy and interest groups, churches and religious institutions, academic institutions.

²⁷³ Civil societies play an important role of reweaving the social fabric of post-conflict societies by encouraging and facilitating coexistence and reintegration of former combatant and victims into the community.²⁷⁴

Both international and local civil society organizations have always influenced the decisions taken by the state when it comes to the transitional justice process by fostering dialogue and promoting reconciliation²⁷⁵. They fill gaps of technical expertise that exist within the state institutions and deliver services in areas in which the government is not able to deliver

²⁷¹Caparini, M. and Fluri, Ph. (2006) ‘Civil Society Actors in Defence and Security Affairs’ in Caparini, M., Fluri, Ph. and Molnar F eds.,Civil Society and the Security Sector: ‘Concepts and practices in new democracies,’ Geneva, DCAF, 1

²⁷² Urs Geiser; ‘Civil society need not speak English’ Development and Cooperation, Number 8 August 2006

²⁷³ Megan Bastick Karin Grimm and Rahel Kunz, ‘Sexual violence in armed conflict , global overview and implications for the security sector’ Geneva Centre for the Democratic Control of Armed Forces, 2007 pg 191

²⁷⁴ Cybèle Cochran, ‘Transitional Justice: Responding to Victims of Wartime Sexual Violence in Africa,’ The Journal of International Policy Solutions

²⁷⁵ Camilla Orjuela ‘Building Peace in Sri Lanka: A Role for Civil Society’ Journal of Peace Research, Vol. 40, No. 2 (Mar., 2003), pp. 195-212

due to resource constraints. They are also considered to be more efficient and flexible²⁷⁶. In most cases they serve as linkages between the state and the victims. Kofi Annan, the Former United Nations Secretary General has referred to civil society as "the conscience of humanity."²⁷⁷ Mary Burton a former commissioner of the South African truth and reconciliation commission has observed that a strongly built civil society contributed significantly to the smooth transition to democracy.²⁷⁸

Women NGO's play a key role in providing vital services to women who are victims of sexual and gender based violence and are also able to articulate their needs to decision makers. They are responsible for ensuring that a gender dimension is incorporated in the transitional justice mechanisms.²⁷⁹

The UN *Declaration on the Elimination of Violence against Women*, pledges to

"... Recognize the important role of the women's movement and nongovernmental organizations worldwide in raising awareness and alleviating the problem of violence against women ... Facilitate and enhance the work of the women's movement and nongovernmental organizations and cooperate with them at local, national and regional levels."²⁸⁰

Civil society in northern Uganda is a key stake holder in the transition process. Both Local and International NGO's have used the media as an effective tool for spreading the message of reconciliation and reintegration in the communities in transition.²⁸¹ NGO's have held and sponsored radio talk shows documentaries and dramas which have contributed significantly in engaging communities in debates and dialogues about peace, accountability and

²⁷⁶ Ross, Marc Howard & Jay Rothman, 'Theory and Practice in Ethnic Conflict Management: Theorizing Success and Failure'. London: Macmillan; New York: St. Martin's 1999.

²⁷⁷ Risto Karajkov 'N.G.O.s: Who Else Will Do the Work'? World press, <http://www.worldpress.org> (July 16, 2006)

²⁷⁸ Dialogue held at the Institute for Justice and Reconciliation on 23 October 2008

²⁷⁹ Cybèle Cochran, 'Transitional Justice: Responding to Victims of Wartime Sexual Violence in Africa' The Journal of International Policy Solutions

²⁸⁰ United Nations General Assembly, Declaration on the Elimination of Violence against Women, A/RES/48/104, 23 February 1994, article 4(o) and (p).

²⁸¹ Jackee Budesta Batanda, 'The role of civil society in advocating for transitional justice in Uganda'. Institute for Justice and Reconciliation 2009

reconciliation²⁸² They have also sponsored programs that highlight the undesired consequences of sexual violence and have advocated for an end to the cultural tolerance for sexual violence. They have also used the media to call upon the communities to be compassionate to the victims and their children and also to put an end to their stigmatization..²⁸³ Civil society organizations have also used the media as a platform to call upon combatants to lay down their arms and encouraged them to apply for amnesty and participate in the Juba peace process.

Religious communities, which form part of the civil society in Northern Uganda, have also contributed significantly in fostering peace and reconciliation. Through the coalition of Acholi Religious Leaders Peace Initiative (ARLPI) which was founded in 1998, Religious leaders have been able to mobilize communities to discuss the effects of the conflict and identify way of ending it.²⁸⁴ They have organized workshops in which they have engaged communities in dialogues about peace and reconciliation helped identify the path that the transition process should take.²⁸⁵

This chapter explores the role that civil society in post conflict northern Uganda and in particular in ensuring justice for victims of sexual violence.

4.2 REHABILITATION, SOCIAL REINTEGRATION AND EMPOWERMENT OF VICTIMS OF SEXUAL VIOLENCE AND THEIR CHILDREN

Many of the girls who return home after successfully escaping from the claws of the rebels are often faced with the challenge of how to reintegrate in the community. Most of these girls are illiterate having been denied access to education. The fact that most of them are socially

²⁸² Jackee Budesta Batanda, 'The role of civil society in advocating for transitional justice in Uganda'. Institute for Justice and Reconciliation 2009

²⁸³ Mega FM in Gulu has aired many shows that highlight the evils of rape.

²⁸⁴ Carlos Rodriguez, 'The role of Religious leaders in Uganda', 2002 <http://www.c-r.org/our-work/accord/northern-uganda/religious-leaders.php> a accessed on 4th October 2009

²⁸⁵ Carlos Rodriguez, 'The role of Religious leaders in Uganda', 2002 <http://www.c-r.org/our-work/accord/northern-uganda/religious-leaders.php> accessed on 4th October 2009

stigmatized and discriminated against does not make their lives any easier. As a result, many of these girls resort to prostitution to make ends meet and as a source of income to look after their babies.²⁸⁶ There is a need for civil society to provide these victims with training in basic skills that would enable them to engage in income generating activities to sustain themselves and their children. They can also set up shelters, where victims of sexual violence especially those subjected to sexual slavery can retreat and gain rehabilitation before being reintegrated into the communities.

Sexual violence has a huge physical and psychological toll on its victims. Many victims of sexual violence have been infected with HIV Aids and other sexually transmitted infections and have developed a number of health complications. It has been documented that

“Northern Uganda has the highest HIV prevalence rate of 10.5%, compared to the rest of the country (the national average of 6.4%), It has the lowest rate of contraceptive use at 12% (national average of 23%) and a high rate of abortions and unwanted pregnancies (1 in every 5 pregnant women in Northern Uganda carries out an abortion, while 50% of pregnancies are unwanted, Many lack access to safe motherhood services, access to modern contraceptives.”²⁸⁷

The trauma suffered by many of the victims of sexual violence has left many of them with mental health mental health problems. Unfortunately many of the districts in northern Uganda do not have mental health clinics or psychosocial support centers. Due to limited resources, government is unable to establish more mental health clinics in districts affected by the conflict Civil society is in a position to fill this gap by establishing Health clinics that cater for the physical and reproductive health of the victims and also offer .psycho-traumatic treatment that caters for the mental health needs victims and survivors of sexual violence.²⁸⁸ These clinics

²⁸⁶ Susan McKay, ‘Reconstructing Fragile Lives: Girls' Social Reintegration in Northern Uganda and Sierra Leone’ Gender and Development, Vol. 12, No. 3, Peace building and Reconstruction (Nov., 2004), pp. 19-30

²⁸⁷ Ibid. pg2

²⁸⁸ Helen Liebling-Kalifani et al. Violence against Women in Northern Uganda: The Neglected Health Consequences of War Journal of International Women’s Studies. 2008 May;9(3):174-192.

could offer testing counseling and free Anti retroviral therapy to victims who are infected with HIV Aids. These health clinics could also offer maternity services to women.

Civil society organizations could facilitate the reintegration of victims who are HIV positive into the community by increasing the awareness among the community about the implications of being HIV positive, the mode it is transmitted, and the importance of not discriminating against HIV positive women²⁸⁹

Legal Aid is also an important service that needs to be availed to victims, due to the various legal issues that victims of sexual violence face. The legal issues affecting victims of sexual violence range from ensuring effective prosecution of perpetrators, seeking civil remedies from the perpetrators; to obtaining maintenance and child support orders for their children born as a result of rape.

Since many of the victims cannot afford the services of private lawyers. Legal aid is the best available option to address these issues. Legal aid- is a key human right, which is central to ensuring that other human rights are guaranteed through effective access to justice. Legal aid includes availing legal advice to clients, strategic litigation, and alternative dispute resolution and court representation for the clients. Unfortunately, Uganda lacks a functioning national legal aid policy framework, and relies on civil society organizations to provide the legal aid services

Legal aid empowers victims of sexual violence to demand and enforce their rights. Victims have the option of obtaining a civil remedy against the perpetrator if they can identify them. In the criminal proceedings the NGO's that offer legal aid can watch brief over the case to ensure that it is being effectively prosecuted and also ensure that the interests of the victim are catered for. Through legal aid the victim could also apply for special measures for instance

²⁸⁹ Naomi Cahn 'Beyond retribution and impunity; Responding to war crimes of sexual violence' 1 Stan. J. Civ. Rts. & Civ. Liberties 217

hearings to be held in camera to protect the privacy of the victim. Legal aid also enables victims, who can identify the fathers of their children, to obtain child support and maintenance orders.²⁹⁰ Availing legal aid to victims of sexual violence empowers them to seek legal redress for the violations.

4.3 ADVOCACY AND LOBBYING

As already mentioned in Chapter two of this Thesis, the criminal laws in Uganda do not cover a number of sexual offences that were perpetrated during the armed conflict. Consequently many victims of sexual, violence who were subjected to the various forms of sexual violence not covered in the penal code such as sexual slavery, or raped using objects, are unable to seek redress. Furthermore, the evidentiary requirements of proving sexual violence are not alive to the context in which sexual violence is committed during armed conflict,. For example it is impossible during an armed conflict, for a victim to seek a medical examination immediately after being sexually molested. Therefore it is incumbent on Civil society organizations to engage decision makers such as parliamentarians for law reform to ensure that better adjusted and gendered laws , which enable victims of sexual violence have access to a remedy, are enacted. These laws should contain protective measures that shield victims from being further traumatized by the criminal process. Two such laws include the International Criminal Court Bill and the Sexual offences bill, both bills contain broad definitions for sexual violence and offers protective measures for victims²⁹¹.

Currently civil society organizations in Uganda are lobbying for the enactment of laws that will ensure a smooth transition. For example, the Beyond Juba Project is currently pressing

²⁹⁰ Naomi R. Cahn ‘Women In Post-Conflict Reconstruction: Dilemmas And Directions’ 12 Wm. & Mary J. Women & L. 335

²⁹¹ International Criminal Court Bill of 2006

for the enactment of the National reconciliation Bill²⁹² that provides for the establishment of a truth forum that would investigate human rights violations in the country. The National Reconciliation bill has faced stiff opposition from the current government because the Truth forum it proposes to establish would have the jurisdiction to investigate gross human rights violations that occurred from 1962 when Uganda got independence to date. This would mean the current regime would be held accountable for atrocities it committed during the guerrilla war that brought it in power.²⁹³

Civil society organizations can lobby for the increased and improved provision of critical social services to victims of sexual violence. These include health care facilities that also offer maternal care and counselling, schools, child care centres.

4.4 CAPACITY BUILDING AND RAISING AWARENESS

In post conflict societies there is always need to build the capacities of women to make them effective participants in the peace building and peace negotiation process and to ensure that gender concerns are catered for in the peace agreement. In Sierra Leone, for example Civil Society Organizations held workshops that helped women identify ways in which they could effectively participate in the Truth and Reconciliation commission.²⁹⁴ In Liberia, a group of women's NGO's organized community dialogues to evaluate the effectiveness of the truth and reconciliation commission process from a gender perspective.²⁹⁵ These meetings brought together women from diverse communities who had been victimized during the war. The

²⁹² National Reconciliation Bill 2009

²⁹³ Jackee Budesta Batanda, 'The role of civil society in advocating for transitional justice in Uganda'. Institute for Justice and Reconciliation 2009

²⁹⁴ Binaifer Nowrojee 'Making the invisible war crime visible. Post conflict justice for Sierra Leone's rape victims' Harvard Human Rights Journal / Vol. 18, 2005

²⁹⁵ Anu Pillay and Lizzie Goodfriend, 'Evaluating Women's Participation in Transitional Justice and Governance: A Community Dialogue Process in Liberia'; conflict trends, issue2 2009

meetings created a space where the women could discuss ways in which they could recreate their communities and also heal their nation

Women organizations such as The Uganda Association of women lawyers (FIDA-Uganda) and Akina Mama wa Africa (Amwa) have begun mobilizing women in Northern Uganda and engaging them in community dialogues aimed at identifying the key issues that affect them and how the available transitional justice mechanisms can address these issues²⁹⁶ They have conducted seminars and trainings for women aimed at enabling them claim and assert their rights within the existing legal framework and also task their political leaders cater for their needs.²⁹⁷

There are a number of key stake holders in the transitional justice process in Northern Uganda who also need capacity building trainings that would enable them to infuse human rights standards in their operations. The key stake holders include traditional justice institutions, the formal law enforcement agencies and the Judiciary. Unfortunately, most of these institutions are patriarchal and may not offer gender justice to victims of sexual violence and as indicated in the second chapter of this thesis, they may instead perpetuate further injustices against victims of sexual violence. Civil society can engender the transitional justice process by conducting Human rights and gender training for all the above mentioned stakeholders to ensure compliance with established human rights provisions that promote equal protection for women. The trainings would also create awareness on the gender sensitive methods of dealing with cases of sexual violence. The trainings will enhance the institutional capacities of the judiciary and police in dealing with sexual violence and the protection of women's rights through the application of

²⁹⁶ This is based from the authors experience as a member of FIDA Uganda and as a participant of the meetings in which the said activities were organized.

²⁹⁷ Ibid,

international human rights standards in law enforcement practices. The training will also enable the law enforcement agencies to offer more effective and compassionate service to victims.

Civil society organizations should organize awareness raising sessions and community human rights dialogues, civil society organizations are able to change the perception the public has about victims of sexual violence shift the blame that has always been focused on the victims. For example in Sierra Leone after the civil war a program was started to highlight the plight of the victims of sexual violence and how they are not to blame.²⁹⁸ The community dialogues will increase awareness within the communities about the consequences of sexual violence and may result in the reduction of the cultural tolerance for sexual violence. They will also create a platform for victims of sexual violence to be heard as active participants in designing solutions to their violations and entrenching their experiences in the public arena for effective human rights redress.

4.5 RESEARCH AND DOCUMENTATION

It has been noted that the best way to respond to the needs of victims of sexual violence, is by first listening to their experiences and how the sexual violence has affected their lives, and thereafter design programs that are tailored to address those issues affecting their lives.²⁹⁹ Local NGO's, given their close connections with the communities, are better placed to document the stories of victims of sexual violence. This information would be used in truth forums, traditional justice mechanisms and in the formal courts as evidence.³⁰⁰ This information could also be used in designing social and economic programs that contribute to the rehabilitation and reintegration

²⁹⁸ Binaifer Nowrojee, 'Making the invisible war crime visible, Post conflict Justice for Sierra Leone's Rape victims' *Havard Human rights Law Journal* Vol 18 2005

²⁹⁹ Naomi Cahn 'Beyond retribution and impunity; Responding to war crimes of sexual violence' 1 *Stan. J. Civ. Rts. & Civ. Liberties* 217

³⁰⁰ Jackee Budesta Batanda, 'The role of Civil Society in advocating for transitional justice in Uganda'. *Institute for Justice and Reconciliation* 2009

of the victims. The stories can be used to raise awareness about the atrocities that were committed and their effect on the community.

Civil society organizations can also develop resource materials such as desk manuals and guidelines which will guide the communities and law enforcement agencies on how to deal with sexual violence. These manuals could contain simplification of international provisions on rights of women to be free from violence and discrimination. They could be translated to a language that is understood by all persons

4.6 CONCLUSION

The importance a strong and vibrant civil society in Northern Ugandan cannot be over emphasized. Civil society plays a key role in the rehabilitation and reintegration of victims of sexual violence. They offer vital services such as legal aid, psych social support and health services. Importantly they empower the victims to seek redress and also reclaim their lives.

CHAPTER 5: RECOMMENDATIONS AND CONCLUSIONS

INTRODUCTION

All the arguments in the foregoing chapters allude to the need for a victim centered approach when addressing the issue of justice for victims of sexual violence. There is also need for a holistic and comprehensive view of justice that goes beyond criminal prosecution but also encompasses other forms of restorative justice such as traditional justice mechanisms, truth and reconciliation commissions' reparations schemes and guarantees of non repetition.

5.1 RECOMMENDATIONS

The government in collaboration with civil society organizations needs to develop and create awareness, through public education and community dialogues about the need to end and prevent sexual violence against women. These awareness campaigns should also highlight the rights of victims of sexual violence, which include access to justice.

There is need to facilitate the reintegration of victims of sexual violence into their communities. Reintegration involves various levels, starting with acceptance back into their families and subsequently into the larger community. This also entails protecting victims from abuse and stigmatization through community awareness programs to prevent community members from heaping responsibility and blame on the victims for being raped or sexually abused.³⁰¹ Reintegration can also be facilitated through community mediations conducted by the elders to facilitate the acceptance of the victims and their children back into the community.³⁰²

³⁰¹ Naomi Cahn, 'Beyond retribution and impunity: responding to war crimes of sexual violence' 1 Stan. J. Civ. Rts. & Civ. Liberties 217

³⁰² *ibid*

As already mentioned in the first Chapter of this thesis, the ICC is not capable of offering justice to all victims given the various institutional shortcomings mentioned above. There is therefore need for the international criminal court to establish an outreach program that would provide information to victims and witnesses about the mandate of the court and the limitations of that mandate. Victims need to know that the Court may not be able to meet their expectations given the system of complementarity that governs the operation of the court;³⁰³ the *Rationae Temporis* of the court, which restricts jurisdiction to crimes that were committed since 2002;³⁰⁴ and the prosecutorial strategy of the office of the prosecutor which focuses on “prosecuting those responsible for committing the most serious crimes and who bear the greatest responsibility.”³⁰⁵

Currently out of the thousands of perpetrators of human rights violations in Northern Uganda only five including Kony have been indicted.³⁰⁶ Consequently, the bulk of the perpetrators of grave human rights violations would be held accountable by the national justice mechanisms. It is therefore important that victims are aware of the limited mandate of the international criminal court and should instead focus on seeking accountability and redress through the national mechanisms. The arrest warrants issued against the top commanders of the LRA can be used to raise awareness about the atrocities that were committed in Northern Uganda and the need for victims to have redress.

It is recommended that strategic prosecutorial policy be adopted whereby those rebel commanders responsible for committing the gravest crimes and who bear the greatest responsibility be prosecuted by the International Criminal Court, so as to send a message of

³⁰³ The Rome Statute of the ICC Statute Article 17

³⁰⁴ The Rome statute of the ICC statute Article 11

³⁰⁵ , Office of the Prosecutor of the International Criminal Court Report on the prosecutorial strategy, September 2006. www.iccnw.org/documents/StrategieBdP_06Sep26_eng.pdf accessed on November 4th

³⁰⁶ ICC ICC-02/04-01/05 Case of the prosecutor V. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen

deterrence to future perpetrators of sexual violence; the middle level perpetrators be prosecuted by the war crimes division of the High court of Uganda; and finally those low level perpetrators be held accountable through the traditional justice mechanisms or a truth commission.

The second chapter to this thesis highlighted the institutional deficiencies of the national courts and law enforcement agencies. It is therefore recommended that the institutional capacities of the law enforcement agencies and the judiciary need to be strengthened and made more gender sensitive in order for them to be responsive to the rights and interests of victims of sexual violence. This can be done through trainings, on how best to protect the rights and interests of victims of sexual violence. There is also need to allocate adequate resources to the law enforcement sectors and the judiciary to enable them to conduct effective investigations and to enable them to conduct fair and credible trials. Increased resources will also enable law enforcement institutions to provide witness protection to victims and witnesses in the form of safe-houses where victims can be sheltered until they are able to return to their homes and communities.

The government of Uganda needs to expedite the implementation of the Peace a Recovery and Development Plan for northern Uganda (PRDP) which came into effect in 2007 and whose goal is to "[c]onsolidate peace and security and to lay foundation for recovery and development in northern Uganda."³⁰⁷ The PRDP also seeks build and strengthen the institutional capacity of the security service sector, law enforcement sector and the judiciary.

There is a need to restore the integrity of the law enforcement agencies and judiciary by adopting measures that prevent abuse and making them more accountable to the public. This can be done by: ensuring the independence of the courts from political interference; putting in place

³⁰⁷ Peace Recovery and Development Plan for Northern Uganda, 2007-2010

a system that enables members of the public to report cases of corruption; effectively investigating all reported cases of misconduct and subsequently punishing the errant police officers, magistrates and prosecutors and finally by ensuring that only the most qualified persons are appointed as policemen, magistrates and judges.

As highlighted in the second chapter of this thesis, Justice for victims of sexual violence can be achieved domestically if the necessary legal reforms are put in place. Consequently, there is need to review the criminal laws in Uganda to ensure that they adequately capture and offer adequate sanctions for all forms of sexual violence that were committed during the conflict. The passing of the ICC Bill 2006 into law is one of the ways of ensuring that there are adequate laws to cover the crimes committed during the armed conflict. The Bill, which seeks to domesticate the Rome statute of the ICC, contains a broad definition of sexual violence and also recognizes sexual violence as a war crime and a crime against humanity.³⁰⁸ It also incorporates all the protective measures contained in the Rome statute. Once enacted, the ICC Bill would grant jurisdiction to the War crimes division of the High Court to try perpetrators of sexual violence for committing war crimes, crimes against humanity and Genocide.

Furthermore, all evidentiary and procedural requirements that make it difficult for the victims to report rape, and which subject them to further re-victimization need to be amended or repealed. They should be made more sensitive to the rights and interests of witnesses and victims of sexual violence, making it conducive for victims of sexual violence to report cases of sexual abuse and also seek a remedy. For example doing away with the corroboration requirement and providing for in camera proceedings in order to protect the privacy of victims, will encourage

³⁰⁸ The Rome Statute of the International Criminal Court Bill 2006 Clause 7 1 (g) a,d clause 8 1 e (vi)

many victims to seek redress. There is also need to put in place a comprehensive witness protection program.

The Government of Uganda needs to comply with its obligation under the Great Lakes Protocol on the Prevention and Suppression of Sexual violence against women and children,³⁰⁹ which calls upon member states to “provide legal assistance to women and girls who are victims and survivors of rape as well as other acts of sexual violence and exploitation”³¹⁰. The Protocol also call upon member states to comply with security council resolution 1356 which provides for the respect and promotion of the rights of women during armed conflict.

The Government of Uganda also needs to ratify and incorporate the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, which contains a number of progressive provisions aimed at protecting the rights and improving the status of women in Africa. The protocol calls upon state parties to:

“Protect the reproductive rights of women by authorizing medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus”.³¹¹

As observed in the third chapter of this thesis, the formal mechanisms of justice need to be complemented by the informal justice mechanisms such as traditional justice mechanisms and established community dispute resolution mechanisms in order to offer a comprehensive form of justice to victims. Given the large numbers of perpetrators, these mechanisms would ease the burden on the formal courts by holding law ranking perpetrators accountable. They are also restorative and will foster reconciliation within the communities.

³⁰⁹ Protocol on the Prevention and Suppression of Sexual Violence against Women and Children, November 2006

³¹⁰ Preamble Protocol on the Prevention and Suppression of Sexual Violence against Women and Children, November 2006 and Article 67 of the Declaration on Peace, Security, Democracy and Development in the Great Lakes Region adopted on 20th November 2006

³¹¹ The protocol to the African Charter on Human and Peoples' rights on the Rights of women in Africa, Article 14 (2) (c)

There is therefore a need to strengthen these informal justice mechanisms through trainings in gender and human rights, to ensure that are gender sensitive when dealing with victims of sexual and gender based violence. There is also a need to ensure that these mechanisms operate fairly and a do not perpetuate injustices against victims of sexual violence. There should be laws and policies regulating there operations to ensure that the mechanisms are in conformity with the established human rights standards. The policies should also ensure that all members of the community are able to participate effectively in the processes.

The traditional justice institution need to put in place measures to ensure that guarantee that victims who participate in the process are not subjected to retribution from the perpetrators.³¹² The processes should not be used by perpetrators to diminish guilt, trivialize the violence or shift the blame to the victims.³¹³

The traditional justice mechanisms should not, in the name of obtaining a consensus pressure victim to accept an outcome they are not comfortable with. The interests of the victims should be taken into account when a decision to accept a perpetrators confession and apology is made. Ultimately, the decision to forgive should be vested in the victim. Victims who seek redress from the traditional justice mechanisms should not be barred from recovering damages and compensation from perpetrators, by filing civil suits in the formal courts.³¹⁴

As already mentioned in the third chapter of this thesis, truth telling processes play an important role in the reconciliation and healing process. If established, a truth commission will provide platform for uncovering the truth about the atrocities that were committed during the armed conflict in Northern Uganda. Truth commissions empower victims by providing them

³¹² Kathleen Daly and Julie Stubbs, 'Feminist engagement with restorative justice'. 10 *Theoretical Criminology* 9, 2006;

³¹³ Ibid

³¹⁴ Ibid

with a platform where they can confront their perpetrators and also engage in the decision making process of which appropriate punishment should be issued against the perpetrator.³¹⁵

It is important that women are involved in the initial stages of the establishment of the truth commission which includes the formulation of the mandate of the truth commission; the classification of crimes that would constitute serious human rights violations; the formulation of the definition of a victim; the development of a criteria for awarding reparations to victims and granting of amnesty to perpetrators.

It has been noted that the absence of the participation of women in the initial formulation of the mandates of the respective transitional justice mechanisms to be employed in post conflict societies has often resulted in the marginalization and trivialization of gender concerns.³¹⁶ Some scholars have criticized the South African Truth and reconciliation commission for not providing an enabling space for women to talk about their experiences of abuse, as a result the report did not adequately capture the abuse the women had suffered during the apartheid era.³¹⁷

As already emphasized in the preceding chapter the TRC, if established, should adopt some of the best practices of the from the Sierra Leone truth commission aimed at encouraging the participation of women in the TRC. These include holding women-only sessions, which should be presided over by the female commissioners. These women-only hearings will provide a safe space for women who are unable to talk about their experience of abuse publicly due to fear of stigma and re victimisation, to do so. These hearings will also result in the documentation of gender sensitive testimony.³¹⁸ Additionally women who appear before testify before the

³¹⁵ Kathleen Daly and Julie Stubbs: 'Feminist engagement with restorative justice'. *Theoretical Criminology* 2006; 10; 9

³¹⁶ Tristan Anne Borer, 'Gendered War and Gendered Peace: Truth Commissions and Post conflict Gender Violence: Lessons From South Africa' *Violence Against Women* 2009; 15

³¹⁷ *ibid*

³¹⁸ *ibid*

commission on behalf of their relatives or friends whose rights were abused, should be encouraged to talk about their own experiences.

There is also a need for the Truth commission to develop gender analytical framework that would aid in understanding how the conflict has affected women and the various violations they suffered.

Amnesty should be granted to perpetrators who publicly confess and seek forgiveness from victims before either the truth and reconciliation commission or a traditional justice mechanism. The granting of amnesty as it currently is being done without having the perpetrators confess their atrocities, is a perpetuation of injustice against victims.

As already emphasized in Chapter three of this thesis given the nature of atrocities committed, there is need for a comprehensive reparations scheme that meets the social economic needs of victims of sexual violence. It has been observed that

Not only is sexual violence perhaps the most egregious form of gender-based violence, its socioeconomic impact on women can undermine their chances for recovery and for reintegration into the family, the community, and the state³¹⁹

Consequently, the reparations scheme should contribute to enhancing the reintegration and rehabilitation of the victims of sexual violence it could take the form access to free health care, training in basic skills, psycho-social support in the form of counselling.

There is a need for increased coordination between the various stakeholders that provide services to victims of sexual violence such as, the health sector, security sector and judiciary. This will ease access to services the victims by creating a referral system.

³¹⁹ Tristan Anne Borer, 'Gendered War and Gendered Peace: Truth Commissions and Post conflict Gender Violence: Lessons From South Africa', *Violence Against Women* 2009; 1183

There is need to strengthen the women organizations in the communities which offer initial support to victims and also link them with other service providers.

5.2 CONCLUSION

Justice for victims of sexual violence, in post conflict Northern Uganda goes beyond the courtroom and includes a number of non legal interventions. It has been observed that “the response of local, national, and international actors must include legal and non legal approaches that recognize the varying impacts of gender-based sexual violence during armed conflict”³²⁰ Much as the criminal justice process is vital for holding perpetrators accountable and offering retribution to victims, it does not adequately address the complex needs of victims in the post war situations.³²¹ Like all other crimes committed during conflict, sexual violence has various implications for its victims and therefore justice for its victims entails a broad spectrum of interventions which comprise of retributive justice in the form of criminal prosecutions of perpetrators and restorative justice consisting of truth telling process through either truth commissions or traditional justice mechanisms, reparation schemes. It also includes increased and improved access to social services such as psycho social support centres, hospitals, and schools. It also involves facilitating community dialogues and awareness campaigns aimed at ending the cultural tolerance for sexual violence and the stigma that is attached to its victims. It is important to reiterate that all forms of interventions, both legal and non legal need to be guided by the interests of the victim who should participate in all the processes.

³²⁰ Naomi Cahn, ‘Beyond retribution and impunity: responding to war crimes of sexual violence’, 1 Stan. J. Civ. Rts. & Civ. Liberties 217 (which year?)

³²¹ *ibid*

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