

Maximizing Options: A Case for Alternative Justice Mechanisms for Survivors of Conflict- related Sexual Violence in Northern Uganda

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Executive Summary

The twenty years of conflict in Northern Uganda were characterized with gross human rights violations including murder and widespread sexual violence. The extent of sexual violence during the conflict negatively impacted the lives of the people in Northern Uganda. While the region currently enjoys relative peace, survivors of conflict-related sexual violence require justice for the violations they suffered. Government efforts to ensure justice for the survivors have focused on the use of formal criminal justice mechanisms with little attention paid to alternative forms of justice.

This study argues that given the short comings of the formal justice system, the government should explore alternative justice mechanisms namely traditional justice systems, truth commissions and reparations. The study examines the role of alternative justice mechanisms in ensuring justice for survivors of conflict-related sexual violence in the region. It asks; whether formal justice mechanisms effectively address the punitive and restorative justice needs of survivors, whether alternative justice mechanisms address punitive and restorative justice needs of survivors and whether the exclusive focus on women and girls as the only survivors of conflict-related sexual violence affects delivery of comprehensive justice to survivors.

The study finds that formal criminal justice mechanisms have failed to effectively provide justice to survivors of conflict-related sexual violence and that the exclusive focus on women and girls as survivors of conflict-related sexual violence also hinders access to justice for male survivors. Using Rwanda and Sierra Leone as case studies, the study recommends the use of alternative forms of justice which enjoy wide spread support among survivors in Northern Uganda and the need for a victim-centred and gender sensitive approach in designing alternative justice mechanisms for survivors.

Dedication

To my parents, Mr. David Magara and Mrs. Flavia Magara, siblings Aaron Mwesigye and Sight Kikanshemeza, thank you for tirelessly encouraging me to be the best that I can ever be. Your support and encouragement has made me who I am today. For your endless love and daily inspiration, I dedicate this thesis to you.

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Most of all, I thank God for his love, grace and mercy.

List of Acronyms

ACHPR: African Charter on Human and Peoples' Rights

CEDAW: Convention on the Elimination of all forms of Discrimination Against Women

CID: Criminal Investigations Department

DRT: Demobilization and Resettlement Team

DRC: Democratic Republic of Congo

DPP: Directorate of Public Prosecution

HIV: Human Immunodeficiency Virus

IDP: Internally Displaced Persons

IACHR: Inter-American Commission for Human Rights

ICTJ: International Centre for Transitional Justice

ICGLR: International Conference on the Great Lakes Region

ICCPR: International Covenant for Civil and Political Rights

ICESCR: International Covenant for Economic, Social and Cultural Rights

ICD: International Crimes Division

ICC: International Criminal Court

ICTR: International Criminal Tribunal for Rwanda

ICTY: International Criminal Tribunal for the Former Yugoslavia

JLOS: Justice Law and Order Sector

LRA: Lord's Resistance Army

NaCSA: National Commission for Social Action

NRB: National Reconciliation Bill

NRA: National Resistance Army

NRM: National Resistance Movement

NUSAF: Northern Uganda Social Action Fund

PRDP: Peace Recovery and Development Plan

PCA: Penal Code Act

RUF: Revolutionary United Front

SLTRC: Sierra Leone Truth and Reconciliation Commission

SCSL: Special Court of Sierra Leone

SRSG-SVC: Special Representative of the Secretary-General on Sexual Violence in Conflict

TJP: Transitional Justice Policy

TJWG: Transitional Justice Working Group

TRC Act: Truth and Reconciliation Act

UPDF: Uganda People's Defence Forces

UN: United Nations

UNDP: United Nations Development Programme

UNIFEM: United Nations Fund for Women

UDHR: Universal Declaration for Human Rights

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INTRODUCTION

The African continent has for a very long time experienced intra and inter-state armed conflicts. Since the 1960's a wave of conflicts have swept across the continent.¹ In the period ranging from 1987 to 2007 alone, twenty out of the fifty six countries on the African continent experienced armed conflicts.² Unfortunately, these conflicts which have become a distinct characteristic of the continent have caused, and continue to cause enormous loss of lives, destruction of property and mass displacement with the latest examples being Central African Republic and South Sudan.³ The continuous civil and political strife on the continent has created an unending refugee problem, retarded economic growth and a perpetual cycle of poverty in Africa.

Sexual violence in various forms and severity is a definitive feature of these conflicts. Used as a tool of humiliation, intimidation and domination of rival communities, the extent and occurrence of sexual violence in these conflicts is alarming.⁴ In Rwanda, about 500,000 women were sexually tortured and raped during the 1994 genocide⁵, while in Sierra Leone over 50 percent of the human rights abuses constituted sexual violence.⁶ The 2013 report of the Secretary-General on sexual violence in conflict reveals that, in the Democratic Republic of Congo, 764 people

¹See details on conflicts in Africa, the causes and effects in Aremu, Johnson Olaosebikan, Conflicts in Africa: Meaning, Causes, Impact and Solution, African Research review, An International Multi-Disciplinary Journal, Ethiopia, Vol. 4 (4), Serial No. 17, October, 2010. Pp 549-560

² Megan Bastick et al, Sexual Violence in Armed Conflict: Global Overview and Implications for the Security Sector, Geneva centre for the Democratic Control of Armed Forces, 2007

³ United Nations, Report of the Secretary-General, Sexual violence in conflict, A/67/792-S/2013/149, 14 March 2013 available at http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2013/149, accessed on 7 October 2014, Par 40

⁴ Susan Brown Miller, Against Our will: Men, Women and Rape (NewYork; Facett Columbine 1993), 38 and *see* also Astrid Aafjes, Gender Violence: The Hidden War Crime, (Women Law Development International1998) The authors explain in detail why sexual violence is prevalent in armed conflict and point out how rival forces rape women as a sign of conquest.

⁵ Emily Amick, Trying International Crimes on Local Lawns: The Adjudication of Genocide sexual violence in Rwanda's Gacaca Courts, 20 Colum. J. Gender & L. 1 2011, 7

⁶ Binaifer Nowrojee, Making the Invisible War Crime Visible: Post-Conflict Justice for Sierra Leone's Rape Victims, 18 Harv. Hum Rts. J. 85 2005

experienced sexual violence between December 2011 and November 2012 alone.⁷ The brutality with which sexual violence is carried out is despicable. Children as young as 10 months are raped and elderly women are not spared.⁸ Women are raped with objects and mutilated with burning wood and hot oil,⁹ genital organs are removed, pelvis areas cut and wombs slit open to remove the foetus before killing the mother.¹⁰ Women and men are forced to rape, and watch the rape of their children and relatives, and several others are bundled away into sexual slavery and forced marriages with combatants.¹¹

The conflict in the Northern part of Uganda was no exception to this pattern of violence. The over two decades long conflict, which began in 1986, was fought between the current Government's Uganda People's Defense Forces (UPDF) and the Lord's Resistance Army (LRA), a rebel force led by Joseph Kony.¹² The conflict which initially enjoyed the popular support of the Acholi people (the community living in Northern Uganda), who felt marginalized and alienated from the rest of the country by Museveni's government (the current president), quickly lost support when the LRA turned against the Acholi believing that they were collaborating with government forces.¹³ Civilians soon became the target in a conflict characterized by mass killings, amputations and mass displacement.¹⁴ 1.7 million People were

⁷ United Nations, Report of the Secretary-General, Sexual violence in conflict, Supra note 3 at Par 40

⁸ Ward J and Marsh M, Sexual violence against women and girls in war and its aftermath: Realities, responses and required resources, Proceedings of the Symposium on sexual violence in conflict and beyond Brussels, Belgium; (2006), 2

⁹ Megan Bastick et al, supra note 2

¹⁰ Emily Amick, supra note 5, at 7

¹¹ Megan Bastick et al, supra note 2

¹² M. C. OKello and L. Hovil, Confronting the Reality of Gender-based Violence in Northern Uganda, The International Journal of Transitional Justice, Vol. 1, 2007, 433–443, 434

¹³ Ibid at 434, For a detailed account on the historical causes of the conflict, *see* Zachary Lomo and Lucy Hovil, Behind the Violence: Causes, consequences and the search for solutions to the war in Northern Uganda, Refugee Law Project Working Paper No. 11, February 2004 available at http://www.refugeelawproject.org/files/working_papers/RLP.WP11.pdf

¹⁴ Human Rights Watch, Abducted and abused: Renewed conflict in Northern Uganda, Vol 15, No.12(A), July 2003

displaced into more than 200 Internally Displaced Person's (IDP) camps, while close to 25,000 children, 7,500 of them being girls were abducted by the LRA.¹⁵ Girls as young as twelve were assigned to rebel commanders as "wives" and forced into sexual intercourse.¹⁶ Men and boys were equally subjected to rape, abductions and forced conscription into the rebel and army forces.¹⁷ Abducted boys were forced to rape and kill their siblings, parents and relatives.¹⁸ Acts of sexual violence and torture were committed by the LRA and Government soldiers alike although most of the abuses by government soldiers took place in the IDP camps.¹⁹ Several women and girls who escaped from captivity returned with children born of rape,²⁰ severe gynecological issues, and mental problems.²¹

In 2007, there was a cessation of hostilities resulting from peace talks held between the Ugandan government and the LRA in South Sudan.²² Since then, the region has enjoyed relative peace and the many of the internally displaced persons have returned to their homes and are rebuilding their lives. The extent of sexual violence committed during the conflict and its consequences, calls for justice to survivors through holding perpetrators accountable and providing rehabilitation to survivors. Although international legal instruments describe a wide range of justice measures ranging from prosecutions to reparations for victims of human rights violations, international actors have focused on criminal prosecution as the appropriate justice mechanism for survivors.

¹⁵ UNICEF Humanitarian Action Report 2007,99

¹⁶ Ibid at 99 and Human Rights Watch Children's Project, *The scars of Death: Children abducted by the Lord's Resistance Army in Uganda*, 1997

¹⁷ Human Rights Watch, *supra* note 14,

¹⁸ Ibid, the rebels use this strategy to destroy the children's sense of belonging and to create guilt and fear which would prevent them from escaping and returning home. *See also* Megan Bastick et al, *supra* note 2.

¹⁹ Human Rights Watch, *supra* note 14, at 16 & 41

²⁰ In 2007, UNICEF reported that out of the 7,500 abducted girls, 1,000 of them returned with children of their own. UNICEF *supra* note 15 at,99

²¹ Ibid at 99

²² Kiyanda Eugene et al, *War-related Sexual violence and it's medical and psychological consequences as seen in Kitgum, Northern Uganda: A cross-sectional study*, BMC International Health & Human Rights (Vol 10, 2010)

Uganda with the aim of holding perpetrators of sexual violence in Northern Uganda accountable followed the prosecution approach by referring the LRA to the International Criminal Court (ICC) and by establishing the International Crimes Division (ICD).²³ Unfortunately, nine years after the ICC referral, no person has been tried by either court as the LRA leaders remain at large while the amnesty provisions hinder prosecution in Uganda's courts.

This thesis therefore asserts that the exclusive focus on prosecution as a justice mechanism has denied meaningful justice to survivors of sexual violence in Northern Uganda because of the limited number of perpetrators it handles and its exclusive focus on punishment of the perpetrators with little or insignificant attention to the rehabilitation and restitution of victims. This thesis argues that Uganda should explore and establish alternative justice mechanisms namely, truth commissions, traditional justice mechanisms and reparation which promote victim rehabilitation, provide punitive justice and guarantee non-repetition for the survivors and their future generations. These mechanisms provide a holistic approach to in which a victim feels a sense of remedy.

The study therefore focuses on exploring and establishing alternative justice mechanisms that Uganda can develop and operationalize to provide justice for survivors of conflict-related sexual violence.

²³ A detailed discussion on these processes is contained in Chapter 2. *See also* Christopher Mbazira, Prosecuting International Crimes Committed by the Lord's Resistance Army in Uganda, in, Chacha Murungu & Japhet Biegon, eds, *Prosecuting International Crimes in Africa*, (Pretoria University Law Press 2011), 204 accessed at http://www.pulp.up.ac.za/pdf/2011_04/2011_04.pdf 11 March 2012 A detailed discussion on these processes is contained in Chapter 2

Problem Statement

Since 2007, there has been a cessation of hostilities in the Northern region of Uganda. With the LRA out of Uganda and believed to be operating between the DRC and the Central African Republic, the people in Northern Uganda are slowly rebuilding their lives.²⁴ However, the consequences of the conflict still remain; mental health problems especially among former abductees, children born out of rape, sexually transmitted diseases, broken marriages and severe gynecological problems.²⁵ Survivors of sexual violence and children born of rape continue to face stigmatization and discrimination and like the majority of the population, are poor.²⁶ The right to effective remedy for victims of human rights violations is adequately enshrined in international binding and non-binding legal instruments including international covenants, United Nations Security Council resolutions and United Nations General Assembly Declarations. It includes compensation for the violations suffered, investigation and guarantees of non-repetition.²⁷

In 2006, Uganda with the aim of ending the conflict and holding the LRA accountable for atrocities committed in the region referred the top LRA leaders to the International Criminal Court (ICC). The ICC prosecutor conducted investigations and issued arrest warrants for six top LRA commanders.²⁸ Because the arrest warrants were issued during peace talks, the LRA in return refused to sign the final peace deal demanding that the arrest warrants be withdrawn.²⁹

²⁴ United Nations, Report of the Secretary-General, Sexual violence in conflict, *supra* note 3, at par 41

²⁵ Bruce Baker, Justice for survivors of sexual violence in Kitgum, Uganda in the *Journal of Contemporary African Studies* (Vol. 29, No. 3), July 2011, 247

²⁶ *Ibid* at 247

²⁷ United Nations Human Rights Committee Decisions, *Tshitenge Muteba v Zaire* Communication No. 124/1982 at 182, referred to in Seibert-Fohr, *Prosecuting Serious Human Rights Violations*, Oxford University Press, 2009

²⁸ Bruce Baker, *supra* note 25, at 251

²⁹ *Ibid* at 251

Today, the LRA leaders remain at large despite the numerous efforts to ensure their arrest. In 2008, the government took another step aimed at addressing the survivors' justice needs and established the International Crimes Division to prosecute crimes committed in Northern Uganda.³⁰

Unfortunately, the inadequacies in the laws and the amnesty process in Uganda are making prosecution difficult.³¹ Thus justice through prosecution of perpetrators has not been achieved given the fact that no single person has yet been prosecuted by the ICC or ICD for the atrocities for sexual violence committed in the region.³² This coupled with fear of reprisals from perpetrators, lack of evidence, ignorance about the formal court systems; failure to identify perpetrators makes pursuing justice through the criminal justice system an uphill task.³³ The inability of the formal criminal justice system to provide justice to survivors of sexual violence by punishing perpetrators brings to the fore the need to focus on the alternative justice mechanisms which provide both punitive and restorative aspects of justice as a complement to formal court processes. The use of these alternative forms of justice will in the meantime better serve the survivors restorative and punitive justice needs while we wait for the formal criminal justice system to function when the LRA leaders are apprehended and the amnesty process in Uganda changed or ended.

³⁰ Asimwe Tadeo, Effecting Complementarity: Challenges and Opportunities: A Case Study of the International Crimes Division of Uganda <http://www.asf.be/wp-content/uploads/2012/10/Case-Study-of-the-International-Crimes-Division-of-Uganda.pdf> accessed on 24 March 2014

³¹ See detailed discussion in Chapter 2.

³² Reta E. Raymond, When Two Elephants Fight, It Is The Grass That suffers : Proposed Amnesty Legislation for Peace and Justice , Syracuse Journal of International Law & Commerce (Vol. 40 Issue 2, 2013),32

³³ Bruce Baker, supra note 25

Objectives of the Study

The specific objectives of the study are; to examine the effectiveness of international and regional framework and processes aimed at addressing conflict-related sexual violence and justice needs of survivors; to understand the current legal frame work in Uganda and its effectiveness in terms of accessibility and availability in addressing the justice needs of survivors of sexual violence and; to examine best practices from countries that have gone through transition so as to inform Uganda's transition justice processes

Significance of the study

- The study will provide additional literature to the already existing body of research to highlight the conflict in Northern Uganda, existing justice processes and the challenges faced by survivors in acquiring justice in Uganda.
- The study will help enhance existing formal justice mechanisms to effectively address peculiar justice needs of survivors of sexual violence
- The study will find alternative solutions to ensure justice needs of survivors of conflict-related sexual violence.
- The study will guide policy makers in designing and implementing a comprehensive transitional justice policy for Uganda by conflating best practices from countries with similar history.
- The study will provide evidence and information to support civil society in comprehensive and effective advocacy for alternative justice mechanisms.
- The study will provide a basis for further research on justice needs for specific groups affected by sexual violence.

Methodology

The research is a comparative study of alternative justice processes in Sierra Leone, Rwanda and Uganda. It is based on secondary sources namely books, scholarly articles, civil society reports, laws and other online sources.

Limitations of the Study

The major limitation of this study is in its reliance on secondary information sources. While secondary sources are sufficient for the academic context in which the study is premised, there are risks of some information being misrepresented, misinterpretation, and being obsolete with the current circumstances. In which case, the primary data, including interviews with survivors of sexual violence, and key informants like organisations working with survivors would have reinforced and perhaps validated such prior establishments. It is therefore expected that the findings and the attendant recommendations are considered and adopted in context.

Thesis Chapter overview

The thesis is divided into five Chapters. The First Chapter examines the international and regional framework regarding conflict-related sexual violence. It specifically discusses the legal instruments and institutions at both the international and African level that focus on addressing conflict-related sexual violence and the extent to which each of these mechanisms can ensure justice for survivors of conflict-related sexual violence in Northern Uganda.

The Second Chapter focuses on Uganda's formal legal and institutional framework. It discusses the current criminal justice processes that have been established to hold perpetrators accountable and provide healing to survivors. The chapter in great depth examines the possibilities and challenges of the formal criminal justice processes in Uganda in providing justice to survivors of conflict related sexual violence. The Third Chapter discusses alternative justice mechanisms in

Uganda namely traditional justice mechanisms, truth commissions and reparations and their potential and shortcomings in ensuring justice for survivors of conflict-related sexual violence.

The Fourth Chapter following the discussion on alternative justice mechanisms in the second chapter attempts to address the shortcomings identified in the alternative justice mechanisms by examining the use of alternative justice mechanisms in Sierra Leone and Rwanda. The achievements and challenges of the processes in these countries are discussed while drawing best practices to enhance and guide Uganda's alternative justice processes. This chapter is followed by general recommendations and conclusion drawn from the study in the Fifth Chapter.

CHAPTER ONE: INTERNATIONAL AND REGIONAL FRAMEWORK FOR ADDRESSING CONFLICT RELATED SEXUAL VIOLENCE

For a long time, sexual violence was tolerated as a normal consequence of war and treated as “a necessary, if regrettable evil.”³⁴ It therefore went undocumented and unpunished for several years.³⁵ However, the last two decades have shown dramatic media attention, efforts and progress at combating and punishing conflict-related sexual violence. The United Nations’ Security Council has between the year 2000 and 2010 passed resolutions to foster women participation in peace and security efforts,³⁶ to protect women from sexual violence during conflict³⁷ and to provide enforcement and accountability mechanisms to address sexual abuse.³⁸ The establishment of the international criminal tribunals for Rwanda and Yugoslavia to prosecute war crimes also represented significant success at punishing conflict-related sexual violence.³⁹ Similarly, in Africa, the African Commission for Human and Peoples’ rights has held states accountable of sexual crimes committed by state⁴⁰ and non-state actors.⁴¹ And, the heads of state and government in the Great Lakes region have through the International Conference of

³⁴ Estelle Zinsstag, Sexual Violence against Women in Armed Conflicts and Restorative Justice in Martha Albertson and Estelle Zinsstag (eds), *Feminist perspectives on Transitional Justice: from international and criminal to alternative forms of justice* (Intersentia 2013), 190

³⁵ Kimberly E. Carson, Reconsidering the theoretical accuracy and prosecutorial effectiveness of International tribunals’ ad hoc approaches to conceptualizing crimes of sexual violence as war crimes, crimes against humanity, and acts of genocide, *Fordham Urban Law Journal*, (Vol.39, 2012), 1251

³⁶ UN Security Council, Security Council Resolution 1325, S/RES/1325(2000), available at: <http://www.refworld.org/docid/3b00f4672e.html> [accessed 30 January 2014]

³⁷ UN Security Council, Resolution 1820, 19 June 2008, S/RES/1820 (2008), hereinafter referred to as Resolution 1820 For a detailed discussion of the importance of the resolution in *see* Melissa Goldenberg Goldstoft, Security Council Resolution 1820: An Imperfect but Necessary Resolution to Protect Civilians from Rape in War Zones [notes], *Cardozo Journal of Law & Gender*, Vol. 16, Issue 3 (2010), pp. 491-518

³⁸ UN Security Council, Security Council Resolution 1960, 16 Dec 2010, S/RES/1960 (2010), hereinafter referred to as Resolution 1960

³⁹ Tonia St. Germain et al, Justice on whose terms? A critique of international criminal justice responses to conflict-related sexual violence, *Women's Studies International Forum*, Vol 37 (2013)

⁴⁰ African Commission on Human and Peoples’ Rights, Decisions on Communications, 227/99 Democratic Republic of Congo/ Burundi, Rwanda, Uganda accessed at <http://www.achpr.org/communications/decision/227.99/>

⁴¹ African Commission on Human and Peoples’ Rights, Decisions on Communications, 245/2 Zimbabwe Human Rights NGO Forum Vs Zimbabwe accessed at <http://www.achpr.org/communications/decision/245.02/>

the Great Lakes Region (ICGLR) stepped up efforts to fight sexual violence in the region through the adoption of declarations and protocols aimed at eradicating sexual violence in the region.⁴²

This chapter discusses the international and regional frameworks addressing conflict-related sexual violence and the extent to which these frameworks provide and facilitate justice for survivors of conflict-related sexual violence in Northern Uganda.

1.1 International Normative and Institutional Framework

1.1.1 International Normative Framework

The international human rights normative framework is made up of binding and non-binding legal instruments. Binding legal instruments are those which states have ratified and instruments which have attained the status of customary international law such as the Universal Declaration of Human Rights (UDHR). Non-binding legal instruments, on the other hand, are not ratified by states and include United Nations Special Resolutions and General Assembly declarations.

Binding international instruments, such as the UDHR,⁴³ the International Covenant for Civil and Political rights (ICCPR)⁴⁴ and International Covenant on Economic, Social and Cultural rights (ICESCR)⁴⁵ enshrine civil, political, economic, social and cultural rights. Among these rights are the right to life,⁴⁶ freedom from torture, cruel, inhuman or degrading treatment,⁴⁷ the right to

⁴² International Conference on the Great Lakes Region, Protocol on the Prevention and Suppression of Sexual Violence against Women and Children , 30th Nov 2006

⁴³ Universal Declaration of Human Rights (1948) , hereinafter UDHR available at <http://www.un.org/en/documents/udhr/> [accessed 29 January 2014]

⁴⁴ International Covenant on Civil and Political Rights 1966, hereinafter, ICCPR available at <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> [accessed 29 January 2014]

⁴⁵ International Covenant on Economic, Social and Cultural Rights(1966), hereinafter ICESCR available at <http://www.ohchr.org/en/professionalinterest/pages/cescr.aspx> [accessed 29 January 2014]

⁴⁶ UDHR, supra note 43, Art 3 ; ICCPR, supra note 44, Art 6

⁴⁷ Ibid, UDHR, Art. 5; ICCPR, Art. 7 see

health⁴⁸ and non-discrimination among others.⁴⁹ International covenants require state parties to respect, protect and fulfill these rights and in the event of violation, to provide effective redress to victims. The ICCPR for example obliges State parties “to ensure and respect rights of individuals in their territory”⁵⁰ and to provide effective redress when a violation of a person’s rights or freedoms occurs.⁵¹ The provisions of the ICCPR apply during peace times and in situations of armed conflict.⁵²

The United Nations Human Rights Committee, the body which oversees implementation of the ICCPR by States in *Tshitenge Muteba v Zaire* defined the right to effective remedy to include compensation for the violations suffered, investigation and punishment of perpetrators, and guarantees of non-repetition.⁵³ Astrid Aafjes adds that the right to effective remedy applies to victims of fundamental human rights abuses and their families or immediate dependents.⁵⁴

Conflict-related sexual violence violates the above mentioned rights and several others as provided for in various international instruments. This position has been taken by regional human rights bodies. The Inter-American Commission on Human rights (IACHR) in *Raquel Martí de Mejía v. Perú*⁵⁵ held “that an act of rape may violate the prohibition against torture if it constitutes 1) an intentional act through which physical and mental pain and suffering is inflicted on a person; 2) committed with a purpose; and 3) committed by a public official or by a private

⁴⁸ UDHR, Art. 25; ICESCR, Arts. 7(b), 12

⁴⁹ UDHR, Art. 2; ICCPR, art. 2, 26; ICESCR, Art. 2

⁵⁰ ICCPR, Art 2

⁵¹ ICCPR, Article 2(3) b

⁵² United Nations Human Rights, General comments Nos. 29 (2001) and 31 (2004) referred to in International Legal Protection of Human rights in armed conflict (United Nation Publications) 2011 accessed at www.ohchr.org/documents/.../hr_in_armed_conflict.pdf [accessed 29 January 2014]

⁵³ United Nations Human Rights Committee Decisions, *Tshitenge Muteba v Zaire*, supra note 27

⁵⁴ Astrid Aafjes, supra note 4, 60

⁵⁵ *Raquel Martí de Mejía v. Perú*, as quoted in Refugee Law Project and University of California, Berkeley, School of Law, Promoting Accountability for Conflict-related Sexual Violence against men: A comparative legal analysis of International and domestic laws relating to IDP and Refugee men in Uganda, Refugee Law Project Working Paper No. 24, July 2013, at 36 available at http://www.refugeelawproject.org/files/working_papers/RLP.WP24.pdf

person acting at the instigation of the former.”⁵⁶ A similar position was later taken by the European Court of Human Rights in the case of *Aydin v. Turkey*.⁵⁷

The violation of these rights requires effective remedies from state parties. According to the UN Human Rights Committee the remedies include prosecution and other alternative forms of justices namely, compensation, investigation and guarantee of non-repetition.⁵⁸ Uganda ratified the ICCPR and its first optional protocol establishing the UN Human Rights Committee in 1995.⁵⁹ The survivors in Northern Uganda can therefore take a matter before the Human Rights Committee in the event that Uganda does not provide effective redress. However, the committee has not yet received any individual complaint from Uganda.⁶⁰

Worth noting is that the measures of effective redress as pronounced by the UN Human Rights Committee are not limited to prosecution but include investigation, compensation, punishment of perpetrators and guarantees of non-repetition.⁶¹ Uganda has so far only utilized the option of prosecution by referring the situation of Northern Uganda to the ICC and establishing a national court to prosecute sexual violence committed in Northern Uganda during the conflict.⁶²

In addition to the binding legal instruments, the United Nations Security Council adopted various special resolutions to combat conflict-related sexual violence, including Resolution 1325 on women, peace and security, Resolution 1820 addressing widespread sexual violence in conflict and Resolution 1960, which creates institutional tools for prevention and protection from sexual

⁵⁶ Refugee Law Project and University of California, Berkeley, School of Law, *supra* note 55, at 37

⁵⁷ *Aydin v. Turkey*, referred to in *Ibid*, at 37

⁵⁸ Seibert-Fohr, *supra* note 27.

⁵⁹ United Nations Human Rights, Uganda and the United Nations Human Rights Mechanisms, A Compilation on the Occasion of the 60th Anniversary of the Universal Declaration of Human Rights, 11 available at <http://www.ohchr.org/Documents/Countries/PublicationUgandaUNHRMechanisms.pdf>

⁶⁰ *Ibid*

⁶¹ Tshitenge Muteba v Zaire referred to in Seibert-Fohr, *supra* note 27

⁶² Christopher Mbazira, *supra* note 23, at 204

violence. The following is an analysis of these three resolutions and the extent to which they combat sexual violence in conflict and ensure justice for survivors.

In 2000, the UN Security Council in the wake of the Balkan wars and the Rwandan genocide in the 1990s adopted Resolution 1325, the first resolution focusing on “women, peace, and security.”⁶³ The land mark document recognizes women and children as vulnerable victims of war. It stresses the need “for special measures to protect women and girls from gender based violence, particularly rape and other forms of sexual abuse, and all other forms of violence in situations of armed conflict.”⁶⁴ It also calls for gender mainstreaming in peace operations and women participation in conflict resolution and peace processes.⁶⁵

In 2008, the UN Security Council adopted another resolution, Resolution 1820 which expands the scope of Resolution 1325 and specifically addresses sexual violence in conflict.⁶⁶ This resolution links sexual violence to international security and peace and specifically notes that sexual violence is a tactic of war.⁶⁷ According to Pamela Scully, the resolution was a response to wide spread sexual violence occurring the Liberia, Sierra Leone and Democratic Republic of Congo (DRC) at the time.⁶⁸ The resolution calls upon the United Nations Security Council to take steps to end sexual violence in conflict.⁶⁹ It also demands warring parties to desist from acts of sexual violence⁷⁰ and calls for “evacuation of women and children under threat to safety.”⁷¹ It

⁶³ Pamela Scully, *Vulnerable Women: A critical reflection on the Human Rights Discourse and Sexual Violence*, *Emory International Law Review*, Vol 23, (January 1, 2009),115, *see also* UN Security Council, Security Council resolution 1325 (2000) *supra* note 36

⁶⁴ Resolution 1325 *supra* note 36, at Par 10

⁶⁵ *Ibid* Preamble, Par 2-5 *see also* Pamela Scully, *supra* note 63, at 115

⁶⁶ Pamela Scully, *Ibid* at 116, Resolution 1820, *supra* note 37

⁶⁷ Resolution 1820, *supra* note 37, at Par 1

⁶⁸ Pamela Scully, *supra* note 63, at 116

⁶⁹ Resolution 1820, *supra* note 37, at Par 1

⁷⁰ *Ibid*, Par 2

⁷¹ *Ibid*, Par 3

stresses the need to exclude sexual offences from amnesty provisions in conflict resolution processes⁷² and affirms the intention of the Security Council to establish sanctions against parties who commit sexual crimes against women and girls during conflict.⁷³

In 2010, the Security Council adopted yet another resolution; Resolution 1960 aimed at enforcing provisions resolutions 1325 and 1820.⁷⁴ Gina HeathCote explains that resolution 1960 was an attempt by the Security Council to address the accountability gaps that existed in prior resolutions 1325 and 1820.⁷⁵ “The resolution reaffirms the need to end impunity as a means of promoting post conflict recovery and a guarantee of non-repetition.”⁷⁶ It highlights the importance of “using a range of justice and reconciliation mechanisms including national, international and “mixed” criminal courts and tribunals, truth and reconciliation commissions to promote individual responsibility for serious crimes, and peace, truth, reconciliation and the rights of the victims.”⁷⁷ It also reaffirms the need for “states to increase access to health care, psychosocial support, legal assistance, and socio-economic reintegration services for victims of sexual violence.”⁷⁸ The resolution therefore builds on to the UN Human Rights Committee definition of effective remedy by adding rehabilitation measures such as health care and psycho-social services as necessary components for effective remedy. Finally, it proposes naming and

⁷² Ibid, Par 4

⁷³ Ibid , Par 5

⁷⁴ Security Council Resolution 1960, supra note 38

⁷⁵ Gina HeathCote, Naming and Shaming: Human Rights Accountability in Security Council Resolution 1960 (2010) on Women, Peace and Security, *Journal of Human Rights Practice* Vol 4 , Number 1, 2012, 88

⁷⁶ Resolution 1960, supra note 38, at Par xi

⁷⁷ Ibid

⁷⁸ Ibid, at Par xiii

shaming and imposing sanctions on parties suspected of, or responsible for committing sexual violence during conflict as accountability tools.⁷⁹

Although these resolutions are not legally binding, they represent growing consensus to address combat sexual violence in conflict and provide justice to survivors.⁸⁰ Resolution 1325 emphasizes the need to protect women and girls from gender-based violence during conflict, 1820 expressly stresses the need to exclude sexual offences from amnesty provisions⁸¹ while resolution 1960 establishes naming and shaming of perpetrators and sanctions as tools to hold perpetrators accountable. Further, Resolution 1960 provides that other mechanism such as truth commissions, health care services and socio-economic services alongside prosecution are essential in ensuring justice for survivors of conflict-related sexual violence.⁸²

However, these resolutions are not binding on Uganda and require the government's political will to implement them. Further, resolutions 1820 and 1960 were passed in 2008 and 2010 after the cessation of hostilities in the region thus the measures proposed by them such as excluding sexual violence from amnesty provisions⁸³ and naming and shaming perpetrators could not be implemented. Also pertinent to note is that the resolutions especially 1325 and 1820 for the most part focus on women as the only victims of sexual violence excluding men as victims or potential victims.⁸⁴ While the resolutions make mention of "children" and "civilians" categories under which men and boys could be presumably covered, the paragraphs emphasizing measures of

⁷⁹ Ibid, at Par 3. For a detailed analysis on the accountability mechanisms in Resolution 1960, *see* Gina HeathCote, *supra* note 75

⁸⁰ Pruitt, Lesley Looking Back, Moving Forward: The Role of the International Community in Addressing Conflict-Related Sexual Violence, International Studies Association, (2010)

⁸¹ Resolution 1820, *supra* note 37, Par 4

⁸² Resolution 1960, *supra* note 38, at Par xi

⁸³ Resolution 1820, *supra* note 37, at Par 4

⁸⁴ Pamela Scully, *supra* note 63, at 118

protection, make mention of only women and girls.⁸⁵ In her article on the human rights discourse and sexual violence, Pamela Scully notes that;

By and large, Resolution 1820 merges women and girls as victims; the phrase "women and girls" is used thirteen times in the document, while no explicit mention is made of how men and boys are also victims. One sees other international documents reproducing similar language.⁸⁶

This narrative has also been reproduced in Uganda's laws and the formal criminal justice system which largely define sexual crimes as a woman's issue (as discussed in chapter two) thus greatly hindering male survivors of sexual violence in Northern Uganda from speaking out on their victimization and seeking redress.⁸⁷ Because policy makers and persons designing justice interventions often make reference to these documents, the omission of men as victims means that the designed interventions are limited in approach. Further, the exclusive focus on women as victims especially by resolution 1820 also creates a narrative and a status of "a vulnerable woman."⁸⁸ Pamela Scully notes that this emphasis poses serious implications in ending sexual violence which is deeply rooted in gender-stereotypes that emphasize male dominance.⁸⁹

1.1.2 International Institutional framework

The United Nations has backed up the enactment of international legal instruments with the establishment of institutions. These institutions oversee the implementation of legal instruments through advocacy, reporting and prosecution. They include United Nations offices with special mandates and international criminal tribunals. This section discusses the role of United Nations Offices and international criminal tribunals in combating conflict-related sexual violence and providing justice to survivors.

⁸⁵ Resolution 1325 (2000) *supra* note 36, see Par 34

⁸⁶ Pamela Scully, *supra* note 63, at 115

⁸⁷ Refugee Law Project and University of California, Berkeley, School of Law, *supra* note 55, at 36

⁸⁸ Pamela Scully, *supra* note 63, at 119

⁸⁹ *Ibid*, at 120

United Nations offices with a Special Mandate

The United Nations has showed its commitment to combating conflict-related sexual violence and providing justice to survivors through establishing offices with special mandates. In 2009, the Office of the Special Representative of the Secretary-General on Sexual Violence in Conflict (SRSG-SVC) was established with the aim of ending impunity for sexual violence in conflict through assisting national authorities to strengthen criminal accountability, responsiveness to survivors and judicial capacity; protect and empower civilians who face sexual violence in conflict and to increase the recognition rape as a tactic and consequence of war.⁹⁰ The office began its work in 2010 under the leadership of Margret Wallstrom of Sweden and in 2012; she was replaced by Zainab Hawa Bangura of Sierra Leone.⁹¹ The office has through training, advocacy and reporting on sexual violence in conflict situations increased the visibility on its occurrence.⁹² The work of this office has also inspired the UN ‘Stop Rape Now Campaign’ which is aimed at ending the use of sexual violence as a tactic of war.

In September 2011, the Human Rights Council adopted a resolution to appoint a UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence under the Office of the High Commissioner for Human rights. The establishment was highly welcomed and considered as “...a significant contribution by the Council to establish accountability for serious crimes and human rights violations.”⁹³ The establishment of this position revealed the will of the international community to take into account alternative justice mechanisms in post-

⁹⁰ About the office of the Special Representative of the Secretary General on Sexual in Violence Conflict <http://www.un.org/sexualviolenceinconflict/about-us/about-the-office/> accessed on 20 October 2014

⁹¹ Ibid

⁹² Key Initiatives <http://www.un.org/sexualviolenceinconflict/about-us/about-the-office/> accessed on 20 October 2014

⁹³ ICTJ Welcomes Establishment of UN Special Rapporteur on Truth, Justice, Reparation and Guarantees of Non-Recurrence, [ictj.org/news/ictj-welcomes-establishment-un-special-rapporteur-truth-justice-reparation-and-guarantees-non-recurrence](http://www.ictj.org/news/ictj-welcomes-establishment-un-special-rapporteur-truth-justice-reparation-and-guarantees-non-recurrence)

conflict situations. The Special Rapporteur is mandated to gather information on national situations including experiences with truth and reconciliation commissions and other mechanisms aimed at truth, justice and reparations and to recommend ways to improve truth, justice, reparations and guarantees of non-recurrence.⁹⁴ The Special Rapporteur also provides technical support and advice on implementing transitional justice measures. In 2013, the Special Rapporteur in his annual report called upon the UN to create stronger links between truth, justice, reparations and non-recurrence.⁹⁵ He emphasized that these four mechanisms were important for security and development.⁹⁶ He called for a victim-centred and gender sensitive approach in implementing transitional justice mechanisms.⁹⁷ Several African countries have requested the Rapporteur to visit their countries but Uganda is not among them.⁹⁸

International Criminal tribunals

In the introduction of this chapter, it was noted that rape was tolerated as a normal consequence of war.⁹⁹ However, the situation began to change in the 1990's following the conflicts in the former Yugoslavia and Rwanda. During these conflicts, sexual violence was used as an "integral aspect of ethnic cleansing."¹⁰⁰ The widespread nature and the brutality with which it was executed caught international attention through media coverage.¹⁰¹ The UN Security Council then established the International Criminal Tribunal for the former Yugoslavia (ICTY) to prosecute war crimes committed in the territories of former Yugoslavia between 1991 and

⁹⁴ <http://www.ohchr.org/EN/Issues/TruthJusticeReparation/Pages/Mandate.aspx>

⁹⁵ Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff, http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/24/42 accessed 20 October 2014

⁹⁶ UN Special Rapporteur Delivers First Annual report, <http://ictj.org/news/un-special-rapporteur-delivers-first-annual-report>

⁹⁷ Ibid

⁹⁸ Country Visits, <http://www.ohchr.org/EN/Issues/TruthJusticeReparation/Pages/CountryVisits.aspx>

⁹⁹ Estelle Zinsstag, supra note 34, at 190

¹⁰⁰ Kimberly E. Carson, supra note 35, at 1252

¹⁰¹ Ibid, at 1262- 1263

1995.¹⁰² In 1994, the UN Security Council established the International Criminal Tribunal for Rwanda (ICTR) to prosecute war crimes committed between 1st January 1994 and 31st December 1994.¹⁰³

In order to address the widespread sexual violence in these conflicts, the Statutes establishing the tribunals listed rape as a crimes against humanity.¹⁰⁴ The statute of the ICTR defined rape as an outrage upon personal dignity which violates the Geneva Conventions' common article 3 and Additional Protocol II.¹⁰⁵ Using these provisions, the tribunals became the first to recognize and prosecute sexual violence as a crime in international law. The tribunals have also developed the jurisprudence on sexual violence occurring during conflict. The ICTR in its land mark case of *Prosecutor vs Akayesu* defined sexual violence as "any act of a sexual nature which is committed on a person under circumstances which are coercive."¹⁰⁶ The tribunal interpreted rape to mean "a physical invasion of a sexual nature, committed on a person under circumstances which are coercive."¹⁰⁷ The tribunal found that sexual violence targeting Tutsi women constituted act to genocide.¹⁰⁸

The ICTY following the ICTR, also defined rape but in a restricted manner by limiting it to body parts. In *Prosecutor v. Furundzija*¹⁰⁹ the ICTY defined rape as "sexual penetration, however slight of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or of the mouth of the victim by the penis of the perpetrator; committed by

¹⁰² Ibid, 1262

¹⁰³ Ibid, 1262

¹⁰⁴ The ICTY Statute art 5(g) , the ICTR Statute Art 3(g)

¹⁰⁵ ICTR art 4(e)

¹⁰⁶ Prosecutor v. Akayesu, Case No. ICTR-96-4-T, as quoted in Kimberly E. Carson, supra note 35, at 1264

¹⁰⁷ Ibid

¹⁰⁸ Ibid

¹⁰⁹ see Kimberly E. Carson, supra note 35, at 1265

coercion or force or threat of force against the victim or a third person.”¹¹⁰ The significance of these decisions in developing the definition of rape in international criminal law is seen in the later decisions of *Prosecutor v. Kunarac*, *Prosecutor v. Muhimana* and *Prosecutor vs Musema*.¹¹¹ Additionally, the ICTR and ICTY have defined forms of sexual violence to constitute torture.¹¹²

The tribunals through their work have raised visibility on the occurrence of sexual violence in conflict. Having been the first tribunals to prosecute sexual violence during conflict, the tribunals introduced the use prosecution as a justice and accountability to for survivors of conflict-related sexual violence. Since then, the international trend has focused on using prosecution as a justice mechanism as evidenced by the establishment of hybrid courts in Kosovo in 1999, East Timor in 1999 and Sierra Leone in 2002 to punish perpetrators of conflict-related sexual violence among others.¹¹³ The establishment of these tribunals and courts culminated into the establishment of a permanent court in 2002 with the mandate of prosecuting the “most serious crimes of concern to the international community”¹¹⁴ The Rome Statute establishing the court significantly expands the definition of sexual violence to include “sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, and other forms of sexual violence of equivalent gravity to the list of war crimes and crimes against humanity.”¹¹⁵ At present, the ICC is handling several cases including a referral from Uganda.¹¹⁶ The following discusses Uganda’s self- referral to the ICC

¹¹⁰ *Prosecutor v. Furundzija*, definition of rape as quoted by in Kimberly E. Carson, supra note 35, at 1265

¹¹¹ See detailed explanation in Kimberly E. Carson, supra note 35, at 1265 -1266

¹¹² See *Prosecutor v. Akayesu*, 687 and *Prosecutor v. Kunarac*, 150-55 as examined in Kimberly E. Carson, supra note 35

¹¹³ Laura A. Dickinson, The promise of Hybrid Courts, 97 American Journal of International Law, April, 2003

¹¹⁴ The Rome Statute of the International Criminal Court, Article 1, herein after called the Rome Statute available at <http://www.icc-cpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE79CDC7CF02886/283503/RomeStatutEng1.pdf> accessed 18 March 2014

¹¹⁵ Refugee Law Project and University of California, Berkeley, School of Law, supra note 55, at 22-23

¹¹⁶ Tonia St. Germain et al, supra note 39, at 37

and examines the extent to which the ICC will provide justice to survivors of conflict-related sexual violence in Northern Uganda.

1.1.2.1 The ICC and the Situation in Northern Uganda

The government of Uganda ratified the Rome Statute on 14 June 2002, when the conflict in Northern Uganda was raging on.¹¹⁷ The statute gives the ICC jurisdiction over crimes of genocide, war crimes, crimes against humanity and the crime of aggression.¹¹⁸ Most importantly, the statute recognizes sexual violence as a crime against humanity.¹¹⁹ The statute also establishes the principle of complementarity and the court can only intervene where a state party is unable or unwilling to investigate and prosecute the accused.¹²⁰ The Court assumes jurisdiction in respect of cases referred to it by a state party, the United Nations Security Council and the Prosecutor.¹²¹

After several failed peace talks and military interventions to end the conflict in Northern Uganda, the government in December 2003 referred the situation in Northern Uganda to the ICC.¹²² The referral to the ICC was aimed at ending impunity committed by the LRA in the region.¹²³ In July 2004, the prosecutor started investigations into crimes committed by both the LRA and the government forces (UPDF). The investigations revealed that while the government's UPDF forces had committed crimes, the crimes committed by the LRA were of a higher gravity than to

¹¹⁷ Payam Akhavan, *The Lord's Resistance Army Case: Uganda's Submission of the First state referral to the International Criminal Court*, *The American Journal of International Law*, Vol. 99:403, 2005, 412

¹¹⁸ The Rome Statute, *supra* note 114, Art 5

¹¹⁹ The Rome Statute, *supra* note 114, Article 7(g) states that where "rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity are committed as part of a widespread committed as part of or systematic attack directed against any civilian population, with knowledge of the attack, they constitute Crimes against Humanity."

¹²⁰ The Rome Statute, *supra* note 114, Article 17(1)

¹²¹ The Rome Statute, *supra* note 114, Article 13

¹²² Terry Beitzel and Tammy Castle, *Achieving Justice Through the International Criminal Court in Northern Uganda: Is Indigenous/Restorative Justice a Better Approach?* *International Criminal Justice Review* 23(1) 41-55, 43

¹²³ Payam Akhavan, *supra* note 117, at 410

those of the UPDF.¹²⁴ As a result, the investigations focused on crimes committed by the LRA were commenced.¹²⁵

Following this, the Pre-Trial Chamber, on 8 July 2005, issued five arrest warrants for LRA top commanders including Joseph Kony, Vincent Otti (second in command), Raska Lukwiya (Army Commander), Okot Odhiambo (commander of the most violent of the LRA's four brigades) and Dominic Ongwen (Brigade Commander).¹²⁶ The issuance of arrest warrants produced mixed reactions among international and national actors. The International community warmly welcomed the move taken by the ICC. The then United Nations Secretary General, Koffi Annan stated that "the warrants were a powerful reminder that perpetrators of international crimes shall be held to account for their deeds."¹²⁷ Human rights institutions including the International Centre for Transitional Justice (ICTJ), Amnesty International and Human Rights Watch commended the move as an important stand against violations of human rights and a crucial tool in ending the conflict.¹²⁸

In Uganda, the ICC was criticized by many including the victims of the LRA insurgency who for feared of continued insurgence arising from the issuance of arrest warrants.¹²⁹ Archbishop, John Baptist Odama a prominent religious figure in Northern Uganda complained that ICC

¹²⁴ Christopher Mbazira, *supra* note 23, at 204

¹²⁵ The ICC opened an office in Kampala at the beginning of 2005 in order to coordinate investigations and give support to local authorities. *See* Christopher Mbazira, *supra* note 23, at 204

¹²⁶ *Ibid*, Christopher Mbazira, at 204-205

¹²⁷ Prudence Acirokop, *Accountability for Mass Atrocities, The LRA Conflict in Uganda*. University of Pretoria, 2012, 131 <http://www.repository.up.ac.za/bitstream/handle/2263/23898/Complete.pdf?sequence=12> accessed 17 March 2014

¹²⁸ *Ibid*, at 131

¹²⁹ Hovil & Lomo, *Whose Justice? Perceptions of Uganda's Amnesty Act 2000: The Potential for Conflict Resolution and Long-term Reconciliation*, Refugee Law Project, working paper No.15, February 2005, Refugee Law Project, 21-22 accessed at <http://www.refugeelawproject.org/resources/working-papers/92-whose-justice-perceptions-of-uganda-s-amnesty-act-2000-the-potential-for-conflict-resolution-and-long-term-reconciliation.html> accessed 11 March 2014

involvement would end peaceful negotiations¹³⁰ while Justice Onega the Chairperson of the Amnesty Commission argued that the ICC was going to jeopardize the amnesty process.¹³¹

The criticisms against the ICC were a genuine sign of fear of continued violence by victims in Northern Uganda who had fixed their hope on the peace talks that were underway in south Sudan.¹³² The community also saw negotiations and amnesty as the only way through which their abducted children- now turned rebels would return home.¹³³ Following these criticisms, the government sought to withdraw the case from the ICC arguing that it would establish a court to prosecute the accused.¹³⁴ The ICC prosecutor refused to drop the case, asking for information to prove that the proposed International Crimes Division would competently to handle the cases.¹³⁵ The case is still before the ICC and this calls for an examination into the extent to which the court will provide both punitive and restorative justice to survivors of sexual violence in Northern Uganda.

1.1.2.2 Justice for survivors of sexual violence in Northern Uganda at the ICC

The ICC indictments against the LRA commanders contained charges of sexual violence including rape, sexual enslavement and inducing rape under the categories of war crimes and crimes against humanity.¹³⁶ In total, the LRA commanders were charged with 33 counts of war

¹³⁰ Prudence Acirokop, *supra* note 127 at 131

¹³¹ Hovil & Lomo, *supra* note 129, at 22

¹³² *Ibid* at 22

¹³³ *Ibid* at, 21-22

¹³⁴ Bruce Baker, *supra* note 25

¹³⁵ Issaka K. Souaré, 'The International Criminal Court and African Conflicts: The Case of Uganda, Review of African Political Economy', 36:121, (2009) 369-388, 374

¹³⁶ Tonia St. Germain et al, *supra* note 39, at 37 *See also* 'Situation in Uganda' ICC-02/04-01/05 The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen available at www.icc-cpi.int [accessed 23 March 2014]

crimes and crimes against humanity.¹³⁷ While the inclusion of crimes of sexual violence in the ICC indictment is a positive step towards achieving justice for survivors, justice can only be actualized after the accused are apprehended.¹³⁸

It is also questionable whether the ICC's involvement will result in the capture of the LRA commanders since the ICC is heavily dependent on state to implement and enforce its warrants.¹³⁹ Indeed, the arrest warrants were served on the governments of Uganda and the Democratic Republic of Congo and the Republic of Sudan for execution.¹⁴⁰ Worth noting however, is that these are the very states that failed to capture the accused during the 20 years of conflict.¹⁴¹ Moreover, the DRC,¹⁴² South Sudan¹⁴³ and the Central African Republic¹⁴⁴ are currently experiencing civil wars. This naturally removes the focus from the LRA as the states attempt try to solve their internal issues. Also worth noting, is that the chief negotiator in the LRA and Uganda government peace talks, Riek Machar is currently the rebel leader in an insurgency in South Sudan.¹⁴⁵ Uganda is accused of being directly involved in providing support

¹³⁷ Christopher Mbazira, *supra* note 23, at 205

¹³⁸ United Nations, Report of the Secretary-General, Sexual violence in conflict, *supra* note 3, at 41

¹³⁹ Richard J. Goldstone and Janine Simpson, The Prospects and Challenges facing the International Criminal Court, South African Yearbook of International Affairs (2002/03), 370 and The Rome Statute, *supra* note 114 Article 87(1) (a) and 87(5)(a)

¹⁴⁰ Christopher Mbazira, *supra* note 23, at 205

¹⁴¹ The Sudan government was in fact providing support to the accused, while Uganda's military strategies failed.

¹⁴² In 2012 to early 2013, there was an outbreak of conflict in the Eastern part of the DRC between the M23 rebels and the government forces. An agreement was later reached the rebels and the government with the help of the United Nations but the country is still unstable. *see* BBC News Africa, Democratic Republic of Congo profile <http://www.bbc.com/news/world-africa-13283212> and UNHCR, 2014 UNHCR country operations profile - Democratic Republic of the Congo <http://www.unhcr.org/pages/49e45c366.html> accessed on 28 March 2014

¹⁴³ The conflict in South Sudan broke out in December 2013, *see* Reuters, Gun fire erupts in army base in South Sudan capital 5 March 2014 <http://www.reuters.com/article/2014/03/05/us-southsudan-unrest-idUSBREA240GP20140305> accessed 28 March 2014

¹⁴⁴ Brutal fighting continues in the Central African Republic between Christian Militias and Muslims *see*, Reuters, New fighting in the Central African Republic blocks U.N Visit, Wednesday, 19 February 2014 <http://www.reuters.com/article/2014/02/20/us-centralafrican-idUSBREA1J01820140220> accessed 28 March 2014

¹⁴⁵ See signatories to the Agreement on Accountability and Reconciliation between the Government of Uganda and the Lord's Resistance Army/Movement http://www.amicc.org/docs/Agreement_on_Accountability_and_Reconciliation.pdf accessed on 15 March 2014

to the incumbent South Sudan government against the rebels.¹⁴⁶ It therefore remains to be seen who the next chief negotiator will be now that the relationship between Riek Machar and Uganda has gone sour.

Nonetheless, there is hope that the accused will be captured or better still, surrender given the pressure from the ICC.¹⁴⁷ International and regional efforts have also been intensified to ensure execution of the warrants. The United States and the African Union also sent troops to boost Uganda's efforts to the accused.¹⁴⁸ Recent reports have also indicated that the LRA leader contacted the President of the Central African Republic expressing intentions to surrender.¹⁴⁹

In the event that the LRA leaders are captured and prosecutions begin, the principles of victim participation and victim protection enshrined in the Rome Statute, aimed at guaranteeing justice to survivors of sexual violence will become operational.¹⁵⁰ The Rome Statute defines victims as "any natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court."¹⁵¹ They include "organisations or institutions that have sustained direct harm or harm to property which is dedicated to religion, education, art, science or

¹⁴⁶ See BBC News, South Sudan ceasefire 'ends' amid Malakal fighting South 18 February 2014 <http://www.bbc.com/news/world-africa-26238849> [accessed on 28 March 2014]

¹⁴⁷ Some arrest warrants issued by the court between 2006 and 2010 have resulted into the arrest or surrender of the accused. See ICC, situations and cases for information on arrest warrants issued against Thomas Lubanga Dyilo, Germaine Katanga, Bosco Ntaganda and Jean-Pierre Bemba among others http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx [accessed on 28 March 2014]

¹⁴⁸ See, Prudence Acirokop, *supra* note 127, at 144

¹⁴⁹ Sudan tribune, UN Security Council calls for execution of Kony arrest warrant, 26 November 2013, <http://www.sudantribune.com/spip.php?article48939> [accessed 28 March 2014]

¹⁵⁰ The Rome Statute is the first document to consider Victims rights as fundamental in the pursuit of justice. See G. P. Fletcher: Justice and Fairness in the Protection of Crime Victims. 9 Lewis & Clark L. Rev. 547 (2005), 554

¹⁵¹ Rules of Procedure and Evidence of the Rome Statute, Rule 85(a) see criteria to obtain victim status in Gioia Greco, Victims' Rights Overview under the ICC Legal Framework: A Jurisprudential Analysis, International Criminal Law Review 7(2007) 531–547, 535

charitable purposes and to historic monuments, hospitals and other places and objects of humanitarian purposes.”¹⁵²

To ensure victim protection, the Rome Statute establishes a Victims and Witnesses Unit to provide assistance and make security arrangements for victims and witnesses appearing before the court.¹⁵³ It also mandates the court to take into account the age and gender of victims and the nature of the crime during all proceedings so as to ensure the safety and psycho-logical well being of victims and witnesses before the court.¹⁵⁴ The Statute and Rules of Procedure and Evidence also allow the court to hold proceedings in camera.¹⁵⁵ In the *Lubanga case* the ICC defined victim protective measures as the legal means by which the Court can secure the participation of victims in the proceedings, because they are a necessary step in order to safeguard their safety, physical and psychological well-being, dignity and private life in accordance with Article 68(1) of the Statute.”¹⁵⁶ The statute specifically states that “special measures shall be applied in cases involving victims of sexual and gender based violence among others”.¹⁵⁷ The court also recognizes the need for psycho-social support for witnesses and victims that appear before the court and thus the Unit’s staffs are trained in handling trauma.¹⁵⁸

A study carried out in Northern Uganda in 2011, revealed that survivors of conflict-related sexual violence experience stigma and rejection from the community which leaves them feeling isolated.¹⁵⁹ Another study revealed that survivors of sexual violence present with psychological

¹⁵² Rules of Procedure and Evidence of the Rome Statute, Rule 85(a), Gioia Greco, Ibid at 535-536

¹⁵³ The Rome Statute, supra note 114, article 46(3)

¹⁵⁴ Ibid Article 68(1)

¹⁵⁵ Ibid, Article 68(2) and Rule 87(3)

¹⁵⁶ Lubanga case as quoted in Silvana Arbia, The International Criminal Court: witness and victim protection and support, legal aid and family visits, Commonwealth Law Bulletin Vol. 36, No. 3, September 2010, 519–528, 521

¹⁵⁷ The Rome Statute, supra note 114, Article 68(1) and (2), and Rule 88 of Rules of Procedure and Evidence

¹⁵⁸ Silvana Arbia, supra note 156, at 522

¹⁵⁹ Bruce Baker, supra note 25, at 249

issues including post-traumatic stress disorders, depression, anxiety and fear.¹⁶⁰ Given the psychological issues which survivors of sexual violence experience, the Victims and Witness Protection Unit will provide the required psycho-social support to enable survivors give a proper account of events to the court which could result in the conviction of the accused.¹⁶¹

Victims are also allowed to take part in court proceedings including proceedings on a request for investigation¹⁶² or on the admissibility proceedings.¹⁶³ The victims must however first submit an application for participation to the court.¹⁶⁴ Article 68(3) allows the court to take into account the victim's views at any stage of the proceedings as long as they does not negatively impact on the rights of the accused. Article 54(1) b provides that in cases involving sexual and gender violence, the interests and personal circumstances of victims and witnesses shall be taken into account by the prosecutor. Victim participation is crucial in the justice process and it emanates from the victim's rights to truth and justice.¹⁶⁵

It has been argued that the provisions on victim participation in the Rome Statute were an attempt at correcting the mistakes of the ICTY and the ICTR which did not allow for victim participation.¹⁶⁶ Carla del Ponte a prosecutor at the ICTY had expressed her concern for the lack of victim participation in the trial before the ICTY, as follows;

The fact the [sic] (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 [sic] his or her chief task. In the current system, there is little time and space left to plea in favour of victims [...]. A

¹⁶⁰ Kiyanda Eugene et al, *supra* note 22, at 28

¹⁶¹ Silvana Arbia, *supra* note 156, at 520

¹⁶² The Rome Statute, *supra* note 114, Article 15(3)

¹⁶³ *Ibid*, Article 19(3)

¹⁶⁴ Brianne McGonigle Leyh, Victim-Oriented Measures at International Criminal Institutions: Participation and its Pitfalls, *International Criminal Law Review* 12 (2012) 375–408, 392

¹⁶⁵ *Ibid* at 389

¹⁶⁶ Kasande Kihika Sarah, *Securing Post Conflict Justice for Victims of Sexual Violence in Armed Conflict, A Case Study of Northern Uganda*, CEU Budapest College (2010), 21-28

system of criminal law that does not take into account victims of crimes is fundamentally lacking.¹⁶⁷

Victim participation allows the court to receive first hand information from the victims. It can therefore be assumed that through victim participation, the court will make judgments that are reflective of or in resonance with the harm or loss suffered, thus meeting the victims' justice needs. Further, victim participation amounts to an acknowledgment of the harm suffered by victims and also allows victims to get involved in processes aimed at addressing their problems.

Another aspect the Rome Statute establishes is the system of reparations for victims of crimes.¹⁶⁸

The statute provides that "the court may upon request of the victim or on its own motion take into account the extent of the injury, loss or damage suffered by the victim and make orders for reparations."¹⁶⁹ Reparations include restitution, compensation and rehabilitation.¹⁷⁰ In order for victims to claim reparations, they are required to make a written request to the court providing information on the injury or loss suffered and supporting evidence where possible.¹⁷¹

Reparations can be made to individuals and affected communities¹⁷² with the assistance of experts.¹⁷³ Orders of reparation can be made against the convicted person or the Trust Fund for victims established under Article 79.¹⁷⁴ It has been argued that reparation orders made against the convict are aimed at promoting individual responsibility for crimes committed.¹⁷⁵

¹⁶⁷ Ibid, at 22, (foot note 87)

¹⁶⁸ For detailed reading on the ICC and reparations see Luke Moffett, Reparative complementarity: ensuring an effective remedy for victims in the reparation regime of the International Criminal Court, *The International Journal of Human Rights*, 2012 see also Anja Wiersing, Lubanga and its Implications for Victims Seeking Reparations at the International Criminal Court, 4 *Amsterdam Law Forum*, 21 2012

¹⁶⁹ The Rome Statute, supra note 114, Article 75(1)

¹⁷⁰ The Rome Statute, supra note 114, Article 75(1) see also Basic principles (in first chapter for definitions)

¹⁷¹ The Rules of Procedure and Evidence, Rule 94

¹⁷² The Rules of Procedure and Evidence, Rule 97(1)

¹⁷³ The rules of Procedure and Evidence, Rule 97(2)

¹⁷⁴ The Rome Statute, supra note 114, Article 75(1)

¹⁷⁵ Prudence Acirokop, supra note 127

While the conflict in Northern Uganda resulted into gross violations of human rights there has been limited response by the government in providing reparations to victims. Survivors of sexual and gender violence in Northern Uganda are considered among categories of victims that are in urgent need of reparations.¹⁷⁶ The desired forms of reparations as identified by survivors include educational initiatives, public apologies and psychological counseling.¹⁷⁷ The provision on individual reparations under the ICC statute is crucial for the situation of Northern Uganda since the consequences of sexual violence on individuals differ. Male survivors of sexual violence have also received little recognition from the government compared to women thus the ICC provides them with an opportunity of redress.¹⁷⁸

However, collective reparations as envisaged by the ICC are also important because not all survivors can appear before the court. The acknowledgement and recognition of harm depicted through collective awards of reparation create a sense of justice not only to the survivors but to the community as well.¹⁷⁹ The award of reparations by the ICC is an acknowledgment of the fact that punitive mechanisms of justice need to be complimented with restorative mechanisms focused on victims.

In addition to the above victim-centered principles, the Rome Statute also establishes victim sensitive rules of evidence in cases of sexual violence. The Statute provides that previous sexual behavior of the victim is irrelevant.¹⁸⁰ It lays down the principles to apply in determining the element of consent in crimes of sexual violence.¹⁸¹ The Statute provides that silence of a victim,

¹⁷⁶ International Centre for Transitional Justice, Reparations for Northern Uganda: Addressing the Needs of Victims and Affected Communities ICTJ Uganda Briefing Paper (September 2012) available at www.ictj.org 4.

¹⁷⁷ Ibid, at 4

¹⁷⁸ Ibid, at 5

¹⁷⁹ The Rome Statute, supra note 144 Article 75(6)

¹⁸⁰ The Rules of Procedure and Evidence, Rule 70(d) and 71

¹⁸¹ The Rules of Procedure and Evidence, Rule 70

failure to resist, acceptance of a victim and words used by the victim in a coercive environment should not be interpreted to mean that the victim consented to the act. These rules provide survivors of conflict-related sexual violence in Uganda with a form of protection that they do not have under Uganda law where consent is a decisive element and corroboration to prove lack of consent is required for successful prosecution.¹⁸²

Despite these important provisions, concerns have been raised on the effectiveness of the ICC in delivering justice to survivors. First, the ICC has jurisdiction to try offences that were committed after July 2002 when the Rome Statute came into force.¹⁸³ The conflict in Northern Uganda started in 1986 and various people were victims of the acts of sexual violence. These persons will be left out in the redress mechanism under the ICC including prosecutions and reparations.¹⁸⁴

Secondly, the ICC only indicted the LRA and yet crimes of sexual violence were committed by both parties to the conflict. Survivors hoped that the ICC would hold the government accountable for crimes committed during the conflict.¹⁸⁵ The focus on only the LRA has raised suspicion and dissatisfaction among survivors as evidenced by one community member who stated that:

They should investigate all the crimes, whether committed by government troops or rebels. Otherwise to me that is not justice... There is a saying, it takes two people to make a quarrel...What yardstick are they [ICC] making to only prosecute Kony?¹⁸⁶

¹⁸² See elements of sexual offenses, Chapter Fourteen, Penal Code Act of Uganda and the Evidence Act Chapter 6

¹⁸³ The Rome Statute, supra note 114, Article 11

¹⁸⁴ Issaka K. Souaré, supra note 135 at 381

¹⁸⁵ Hovil & Lomo, supra note 129 at 21

¹⁸⁶ Ibid, at 21

Further, the argument based on gravity has an unfortunate way of dismissing survivors of sexual violence at the hands of the government as unworthy victims not deserving the attention of the court thus creating categories of victims

Thirdly, it is unlikely that reparations orders directed against the convicted person will yield much in the event the accused might not have enough resources. Further, the Trust Fund money collected through voluntary contributions of individuals, companies, organisations and governments¹⁸⁷ might be too small to cater for the needs of all survivors given the number of cases before the court.¹⁸⁸

What is even more disturbing is that the fact the ICC has failed to secure a conviction for crimes of sexual violence. In the case of *Prosecutor v Thomas Lubanga Dyilo*,¹⁸⁹ the court's first case in relation to crimes in the DRC, the court did not find the accused guilty for crimes of sexual violence but only convicted him forced conscription of children into the army.¹⁹⁰ Judge Elizabeth Odio Benito argued that "[the decision of the court] disregards the damage caused to the victims and their families, particularly as a result of the harsh punishments and sexual violence suffered by the victims of these crimes"¹⁹¹ while Tonia St. Germain and Susan Dewely argued that the lack of conviction on sexual violence in this case established a bad precedent.¹⁹²

¹⁸⁷ Questions and Answers: The Victim Trust Fund of the ICC, <http://www.iccnw.org/documents/FS-VTFC-FAQ.pdf> accessed 26 March 2014

¹⁸⁸ See Tonia St. Germain et al, supra note 39, at 37

¹⁸⁹ Situations and Cases, available at http://www.icccpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200104/related%20cases/icc%200104%200106/Pages/democratic%20republic%20of%20the%20congo.aspx [accessed 28 March 2014]

¹⁹⁰ Tonia St Germain, supra note 39, at 38

¹⁹¹ See, Tonia, St. Germain et al, supra note 39, at 37 *see also* a brief on the case and judgment at http://www.icccpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200104/related%20cases/icc%200104%200106/Pages/democratic%20republic%20of%20the%20congo.aspx

¹⁹² Ibid, Tonia, St. Germain et al

In the 2014 case of *Prosecutor vs Germain Katanga*, the ICC once again failed to convict the accused for crimes of sexual violence in the DRC and instead acquitted him of the charges.¹⁹³

The ICC has as a result been criticized for failing to recognize the plight of survivors of sexual violence because of these rulings.¹⁹⁴ This trend is worrisome and leaves one in doubt as to whether survivors of sexual violence in Northern Uganda will receive justice before the court once the LRA are apprehended. Tonia St.Germain and Susan Dewely however explain that:

The...concern with respect to inadequate attention paid to conflict-related sexual violence is not unique to the ICC. That more than half of the convictions at the ICTR and ICTY included elements of sexual violence may not be a cause for celebration at all given the widespread and systemic nature of rape in [sic] during the conflicts in both Rwanda and the former Yugoslavia. The Tribunals have issued a combined total of 105 convictions, meaning that just over 52 involved sexual violence. ...we must ask the question of what these mere 52 convictions might mean to the 500,000 women in Rwanda or the 20,000 women in the former Yugoslavia who were raped during the conflicts.¹⁹⁵

These remarks reveal that international criminal tribunals are unable to effectively deliver justice to victims given the few convictions and the large numbers of victims. There is therefore a need to explore alternative forms of justice.

1.2 Regional Normative and Institutional Frame work

This section discusses the legal norms and institutional framework on sexual violence in Africa and also looks at the great lakes region where Uganda lies.

¹⁹³ International Criminal Court, Germain Katanga found guilty of four counts of war crimes and one count of crime against humanity committed in Ituri, DRC, Press release, 7 March 2014 available at http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr986.aspx accessed 14 October 2014

¹⁹⁴ International Federation for Human Rights, DRC: Germain Katanga before the International Criminal Court, A Mixed Verdict <http://www.fidh.org/en/africa/democratic-republic-of-congo/DRC-ICC/14877-drc-germain-katanga-before-the-international-crimal-court-a-mixed-verdict>, accessed 26 March 2014

¹⁹⁵ Tonia St.Germain et al Supra note 39, at 38

1.2.1 Regional Normative Framework

The African Charter for Human and Peoples' Rights (ACHPR) is the principal human rights instrument in Africa and it is binding on all states signatory to it.¹⁹⁶ Similar to other international human rights instruments already discussed the ACHPR enshrines rights that are pertinent for the protection of persons against conflict-related sexual violence. These include the right to life and physical integrity,¹⁹⁷ right to physical and mental health¹⁹⁸ and freedom from slavery, torture, cruel, inhuman and degrading treatment.¹⁹⁹ Additionally, the ACHPR obliges states to respect and promote to rights that are enshrined in the Charter.²⁰⁰ Uganda ratified the ACHPR in 1984 and therefore has a duty to respect, protect and promote rights enshrined in this Charter.²⁰¹

Recognising the extent of sexual violence and discrimination against women on the African continent, African states adopted the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa to provide protection to women.²⁰² The Protocol among others obliges states to eliminate discrimination against women through legislative and institutional reforms and advocacy.²⁰³ It explicitly prohibits exploitation, cruel, inhumane or degrading punishment and treatment of women and emphasizes their rights to life, integrity and

¹⁹⁶ African (Banjul) Charter on Human and Peoples' Rights (Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986) [herein after ACHPR.] available at http://www.africaunion.org/Official_documents/Treaties_%20Conventions_%20Protocols/Banjul%20Charter.pdf See Gina Bekker, Recent Developments in the African Human Rights System 2008-09, Human Rights Review 2009 for general understanding of the current African Human Rights System

¹⁹⁷ Ibid, ACHPR, art 4

¹⁹⁸ Ibid art 16

¹⁹⁹ Ibid, art 5

²⁰⁰ Ibid, ACHPR, art 1

²⁰¹ Ratification Table: African Charter on Human and Peoples' Rights, Uganda available at <http://www.achpr.org/instruments/achpr/ratification/> accessed on 14 October 2014

²⁰² Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa Sept. 13, 2000, CAB/LEG/66.6, here in after [African Protocol on Women's rights] available at <http://www1.umn.edu/humanrts/africa/protocol-women2003.html>

²⁰³ Ibid, African Protocol on Women's Rights, Article 2

security of person.²⁰⁴ Additionally, the Protocol requires states to punish perpetrators and implement rehabilitation and reparation programs for women victims of such violence.²⁰⁵ Articles 2(2) and 4(2) also require states to find strategies to eliminate practices or stereotypes that are based on inferiority or superiority of either sex. However, given that it is a protocol for the protection of women, its provisions like the UN special resolutions focus on women as victims of sexual violence to the exclusion of men.²⁰⁶ It is important to note that the provisions in the Maputo protocol and the ACHPR have been positively interpreted by the African Commission on Human and Peoples' Rights to provide justice to survivors of human rights abuses on the continent. Uganda ratified this protocol on 22 July 2010 and can be held accountable.²⁰⁷

1.2.2 Regional Institutional Mechanisms

The African Commission on Human and Peoples' Rights is established by the African Charter on Human and Peoples' Rights to interpret and safeguard rights provided for in the Charter.²⁰⁸ The Commission is mandated to receive inter-state complaints and complaints from individual and non-governmental organizations alleging violation of rights enshrined in the Charter.²⁰⁹ In regard to conflict-related sexual violence, the Commission has been instrumental in laying principles to hold states accountable. In the case of *Zimbabwe Human Rights NGO Forum vs Zimbabwe*,²¹⁰ the complainant alleged that following the 2000 referendum and the parliamentary elections,

²⁰⁴ Ibid, Article 4(1)

²⁰⁵ Ibid, Art 4(2)e and 4(2)f

²⁰⁶ Ibid Art 4(2) and 4(2) f.

²⁰⁷ Ratification Table: Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, Uganda, available at <http://www.achpr.org/instruments/women-protocol/ratification/> accessed 14 October 2014

²⁰⁸ ACHPR supra note 196. art 30, *see* detailed account on the African Human Right System in Moussa Samb, Fundamental Issues and Practical challenges of Human rights in the Context of the African Union, Annual Survey of Int'l & Comp. Law

²⁰⁹ ACHPR supra note 196, at Art 48 and Art 55

²¹⁰ African Commission on Human and Peoples' Rights, Decisions on Communications 245/02: Zimbabwe Human Rights NGO Forum / Zimbabwe supra note 41.

political violence erupted in Zimbabwe. Supporters of the ruling party Zanu (PF) engaged in acts of murder, rape and kidnap and the government did not provide sufficient security to stop the violence. They further argued that in 2000, the government adopted a clemency order which exonerated persons from criminal prosecution liable for acts committed during that time thus denying victims the right to seek redress.²¹¹

The respondent (the state) argued that it could not be held accountable for acts committed by non-state actors and that the clemency was is an integral part of constitutional democracies.²¹² Commission interpreting the ACHPR stated that the Charter imposes an obligation on the state to prevent violation of human rights by third parties. It then held that, “an act by a private individual not directly imputable to a state can generate state responsibility.....because of the lack of due diligence to prevent the violation or for not taking the necessary steps to provide the victims with reparation.”²¹³ It added that states must therefore “prevent, investigate and punish acts which impair any of the rights recognized under international human rights law and if possible, provide appropriate compensation.”²¹⁴ The Commission in finding the state in violation of article 1 and 7(1) stated that

By enacting the clemency order without putting in place alternative adequate legislative or institutional mechanisms to ensure that perpetrators of the alleged atrocities were punished, and victims of the violations duly compensated or given other avenues to seek effective remedy, the respondent state did not only prevent the victims from seeking redress, but also encouraged impunity, and thus reneged on its obligation in violation of articles 1 and 7 (1) of the African Charter. The granting of amnesty to absolve perpetrators of human rights violations from accountability violates the right of victims to an effective remedy.²¹⁵

²¹¹ The Clemency Order excluded crimes such as murder, rape, robbery, indecent assault, statutory rape, theft and possession of arms.

²¹² African Commission on Human and People’s Rights, Decisions on Communications 245/02: Zimbabwe Human Rights NGO Forum / Zimbabwe supra note 41, at 70 Par 188

²¹³ Ibid, at Par.143

²¹⁴ Ibid, at Par 146

²¹⁵ Ibid, at Par 215

The Commission requested Zimbabwe to investigate the reported crimes, bring those who committed the crimes to justice, and provide victims with adequate compensation.

Although the state was not held accountable for the acts of sexual violence committed by third parties, the Commission laid down two fundamental principles namely: that states can be held accountable for acts of non-state actors and that states are prohibited from using amnesty provisions in the name of reconciliation to deny victims of atrocities the opportunity for redress. By so doing the Commission reflected the position enshrined in United Nations resolution 1820 discussed above. The Commission also clearly points out the need for alternative forms of justice such as compensation for victims of human rights violations.

In the case of *Democratic Republic of Congo vs Burundi, Rwanda, Uganda*²¹⁶, the complainant alleged gross violation of human rights by the respondents forces in the Eastern province of The Democratic Republic of Congo. The complainant alleged that Rwandan and Ugandan forces with the sole aim of spreading sexually transmitted (particularly HIV-AIDS) among the local population committed mass rape in the territory. Although Uganda refuted the claim of spreading sexually transmitted diseases as ridiculous, it did not deny the occurrence of rape. The commission therefore held that the raping of women and girls, as alleged by the complainant and not refuted by the Respondents violated the first additional protocol to the Geneva Conventions, the ACHPR and the Convention on the Elimination of all forms of Discrimination Against Women CEDAW.²¹⁷ The Commission requested that adequate reparations be paid to the DRC on behalf of the victims for the human rights violations that they suffered.

²¹⁶ African Commission on Human and Peoples' Rights, Decisions on Communications, 227/99 Democratic Republic of Congo/ Burundi, Rwanda, Uganda , supra note 40

²¹⁷ Ibid, par 86

Since Uganda is signatory to the ACHPR which establishes the Commission, survivors of sexual violence in Northern Uganda can petition the commission for violation of their rights under the Charter. However, the African Commission as a mechanism of redress raises issues of accessibility of the Commission by the survivors in Northern Uganda, given that majority of the survivors are poor and unable to find the necessary resources to take their complaints to the commission. Even though non-governmental organisations can assist victims in filing these cases, the ignorance about this mechanism in Uganda hinders its use. Further, the decisions of the commission are not binding, thus leaving victims at the mercy of the government.

Another important regional institution is the African Court on Human and Peoples' rights. The court was established by a protocol of the ACHPR to complement and reinforce the mandate of the African Commission.²¹⁸ The court receives complaints from the African Commission, state parties and Intergovernmental organizations. Individuals can only take their complaints to the court after a state has made a declaration accepting the competence of the court to receive the cases.²¹⁹ Unlike the decisions of the African commission, the decisions of the court are binding.²²⁰ Unfortunately, Ugandans cannot make use of this mechanism because Uganda has not submitted a declaration accepting the competence of the court.²²¹

Great Lakes Region Initiatives

At the sub-regional level, leaders of the great lakes region are committed to combating sexual violence. In November 2004 during the International Conference on the Great Lakes Region

²¹⁸ The Protocol to the ACHPR on the Establishment of an African Court on Human and Peoples' Rights, [here in after] protocol establishing the court

<http://africancourt.org/en/images/documents/Court/Court%20Establishment/africancourt-humanrights.pdf>

²¹⁹ Ibid Art 34 (6)

²²⁰ Ibid, Art 28

²²¹ Open Society Foundations, African Court on Human and Peoples' Rights, [Open Society Justice Initiative](http://www.opensocietyfoundations.org/fact-sheets/african-court-human-and-peoples-rights), June 2013 available at <http://www.opensocietyfoundations.org/fact-sheets/african-court-human-and-peoples-rights> accessed 15 October 2014

(ICGLR) the 11 member states adopted the Declaration on Peace, Security and Development in the Great Lakes region.²²² The declaration was aimed at finding solutions to conflicts in the region and addressing sexual violence.²²³ Following this Declaration, the ICGLR in November 2006 adopted the ‘Protocol on the Prevention and Suppression of Sexual Violence against Women and Children.’²²⁴ The Protocol defines “sexual violence any “act which violates the sexual autonomy and bodily integrity of women and children under international criminal law, including, but not limited to Rape, Sexual assault, Grievous bodily harm; Assault or mutilation of female reproductive organs, Sexual slavery and Enforced prostitution.”²²⁵ The protocol focuses on women and girls as victims and potential victims of sexual violence and only sees men as partners in the effort to combat sexual violence against women.

In 2008, the Goma Declaration on Eradication of Sexual Violence and ending impunity in the Great Lakes Region was passed.²²⁶ The Declaration recognizes boys as victim of sexual violence.²²⁷ It highlights the challenges in the formal criminal justice system and seeks to strengthen the formal justice system to effectively handle and prosecute sexual and gender based violence.²²⁸ It emphasizes the need for specialized training for judicial officers, police, prisons

²²² The Declaration was signed by Heads of State and Government from Angola, Burundi, Central Africa Republic (CAR), Democratic Republic of Congo (DRC), Kenya, Rwanda, Republic of Congo, Sudan, Uganda, Tanzania and Zambia.

²²³ Dar-es-salaam Declaration on Peace, Security, Democracy and Development in the Great Lakes Region, December 2004 (Par 6, 27 and 67) available at

http://peacemaker.un.org/sites/peacemaker.un.org/files/041120_DarEsSalaamDeclaration.pdf

²²⁴ Protocol on the Prevention and Suppression of Sexual Violence against Women and Children (30th November 2006) [http://www.internaldisplacement.org/8025708F004BE3B1/%28httpInfoFiles%29/381B8D820A51C229C12572FB002C0C5B/\\$file/Final%20protocol.Sexual%20Violence%20-%20En.pdf](http://www.internaldisplacement.org/8025708F004BE3B1/%28httpInfoFiles%29/381B8D820A51C229C12572FB002C0C5B/$file/Final%20protocol.Sexual%20Violence%20-%20En.pdf)

²²⁵ Ibid art 1(5)

²²⁶ The Goma Declaration on Eradication of Sexual Violence and ending impunity in the Great Lakes region, 18 June 2008, hereinafter Goma Declaration, available at

http://www.norway.go.ug/Global/SiteFolders/webkamp/GOMA_DECLARATION1%20%282%29.pdf ,

²²⁷ Ibid, Preamble and Par 10

²²⁸ Ibid, Par 2&5

and medical personnel in handling victims and cases on sexual violence.²²⁹ In addition to prosecution, the declaration calls for establishment of a reparation fund to assist victims of sexual and gender based violence.²³⁰ While these declarations are important at combating sexual violence and in providing justice for survivors in Northern Uganda they are not legally binding on Uganda.

1.3 Conclusion

International and regional human rights instruments enshrine rights for the protection of all persons (men, women and children) against conflict-related sexual violence in a general perspective. They also impose an obligation on states to protect and promote these rights. In the event of violation, the instruments require states to provide effective redress which according to the UN Human Rights Committee, the African Commission and UN resolutions include compensation, punishment of perpetrators, truth commissions and guarantees of non-repetition.

International and regional institutions have played a vital role in implementing rights enshrined in the legal instruments and holding states accountable to provide redress in the event of violation. Unfortunately however, states and international actors have narrowed down the measures of redress and focused on the use of prosecution through international courts and special courts as a mechanism of justice for survivors of sexual violence, despite the fact that the UN resolutions and UN Human Rights committee and the African Commission provides for other measures such as compensation and truth commissions. This is also clearly evident from the fact that a Special Rapporteur on truth, justice, reparations and guaranteed of non-recurrence was only established in September 2011. Prosecution however is unable to provide effective justice to survivors

²²⁹ Ibid, Par 11

²³⁰ Ibid, Par 18

mainly because these institutions only try a few perpetrators, they do not take into account the psycho-social needs of the survivors and there is no guarantee that a conviction for crimes of sexual violence will be secured before the courts.

Furthermore, the recognition of women as the majority victims of sexual violence at the international and regional levels has led to the enactment of laws and policies which are blind to the plight of male survivors of conflict-related sexual violence. As a result, this has limited the development of holistic approaches to justice there by denying men the appropriate justice.

Uganda has a duty under international and regional law to provide effective remedies to survivors of conflict-related sexual violence. It took steps through referring the situation in Northern Uganda to the ICC. However, given the analysis on the ICC above, Uganda needs to explore alternative justice mechanisms to ensure justice for survivors of conflict-related sexual violence in Northern Uganda.

CHAPTER TWO: AN ANALYSIS OF THE FORMAL DOMESTIC LEGAL AND INSTITUTIONAL FRAMEWORK FOR ADDRESSING CONFLICT-RELATED SEXUAL VIOLENCE IN NORTHERN UGANDA

During the conflict in Northern Uganda, many people experienced sexual violence at the hands of the LRA and the government UPDF soldiers. Hostilities in the region ceased only after the government referred the situation of Northern Uganda to the ICC and the court responded by issuing arrest warrants for the LRA top commanders.²³¹ The issuance of arrest warrants pushed the LRA to the negotiation table and peace talks with the Ugandan government began in South Sudan.²³² The peace talks resulted into the signing of the Agreement on Accountability and Reconciliation signed on 29 June 2007²³³ and the Annexure to the Agreement on Accountability and Reconciliation signed on 19 February 2008.²³⁴

The agreement noted that the violations of human rights committed during the conflict required redress.²³⁵ It proposed redress mechanisms consistent with Uganda's Constitution and international obligations particularly the principle of complementarity in the Rome Statute.²³⁶ Following this, the parties to the agreement endorsed the use of national formal and informal mechanisms of justice to promote justice, reconciliation and accountability with respect to the conflict.²³⁷ In 2008, the parties adopted the annexure to the agreement which laid down a

²³¹ Christopher Mbazira, *supra* note 23, at 204

²³² *Ibid*, at 205

²³³ Agreement on Accountability and Reconciliation between the Government of the Republic of Uganda and the Lord's Resistance Army/Movement, Juba, Sudan 29 June 2007 herein after called the Agreement available at http://www.amicc.org/docs/Agreement_on_Accountability_and_Reconciliation.pdf accessed on 15 March 2014

²³⁴ Annexure to the Agreement on Accountability and Reconciliation between the Government of the Republic of Uganda and the Lord's Resistance Army/ Movement, 19 February 2008 herein after called the Annexure to the agreement <http://www.peaceau.org/uploads/northern-uganda-accountability.pdf> [accessed on 15 March 2014]

²³⁵ The Agreement, *supra* 233, Preamble

²³⁶ *Ibid*

²³⁷ *Ibid*, at Par 2.1 and 5.1

framework for implementation of provisions in the agreement.²³⁸ Unfortunately, the final peace agreement was never signed by Joseph Kony who conditioned his signature to the cancellation of the arrest warrants by the ICC.²³⁹

The government has nonetheless unilaterally embarked on fulfilling the provisions of the agreements through establishing a formal court and a Transitional Justice Working Group (TJWG) in 2008.²⁴⁰ The TJWG established under the Justice Law and Order Sector (JLOS) was charged with developing a comprehensive National Transitional Justice Policy (TJP) to guide the implementation of justice processes proposed in the Agreement.²⁴¹ Its work has resulted into a draft National Transitional Justice Policy (TJP)²⁴² aimed at guiding the development of a comprehensive legal frame work for transitional justice processes in Uganda.²⁴³ The policy also recommends a combination of formal and informal justice processes but also highlights their challenges.²⁴⁴

This chapter discusses the formal criminal justice mechanisms as envisioned in the Agreement on Accountability and Reconciliation and its Annexure and the extent to which these mechanisms deliver justice to survivors.

²³⁸ The Annexure to the Agreement, supra note 234, Preamble

²³⁹ Bruce Baker, supra note 25, at 251

²⁴⁰ International Centre for Transitional Justice, Confronting Impunity and Engendering Transitional Justice Processes in Northern Uganda, 4 (On file),

²⁴¹ Justice Law and Order Sector, National Transitional Justice Policy, 4th Draft July 2013 (on file) herein after referred to as the Transitional Justice Policy.

²⁴² Ibid, The Transitional Justice Policy is now in its 4th Draft

²⁴³ Transitional Justice Policy, supra note 241, at 3

²⁴⁴ Ibid, at 3

2.1 Normative Framework addressing Conflict-related Sexual violence in Northern Uganda

Uganda ratified several international and regional human rights instruments²⁴⁵ including the ICCPR,²⁴⁶ the United Nations Convention against Torture and Other Cruel Inhuman or Degrading Treatment,²⁴⁷ the African Charter on Human and Peoples' Rights²⁴⁸ and the Rome Statute of the International Court.²⁴⁹ In order to implement its international obligations, Uganda domesticated provisions of these international instruments through the Constitution and Acts of Parliament making them directly applicable at the national level.²⁵⁰

The 1995 Constitution of Uganda in its Chapter four introduces fundamental human rights into Uganda's legal system²⁵¹ and gives validity to agreements entered into by the government before and after the coming into force of the constitution.²⁵² Article 21 of the Constitution establishes the right to equality of all persons under the law. Article 24 prohibits torture, cruel, inhuman or degrading treatment²⁵³ while Article 25 provides for freedom from slavery and forced labour.²⁵⁴ Further, Article 33 provides for rights of women and it stipulates that "women should be accorded full and equal dignity of person with men."²⁵⁵ It also prohibits laws, cultures and

²⁴⁵ Some of which have already been discussed in Chapter 1

²⁴⁶ Uganda ratified the International Convention on Civil and Political Rights on 21 June 1995, see https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=iv-4&chapter=4&lang=en accessed 27 March 2014

²⁴⁷ Uganda ratified the Convention on 3 November 1986, see, <http://www.achpr.org/instruments/uncat/ratification/> [accessed 27 March 2014]

²⁴⁸ Uganda ratified the African Charter on Human and Peoples' Rights on 10 May 1986, <http://www.achpr.org/instruments/achpr/ratification/> [accessed 27 March 2014]

²⁴⁹ Uganda ratified the Rome Statute of the International Criminal Court on 14 June 2002, available at http://www.icc-cpi.int/en_menus/asp/states%20parties/african%20states/Pages/uganda.aspx accessed 27 March 2014

²⁵⁰ Uganda is a dualist state, see details in Chacha Murungu & Japhet Biegon, eds, *Prosecuting International Crimes in Africa*, (Pretoria University Law Press 2011), 213 and 285

²⁵¹ The 1995 Constitution of the Republic of Uganda, herein after referred to as the 1995 Constitution (on file) also available at http://www.parliament.go.ug/new/images/stories/constitution/Constitution_of_Uganda_1995.pdf

²⁵² Ibid, Article 287,

²⁵³ Ibid, Article 24

²⁵⁴ Ibid, Article 25

²⁵⁵ Ibid, Article 33(1)

tradition that undermine the dignity and integrity of women.²⁵⁶ The rights of children are also enshrined in Article 34.

Conflict-related sexual violence as experienced by the people in Northern Uganda is a violation of rights enshrined in Uganda's Constitution and requires effective redress. The 1995 Constitution of Uganda in Article 50 provides that any person whose rights are violated can seek redress through the national courts.²⁵⁷ Following this provision, the agreement on Accountability and Reconciliation provided that accountability for crimes was to be achieved through formal criminal and civil justice process applied against those alleged to have committed human rights violations.²⁵⁸ Paragraph 6 provided that formal courts recognized under the Constitution shall preside over these cases.²⁵⁹ Given the nature and magnitude of human rights violations, the parties in the annexure proposed that a special court be established to try individuals that committed serious crimes during the conflict.²⁶⁰

The parties to the agreement were eager to find a domestic remedy to the problems in the region. It is for this reason that they provided for the use of Uganda's courts.²⁶¹ It has been argued that prosecuting international crimes in national courts of post-conflict countries is an effective way of providing justice to victims because these countries usually have easier access to witnesses, evidence and sometimes to the accused.²⁶² Trials at the national level allow victims to participate as witnesses and observers of the justice process and are likely to promote the respect for of rule

²⁵⁶ Ibid, Article 33(6)

²⁵⁷ 1995 Constitution, supra note 251, Article 50(1) of the 1995 Constitution provides that any person who alleges that their rights have been violated or threatened can apply to a court as established by law for redress. Redress may include compensation.

²⁵⁸ The Agreement, supra note 233, at Clause 4.1

²⁵⁹ Ibid Clause 6.1

²⁶⁰ The Annexure to the Agreement supra note 234, at Clause 7

²⁶¹ The Agreement, supra note 233, Clause 5.1

²⁶² Open Society Foundations, Putting Complementarity into Practice: Domestic Justice for International Crimes in DRC, Uganda, and Kenya 2011, 5

of law.²⁶³ The above reasons are partly why the drafters of the Rome Statute enshrined the principle of complementarity.²⁶⁴ Thus in order to fulfill its international obligations to provide effective redress to survivors of sexual violence in Northern Uganda and to honor its commitments under the Agreement on Accountability and Reconciliation, the government of Uganda established the International Crimes Division to try crimes of sexual violence resulting from the conflict.

2.2 The International Crimes Division of the High Court of Uganda

The Constitution of Uganda vests judicial power in the courts of law as established under the constitution.²⁶⁵ These courts of judicature include the Supreme Court- the superior court, followed by the Court of Appeal (which also acts as a Constitutional Court), the High Court and lastly subordinate courts including Magistrates and qhadis' courts.²⁶⁶ Given that the High Court is the only court with unlimited original jurisdiction in all matters,²⁶⁷ the proposed court was to be established as a special division of the High Court to try those alleged to have committed serious crimes.²⁶⁸

In 2008, the International Crimes Division (ICD) (formerly known as the War Crimes Division) was established by the government as a division of the High Court.²⁶⁹ The court did not become operational until 2010 when the International Criminal Court Act (ICC Act) operationalising the

²⁶³ Geoffrey Robertson, *Crimes against Humanity: The Struggle for Global Justice* (2nd edn New Press 2012), 568

²⁶⁴ The Rome Statute, supra note 114, Preamble and Art 17

²⁶⁵ The 1995 Constitution, supra note 251, Art 126

²⁶⁶ Ibid, at Arts 129-138

²⁶⁷ Ibid, Art 137

²⁶⁸ The Annexure to the Agreement, supra note 234, Clause 7-9

²⁶⁹ Asimwe Tadeo, supra note 30, at 4

court was passed into law.²⁷⁰ Following the passing of the ICC Act, the court was formalized and renamed the International Crimes Division (ICD) under the High Court (International Crimes Division) Practice Directions, Legal Notice No.10 of 2011.

The ICC Act domesticates the provisions of the Rome Statute²⁷¹ and gives the ICD jurisdiction over crimes of genocide, war crimes, crimes against humanity and the crime of aggression.²⁷² It largely adopts provisions of the Rome Statute including definitions and penalties for the offences of genocide, crimes against humanity and war crimes.²⁷³ Like the Rome Statute, it rejects immunity as a bar to prosecution for government officials making it possible to try government officials under the Act for crimes committed in Northern Uganda.²⁷⁴ The ICD also has jurisdiction under the High Court Practice Directions over crimes defined in the ICC Act 2010, Geneva Conventions Act 1964 chapter 363 and the Penal Code Act chapter 120.²⁷⁵

The ICD consists of five judges, who sit in a panel of three during proceedings.²⁷⁶ The Court is supported by the Criminal Investigation Department (CID) of the Uganda police which is in charge of investigation and the Directorate of Public Prosecution (DPP) which conducts prosecution.²⁷⁷ The headquarters of the court are in Kampala but during its first court hearing in

²⁷⁰ The International Criminal Court Act No.11 2010 here in after referred to as the ICC Act. The Act does not expressly mention the ICD of the High Court but it gives jurisdiction to the High Court of which the ICD is part. Ibid, Asimwe Tadeo, at 4

²⁷¹ Ibid, the ICC Act, Section 2. Uganda is a dualist country thus international treaties acquire domestic force after their provisions are promulgated into law. For more information on dualist and monist states, see Mwiza Nkhata Implementation of the Rome Statute in Malawi and Zambia; Progress, Challenges and Prospects in Chacha Murungu & Japhet Biegon, eds, Prosecuting International Crimes in Africa, Pretoria University Law Press 2011, 285

²⁷² The ICC Act, supra note 270, Section 2(c), 7, 8 and 9

²⁷³ See Ibid Section 7 defining Genocide, Section 8 defining Crimes against Humanity and Section 9 on War Crimes and *see also* definitions in the Rome Statute, supra note 114, Articles 6,7 and 8

²⁷⁴ Ibid ICC Act, Section 25

²⁷⁵ The High Court (International Crimes Division) Practice Directions, Legal Notice No.10 of 2011, Section 6

²⁷⁶ Justice Law and Order Sector, Frequently asked questions on the International Criminal Division of the High Court of Uganda, http://www.judicature.go.ug/files/downloads/ICD_FAQs.pdf accessed 5 August 2014

²⁷⁷ The 1995 Constitution of Uganda, supra note 251, Art 120(3), The ICC Act supra note 270, Section 17

a matter of *Uganda vs Thomas Kwoyelo*²⁷⁸ concerning the conflict in Northern Uganda, the court sat in Gulu, a district in the Northern region that was largely affected by the conflict.²⁷⁹

The establishment of the ICD is a commendable innovation by the government of Uganda in line with the principle of complementarity and a crucial step towards the realization of justice for survivors of sexual violence. However, despite being a newly established court, the ICD has already encountered challenges that have, and are likely to pose several obstacles in delivering justice to survivors of sexual violence. These include the current amnesty process in Uganda and inadequacies in the legal frame work governing the ICD namely the International Criminal Court Act, the Geneva Conventions Act and Penal Code Act. It therefore remains to be seen whether the court will meet its goal as a mechanism of justice and accountability to deliver the much anticipated justice for survivors of conflict-related sexual violence. The following covers the amnesty process in Uganda and the challenges it poses to the ICD. This is followed by an examination of International Criminal Court Act, the Geneva Conventions Act and Penal Code Act in relation to prosecuting of conflict-related sexual violence before the ICD.

2.2.1 The Amnesty Process in Uganda

The Amnesty process in Uganda presents the first obstacle to effective prosecution of serious violations of human rights before the International Crimes Division. Amnesty is a legal measure aimed at exonerating an individual or class of persons from criminal liability in respect of specific offences as enumerated.²⁸⁰ It is “a pardon, forgiveness, exemption or discharge from

²⁷⁸ Thomas Kwoyelo is alleged a former LRA commander. He was charged with grave breaches under the Geneva Conventions Act and Murder, kidnap with murder, attempted murder and aggravated Robbery under the Penal Code Act. He is not among those indicted by the ICC. See also Frequently asked questions on Thomas Kwoyelo at www.jlos.go.ug accessed on 31 July 2014.

²⁷⁹ Human Rights Watch 2012, Justice for Serious Crimes before National Courts, Thomas Kwoyelo trial at 8

²⁸⁰ Reta E. Raymond, *supra* note 32, at 423

criminal prosecution or any other form of punishment by the State.”²⁸¹ Geoffrey Robertson explains that “pardons and amnesties have been used from time immemorial, benevolently (as a measure of forgiveness to those who have already suffered some punishment for their crimes), politically (to bring to an end civil wars and insurrections) and legally (to absolve convicts who later appear innocent).”²⁸²

In Uganda, the current amnesty process was introduced by the Amnesty Act 2000.²⁸³ The Act was aimed at ending conflicts in Northern Uganda and other parts of the country.²⁸⁴ Notably, the use of amnesty laws in Uganda is not new. The first amnesty law was passed in the 1970’s during President Idi Amin’s regime to encourage those in exile to return home.²⁸⁵ In the 1980s after Museveni took over power, he too used amnesty to persuade opposing forces to surrender.²⁸⁶ The difference however between the 2000 amnesty process and previous ones, is that the Amnesty Act 2000 was a result of lobbying by the victims in Northern Uganda, after military strategies had failed to end the conflict unlike previous amnesties granted during political transition.²⁸⁷

Although spearheaded by elders from Northern Uganda, the Parliament extended the Act to all regions of the country in order to end conflicts that had at the time engulfed the country.²⁸⁸ Specifically for Northern Uganda, amnesty was seen as an instrument of peace and

²⁸¹ The Amnesty Act, 2000 Cap 294, Section 2, herein after, The Amnesty Act

²⁸² Geoffrey Robertson, *Crimes against Humanity: The Struggle for Global Justice* (2nd edn New Press 2012) as quoted by Chacha Murungu in *Prosecution and punishment of international crimes by the Special Court for Sierra Leone*, supra note 250, at 170

²⁸³ The Amnesty Act, supra note 281.

²⁸⁴ Hovil & Lomo, supra note 129, at 6

²⁸⁵ Reta E. Raymond, supra note 32, at 428

²⁸⁶ Ibid, at 428

²⁸⁷ Hovil & Lomo, supra note 129, at 6 *Whose Justice? Perceptions of Uganda’s Amnesty Act 2000: The Potential for Conflict Resolution and Long-term Reconciliation*, Refugee Law Project, February 2005,6

²⁸⁸ Ibid

reconciliation.²⁸⁹ More so, it was in tandem with the traditional conflict-resolution mechanisms of forgiveness and reconciliation valued by the Acholi- the community living in Northern Uganda.²⁹⁰

The Amnesty Act 2000 grants amnesty to “any Ugandan who has at any time since the 26th day of January, 1986 engaged in or is engaging in war or armed rebellion against the government of the Republic of Uganda by actual participation in combat, collaborating with the perpetrators of the war or armed rebellion, committing any other crime in the furtherance of the war or armed rebellion or assisting or aiding the conduct or prosecution of the war or armed rebellion.”²⁹¹ For one to receive amnesty, he/she is required to report to a police unit, army unit or a designated official; renounce and abandon rebellion; and surrender any weapons in his possession.²⁹² Where he/she is in lawful custody or is charged with an offence under the Act, he/she shall be granted amnesty upon renouncing rebellion and declaring his intention to apply for amnesty to a prison officer, a judge or Magistrate before whom he is brought²⁹³ and upon clearance by the Director of Public Prosecutions.²⁹⁴ Those granted amnesty are issued with certificates of amnesty²⁹⁵ and a resettlement package including a mattress, saucepans, blankets and Ug.shs 263,000 by the Amnesty Commission.²⁹⁶

The Amnesty Commission is the institution mandated by the Act to oversee the amnesty process. The Commission is required to monitoring demobilization, re-integration and resettlement

²⁸⁹ Ibid

²⁹⁰ Ibid

²⁹¹ The Amnesty Act, *supra* note 281, Section 3

²⁹² Ibid, section 4(1)

²⁹³ Ibid, Section 4(2)

²⁹⁴ Ibid, Section 4(3) and 4(4)

²⁹⁵ Ibid, Section 4(6)

²⁹⁶ Hovil & Lomo, *supra* note 129, at 68

programs for reporters (persons seeking to be granted amnesty),²⁹⁷ carry out sensitization on amnesty and promote reconciliation in conflict affected areas.²⁹⁸ The act also establishes the Demobilization and Resettlement Team (DRT) whose functions include de-commissioning arms, demobilization, re-settlement and reintegration of reporters.²⁹⁹ This team works under the supervision of the Amnesty Commission.³⁰⁰ An individual who receives amnesty under the Act is exonerated from prosecution or punishment for all crimes committed during the war.³⁰¹

Uganda's concept of amnesty under the 2000 Act has been heavily criticized by those who view it as a blanket amnesty.³⁰² In international human rights law amnesties that cover serious violations of human rights as impermissible.³⁰³ The United Nations High Commissioner for Human Rights re-affirmed this position in 2004 by emphasizing that amnesties that prevent the prosecution of individuals alleged to have committed war crimes, genocide and crimes against humanity are void and impermissible.³⁰⁴ The practice in Sierra Leone demonstrated this position when the United Nations in partnership with the Government established the Special Court of Sierra Leone to counter the amnesty provisions in the Lome Peace Agreement.³⁰⁵

The rejection of blanket amnesties is premised on the argument that respect for humanity necessitates punishment of perpetrators.³⁰⁶ Blanket amnesties are also seen to promote impunity

²⁹⁷ The Amnesty Act, supra note 281, Part 1, Preliminary

²⁹⁸ Ibid, Section 9

²⁹⁹ Ibid, Section 11 and 13

³⁰⁰ Ibid, Section 14(2)

³⁰¹ Ibid, Section 3(2)

³⁰² Kasande S. Kihika, supra note 166, at 45

³⁰³ Reta E. Raymond, supra note 32, at 424

³⁰⁴ Ibid, at 424

³⁰⁵ See William Schabas, The Relationship between Truth Commissions and International Courts: The case of Sierra Leone, Human Rights Quarterly, Volume 25, Number 4, November 2003, 1036

³⁰⁶ Issaka K. Souaré, supra note 135, at 381

and violation of international human rights law.³⁰⁷ However, Lucy Hovil and Zachary Lomo argue that, “[while Uganda’s] amnesty does not fit with ‘conventional’ or western understandings of justice; it would be a mistake to simply write it off as somehow weak or as rewarding impunity.”³⁰⁸ They argue further that the specific context in which the law is passed and applied should be taken into consideration.³⁰⁹

Uganda’s Amnesty is indeed unique because unlike amnesties granted during a political transition, Uganda’s amnesty was not negotiated by rebels to escape prosecution³¹⁰ but by victims who bore the brunt of the conflict.³¹¹ The urgent desire for peace contributed to the adoption of the broad scope of amnesty granting pardon to all combatants. Further, the support for broad amnesty was premised on the fact that majority of the LRA were abducted as children and the belief that limited amnesty would discourage them from returning home.³¹²

Further, unlike other amnesties, the Amnesty Act was passed in isolation of wider transitional processes and it only applied to opponents of the government. In that regard, the constitutional court found that Uganda’s Amnesty is not blanket amnesty since it does not exonerate government soldiers from prosecution and grants the minister powers to declare certain persons ineligible for amnesty.³¹³ Also worth noting is that, Ugandans did not perceive amnesty as a

³⁰⁷ Ibid, 381

³⁰⁸ Hovil & Lomo, supra note 129, at 5

³⁰⁹ Ibid, at 5

³¹⁰ Ibid at 6

³¹¹ Louise Mallinder, Uganda at Crossroads: Narrowing the Amnesty? Working Paper No.1 from Beyond Legalism: Amnesties, Transition and Conflict Transformation, Institute of criminology and Criminal Justice, Queen’s University Belfast March 2009, 3 see also, Hovil & Lomo, supra note 129, at 4-6

³¹² Ibid at 21

³¹³ Judgment, Thomas Kwoyelo alias Latoni vs Uganda, Constitutional Petition No.036/11 (Reference) <http://www.ulii.org/ug/judgment/2011/10>

measure absolving perpetrators of wrong doing because they hoped to use traditional justice mechanisms to address the violations.³¹⁴

Indeed, the Amnesty Act remarkably impacted on the peace process as several LRA fighters abandoned the war and claimed amnesty.³¹⁵ By 2013, over 27,000 individuals were granted amnesty; half of them were part of the LRA.³¹⁶ Initially enacted to last for a period not exceeding six months, the Amnesty Act has undergone several amendments and extensions.³¹⁷ The first amendment in 2002 excluded the possibility of granting a re-offender amnesty except in exceptional circumstances like re-abduction, duress and coercion.³¹⁸ In 2006, the Act was amended to extend the amnesty duration to two years and to exclude persons considered ineligible for amnesty by the Minister of internal affairs.³¹⁹ It provides;

Notwithstanding the provisions of section 2 of the Act a person shall not be eligible for the grant of amnesty if he or she is declared not eligible by the Minister [of Internal Affairs] by the statutory instrument made with the approval of Parliament.³²⁰

This provision was allegedly intended to deny rebel commanders the opportunity of receiving amnesty.³²¹ Unfortunately, the Minister has not by statutory instrument named any category of persons as ineligible for Amnesty.³²² This technically means that all LRA fighters are entitled to amnesty despite crimes committed in the region.

³¹⁴ Louise Mallinder, *supra* note 311 at 2, *see* Ketty Anyeko et al, *Cooling of Hearts: Community Truth-telling in Northern Uganda*, Human Rights Review (2012)

³¹⁵ Reta E. Raymond, *supra* note 32, at 428

³¹⁶ International Centre for Transitional Justice, *supra* note 256 at 3

³¹⁷ Ketty Anyeko et al, *supra* note 314 at 108 *see also* The Amnesty Act *supra* note 281, Part IV

³¹⁸ The Amnesty (Amendment) Act 2006, available at

http://www.beyondjuba.org/BJP1/policy_documents/Amnesty_%28Ammendment%29_Act_2006.pdf

³¹⁹ *Ibid*, Section 16

³²⁰ *Ibid*, Section 2A

³²¹ Louise Mallinder, *supra* note 311 at 24

³²² *Ibid*, at 27

In 2008, the Amnesty Act set to expire that year was renewed for another two years until 2010.³²³ In 2010, the Act was further extended for twenty four (24) months.³²⁴ Finally in 2012, the Act was amended to declare the lapse of amnesty contained in Part II of the Amnesty Act.³²⁵ Interestingly, lobbying by civil society and consultations by the Defence and Internal affairs committee of parliament saw the reinstatement of part II of the Act in May 2013.³²⁶ The constitutionality of the procedure reinstating Part II has however been challenged.³²⁷ Although the constitutional petition is *sub judice*, in the event that the court finds in favor of the petitioners, all amnesty certificates issued after the first lapse of May 2012 will have no legal effect. But for now, Uganda is still granting amnesty to all combatants for all crimes committed during the war. As a result, Uganda's amnesty process is on a collision course with the ICC Act and the Geneva Convention. This was clearly illustrated in first case before the International Crimes Division in relation to the Northern Uganda conflict.

2.2.1.1 The case of Thomas Kwoyelo³²⁸

In 2008, Thomas Kwoyelo an LRA fighter was captured by the government forces in the Democratic Republic of Congo.³²⁹ On 12th January 2010, while in custody, he renounced rebellion before a prison officer and sought amnesty.³³⁰ On 19th May 2010, the Amnesty

³²³ Ibid

³²⁴ The Amnesty Act(Extension of Expiry Period) Instrument, 2010

³²⁵ Statutory Instrument No. 34 of 2012, see also Justice and Reconciliation Project, Who Forgives Whom? Northern Uganda's Grassroots Views on the Amnesty Act, Policy brief (June 2012), 3

³²⁶ Statutory Instrument No.17 of 2013.For reasons of reinstatement , See Refugee Law Project, A Renewed Promise for Peace & Justice: The Reinstatement of Uganda's Amnesty Act 2000, Press release 29May 2013 accessed 21 August 2014 available at <http://www.refugeelawproject.org/resources/press-releases/328-a-renewed-promise-for-peace-and-justice-the-reinstatement-of-uganda-s-amnesty-act-2000.html>

³²⁷ Constitutional petition challenging the reinstatement of Part II of the Amnesty Act 2000(as amended) <http://www.apiluganda.org/constitutional-petition-challenging-the-reinstatement-of-part-ii-of-the-amnesty-act-2000-as-amended/>

³²⁸ Uganda v Thomas Kyowelo alias Latoni HCT-00-ICD- Case No. 02/10

³²⁹ Judgment, Thomas Kwoyelo alias Latoni v Uganda, supra note 313

³³⁰ Ibid,

Commission recommending him for amnesty forwarded his request to the Director of Public Prosecutions (DPP) for clearance but the DPP did not respond to this letter.³³¹ On 6th September 2010, Kwoyelo was indicted with offences under the Geneva Conventions Act and committed to the International Crimes Division.³³²

On 11th July 2011, his trial on an amended indictment consisting of offences under Penal Code Act and the Geneva Conventions Act began.³³³ His counsel requested a constitutional reference arguing that Kwoyelo was entitled to amnesty under the Amnesty Act and his exclusion from amnesty was a violation of his right to equal protection under the law enshrined in article 21(2) of the Constitution.³³⁴ On 22nd September 2011, the constitutional court found in his favor and ordered the ICD to cease trial. The constitutional court noted that failure to grant amnesty to the petitioner was discriminatory since no reasons were given to show that his case was unique from others who received amnesty.³³⁵

The court also went further to explain that the Amnesty Act did not grant blanket amnesty since it did not exonerate government agents from prosecution and also provided for ineligibility of certain persons.³³⁶ It added that indictments against top LRA leaders showed that Uganda is aware of its international obligations.³³⁷ The ICD followed the orders of the Constitutional Court and ceased prosecution. The Director Public Prosecutions however, lodged a notice of appeal

³³¹ The Amnesty Act, supra note 281, section 4(4), Judgment, Thomas Kwoyelo alias Latoni v Uganda, supra note 313

³³² Ibid, Judgment, Thomas Kwoyelo alias Latoni vs Uganda

³³³ Ibid

³³⁴ Ibid

³³⁵ Ibid

³³⁶ Ibid

³³⁷ Ibid

with the Supreme against the ruling and the case is yet to be heard.³³⁸ In the mean time, Kyowelo is still held in detention.³³⁹

Kwoyelo's case is illustrative of the fact that amnesty if not well aligned with other domestic laws hinders effective prosecution of serious violations of human rights. This however does not preclude prosecution by other national and international courts because amnesty does not apply for international crimes or crimes attracting universal jurisdiction. In *Prosecutor vs Kamara* the Appeals Chamber of the Special Court of Sierra Leone in response to a challenge against prosecution before the Special Court on grounds of amnesty concluded that;

[w]hatever effect the amnesty granted in the Lomé Agreement may have on a prosecution for such crimes as are contained in Articles 2 to 4 in the national courts of Sierra Leone, it is ineffective in removing the universal jurisdiction to prosecute persons accused of such crimes that other states have by reason of the nature of the crimes. It is also ineffective in depriving an international court such as the Special Court of jurisdiction.³⁴⁰

Thus those granted amnesty under the Act can still be prosecuted before national courts of other states and international tribunals. Further, prosecution of the former LRA combatants who have been granted amnesty is impossible in Uganda, the Ugandan courts can still proceed against government soldiers and militia since that Act applies to only those engaged in rebellion against the government. In fact, attempts at the making government forces potential beneficiaries in the amnesty process were rejected.³⁴¹

Arguably, the armed forces are unlikely to come before the ICD since the Agreement on accountability and reconciliation provided that state actors shall be subject to existing criminal

³³⁸ Human Rights Watch 2012, supra note 279, at 12

³³⁹ Ibid

³⁴⁰ *Prosecutor v Kamara* as quoted in Chacha Murungu, supra note in Prosecution and punishment of international crimes by the Special Court for Sierra Leone, supra note 250, at 170

³⁴¹ Louise Mallinder, supra note 311, at 22

justice processes and not special processes created under the agreement.³⁴² Since the ICD is a special creation of the agreement, government soldiers may not be tried before it but under the military court system. It however remains skeptical whether the government will genuinely, investigate and prosecute its armed forces for crimes committed in Northern Uganda.

Therefore, until the Minister develops the criteria for ineligibility, the LRA combatants will continue to benefit from amnesty leaving survivors without effective national remedy for crimes. As Uganda grapples with the challenges posed by the amnesty Act, other laws are also likely to present obstacles in prosecuting conflict-related sexual violence given the legal provisions and the nature of the conflict. The following details the possible challenges that the International Criminal Court Act, the Geneva Conventions Act and the Penal Code Act are likely to present.

2.2.2 The International Criminal Court Act

The International Criminal Court Act (ICC Act) of Uganda was enacted in 2010 and commenced on the 25th of June 2010.³⁴³ A debate has however arisen regarding the temporal jurisdiction of the ICC Act and specifically the issue of retrospective application of the law.³⁴⁴ The ICC became operational in June 2010, yet majority of the crimes in Northern Uganda were committed prior to this date-between 1986 to 2006. Uganda should have given the Act retrospective effect to enable prosecution of sexual violence committed in the region given the fact that the crimes against humanity, genocide and war crimes provided for under the Act existed from as far back as the Nuremberg trials.³⁴⁵

³⁴² The Agreement, *supra* note 233, at clause 4.1

³⁴³ ICC Act, Date of commencement 25th June 2010.

³⁴⁴ *Ibid*

³⁴⁵ William Schabas, *An introduction to the International Criminal Court*, Cambridge University Press, 2007, 83-85

Article 28(7) of the 1995 Constitution specifically provides that no person shall be tried and convicted for an act or omission that was not defined as a crime at the time it was committed.³⁴⁶

A similar provision appears in international instruments including the UDHR,³⁴⁷ the ICCPR³⁴⁸ and the ACHPR.³⁴⁹ The principle enshrined in these instruments is the principle of legality relating to non-retrospectivity of laws also known as the *nullum crimen* principle. According to this principle, persons are not to be punished for acts that were not recognized as crimes at the time they were committed. Crimes committed by the LRA in Northern Uganda though not proscribed in Ugandan law as war crimes were already recognized as such in international law binding on Uganda, therefore nothing would have prevented retrospective enactment.³⁵⁰

Further, Sylvie Namwase explains that Uganda unlike other African countries could have passed the Act retrospectively given the fact that Article 28(7) of Uganda's Constitution³⁵¹ does not provide for a strict requirement of proscription under national law.³⁵² The Nigerian Constitution for instance specifically provides that;

...a person shall not be convicted of a criminal offence unless that offence is defined and the penalty therefor is prescribed in a written law, in this subsection, a written law refers to an Act of the National Assembly or a Law of a State, any other subsidiary legislation or instrument under the provisions of a law.³⁵³

³⁴⁶ The 1995 Constitution of Uganda supra note 251

³⁴⁷ UDHR Article 11(2)

³⁴⁸ ICCPR Article 15

³⁴⁹ ACHPR supra note 196, at Article 7(2)

³⁵⁰ ICCPR Article 15(2), The Geneva Conventions of 1949 and Hague 1899 and 1907 have gained the status of International Customary law.

³⁵¹ The 1995 Constitution supra note 251, Article 28(7) "No person shall be charged with or convicted of a criminal offence which is founded on an act or omission that did not at the time it took place constitute a criminal offence.

³⁵² Sylvie Namwase, The principle of Legality and Prosecution of International Crimes in Domestic Courts: Lessons from Uganda, 18-20 http://etd.uwc.ac.za/bitstream/handle/11394/3040/Namwase_LLM_2011.pdf?sequence=1 accessed 31 July 2014

³⁵³ Constitution of the Federal Republic of Nigeria, 1999, section 36(12), in Sylvie Namwase, Ibid

Such a strict requirement of the principle of legality deters states from enacting laws with retrospective effect basing on international law which is not the case for Uganda.³⁵⁴ Uganda should have based on international law and a creative interpretation of Article 28 of the constitution to enact the ICC Act with retrospective application. In the event that the Act is challenged, the court could draw inspiration from the European Court of Human Rights decision in *Kononov vs Latvia*³⁵⁵ where the applicant was convicted for war crimes committed in 1944 under Article 68-3 of the 1961 Latvian Criminal Code a provision introduced into the criminal code by the Supreme Council on 6 April 1993. He argued that his conviction was a violation of articles 7(1) and (2) which prohibited retrospective application of the law. The Grand chamber held "...that by May 1944, war crimes were defined as acts contrary to the laws and customs of war"³⁵⁶ and he should have foreseen the consequences of his actions.³⁵⁷

The failure of the parliament to give the Act retrospective application may not preclude its use because in the alternative, it can be argued that the ICC Act does not create new offences but gives Ugandan courts the jurisdiction to try the offenses already established under international law. However, legal observers state that the judiciary is likely to apply the principle of non-retrospectivity instead of following these arguments and prosecutors are similarly resistant to these arguments.³⁵⁸ It is therefore not surprising that the charges in the Kwoyelo trial were based

³⁵⁴ Ibid, Sylvie Namwase

³⁵⁵ Karoly Bard, Fair Trial Proceedings Before International Criminal Tribunals, Central European University, Kononov v.Latvia , Application no. 36376/04, (on file) Case as available at [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-98669#{%22itemid%22:\[%22001-98669%22\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-98669#{%22itemid%22:[%22001-98669%22]})

³⁵⁶ Ibid, Kononov vs Latvia, at par 202

³⁵⁷ Ibid, Par 223

³⁵⁸ Human Rights Watch, supra note 279, at 15

on the Geneva Conventions Act of 1964 and the Penal code Act of Uganda and not on the ICC Act.³⁵⁹

Another challenge that the ICC Act presents is the lack of efficient provisions for victim protection and victim participation.³⁶⁰ As earlier noted, survivors of conflict-related sexual violence in Northern Uganda face stigma and are afraid of reprisals from perpetrators.³⁶¹ Articles 46 and 58 of the ICC Act provide for victim protection and participation concerning assistance in proceedings before the ICC.³⁶² The ICC Act does not provide witnesses the opportunity to participate in proceedings before the ICD. The Uganda Law Reform Commission is however drafting a witness protection law to address this issue.³⁶³

2.2.3 The Geneva Conventions Act

The Practice directions mandate the ICD to try offences under the Geneva Conventions Act of 1964.³⁶⁴ The Act domesticates provisions of the Geneva Conventions of 1949³⁶⁵ and makes grave breaches enshrined in the Geneva Conventions punishable when committed outside or inside Uganda by any person whatever the nationality.³⁶⁶ Article 2 of the convention in the fourth schedule provides for the protection of civilians during an international armed conflict while Article 3 applies to internal conflicts.³⁶⁷ Since its enactment in 1964, Thomas Kwoyelo was the

³⁵⁹ Uganda vs Kwoyelo Thomas HCT – 00 – ICD- Case No. 02/10

³⁶⁰ The Transitional Justice Policy, *supra* note 257, at Par 40 (i)

³⁶¹ Bruce Baker, *supra* note 25, 249

³⁶² The ICC Act *supra* note 270

³⁶³ Human Rights Watch, *supra* note 279, at 20-21

³⁶⁴ Geneva Conventions Act 1964, Available at <http://www.ulii.org/ug/legislation/consolidated-act/363>

³⁶⁵ The four Geneva conventions are set out in four schedules of the Geneva Conventions Act 1964

³⁶⁶ *Ibid*, section 2

³⁶⁷ *Ibid*, Fourth schedule, Geneva Convention Relative to the Protection of Civilian Person in Time of War of August 12, 1949.

first person to be charged under the Act in 2010.³⁶⁸ Prosecuting crimes and specifically conflict-related sexual violence under the Geneva Conventions presents challenges.

The question as to whether the conflict in Northern Uganda can be classified as an international armed conflict has emerged. Grave breaches under the Geneva Conventions relate to violations committed during international conflicts.³⁶⁹ The ICTY Appeals Chamber affirmed this position in *Prosecutor v Dusko Tadic*.³⁷⁰ By including grave breaches on the charge sheet, the prosecution hopes to argue that the conflict was an international one because of Sudan's involvement.³⁷¹

To prove that a civil war has become international in nature, the prosecution must show that the rebels were acting on the instructions or under the direction or control of Sudan.³⁷² The Appeals Chamber in *Prosecutor Vs Dusko Tadic* explained that "an internal armed conflict may become international if another state intervenes through its troops or one of the participants in the conflict acts on behalf of that state."³⁷³ For a militia, paramilitary or armed force to be considered as acting on behalf of that state or as its de facto organ, "...[the]state must exercise overall control, which may be deemed to exist when the state or party to the conflict 'has a role in organizing,

³⁶⁸ The indictment contained grave breaches including willful killing, taking hostages, and destruction of property, see Human Rights Watch, *supra* note 279, at 11

³⁶⁹ Lindsay Moir, Grave Breaches and Internal Armed Conflicts, 7 *Journal of Int'l Criminal Justice* 763 (2009)

³⁷⁰ International Criminal Tribunal for Former Yugoslavia, *Prosecutor v Tadic* (IT.94-1-A), decision on the defence motion for Interlocutory Appeal on Jurisdiction, 2 October 1995 in Ken Roberts, The Contribution of the ICTY to the Grave Breaches Regime 7 *J. Int'l Crim. Just.* 43 2009, 745

³⁷¹ New Vision, Who Arms the LRA Rebels, March 02, 2004 accessed at <http://www.newvision.co.ug/PA/9/39/343815> on 6 August 2014

³⁷² International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1, available at: <http://www.refworld.org/docid/3ddb8f804.html> [accessed 6 August 2014]

³⁷³ ICTY, Appeals Chamber Judgment, *Prosecutor v Tadic*, (IT-94-1-A), 15 July 1999,Par 84. cited in Ken Roberts, *supra* note 370, at 747

coordinating or planning the military actions of the military group, in addition to financing, training and equipping or providing operational support to that group.”³⁷⁴

Proving that the Sudanese government had a role in organizing, planning and coordinating military actions in addition to arming the LRA will obviously be a tall order for the government which has failed to carry out effective investigations into crimes committed on its own territory.³⁷⁵

Significant however, is that Article 3 of the convention applicable to internal conflicts consists of a similar list of violations as that of under grave breaches. Although not as extensive as the grave breaches provisions, it is submitted that article 3 might offer a better basis for prosecution since proving the conflict as internal one is quite easy. The prosecution should therefore amend the indictment to reflect provisions under article 3. Notable however, article 3 does not list rape or any other form of sexual assault as a serious violation during armed conflicts.³⁷⁶ Therefore sexual violence can only be prosecuted as an element of other offences listed in the article namely cruel treatment and torture; outrages upon personal dignity, in particular humiliating and degrading treatment. The Second Additional Protocol seeks to correct the deficiency in Article 3 by specifically listing rape, enforced prostitution and indecent assault as outrages upon personal dignity.³⁷⁷ Unfortunately Uganda has not domesticated this additional Protocol.³⁷⁸

³⁷⁴ ICTY, Appeals Chamber Judgment, Prosecutor vTadic, (IT-94-1-A), 15 July 1999,Par 137, cited in Ibid Ken Roberts, supra note 370 at 748

³⁷⁵ Open society Foundations, Putting Complementarity into Practice: Domestic Justice for International Crimes in DRC, Uganda, and Kenya 2011

³⁷⁶ The Article lists “violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; taking of hostages; outrages upon personal dignity, in particular humiliating and degrading treatment[...]

³⁷⁷ Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II), Article 49(2)e, <https://treaties.un.org/doc/Publication/UNTS/Volume%201125/volume-1125-I-17513-English.pdf> accessed on 7 August 2014

³⁷⁸ Christopher Mbazira, supra note 23, at 215

Nonetheless, Uganda can still learn the ICTY prosecutors, who when faced with the dilemma of prosecuting sexual violence under article 3 of the Geneva Conventions adopted the strategy of considering rape as an element of other war crimes and grave breaches.³⁷⁹ In *Prosecutor v Zejnir Delalic, Zdravko Mucic and Esad land*, the prosecutor successfully argued that rape constituted torture and the Trial Chamber held that stated that “... rape of any person to be a despicable act which strikes at the very core of human dignity and physical integrity.”³⁸⁰

While prosecuting sexual violence under common Article 3 will offer redress to survivors of sexual violence, it is nonetheless a step backwards given the tremendous progress that has been realized in the jurisprudence on sexual violence in conflict situations. Just as prosecuting conflict-related sexual violence under the ICC Act and the Geneva Convention Act presents challenges, prosecution under the Penal Code Act is equally problematic.

2.2.4 The Penal Code Act³⁸¹

The Penal Code Act (PCA) is the criminal code of Uganda. It encapsulates offences of a sexual nature in a chapter titled offences against morality.³⁸² The offences provided therein include rape, defilement, abduction and detention with sexual intent. Section 123 of the Act defines rape as “unlawful carnal knowledge of a woman or a girl, without her consent, or with her consent, if the consent is obtained by force or by means of threats or intimidation of any kind or by fear of bodily harm...”³⁸³ Rape is punishable by death³⁸⁴ and attempted rape by life imprisonment.³⁸⁵

³⁷⁹ See Richard Goldstone et al, *Engendering Accountability, Gender Crimes Under International Criminal Law*. New England Journal of Public Policy (on file) referring to ICTY, Judgment of the Trial Chamber , Prosecutor v Zejnir Delalic, Zdravko Mucic and Esad land, IT-96-21-T, 16 November 1998,

³⁸⁰ Ibid Richard Goldstone et al, referring to ICTY, Judgment of the Trial Chamber, Prosecutor v Zejnir Delalic, Zdravko Mucic and Esad land, IT-96-21-T, 16 November 1998,

³⁸¹ Penal Code Act of Uganda Cap 120 here in after referred to as PCA

³⁸² Ibid chapter fourteen (XIV)

³⁸³ Ibid, section 123

³⁸⁴ Ibid, section 124

Defilement is defined as a sexual act with a person below (18) eighteen years³⁸⁶ and it punishable with life imprisonment.³⁸⁷ The section creates circumstances in which a sexual act amounts to aggravated defilement punishable by death.³⁸⁸ These situations are; where the victim is below the age of fourteen years³⁸⁹ or a person with a disability;³⁹⁰ where the offender is infected with the Human Immunodeficiency Virus (HIV)³⁹¹ or is a parent or guardian of the victim or a person in authority over the victim,³⁹² or is a serial offender.³⁹³ The PCA also criminalizes abduction and defines it as the forceful taking or detaining of a person against their will with the intent of having sexual intercourse with them.³⁹⁴

The acts committed by the LRA in Northern Uganda constitute offences prohibited under the PCA. However prosecuting conflict- related sexual violence under the PCA presents challenges that are bound to hinder effective justice delivery to survivors because the Penal Code is principally designed to respond to offences committed during peace times. In conflict situations where crimes become the norm it is bound to fail.

During conflict, sexual violence is often indiscriminate and widespread. The mass displacement of people coupled with a breakdown in both judicial and medical facilities make it impossible for victims of sexual violence to report cases and attain treatment or evidence required for prosecution under the PCA. More so, the Act has not been tested in prosecuting conflict-related sexual violence.

³⁸⁵ Ibid, section 125

³⁸⁶ See section 2 of the Penal Code (Amendment) Act 2007 amending the Penal Code Act (on file)

³⁸⁷ Ibid, Section 129(1)

³⁸⁸ Ibid, Section 129(3)

³⁸⁹ Ibid, Section 129(4) (a)

³⁹⁰ Ibid, Section 129(4) (d)

³⁹¹ Ibid, Section 129(4)(b)

³⁹² Ibid, Section 129(4) (c)

³⁹³ Ibid, Section 129(4) (e)

³⁹⁴ Ibid, Section 126

Even though the PCA is used to prosecute conflict-related sexual violence in Northern Uganda, it will be quite strenuous and impossible for the prosecution to obtain evidence to prove each ingredient of the offence nine years after cessation of hostilities; considering that effective investigation into crimes committed has failed.³⁹⁵ Bruce Baker's study in Northern Uganda reveals that many survivors do not know their perpetrators and many of them never reported sexual violence to the medical centers or police because these systems were almost non-functional during the conflict.³⁹⁶ He therefore concludes that thousands of sexual crimes committed in Northern Uganda are beyond punitive justice because of lack of evidence and identifying or finding perpetrators.³⁹⁷

Moreover, the definition of sexual offence under the Penal Code Act is limited to the extent that it recognizes women, girls and boys as potential victims of sexual violence but excludes men.³⁹⁸ Furthermore, while the definition of a sexual act for defilement is comprehensive to include anal rape and rape by objects,³⁹⁹ the definition of rape excludes forced penetration of the anus, mouth and rape by objects and this is instead reduced to the offence of indecent assault which carries a lesser penalty.⁴⁰⁰ It is well known that during conflict sexual abuse of men, anal rape, forced oral sex and rape by objects happens.⁴⁰¹ This means that adult survivors of sexual violence who

³⁹⁵ Bruce Baker, *supra* note 25 , at 251

³⁹⁶ *Ibid*

³⁹⁷ *Ibid*, at 252

³⁹⁸ Refugee Law Project and University of California, Berkeley, School of Law , *supra* note 55, at 53

³⁹⁹ PCA, Section 29(7) (a) and (b) Sexual act for the purposes of these provisions is defined as penetration of the vagina, mouth or anus, however slight, of any person by a sexual organ or object on another person's sexual organ.

⁴⁰⁰ PCA, Section 129(7)b and S. 148

⁴⁰¹ Letter Dated 24May 1994 from the Secretary-General to the President of the security Council http://www.icty.org/x/file/About/OTP/un_commission_of_experts_report1994_en.pdf accessed on 5th March 2014, see also *Prosecutor v Dusko Tadic* and see also for Northern Uganda, Refugee law Project, Video Documentary, "*They slept with me*" at <http://www.refugeelawproject.org/resources/video-documentaries/video/latest/they-slept-with-me.html>

experience anal rape, rape in the mouth and rape by objects are left without redress under the PCA.

Additionally, the title “offences against morality” under which sexual offences lie reinforces gender stereotypes against women as holders of morals. J. Kiggundu rightly states that the title erroneously suggests that these crimes are a moral issue rather than a human rights issue.⁴⁰² Thus describing these offences as moral issues rather than offences against ones physical integrity is a major setback in ensuring justice as victims are blamed for sexual violence meted on them.⁴⁰³ Such perceptions allow for further sexual violence and explain the biased provisions that the PCA contains when it comes to prosecuting sexual offence against women. Bruce Baker explains that because of such perceptions most female survivors blame themselves for their victimization and request for forgiven from their communities.⁴⁰⁴ The stigma and trauma associated with sexual violence has also discouraged victims from reporting in time.⁴⁰⁵

Rules of procedure and evidence enforcing the PCA are biased against women based on the above stereotypes. As a general rule of evidence, the testimony of a single witness is enough to prove a fact.⁴⁰⁶ However, a rule of practice in Ugandan courts requires the testimony of a complainant in sexual offences to be corroborated.⁴⁰⁷ The rationale behind this rule is that women are believed to be liars who make false allegations against men in respect to sexual offences. In *Neville and 5 others Cr, APP. R. 150* the judge commented that:

⁴⁰² J. Kiggundu, How can the International Criminal Court Influence National Discourse on Sexual Violence? Early Intimations from Uganda, 4 *Eyes on the ICC* 45 2007, 49

⁴⁰³ Ugandans shocked as youth MP blames rape victims for indecent dressing, see Press Statement to denounce rape Culture in Uganda, <http://www.uwonet.or.ug/publications/download-info/press-statement-to-denounce-rape-culture-in-uganda/> accessed on 9 Aug2014

⁴⁰⁴ Bruce Baker, *supra* note 25, at 250

⁴⁰⁵ *Ibid* Bruce Baker

⁴⁰⁶ Evidence Act CAP 6, S.133

⁴⁰⁷ J. Kiggundu, *supra* note 402, 50

On a charge of a sexual offence against a woman or girl, the judge should direct the jury in clear and simple language that it is dangerous to convict on the uncorroborated evidence of the complainant, because human experience in the courts had shown that women and girls, for all sorts of reasons and sometimes for no reason at all, tell a false story which is very easy to fabricate but extremely difficult to refute...⁴⁰⁸

Justice Lugayizi however, notes that despite the application of this rule by the courts, no empirical evidence has been adduced to show that women are greater liars than men or are less likely to tell the truth when it comes to sexual offences.⁴⁰⁹ This rule has exposed women to humiliating experiences including requests for virginity tests, subjective examination of the complainant's ability to resist and her previous sexual conduct to prove the complainants credibility.

2.3 Conclusion

The Ugandan government has shown commendable commitment at delivering justice for survivors of sexual violence in Northern Uganda through the formal justice system. The establishment of the International Crimes Division, the enactment of the ICC Act and an attempt at prosecuting one of the alleged perpetrators is a sign of this commitment. Unfortunately the legal technicalities including temporal jurisdiction of the court and amnesty present obstacles to effective justice delivery to the survivors. Uganda's Penal Code Act which provides an additional option to the ICC Act for prosecution of sexual offences has never been tested in prosecution of conflict-related sexual violence.

The lack of evidence, absence of perpetrators and fear among victims coupled with the absence of victim protection laws makes the prosecution of conflict-related sexual violence in the formal justice system an uphill task. The insurmountable challenges that survivors are bound to experience cannot be overemphasized. The discriminatory laws and practices which, do not

⁴⁰⁸ Neville and 5 others Cr, APP. R. 150 in Uganda v Peter Matovu, (Cr.Case No.146 Of 2001), 3 (on file)

⁴⁰⁹ Uganda vs Peter Matovu, Cr.Case No.146 Of 2001,3 (on file)

recognize male rape, require corroboration for sexual crimes reported by females exacerbate the stigma associated with sexual violence and the culture of silence on sex-related issues thus impeding access to justice for survivors.

Despite government's commitment, the formal justice has failed and continues to fail to deliver justice to survivors of sexual violence because no single person has been successfully prosecuted. While the inadequacies in the laws can be addressed through amendment and legal reform, these processes usually take long. In the meantime, survivors of sexual violence continue to experience physical and psychological consequences of the conflict including trauma, stigma and children born out of rape.

The individual experiences of conflict coupled with other effects of the conflict including the loss of loved ones, economic livelihoods and poverty result into multiple layers of trauma which if left unattended, can result in re-occurrence of conflict. Further, even though the formal justice system finally becomes operational, Uganda's Transitional Justice Policy specifically notes that they will not address restoration, reconciliation and healing which are important for survivors.⁴¹⁰

The call for amnesty was a revelation that victims desired to pursue justice through non-punitive means. The challenges in providing justice to survivors of conflict-related sexual violence through the formal justice system call for an exploration into alternative forms of justice as mechanisms of justice to survivors.

⁴¹⁰ The Transitional Justice Policy, *supra* note 241, Par 40 (iii)

CHAPTER THREE: AN ANALYSIS OF ALTERNATIVE JUSTICE MECHANISM IN ADDRESSING CONFLICT-RELATED SEXUAL VIOLENCE IN NORTHERN UGANDA

Alternative justice also referred to as restorative justice is “a process whereby all the parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future.”⁴¹¹ It can also be defined as a “Process of active participation in which the wider community deliberates over past crimes, giving centre stage to both victim and perpetrator in a process which seeks to bestow dignity and empowerment upon the victim, with special emphasis placed upon contextual factor.”⁴¹²

The above definitions show that unlike the formal justice mechanisms, alternative justice mechanisms emphasize dialogue between the offender and the victim and are based on co-operation or collaboration of the parties. They do not only focus on individual liability but take into account the wider community thereby establishing a sense of security in a community for the victim and the perpetrator.⁴¹³ Because these mechanisms take into account both the individual and community concerns, they provide a holistic approach to justice in which a survivor is likely to find a sense of remedy.⁴¹⁴ The commonly known restorative/alternative justice measures include traditional justice, truth commissions and reparations.⁴¹⁵

The parties to the agreement on Accountability and Reconciliation endorsed the use of alternative justice mechanisms as a supplement to the criminal justice process.⁴¹⁶ They provided

⁴¹¹ Chris Cunneen and Carolyn Hoyle, *Debating Restorative Justice* (Hart 2010), 1

⁴¹² Hovil & Joana, *Peace First, Justice Later, Traditional Justice in Northern Uganda*, Refugee Law Project, working paper, No.17, 2005

⁴¹³ Chris Cunneen and Carolyn Hoyle, *supra* note 411, at 15

⁴¹⁴ Kasande S. Kihika, *supra* note 166,

⁴¹⁵ Chris Cunneen and Carolyn Hoyle, *supra* note 411

⁴¹⁶ The Agreement *supra* note 233, at clause 2.1

for the use of traditional justice,⁴¹⁷ Truth-seeking and truth-telling⁴¹⁸ and reparations processes.⁴¹⁹ Uganda has so far used, to small extent traditional justice processes and is yet to implement truth and reparation processes to provide justice to survivors of conflict-related sexual violence. This section explores the above mentioned mechanisms and their effectiveness in providing justice for survivors of conflict-related sexual violence in Northern Uganda.

3.1 Traditional Justice mechanisms in Northern Uganda

Pre-colonial Northern Uganda communities (the Acholi) resolved their conflicts amicably through traditionally established systems firmly rooted in religious beliefs and customs.⁴²⁰ These justice systems were presided over by traditional chiefs who ruled with the guidance of the council of elders.⁴²¹ Although traditional chiefs were supplanted by colonially appointed chiefs during colonialism, their legitimacy was never destroyed.⁴²² In 1995, the Constitution revived their powers as it allowed for re-establishment of traditional and cultural leaders in Uganda.⁴²³

During the conflict, traditional leaders with support of the communities were at the fore of advocating for alternative justice processes particularly traditional justice ceremonies as a measure for reconciliation.⁴²⁴ They supported the use of traditional ceremonies alongside the amnesty process to integrate LRA fighters who claimed amnesty.⁴²⁵ As a result of their lobbying, the Amnesty Act passed in 2000 mandated the Amnesty commission “to consider and promote

⁴¹⁷ Ibid Clause 3

⁴¹⁸ Ibid Clause 7

⁴¹⁹ Ibid Clause 9

⁴²⁰ James Ojera Latigo, Northern Uganda: Tradition-based practices in the Acholi region in *Traditional Justice After Violent Conflict, Learning from African Experiences*, International IDEA, 2008, 102

⁴²¹ Ibid

⁴²² Barney Afako, *Reconciliation and Justice: ‘Mato oput’ and the Amnesty Act*, in *Protracted conflict, elusive peace: Initiatives to end the violence in northern Uganda* <http://www.c-r.org/accord-article/reconciliation-and-justice-%E2%80%9Emato-oput%E2%80%99-and-amnesty-act-2002>

⁴²³ The 1995 Constitution of Uganda supra note 251, Article 246

⁴²⁴ Barney Afako, supra note 422

⁴²⁵ Louise Mallinder, supra note 311, at 21

appropriate reconciliation mechanisms in the affected areas.⁴²⁶ The Amnesty Commission has since supported the use of traditional justice ceremonies in reintegration processes for former combatants.⁴²⁷

Worth noting is that, while the use of traditional justice mechanisms in Northern Uganda started in 2000 under the Amnesty Act way, the 2007 Agreement on Accountability and Reconciliation explicitly recognized their relevance giving them a firm foundation in the justice and accountability processes in the region.⁴²⁸ Clause 3 of the Agreement specifically provided that “traditional justice mechanisms such as Culo Kwor, Mato oput, Kayo cuk, Ailu and Tuno ci koka and others as practiced by affected communities shall be promoted with necessary modifications as a central part of the frame work on reconciliation and accountability.”⁴²⁹ The role of these mechanisms was also recognized in the 4th Draft of Uganda’s National Transitional Justice Policy which noted that these mechanisms play an invaluable role in conflict resolution and are an important complement to the formal justice system.⁴³⁰

These traditional practices enjoy community support and respect because they are easily understood and accessed by the people unlike formal justice mechanisms.⁴³¹ The traditional ceremonies are conducted by community elders at the community, clan and family levels with the principle aim of reconciling the victim and perpetrator.⁴³² According to Cecily Rose, “[t]he dispute resolution process identifies certain behaviors as *kir*, or taboo.[These taboos] may range

⁴²⁶ The Amnesty Act supra note 281, at Section 9(c)

⁴²⁷ 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 2008,359

⁴²⁸ Christopher Mbazira, supra note 23 at 210

⁴²⁹ The Agreement supra note 233, at clause 3

⁴³⁰ The Transitional Justice Policy, supra note 241, at par 41&42

⁴³¹ Kasande S. Kihika, supra note 166, at 57

⁴³² James Ojera Latigo, supra note 420, at 102

from the criminal to the antisocial-violent acts, disputes over resources, and sexual misconduct-including behavior that would prevent the settlement of the dispute. Clans must then cleanse the *kir* through rituals, which help to reaffirm communal values.”⁴³³ Traditional justice processes consist of various stages including investigation, mediation, compensation and reconciliation. These stages allow for full disclosure, acknowledgment, repentance and forgiveness.

The use of traditional justice mechanisms is supported by several scholars who described them as being restorative in nature because of their focus at addressing the wrong and reconciling both the perpetrator and the victim.⁴³⁴ Proponents of these mechanisms also argue that “[these mechanisms] overcome the principle obstacles that deny many people access to formal justice systems...they are quick, accessible, use the local language, follow procedures that are understood by all and are enforced by people who are socially important to litigants. In addition, they avoid cost to individuals and governments that come with formal state systems.”⁴³⁵ Others in support of these mechanisms criticize international imposed criminal institutions as ““one-size fits-all, technocratic and decontextualized solutions”⁴³⁶ and state that lasting peace should be based on ‘the indigenous, societal resources for inter-group dialogue, cooperation and consensus’⁴³⁷

Several traditional ceremonies are conducted in Northern Uganda including “*nyono tong gweno*, (stepping on the egg) intended to welcome family members who have been away from home for

⁴³³ Cecily Rose, *supra* note 427, at 359-360

⁴³⁴ Chris Cunneen and Carolyn Hoyle, *supra* note 411, at 14-15

⁴³⁵ As quoted in ACORD, Protection and Restitution of Survivors of Sexual and Gender Based Violence in Uganda, the legal peculiarities, the possibilities and the option, September 2010, 8

⁴³⁶ Rosemary Nagy as quoted in Augustine S.J. Park, Community-based restorative transitional justice in Sierra Leone Contemporary Justice Review Vol. 13, No. 1, March 2010, 107

⁴³⁷ *Ibid*, at 107

a long time”,⁴³⁸ *mato oput* (drinking of the bitter root) used when a member of one clan kills a member of another clan⁴³⁹ and *gomo tong* (bending the spear) symbolizing “a vow between two conflicting parties to end hostilities.”⁴⁴⁰ The following details the practice of *Mato oput* (*drinking the bitter root*) a commonly written about practice in Northern Uganda.

3.1.1 Understanding the traditional practice of Mato oput (drinking the bitter root)

This practice is based on the Acholi belief in the sacredness of man who should never be killed or injured except for just cause.⁴⁴¹ Thus, when an intentional or accidental killing of a person without just cause happens, it angers the gods and ancestors of the victim.⁴⁴² Immediately the killing happens, the members of the offender’s and deceased’s clans cease eating, drinking or communing together.⁴⁴³ The killer is considered a social outcast and communication between the two clans does not resume because of the bitterness.⁴⁴⁴ In order to reconcile the clans, the council of elders appoints a mediator between the two clans who then organizes talks and co-ordinates payment of “blood money” as compensation.⁴⁴⁵ After payment is done, the elders arrange a ceremony of reconciliation and at this ceremony the killer and the deceased’s next of kin drink from the same vessel, a mixture made of an alcoholic drink and an extract from the bitter *oput* tree.⁴⁴⁶ Elders and family members from both clans also share the drinks and eats. This ceremony

⁴³⁸ James Ojera Latigo, *supra* note 420, at 105

⁴³⁹ Hovil & Joana, *supra* note 412, at 24

⁴⁴⁰ James Ojera Latigo, *at supra* note 420, at 106

⁴⁴¹ *Ibid*, at 103

⁴⁴² *Ibid*

⁴⁴³ *Ibid*

⁴⁴⁴ *Ibid* at 104

⁴⁴⁵ *Ibid*, every killing is atoned through paying money to the clan of the deceased by the clan of the killer. The money paid will be used to marry a woman who will produce children to “replace” the deceased.

⁴⁴⁶ *Ibid*

of drinking and eating together symbolizes the washing away of anger or bitterness between the clans after which social interaction resumes.⁴⁴⁷

Three stages contained in this process are crucial for reconciliation. The “cooling-off period”⁴⁴⁸ when clans cease interacting with each other is aimed at avoid vengeful killing. The investigation and confession process allows for a full account of events and repentance. The compensation stage is a form of acknowledgment and reparation and finally the ritual of drinking the bitter root symbolizes reconciliation.⁴⁴⁹ James Latigo emphasizes that the precursor of all these processes is acknowledgment of wrong doing by the offender.⁴⁵⁰ He states that;

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 only through this voluntary admission of wrongdoing, the acceptance of responsibility, and the seeking of forgiveness, which then opens the way for healing.⁴⁵¹

Given the elaborate processes and stages involved in the practice of *mato oput*, it has been singled out as an appropriate process through which both punitive and restorative justice needs of survivors can be met. The role of traditional justice mechanisms in the aftermath of civil wars was also acknowledged by the Secretary General in his 2004 report when he 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.⁴⁵²

Traditional rituals are currently playing an important role in reintegrating former abductees and rebels in the community but their role in addressing conflict-related sexual violence has not been

⁴⁴⁷ Ibid, at 105

⁴⁴⁸ Ketty Anyeko et al, *supra* note 314, at 111

⁴⁴⁹ Ibid

⁴⁵⁰ James Ojera Latigo, *supra* note 420, at 107

⁴⁵¹ Ibid

⁴⁵² UN Secretary General’s Report, *The Rule of Law and Transitional Justice in Conflict and Post- Conflict Societies*, 2004 cited in Kasande S. Kihika, *supra* note 166, at 54

tested. It is asserted that the stages contained in *mato oput* including acknowledgment and punishments have the potential of addressing the survivors' justice needs.

3.1.2 Traditional Justice Mechanisms as an avenue of justice to survivors of sexual violence

The concepts of acknowledgment of wrongdoing and seeking forgiveness in the traditional justice system as evidenced by *mato oput* are re-empowering for survivors of sexual violence as they open the door for emotional and psychological healing. Quite often, survivors of sexual violence are afraid to speak about their ordeal for fear of disbelief. This silence contributes to the culture of impunity and questioning of whether such violence takes place at all.⁴⁵³

However, traditional justice systems premised on acknowledgment of wrongdoing focuses on the perpetrator and the harm caused instead of the victim. It allows the victim to affirm the fact that a wrong was committed against them and it was not their fault but rather the fault of the perpetrator is no need to be shamed.⁴⁵⁴ According to Martha Minow “many victims conceive of justice in terms of revalidating oneself, and of affirming the sense 'you are right, you were damaged, and it was wrong.’”⁴⁵⁵ These aspects allow survivors to heal and resume their lives in the community.

Further, acknowledgment of wrongdoing is crucial in preventing re-occurrence of such acts. Estelle explains that “...perpetrators, by rejecting responsibilities for their act, allow themselves to dissociate from the crime or even to re-commit their acts.”⁴⁵⁶ Acknowledgment therefore

⁴⁵³ Estelle Zinsstag, *supra* note 34, at 196

⁴⁵⁴ *Ibid*, at 198

⁴⁵⁵ Emily Amick, *supra* note 5, at 73

⁴⁵⁶ Estelle Zinsstag, *supra* note 34, at 196

allows the perpetrator to examine the extent of the harm caused. This, Estelle argues, is likely to result in reform and non-recurrence.⁴⁵⁷

The component of compensation within the traditional justice mechanism of *mato oput* embodies both restorative and retributive aspects of justice which are important for survivors of sexual violence. In the Acholi tradition, paying compensation is a punishment to the perpetrator.⁴⁵⁸ Although no amount of compensation can repair the harm suffered by the survivors, compensation is both a symbolic recognition of the harm done to the victim and a punishment to the perpetrator often desired by survivors.⁴⁵⁹

Moreover, the punishment is not only felt by the perpetrator but his entire clan which must take part in paying compensation.⁴⁶⁰ This community involvement represents condemnation of impunity and support for the victim. It is likely to prevent re-occurrence as clans keep a keen eye on the conduct of their members. In an interview conducted by Lucy Hovil for Refugee Law Project, a retired teacher is quoted to have said:

In Acholi, compensation for the loss of life is not by killing the culprit, but by paying animals. That is why *all* members of a clan, a family, are very much concerned with the behaviour of the members of the family. The problem of one member is a problem of the whole family.⁴⁶¹

Further, while the formal justice system fails to address other issues that arise in post-conflict settings such as co-existence with perpetrators, feelings of vengeance and hatred,⁴⁶² the traditional justice system aimed at bringing the victim and the perpetrator together addresses these. The reconciliation ceremony of *drinking the bitter root* for example symbolizes washing away of bitterness and allows the parties to resume social interaction and co-exist peacefully.

⁴⁵⁷ Ibid, at 196

⁴⁵⁸ Hovil & Joana, *supra* note 412, at 13

⁴⁵⁹ Ibid

⁴⁶⁰ Ibid

⁴⁶¹ Ibid

⁴⁶² Estelle Zinsstag, *supra* note 34, at 190

It is further asserted that given the limited number of alleged perpetrators handled by the formal justice process and the selectivity of cases based on those ‘bearing the greatest responsibility’, traditional justice systems offer a viable option for handling low rank perpetrators. In Rwanda when the national courts were overwhelmed by the vast numbers of alleged perpetrators, the government adapted traditional justice Gacaca courts to try perpetrators including those suspected of committing crimes of a sexual nature.⁴⁶³ In Uganda, the law prohibits traditional systems from adjudicating sexual violence. In the event that this option is considered, reforms within these systems are required as was done in Rwanda.

A few practical concerns have however been raised regarding the effectiveness of these mechanisms. Uganda’s Transitional Justice Policy states that these mechanisms lack a regulatory framework and accountability mechanisms.⁴⁶⁴ Further, acknowledgment of wrongdoing by the offender being a crucial component of this system requires the victim to know the identity of the perpetrator and vice versa.⁴⁶⁵ Many survivors do not know their perpetrator’s identities. Joseph Wesonga explains that “[i]n the context to extra-ordinary crimes characterized by mass killings, displacement and the inability to determine who the victims and perpetrators were, it becomes difficult to differentiate between the domain of the victim’s community and that of the perpetrator.”⁴⁶⁶ This virtually makes acknowledgment and compensation as understood in the traditional system impossible.

⁴⁶³ Emily Amick, *supra* note 5,

⁴⁶⁴ The Transitional Justice Policy, *supra* note 241, Par 43 (i)

⁴⁶⁵ Joseph Wesonga, Exclusion of Women in Post-conflict Peace Processes, *Transitional Justice in Northern Uganda*; in Martha Albertson Fineman and Estelle Zinsstag (eds), *Feminist Perspectives on Transitional Justice* (Intersentia 2013), 264

⁴⁶⁶ *Ibid*, at 264

Further, that the fact that the system is premised on acknowledgment and forgiveness overestimates the ability of the perpetrator to apologize and the victim to forgive. Some perpetrators simply never apologize and some victims may not be ready to forgive. Sarah Kihika explains that these systems place a heavy burden on the victims to forgive and those unwilling to forgive as criticized for being obstacles to peace.⁴⁶⁷

Moreover, their ability to handle complex human rights violations has been questioned. The Justice Law and Order Sector (JLOS) noted that “ [t]he extent of the crime and damage is beyond anything for which these mechanisms were created, or previously used.”⁴⁶⁸ According to Joseph Wesonga, “since *Mato oput* was initially meant to deal with murder cases, the practice did not articulate how it could deal with crimes such as rape, sexual assault and gender based violence that constituted part of the conflict in northern Uganda.”⁴⁶⁹ They thus fail to adequately meet the needs of the victims except with necessary modifications.

Further, the Transitional Justice Policy states that Uganda’s traditional justice mechanisms are male dominated leaving less room for women participation thus reinforcing gender inequalities.⁴⁷⁰ Although there are a few exceptions, women are often absent in these mechanisms and where they are involved their decision making powers are non-existent or severely curtailed.⁴⁷¹ These systems are tailored with little regard to the unique needs of female survivors. Indeed the stigma associated with rape discourages female survivors from reporting in these male dominated settings. Further, the African cultural orientation is such that women are usually comfortable sharing their experiences in an environment of other women. Specifically

⁴⁶⁷ Kasande S. Kihika, *supra* note 166, at 57

⁴⁶⁸ Quoted in ACORD Uganda (2008), *supra* note 435 at 9

⁴⁶⁹ Joseph Wesonga, *supra* note 465, at 264

⁴⁷⁰ The Transitional Justice Policy, *supra* note 241, at Par 43(ii)

⁴⁷¹ Megan Bastick et al, *supra* note 2, at 165

for male survivors patriarchy makes it impossible for them to anticipate these establishments as spaces to share their experiences since issues of male sexual abuse are not even contemplated.

Further, the mode of compensation as traditionally understood under *Mato oput* violates the rights of a girl-child. In the event of an intentional killing, the killer's clan was required to give a girl child aged between 6 and 10 to the victim's clan as a sign of compensation and replacement of the deceased. The use of a girl child as a ransom for the offender's clan is a violation of the girls' rights and an indication of women's lower status in the society.⁴⁷² It is pertinent to note that the agreement on accountability and reconciliation calls for gender sensitive approaches and elimination for gender inequalities in the traditional justice systems. The agreement requires traditional justice mechanisms in the course of performing their functions to take into women, girls and children's needs in order to ensure effective remedy.⁴⁷³ It also calls for the protection of dignity and privacy of women and girls⁴⁷⁴ and their participation in the traditional justice processes not only as victims but as decision makers.⁴⁷⁵ Sarah Kihika rightly notes that effective implementation of these provisions within the traditional justice system requires both the government's political will and continuous monitoring by civil society organization for successful implementation.⁴⁷⁶

3.1.3 Conclusion

Despite these challenges, traditional justice mechanisms provide a justice avenue for survivors of sexual violence which combines both restorative and retributive aspects of justice. They not only focus on punishing the perpetrator but also re-empower the victim through concepts of

⁴⁷² Joseph Wesonga, *supra* note 465, at 265

⁴⁷³ The Agreement, *supra* 233, clause 11(ii) and 12

⁴⁷⁴ *Ibid* clause 11(iii)

⁴⁷⁵ The Agreement *supra* note 233, Clause 11(iv)

⁴⁷⁶ Kasande S. Kihika, *supra* note 166, at 55

acknowledgment, repentance and compensation. They also takes into account the wider community setting in which both the victim and perpetrator live after the conflict. It is therefore asserted that through these components, traditional justice mechanisms provide a holistic approach to justice and cover the gaps left unattended by the formal justice system. Given the concerns raised about these traditional mechanisms transforming them to address justice needs of survivors of conflict-related sexual violence should be a priority because the mechanisms enjoy grass root support and are easily accessible. Since customs are not static, these mechanisms have the ability of transforming into gender sensitive and human rights respecting mechanisms. The Transitional Justice Policy proposes transformation through training of traditional leaders and enactment of a legislation to provide guiding principles.⁴⁷⁷

3.2 Truth-seeking and Truth-telling processes as Alternative Justice Mechanisms

Truth-seeking and truth-telling are non-judicial restorative justice processes used in post-conflict settings to complement the formal criminal justice system.⁴⁷⁸ They are based on the belief that knowing the truth provides closure to survivors and facilitates healing and reconciliation in post-conflict communities.⁴⁷⁹ Michael Scarf asserts that “[n]ational reconciliation and individual rehabilitation are facilitated by acknowledging the suffering of victims and their families, helping to resolve uncertain cases, and allowing victims to tell their story, thus serving a therapeutic purpose for an entire country, and imparting to the citizenry a sense of dignity and empowerment that could help them move beyond the pain of the past.”⁴⁸⁰ Geoffrey Robertson also explains that truth commissions “...offer two distinct prospects to victims; [the prospect] of

⁴⁷⁷ The Transitional Justice Policy, *supra* note 241, at par 65

⁴⁷⁸ Megan Bastick et al, *supra* note 2, at 157

⁴⁷⁹ Mark Freeman and Priscilla B. Hayner, Truth-Telling, In *Reconciliation After A Violent Conflict*, A handbook, International IDEA, 2003, 122

⁴⁸⁰ As quoted by David Mendeloff in Truth-Seeking, Truth-Telling, and Post conflict Peace building: Curb the Enthusiasm, *International Studies Review* (2004) 6,359

truth, learning how and why they and their loved ones were murdered or maimed and [of] reconciliation through understanding and forgiveness of perpetrators or at least those who genuinely confess and regret.”⁴⁸¹ Truth commissions therefore serve a therapeutic value and provide war ravaged communities with an opportunity to move beyond the issues that fueled the conflict.

Indeed, the value of truth-seeking and truth-telling in post-conflict settings has been acknowledged at the international level through the existence of a right known as the Right to truth. The right to truth is enshrined in the International Convention for the Protection of All Persons from Enforced Disappearance (2006),⁴⁸² the United Nations Principles for the protection and promotion of Human rights through Action to Combat Impunity⁴⁸³ and the Basic Principles and Guidelines on the Right to a Remedy and Reparations (2005)⁴⁸⁴ among others. The United Nations Principles to Combat Impunity provide that;

Irrespective of any legal proceedings, victims and their families have the imprescriptible right to know the truth about the circumstances in which violations took place and, in the event of death or disappearance, the victims' fate.⁴⁸⁵

Truth-telling and truth-seeking processes are usually conducted by bodies or institutions known as truth commissions. Truth commissions are “official, temporary, non-judicial fact-finding

⁴⁸¹ Geoffrey Robertson, Truth Commissions and Transitional Justice in Crimes against Humanity: The Struggle for Global Justice, *supra* note 263

⁴⁸² The International Convention for the Protection of all Persons from Enforced Disappearance Doc. 12880 23 February 2012 at http://reliefweb.int/sites/reliefweb.int/files/resources/Full_Report_3564.pdf [accessed on 28th February 2014]

⁴⁸³ United Nations, Econ. & Soc. Council, Comm'n on Human Rights, Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, U.N. Doc. E/CN.4/2005/102/Add.1 (Feb. 8, 2005) <http://www1.umn.edu/humanrts/instree/HR-protection2005.html> accessed 20 August 2014 hereinafter referred to as UN Principles to Combat Impunity.

⁴⁸⁴ Basic Principles and Guidelines on the Right to a Remedy and Reparations A/RES/60/147

⁴⁸⁵ UN Principles to Combat Impunity, U.N. Doc. E/CN.4/2005/102/Add.1 (Feb. 8, 2005) Principle 4, <http://www1.umn.edu/humanrts/instree/HR-protection2005.html> accessed 20 August 2014

bodies that investigate a pattern of abuses of human rights or humanitarian law, usually committed over a number of years.”⁴⁸⁶ They can also be as defined as

...inquir[ies] established by the government pursuant to its international law duty to investigate and to establish the truth about violations and others in the past, such inquir[ies] having duties (interalia) to take evidence from victims to uncover perpetrators and to deliver a public report.⁴⁸⁷

The use of truth commissions in post-conflict states is becoming increasingly common as a result of limitations in the prosecutorial model of justice. By 2012, more than 30 countries had established truth commissions to investigate and document human rights abuses.⁴⁸⁸ In Africa, truth commissions have been used in Uganda, South Africa, Sierra Leone and Rwanda among others.⁴⁸⁹ In Sierra Leone, the Sierra Leone Truth and Reconciliation Commission (SLTRC) was established following the Lome Peace Agreement signed between the Government and the Revolutionary United Front.⁴⁹⁰ It was mandated to; create an impartial historical record on human rights violations experienced during the conflict, address impunity, respond to victims’ needs and promote healing and reconciliation.⁴⁹¹ The SLTRC operated from 2002 to 2004 alongside the Special Court for Sierra Leone established by an Agreement between the government of Sierra Leone Government and the United Nations on 16th January 2002.⁴⁹²

In Rwanda, although not referred to as a truth commission, the Gacaca courts provided an avenue for truth-telling and seeking. Faced with a backlog of genocide cases and overcrowding

⁴⁸⁶ UN Principles to Combat Impunity, U.N. Doc. E/CN.4/2005/102/Add.1 (Feb. 8, 2005) Preamble, Definitions, D <http://www1.umn.edu/humanrts/instree/HR-protection2005.html> accessed 20 August 2014

⁴⁸⁷ Geoffrey Robertson, *supra* note 263.

⁴⁸⁸ *Ibid*

⁴⁸⁹ See Priscilla B Hayner, Fifteen truth commissions 1974 to 1994: A comparative study, 16 *Human Rights Quarterly*, 597, (1994)

⁴⁹⁰ Julissa Mantilla Falcon, Gender violence and masculinities : Sexual violence against Women and the experience of truth commissions in Carolyn M. Elliot (ed), *Global empowerment of women: Responses to globalization and politicized regions* (Routledge 2008), 223

⁴⁹¹ Megan Bastick et al *supra* note 2, 159

⁴⁹² Elizabeth M. Evenson, Truth and Justice in Sierra Leone: Coordination between Commission and Court, 104 *Columbia Law Review*, 738

in the prisons, the Rwandan government turned to its indigenous dispute resolution mechanism of Gacaca.⁴⁹³ The Gacaca court system was based on three principles; decentralizing the justice process, plea bargaining and categorization of offences.⁴⁹⁴ Bert Ingelaere explains that the first two principles facilitated the discovery of truth which was crucial for the transitional justice process in Rwanda.⁴⁹⁵ Phil Clark adds that confession and truth telling was fundamental in the Gacaca courts and suspects found to have confessed to lesser crimes than they had actually committed were given harsher punishments.⁴⁹⁶ Although the issue of whether the truth was actually told remains a subject of debate,⁴⁹⁷ Bert Ingelaere notes ‘it is the repeated act of coming together in the Gacaca sessions, irrespective of what is done there in the sense of content, that seems to have a transformative influence on social relations with those encountered in those meetings.’⁴⁹⁸

In Uganda, the Agreement on Accountability and Reconciliation provided for the use of truth-seeking and truth-telling processes in respect to the conflict.⁴⁹⁹ It stated that an independent and impartial inquiry into the causes of the conflict and human rights violations suffered was an essential pre-condition for reconciliation.⁵⁰⁰ In that regard, the Annexure recommended the establishment of a body to inquire into issues relating to the conflict.⁵⁰¹ Although the agreement

⁴⁹³ Phil Clark, *The Gacaca Courts, Post Genocide Justice and Reconciliation in Rwanda: Justice without Lawyers* (Cambridge University Press 2010), 100

⁴⁹⁴ Bert Ingelaere, *The Gacaca Courts in Rwanda in Traditional Justice and Reconciliation after Violent Conflict, Learning from African Experiences*, IDEA, (2008), 39

⁴⁹⁵ *Ibid*

⁴⁹⁶ Phil Clark, *supra* note 493, at 109

⁴⁹⁷ Bert Ingelaere, *supra* note 494, at 51

⁴⁹⁸ Bert Ingelaere, *supra* note 494, at 54

⁴⁹⁹ The Agreement *supra* note 233, at clause 7.3

⁵⁰⁰ *Ibid*, at clause 2.2

⁵⁰¹ The Annexure to the Agreement *supra* note 234, at clause 4

and annexure did not expressly use the term ‘truth commission’ the functions assigned to the proposed “body” are similar to those of a truth commission.⁵⁰²

It is pertinent to note that this is not the first time that Uganda attempts to the use truth processes after conflict. In 1974 Uganda had her first truth commission established by President Idi Amin.⁵⁰³ “The Commission of Inquiry into 'Disappearances' of People in Uganda since the 25th of January, 1971” was mandated to investigate the numerous allegations of disappearances of persons in the first years of president Amin’s rule.⁵⁰⁴ The commission chaired by a Pakistani expatriate and consisting of two Ugandan senior police officers and one military officer took testimonies from 545 witnesses and recorded up to 308 cases of disappearances.⁵⁰⁵ It boldly attributed human rights violations to government security forces and proposed reform and trainings on citizens’ rights for these forces.⁵⁰⁶ Unfortunately, intimidation and lack of political will prevented implementation of the commission’s report.⁵⁰⁷

Uganda’s second commission was established under the current President Yoweri Kaguta Museveni in 1986. It was known as the Commission of Inquiry into Violations of Human rights and it was mandated to investigate human rights violations from 1962 to January 1986.⁵⁰⁸ The commission chaired by a High Court Judge conducted its sessions in public and had its hearings broadcasted on state-owned television and radio.⁵⁰⁹ Unfortunately the commission suffered

⁵⁰² The functions include; to consider and analyze any relevant matters including the history of the conflict, to inquire into the manifestations of the conflict to inquire into human rights violations committed during the conflict and to held hearings and sessions in public and private. see Annexure to the Agreement supra note 234, at clause 4

⁵⁰³ Cecily Rose, supra note 427, at 375

⁵⁰⁴ Ibid

⁵⁰⁵ Ibid, at 377

⁵⁰⁶ Cecily Rose, supra note 427, at 377

⁵⁰⁷ Ibid

⁵⁰⁸ Hovil and Joana, supra note 412

⁵⁰⁹ Cecily Rose, supra note 427, at 376

limited funding and resources.⁵¹⁰ Its final report was released in 1994 but again due to lack of political will its recommendations have never been implemented.⁵¹¹

The failure of these two commissions has not dimmed the people's hope in truth processes as vital tools for Uganda's national healing and reconciliation. The Agreement on accountability and reconciliation was firm indication of this belief. Indeed as study conducted by the Justice Law and Order Sector (JLOS) discovered overwhelming support for a truth-telling process in Northern and Eastern parts of the country.⁵¹² Their support is based in the belief that the process will among others; illuminate the causes of the conflict, bring about acknowledgment of the harm done and provide symbolic and material reparations for victims.⁵¹³ They also believe that a truth-telling process shall provide a forum for educating the younger generation about the conflict to prevent re-occurrence.⁵¹⁴ Precisely put,

It is important for such information to... be written down in a book so that...all the [younger] generations...know what happened and [they] avoid repeating the same mistakes that were made by their grandparents.⁵¹⁵

Survivors also see truth-telling as a process that will provide closure and prevent future conflicts through addressing crimes committed during the conflict and those bound to arise as a result of the conflict such as land disputes.⁵¹⁶ Cecily Rose however notes that the Acholi appear to desire a truth commission for fact finding and yet they may already know the truth about what happened and who was responsible.⁵¹⁷ Priscilla B. Hayner notes that indeed "the victimized

⁵¹⁰ Ibid at 377

⁵¹¹ International Centre for Transitional Justice, *Confronting the Past: Truth Telling and Reconciliation in Uganda*, ICTJ Uganda Briefing paper (September 2012),4

⁵¹² Justice Law and Order Sector, *Transitional Justice in Northern Uganda, Eastern Uganda & Some Parts of West Nile Region* (2007), 31

⁵¹³ Ketty Anyeko et al, *supra* note 314, at 113-116

⁵¹⁴ Ibid at 113-116

⁵¹⁵ Respondent in interview conducted by Ketty Anyeko et al in 2007, see Ketty Anyeko et al, *supra* note 314, at 114

⁵¹⁶ Ibid, Ketty Anyeko et al, at 114

⁵¹⁷ Cecily Rose, *supra* note 427, at 373

populations are often clear about what abuses took place and who has carried them out”⁵¹⁸ but their desire to know the truth is instead a desire for an acknowledgement of the truth that they already know.⁵¹⁹

Besides being interested in participating in truth-telling processes⁵²⁰ survivors want to have an input in the planning and mandate of the body of inquiry.⁵²¹ They believe that their involvement in the process will assist in identifying the most vulnerable and hard-to- reach victims.⁵²²

Besides the survivors in Northern Uganda, civil society and government actors also support the idea of establishing a truth institution. The Department of Peace and Conflict Studies and Refugee Law Project of Makerere University and other civil society organizations showed their support for this process by drafting a the National Reconciliation Bill 2009 (NRB) proposing the establishment of a truth forum.⁵²³ The Bill gives detailed information on the mandate, structure and appointment of members of the proposed truth forum. It for instance states that the forum shall unlike previous truth commissions address human rights violations from independence in 1962 to the date of assent of the Bill.⁵²⁴ And that the forum shall have powers to interview witnesses, conduct investigations, grant amnesty and make a final report.⁵²⁵ Although drafted in 2009, the National Reconciliation Bill has not yet been tabled before parliament.

⁵¹⁸ Priscilla B. Hayner, *supra* note 489, 607

⁵¹⁹ *Ibid*

⁵²⁰ 90% of those interviewed were in favor of truth processes. Ketty Anyeko et al, *supra* note 314

⁵²¹ Uganda Human Rights Commission and the UN Office of the High Commissioner for Human Rights, *The Dust Has Not Yet Settled” Victims’ Views on The Right to Remedy and Reparation , A Report from the Greater North of Uganda*, 2011,66

⁵²² *Ibid*

⁵²³ See Justice Law and Order Sector, *supra* note 516, at 30 , *see also* copy of the National reconciliation Bill (2009), memorandum in Prudence Acirokop, *supra* note 127, at annexure B322

⁵²⁴ National Reconciliation Bill (2009), memorandum

⁵²⁵ National Reconciliation Bill (2009) Part III, B and Part II, C see copy in Prudence Acirokop, *supra* note 127, at annexure B 322

However, the body anticipated by the community seems to be different from that proposed by civil societies in the National Reconciliation Bill. Civil society proposes a formal body by the government while the truth-telling process described by survivors is one involving their traditional reconciliation process as evidenced by people's reference to compensation and reconciliation through *mato oput* during the truth-process.⁵²⁶ Whichever form is chosen, it should be one that is victim-oriented, locally informed, and allows for truth-telling and dialogue within the communities without fear. Indeed, Proscovia Svård warns on the challenges that such a body will face if it fails to incorporate traditional practices.⁵²⁷ Civil societies in Uganda have also emphasized for the use of bottom-up strategies taking into account communities' views in establishing truth and reconciliation processes.⁵²⁸

3.2.1 Truth and Reconciliation Commissions as mechanisms of justice for Survivors of Sexual Violence

Truth and reconciliation commissions have been instrumental in addressing conflict-related sexual violence. The first commission to deal with cases of sexual violence in Africa is the South African Truth and Reconciliation Commission. The commission was established in 1995 to investigate human rights violations committed during the apartheid era but it had no specific mandate on sexual violence.⁵²⁹ The commission mainly composed of men did not focus on women's experiences during the conflict until the female commissioners and activists insisted on

⁵²⁶ Majority of the respondents spoke of truth-telling processes as entailing traditional practices of *culu kwor* (compensation) and *mato oput* (reconciliation).

⁵²⁷ Proscovia Svård, The international community and post-war reconciliation in Africa: A case study of the Sierra Leone Truth and Reconciliation Commission, *African Journal on Conflict Resolution* journal Home, Vol 10, No 1 (2010), 43

⁵²⁸ Ketty Anyeko et al, *supra* note 314, at 108

⁵²⁹ Julissa Mantilla Falcon, *supra* note 490, at 222

the need to provide specific sessions for women.⁵³⁰ This resulted into three public hearings to highlight women's experiences.⁵³¹

The hearings revealed that whereas men spoke as direct victims of atrocities, women were ashamed of talking about the sexual abuse they experienced and only spoke as relatives or dependants of persons who had experienced the abuse.⁵³² The commission also brought to the fore the reasons why sexual violence was used during the apartheid era. Sexual violence meted against men was a sign of power while that against women was aimed at shaming, humiliating and creating guilt.⁵³³ The commission established the government was responsible for the sexual abuse experienced by women in custody.⁵³⁴

In contrast, the Sierra Leone Truth and Reconciliation Commission had as a specific objective under the Lome peace agreement to investigate sexual abuses during the conflict.⁵³⁵ As a result the commission paid attention to sexual violence during conflict. To enable survivors of sexual violence to open up, the commission consisted of commissioners with previous experience regarding crimes sexual violence and gender balance was maintained through appointment of both female and male commissioners. Special hearings for female survivors were also conducted. The commission also provided recommendations in their 2004 report included a section "Women and the Armed Conflict" highlighting challenges that women face.⁵³⁶ The report made various

⁵³⁰ Ibid

⁵³¹ Ibid

⁵³² Ibid, at 223

⁵³³ Ibid

⁵³⁴ Ibid

⁵³⁵ Ibid 223

⁵³⁶ Megan Bastick et al, *supra* note 2, at 160

recommendations the including specific reparations in form of medical care for survivors of sexual violence.⁵³⁷

For survivors in Northern Uganda, a truth commission will provide an alternative mechanism for survivors who will be left out in the formal justice system there by addressing the limitations arising from the legal aspects of temporal jurisdiction of the ICC and ICD. As earlier noted, the ICC has jurisdiction to try offences that were committed after July 2002 when the Rome Statute came into force.⁵³⁸ The ICC Act of Uganda was enacted in 2010, giving the court jurisdiction to try offences committed from 2010 onwards. Although Uganda's ICC Act might have same temporal jurisdiction as that of the Rome State,⁵³⁹ the courts will still fail to address the needs of those affected by the conflict before 2002 given the fact that the conflict in Northern Uganda started in 1986. On the other hand, the truth commission anticipated is one which will investigate Uganda's conflicts from 1962. Thus all survivors including those that will not be considered by the courts will benefit from the process.

Further, the redress mechanisms of prosecutions and reparations envisaged under the ICC and the International Crimes Division (ICD) can only become effective after the arrest and trial of the LRA. The LRA leaders indicted by the ICC remain while no word has yet been heard about prosecuting those detained in Uganda. Although the presence of the LRA leaders is desirable for a proper truth and reconciliation process to occur, it is not a determining factor. A truth commission can still conduct hearings and make recommendations for reparations based on testimonies with survivors and former combatants already reintegrated in the communities.

⁵³⁷ Ibid

⁵³⁸ The Rome Statute, *supra* note 114, Article 11

⁵³⁹ see discussion on ICC Act *supra* 270, above

Furthermore, it will investigate violations by both the LRA and UPDF (government forces) in Northern Uganda. Currently, there is no prosecution against government forces before the International Criminal Court or the International Crimes Division. While criminal prosecution of UPDF soldiers remains unlikely, a truth-telling process will provide an opportunity for a balanced approach to justice where both sides including the UPDF to be held accountable crimes committed. In Northern Uganda, Victims see a truth-telling as a process where LRA, UPDF and the communities will sit to discuss the cause of the conflict, the effects and possible compensation.⁵⁴⁰ At the very least, a truth commission will recommend reforms in the military and other security forces to allow for sustainable people in the region and the country at large.⁵⁴¹

A truth commission will provide survivors a platform through which their issues and needs are heard. Richard Goldstone explains that, “the public and official exposure of the truth is itself a form of justice and it does not matter whether that exposure takes place in criminal or civil proceedings.”⁵⁴² Emily Amick describes her interview with a rape survivor, who had appeared before a gacaca court in the following words,

She said that she remembers her heart skipping as she faced him [the perpetrator], but felt happy that he could never take away her pride. She now feels confident that justice was done.⁵⁴³

Sharing their experiences and attributing blame to the perpetrators in these fora, gives survivors a sense of justice and re-empowerment. Other survivors say that upon speaking out, they feel “set free.”⁵⁴⁴ Survivors of sexual violence seek acknowledgement of their pain and suffering.⁵⁴⁵ In Northern Uganda, survivors have stressed the need for documentation of violations in against

⁵⁴⁰ Ketty Anyeko et al, *supra* note 314, at 116-117

⁵⁴¹ Cecily Rose, *supra* note 427, at 374

⁵⁴² Quoted by David Mendeloff, *supra* note 480, at 360

⁵⁴³ Emily Amick, *supra* note 5, at 73

⁵⁴⁴ *Ibid*

⁵⁴⁵ *Ibid*, at 72

children and women in a public national record.⁵⁴⁶ Through taking testimonies of the victims and holding public hearings the commission provides a public voice to the survivors while obtaining a detailed account of the violations. Acknowledgment of the suffering serves to condemn the acts and facilitates healing for the victims.

Truth commissions also address issues that are never covered in the formal criminal justice processes such as co-existence with perpetrators, health complications and stigma within the society. The Sierra Leone Truth and Reconciliation Commission (SLTRC) addressed psychosocial and physical needs of survivors and pre-conflict gender inequalities. The SLTRC after listening to several accounts of survivors of sexual violence recommended health service provision to survivors including gynecological operations, HIV testing and treatment and Psycho-social support.⁵⁴⁷ It also proposed reforms including abolition of discriminatory laws and practices to address the structural inequalities which hampered the survivors' recovery.⁵⁴⁸

Pertinent to note is that sexual violence against women in conflict reflects pre-existing gender inequalities which become exacerbated during conflict. Statements such used by perpetrators of sexual violence on male survivors reveal the lower status ascribed to women. One male survivor stated that their male perpetrators during the attack said to them "We are going to show you that you are women, that you are not men like us"⁵⁴⁹ Truth commissions through allowing victims to break the silence on their victimization assist in revealing the gendered nature of these

⁵⁴⁶ Uganda Human Rights Commission and the UN Office of the High Commissioner for Human Rights, *supra* note 521, at XVI

⁵⁴⁷ Megan Bastick, et al, *supra* note 2, at 161

⁵⁴⁸ UN Women, *A window of opportunity? Making Transitional Justice Work for Women*, September 2010, 12(on file)

⁵⁴⁹ Refugee Law Project, *Gender against Men*, accessed on 6th September 2014, at <http://www.refugeelawproject.org/index.php/resources/videodocumentaries/video/latest/gender-against-men.html>

violations.⁵⁵⁰ According to Estelle Zinsstag, “Visibility and acknowledgement are two concepts established as paramount for a more adequate approach to sexual violence but they have been traditionally ignored.⁵⁵¹ By encouraging community participation and making recommendations, truth commissions contribute to changing traditional attitudes towards women and men which will in the long run prevent non-recurrence. Indeed like Hudson points out, “Victims may want offenders punished but in many cases, they simply want the behavior to stop.”⁵⁵²

3.2.3 Conclusion

A truth-telling process will adequately address the restorative needs of survivors of sexual violence in Northern Uganda through providing a platform for victims to share their experiences, and for the community and perpetrators to acknowledge their suffering. A truth process also provides remedies to survivors who might not be able to testify before the courts due to challenges that they encounter in the formal justice system including temporal jurisdiction, limited number of prosecutions and fear of reprisals. While not all survivors will participate in the truth-telling process, the process will not deny them redress because the collective recommendations made by truth commissions benefit all survivors including those who do not testify.

Since the LRA commanders indicted by the ICC remain at large, the process will provide alternative justice to the survivors through providing a public platform and making recommendations for reform and reparations. In order to meet specific justice needs of survivors, the mandate of the truth commission should require investigation of sexual violence as a specific

⁵⁵⁰ Chandra Lekha Sriram and Suren Pillay, *Peace versus Justice : The Dilemma of Transitional Justice in Africa* (University of KwaZulu-Natal Press 2010), 153

⁵⁵¹ Estelle Zinsstag, *supra* note 34, at 195

⁵⁵² Quoted by Estelle Zinsstag, *supra* note 34, at 201

violation and not under a generalized definition of gross violations of human rights. It is also important to have a victim-centered and gender sensitive process. This can be achieved through appointing both male and female commissioners with prior experience in dealing with gender crimes.

The presence of female commissioners will allow female survivors to open up, since practice has shown that they are more comfortable with female commissioners.⁵⁵³ Victim protection measures such as *camera* proceedings and ‘women or men only hearings’ should also be put in place to protect survivors who might be afraid to speaking out as was done in Sierra Leone. The success of a truth process requires both communal and political support therefore the communities and government should work together to establish a process appreciated and accepted by both parties.⁵⁵⁴

3.3 Reparations as a justice mechanism for survivors of sexual violence

The truth is not enough. When the truth has been told and the perpetrator has accepted his mistake, then he must also fulfil [sic] cultural demands. He must go ahead to culo kwor (**compensate**) ... (emphasis mine).⁵⁵⁵

Reparations “are measures that are intended to ‘repair’—to redress past harms, in particular the systematic violation of human rights that are commonly associated with periods of conflict or repression.”⁵⁵⁶ These measures are either material or symbolic. Material measures include provision of education and health services, infrastructure re-development as well as compensation in monetary terms⁵⁵⁷ while symbolic reparations consist of apologies, memorials

⁵⁵³ Binaifer Nowrojee, *supra* note 6

⁵⁵⁴ The Transitional Justice Policy, *supra* note 241, par 49 (on file)

⁵⁵⁵ A quote from Ketty Anyeko et al, *supra* note 314, at 117

⁵⁵⁶ UN Women, *supra* note 548, at 19

⁵⁵⁷ Uganda Human Rights Commission and the UN Office of the High Commissioner for Human Rights, *supra* note 521, at 16

and national commemorations.⁵⁵⁸ Reparations generally constitute the five elements of “restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.”⁵⁵⁹ Restitution is aimed at “whenever possible...restor[ing] the victim to their original position before the violation occurred.”⁵⁶⁰ It includes restoration of liberty, property and lost employment.⁵⁶¹ Compensation involves monetary payment for loss incurred or harm suffered as a result of human rights violations.⁵⁶² Rehabilitation on the other hand refers to services availed to victims to redress that harm suffered. These may include medical, psychological and legal services.⁵⁶³ Satisfaction includes public apology, punishing of perpetrators and commemoration of victims⁵⁶⁴ while guarantees of non-repetition are mechanisms aimed at preventing, monitoring and resolving conflicts.⁵⁶⁵

International and regional legal frameworks acknowledge the role of reparations through the recognition of the right to reparations for victims of serious violations of human rights.⁵⁶⁶ The UN Basic Principles and Guidelines on the Right to a Remedy and Reparations specifically provide for the right to “...adequate, effective and prompt reparation for harm suffered [and] access to relevant information concerning violations and reparation mechanisms”⁵⁶⁷ for victims of gross violations of Human rights. The Secretary General in his report on *an in-depth study on all forms of violence against women* affirmed this position by stating that “...the right to a

⁵⁵⁸ Ibid

⁵⁵⁹ UN Basic Principles and Guidelines on the Right to a Remedy and Reparations A/RES/60/147, principle 9

⁵⁶⁰ Ibid, Principle 19

⁵⁶¹ Ibid, Principle 19

⁵⁶² Ibid, Principle 20

⁵⁶³ Ibid, 21

⁵⁶⁴ Ibid 22(e) and 22(g)

⁵⁶⁵ Ibid 22(g)

⁵⁶⁶ See international and regional frame work for addressing sexual violence in Chapter 1

⁵⁶⁷ UN Basic Principles, principle 7

remedy should include access to justice; reparation for harm suffered; restitution; compensation; satisfaction; rehabilitation; and guarantees of non-repetition and prevention.”⁵⁶⁸

In Uganda, justice is not done unless the victims, their families and communities receive reparations or some form of compensation from the perpetrators.⁵⁶⁹ It is for this reason that the Agreement on Accountability and Reconciliation endorsed the use reparations as a justice mechanism for victims of human rights violations in Northern Uganda. It specifically provided for the use material measures such as compensation, restitution and rehabilitation, and symbolic measures such as apologies, memorials and commemorations.⁵⁷⁰ In line with the fundamental tenet in international law that reparations should directly benefit victims,⁵⁷¹ the agreement provided for individual reparations⁵⁷² but also endorsed the use of collective reparations⁵⁷³ while emphasizing priority for members of vulnerable groups.⁵⁷⁴

The Agreement provided an additional framework for reparations in Uganda given the fact that Articles 50 and 52 of the 1995 Constitution already provided the legal and institutional framework for reparations. Article 50 provides that “[a]ny person, who claims that a fundamental or other right or freedom guaranteed under this Constitution has been infringed or threatened, is entitled to apply to a competent court for redress which may include compensation.”⁵⁷⁵ The reparation measure here is compensation through a court system. Additionally, Article 52 gives

⁵⁶⁸ United Nations General Assembly, In-depth study on all forms of violence against women, Report of the Secretary General, 2006, 269, cited in Megan Bastick et al, *supra* note 2, at 158

⁵⁶⁹ The Transitional Justice Policy, *supra* note 241, at Par 51

⁵⁷⁰ The Agreement *supra* note 233, clause 9.1

⁵⁷¹ Uganda Human Rights Commission and the UN Office of the High Commissioner for Human Rights, *supra* note 521 at 15

⁵⁷² The Agreement *supra* note 233, Clause 9.2

⁵⁷³ *Ibid* Clause 9.2

⁵⁷⁴ *Ibid*, Clause 9.1

⁵⁷⁵ The 1995 Constitution of Uganda *supra* note 251, Art, 50(1)

the Uganda Human Rights Commission the mandate “to recommend to Parliament effective measures to promote human rights, including provision of compensation to victims of violations of human rights or their families.”⁵⁷⁶

The physical, psychological and socio-economic damage experienced by the people of Northern warrants reparation from the Government and the LRA. Studies in the region have revealed that the communities’ desire for reparations for the serious violations of human rights committed in the region.⁵⁷⁷ The serious violations as listed by the communities include killings, torture, forced marriages and sexual violence.⁵⁷⁸ Besides the serious violations, the communities also want reparations for lost land and damage to their cultural heritage.⁵⁷⁹ The forms of reparations envisaged range from financial compensation to educational services.⁵⁸⁰ Although no amount of remedy can ever repair the harm suffered by victims, reparations represent an acknowledgement of the suffering experienced by victims and a condemnation of the violations. Reparations have been described as “the most victim-centred justice mechanism available and the most significant means of making a difference in the lives of victims”⁵⁸¹ because they endeavor to address victims’ pain and suffering materially, morally and symbolically.⁵⁸²

⁵⁷⁶ Ibid, Art 52(1)d

⁵⁷⁷ See Uganda Human Rights Commission and the UN Office of the High Commissioner for Human Rights, *supra* note 521

⁵⁷⁸ Ibid, at 38

⁵⁷⁹ Ibid, at 38-39

⁵⁸⁰ International Centre for Transitional Justice, *supra* note 176, at 5

⁵⁸¹ U.N. Secretary-General Report on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies(2011), par 26 quoted by Ruth Rubio-Marin, *Reparations for Conflict-related sexual and reproductive violence: A decalogue* 19 Wm. & Mary J. Women & L. 69 2012-2013, 73

⁵⁸² UN Women, *supra* note 548 at 19

Despite the overwhelming need for reparations and numerous calls to the government to provide reparations the government's response has been rather slow and limited.⁵⁸³ The Transitional Justice Policy attributes this to the absence of a reparation policy to guide government.⁵⁸⁴ As a result of these delays some victims in 2009 sought legal redress for the loss of property through an organization called Acholi War Debt claimants. The government in 2009 reached an out of court settlement to compensate the claimants for loss of animals, houses and vehicles at the hands of government soldiers between 1986 and 1989.⁵⁸⁵ The government has currently paid Ug.shs 6.7 million out of Ug.shs 35 million demanded by the group.⁵⁸⁶ Notable however, this compensation is only for loss of property and not any other violations suffered during the conflict.

The Transitional Justice Policy also notes that the other challenges affecting implementation of reparations include absence of a comprehensive process on children born of rape in captivity, unaddressed psycho-social problems that are hindering reintegration and land conflicts as a post-conflict issue.⁵⁸⁷ Despite the delays and challenges, the government has undertaken some initiatives.

In 2007, the Government initiated the Peace Recovery and Development Plan (PRDP) with the aim of rebuilding infrastructure in the war affected communities and promoting economic

⁵⁸³ Daily Monitor, 'Compensate Northern war victims' Dec 4, 2010 <http://www.monitor.co.ug/News/National/-/688334/1065988/-/ckk0twz/-/index.html>

⁵⁸⁴ The Transitional Justice Policy, supra note 241, at Par 53(i) (on file)

⁵⁸⁵ Acholi Times, Acholi war debt claimants in fresh battle with government over compensation, Monday, August 25 2014 accessed 7 September 2014 <http://www.acholentimes.com/index.php/acholi-news/2576-acholi-war-debt-claimants-in-fresh-court-battle-with-government-over-compensation>

⁵⁸⁶ Ibid

⁵⁸⁷ The Transitional Justice Policy, supra note 241, at Par 53

development.⁵⁸⁸ Under the PRDP and the Northern Uganda Social Action Fund (NUSAF), the government constructed courts, police stations and started income generating activities thus improving the people's welfare.⁵⁸⁹ The International Centre for Transitional Justice however noted that although some objectives under the reconstruction plans address survivors' reparation needs, they are not reparatory in nature because they are based on development rather than acknowledgment and repairing of harm the core tenets of reparations.⁵⁹⁰

In January 2014 during the National Resistance Army/Movement (NRA/NRM) 28th Liberation Day anniversary, the President Museveni publicly apologised for killings committed by the government soldiers in the region during the late 1980s and early 1990s.⁵⁹¹ The apology although long overdue was a symbolic measure which is crucial for justice and reconciliation in the region.⁵⁹² Unfortunately the apology did not cover crimes of sexual violence committed during the conflict and it was limited to crimes committed during the late 1980's and early 1990's.

The government and several civil societies have also undertaken extensive research to guide the government in providing comprehensive reparations. Between 2007 and 2011 the Uganda Human Rights Commission and the UN Office of the High Commissioner for Human Rights conducted extensive studies on reparations. In a study comprised of victims of sexual violence, forced wives and mothers of children born out of forced marriage in captivity, the victims were

⁵⁸⁸ Ibid, at Par 52 (on file) *see* details on Uganda's PRDP process in Jonathan Marino, Is PRDP Politics as Usual? Update on the Implementation of Uganda's Peace Recovery and Development plan, Beyond Juba, Briefing Note No.2 December 2008.

⁵⁸⁹ International Centre for Transitional Justice, *supra* note 176, at 5

⁵⁹⁰ Ibid at,5

⁵⁹¹ See, Moses Walubiri, President's NRA apology late, says Bigombe New Vision 1st February 2014 accessed 7 September 2014, <http://www.newvision.co.ug/news/652026-president-s-nra-apology-late-says-bigombe.html>

⁵⁹² Ibid, *see also*, Lino owor ogaro, There's need for an official apology for NRA Atrocities, Daily Monitor, Saturday 1st February 2014

in favor of financial compensation.⁵⁹³ They wanted it to be given directly to individuals rather than through traditional leaders or family heads.⁵⁹⁴ Individual reparation is important because it allows victims to make decisions on how to use the reparation resources.⁵⁹⁵ Further, the victims unequivocally stressed the need for the government to publicly acknowledge the harm suffered before reparations are given.⁵⁹⁶

The International Centre for Transitional Justice in 2012 also carried out a training aimed at determining finding the best way to meet survivors' reparative needs. At this training, participants singled out victims of physical and mental disabilities and survivors of sexual violence as being specifically vulnerable because of the physical ailments, social stigma and trauma as a consequence of the conflict.⁵⁹⁷ According to Ruth Rubio, meaningful reparation can only be provided if attention is paid to the notion harm and categories of victims.⁵⁹⁸ She however emphasizes that "the focus on harm should not translate into an attempt to measure harm for the sake of compensating proportionately" but rather aid the process of determining prioritizing of violations and ascertaining the best redress mechanism given the large scale of victims and victim needs.⁵⁹⁹ The findings from this workshop provide a good starting point for the government given the large number of victims.

However, in March 2014, survivors after growing weary of waiting for government's reparation plans petitioned the parliament for an urgent gender reparations fund. They proposed the inclusion of free health care services, livelihood skills and individual and collective reparations

⁵⁹³ Uganda Human Rights Commission and the UN Office of the High Commissioner for Human Rights, *supra* note 521, at 75

⁵⁹⁴ *Ibid*

⁵⁹⁵ *Ibid*

⁵⁹⁶ *Ibid*, at 72

⁵⁹⁷ International Centre for Transitional Justice, *supra* note 176, at 3

⁵⁹⁸ Ruth Rubio-Marín, *supra* note 581, at 74

⁵⁹⁹ *Ibid*

in the proposed reparation policy.⁶⁰⁰ On 9 April 2014, parliament adopted a resolution urging the government to establish a gender-sensitive reparation fund offering reparation to both women and men affected by the conflict.⁶⁰¹ Nonetheless, the parliamentary resolution, the studies conducted by government and civil society and the reparations policy being developed by the Justice Law and Order sector are positive steps towards the achievement of justice by survivors of conflict-related sexual violence in the region.

3.3.1 Reparations as an avenue for Justice to Survivors of conflict-related sexual violence in Northern Uganda

They come back from their experiences pregnant and HIV positive and it is difficult to counsel them. They often threaten to kill the person who raped them as well as the child . . . I cared for a girl who wanted to kill her child conceived from rape and eventually she delivered but she threatened healthcare staff and was difficult to treat as she wanted to kill everyone. (Interview, December 2009)”⁶⁰²

For survivors of sexual violence, reparations provide an opportunity through which their unique needs including as medical and psycho-social needs can be addressed. Whereas the formal justice system may provide compensation to victims of sexual violence, it may not pay attention to the physical, psychological and economic consequences the violence has on the victim. Many survivors in addition to physical and psychological trauma contracted sexually transmitted diseases and experience gynecological problems.⁶⁰³ Estelle explains that:

...unlike victims of sexual violence in peace times, victims of sexual violence during conflict may have to deal with an accumulation of traumatic events such as the loss of relatives or the loss of a home. For that reason, the consequences may be even more difficult because of the potentially multi-layered trauma. Sexual violence may affect the whole life of the victim and she

⁶⁰⁰ LRA War Affected Women Push For Gender Reparations Fund <http://ugandaradionetwork.com/a/story.php?s=61925>

⁶⁰¹ International Centre for Transitional Justice, “My healing has begun: Uganda votes to provide gender sensitive reparation fund accessed 9th September 2014 <http://www.ictj.org/news/uganda-gender-sensitive-reparations-fund>

⁶⁰² Interview taken by Bruce Baker, *supra* note 25, at 250

⁶⁰³ For details *see* Kiyanda Eugene et al, *supra* note 22

may not be able to recover her prior existence concerning her physical and psychological well being but also her relation to the others around her.⁶⁰⁴

Thus a combination of material and symbolic reparation measures are capable of addressing the special needs of the survivors and restoring them to their earlier position before the violations occurred. Also worth mentioning is that many survivors in Northern Uganda do not know the perpetrators or their whereabouts. Those who do might be afraid to speak for fear of retaliation and stigmatization.⁶⁰⁵ Reparations are an inclusive form of remedy which recognizes victims regardless of existence of the perpetrator or knowledge of the identity of perpetrator.

Majority of the people in Northern Uganda lost their livelihoods during the conflict and the conflict left the region impoverished. Survivors of sexual violence like other victims of the conflict face economic hardship. Economic assistance in form of individual monetary compensation and collective compensation through reconstruction of infrastructure will alleviate the harm that survivors face. Further, where perpetrators have no money to compensate victims, their participation in the building infrastructure will comprise symbolic reparation.⁶⁰⁶

Acknowledgment of responsibility and harm suffered by victims of human rights violations is an essential component of reparations. In Northern Uganda, survivors of conflict-related sexual violence experience social stigma and ridicule. Symbolic reparations in form public acknowledgment and apology by the government would amount to recognition of the harm that victims have suffered and a condemnation of such acts of violence. Survivors of sexual violence

⁶⁰⁴ Estelle Zinsstag, *supra* note 34 at 193-194, *see also* consequences of conflicts of survivors in Ruth Rubio-Marin, *supra* note 581, at 75

⁶⁰⁵ Bruce Baker, *supra* note 25

⁶⁰⁶ Kasande S. Kihika, *supra* note 166, at 71

expressly stated that “public acknowledgement and apology is important because it is essential to stopping the blame, harassment, intimidation and ridicule...”⁶⁰⁷

Further, reparations play a vital role in transforming community perceptions and gender inequalities that exacerbate sexual violence during conflict. Sexual violence in conflict is not just a one-time occurrence, it is “a manifestation of broader gender inequities still prevalent in most societies”⁶⁰⁸ Material reparations in form of financial compensations to victims and symbolic reparations in form of acknowledgment and apology are essential in condemning the culture of impunity and recognizing survivors as victims rather than contributors to the violence.

In conclusion, a successful reparations program can be achieved through designing a comprehensive reparations program. The Transitional Justice Policy states that this can be achieved through enacting a legislation to provide a structural framework, undertaking a mapping exercise and encouraging civil society and public participation.⁶⁰⁹ Mariana Goertz, states that the continuous engagement of survivors in the designing processes on the forms of reparation “Justice is itself an experience and a process, not simply an outcome.”⁶¹⁰ It thus matters how survivors are treated because the involvement in the process is also a form of acknowledgment that will facilitate healing and influence the extent of acceptance and success of established reparation programs.

⁶⁰⁷ Uganda Human Rights Commission and the UN Office of the High Commissioner for Human Rights, *supra* note 521, at 76

⁶⁰⁸ Ruth Rubio-Marin, *supra* note 581, at 72

⁶⁰⁹ The Transitional Justice Policy, *supra* note 241, at Par 68

⁶¹⁰ Quoted in Uganda Human Rights Commission and the UN Office of the High Commissioner for Human Rights, *supra* note 521 at xix

3.4 Conclusion

Alternative justice mechanisms as examined above address both the punitive and restorative needs of survivors of sexual violence. Traditional justice mechanisms through the concepts of acknowledgment and repentance re-empower the victim and this paves way to their emotional and psychological healing. Truth commissions provide survivors with a platform to voice their concerns and provide an important forum through which a detailed account of violations can be taken. Recommendations made by a truth commission also benefit all victims including those who are unwilling to talk about their experiences. Reparations on the other hand are symbols of acknowledgment of the harm suffered and they seek to address emotional, physical and psychological needs of survivors.

Community involvement, a central component of all these mechanisms creates an opportunity for condemnation of violations and acknowledgment. These mechanisms through acknowledgment help to break the tradition on silence under which sexual violence and victimization occurs. These mechanisms also address the challenges that survivors face in the formal justice system including lack for evidence, harsh cross-examination, fear to openly discuss sexual abuse and fear of retaliation from perpetrators. It is therefore asserted that alternative justice systems should be developed and used to supplement the formal justice system in Uganda since both systems have their strengths which when applied in a co-ordinated manner, effectively address survivors' punitive and restorative justice needs.

However, these mechanisms are not without challenges. Some challenges include lack of a legal framework to guide implementation, gender inequalities in the traditional justice system and failure of previous truth commissions to implement findings. Given these challenges the Transitional Justice Policy proposes several measures including enacting a legislation to guide

these process. It also proposes a mapping exercise for an effective reparation process and training of traditional leaders in the traditional justice sector. As Uganda continues to develop a comprehensive Transitional Justice Policy a look at alternative justice mechanisms as implemented in other African countries is crucial as it will provide guidance for Uganda's implementation.

CHAPTER FOUR: LEARNING FROM SIERRA LEONE AND RWANDAN EXPERIENCES WITH ALTERNATIVE JUSTICE MECHANISMS IN ADDRESSING CONFLICT-RELATED SEXUAL VIOLENCE

As a sign of commitment to the Agreement on Accountability and Reconciliation, the government of Uganda in 2008 established the Transitional Justice Working Group (TJWG).⁶¹¹ The TJWG drafted the National Transitional Justice Policy which is yet to be finalized.⁶¹² The policy acknowledges the use of alternative justice mechanisms in ensuring justice for survivors but also highlights the challenges in each of these processes.⁶¹³ It proposes strategies to enable efficient implementation of alternative justice processes in Uganda. In respect to Traditional Justice mechanisms, the Policy recommends enactment of a legislation to establish guiding principles for Traditional Justice Mechanisms.⁶¹⁴

The Policy also recommends establishment of a truth process through a Transitional Justice Act which clearly establishes the structure, jurisdiction and mandate of this establishment. It specifically proposes three functions of the truth body; to investigate human rights violations that occurred in the communities, to recommend redress and facilitate conflict prevention and dispute resolution.⁶¹⁵ For reparations, the Policy proposes establishment of a reparations program taking into account both interim and short term reparations through legislation. It proposes establishment of a reparations fund and carrying out a mapping exercise to identify victims of violations and the magnitude of harm.

⁶¹¹ International Centre for Transitional Justice, *supra* note 511, at 4

⁶¹² The Transitional Justice Policy, *supra* note 241, is now in its 4th Draft

⁶¹³ See discussion in Chapter two on Traditional Justice Mechanisms, Truth-seeking and truth telling processes and Reparations in Uganda.

⁶¹⁴ The Transitional Justice Policy, *supra* note 241, at Par 65

⁶¹⁵ *Ibid*, Par, 66

In order to effectively implement these recommendations, lessons from countries that have been through transitional are important. This chapter examines alternative justice processes in Sierra Leone and Rwanda, focusing on how these processes attended to the punitive and restorative justice needs of survivors of conflict-related sexual violence. Best practices are drawn from the discussion to make recommendations for Uganda. However, a justification for choosing these countries is important.

Justification for choosing Sierra Leone and Rwanda as examples for Uganda

Sierra Leone experience's is particularly relevant to Uganda because of the similarities in situations in these countries. First, the conflict in Sierra Leone lasted 11 years during which civilians were raped and many subjected to sexual slavery and forced marriages.⁶¹⁶ Over 50% of the female victims of human rights abuses were victims of sexual violence.⁶¹⁷ In Uganda, the 20 year conflict was equally characterized with rape, mutilations and sexual slavery.⁶¹⁸ Further, like Uganda, many of the rebel fighters in Sierra Leone were formerly abducted child-soldiers.⁶¹⁹

In Sierra Leone, the Sierra Leone Truth and Reconciliation Commission (SLTRC) was established following a blanket amnesty clause in the Lome Peace Accord.⁶²⁰ Similarly, in Uganda the proposed truth institution will most likely exist alongside an amnesty process. Sierra Leone's experience therefore demonstrates how a truth commission can operate in the presence on an amnesty process.

⁶¹⁶ Lotta Teale, Addressing gender-based violence in the Sierra Leone conflict: Notes from the field, *African Journal on Conflict Resolution*. Vol 9, No.2 (2009), 71

⁶¹⁷ Binaifer Nowrojee, *supra* note 6, at 86

⁶¹⁸ *See* Introduction of this thesis showing the extent of sexual violence during the conflict

⁶¹⁹ Cecily Rose, *supra* note 427, at 383

⁶²⁰ *See* William A. Schabas, Amnesty, the Sierra Leone Truth and Reconciliation Commission And The Special Court for Sierra Leone, 11 U. C. Davis J. Int'l

The SLTRC operated alongside the Special court of Sierra Leone (SCSL).⁶²¹ The proposed Truth institution for Uganda will exist alongside the ICC and the International Crimes Division (ICD). The co-existence of the SLTRC and the SCSL is therefore relevant for Uganda's truth process as it demonstrates the tensions that are likely to arise but also the fact that these mechanisms can harmoniously co-exist. Finally, the work of the SLTRC is relevant for survivors of conflict-related sexual violence in Northern Uganda because it was the first African truth commission to have a specific focus on conflict-related sexual violence in its mandate.⁶²² An examination of its work and lessons from its experience are therefore relevant for Uganda's proposed truth process.

On the other hand, Rwanda's experience with the use of traditional "*gacaca*" (justice on the grass)⁶²³ courts after the conflict is relevant to Uganda because both countries have customs and traditions that are cherished by their communities. The use of *gacaca* in Rwanda began in prisons and churches way before the government formally recognized them as a post-conflict measure.⁶²⁴ Similarly in Uganda, traditional justice practices in Northern Uganda were advocated for, alongside the amnesty process, long before their recognition in the Agreement on Accountability and Reconciliation.⁶²⁵ This illustrates the support for these mechanisms in both countries.

⁶²¹ For details on the establishment and co-existence of these institutions, *See* William A. Schabas, *Ibid*

⁶²² Julissa Mantilla Falcon, *supra* note 490, at 222-223

⁶²³ "Gacaca is derived from the word '*umugaca*', the Kinyarwanda word referring to a plant that is so soft to sit on that people preferred to gather on it. These gatherings were meant to restore order and harmony. The primary aim of the settlement was the restoration of social harmony, and to a lesser extent the establishment of the truth about what had happened, the punishment of the perpetrator, or even compensation through a gift. Bert Ingelaere, *supra* note 494, at 33 *see also* Timothy Longman, *An Assessment of Rwanda's Gacaca Courts*, *A Journal of Social Justice*, (21:304-312) at 306 *Gacaca* literally means "small grass" where the local leaders would sit to solve conflicts between family members and within the community.

⁶²⁴ Emily Amick, *supra* note 5, at 27-28

⁶²⁵ *See* discussion on traditional justice and amnesty in Chapter Two, *Alternative Justice Mechanisms*.

Further, in Rwanda, the overcrowding in prisons compelled the government to resort to arresting high ranking perpetrators, leaving low-ranking perpetrators to live freely in the community.⁶²⁶ The Gacaca courts were used to hold low-ranking perpetrators accountable. In Northern Uganda, low ranking perpetrators are living freely in the communities due to amnesty.⁶²⁷ The communities are dissatisfied because traditional justice practices have been used for reintegration of former combatants and not to provide justice to survivors.⁶²⁸ Rwanda's experience shows how traditional processes can be transformed to facilitate both reintegration and justice.

Rwanda's experience also shows how a traditional justice system can operate alongside an internationally established formal justice process (ICTR) and national formal justice process (Rwanda ordinary courts). This is relevant for Uganda whose traditional practices once formalized, will operate alongside the International Crimes Division (ICD) and the International Criminal Court. The gacaca process also shows how a traditional justice process can be used provide both punitive and restorative justice to victims through apologies and confessions.

4.1 Truth-telling and truth-seeking processes: Learning from Sierra Leone's Truth and Reconciliation Commission (SLTRC)

The SLTRC was a product of the July 1999 Lomé Peace Agreement between the Government of Sierra Leone and the rebel Revolutionary United Front (RUF) aimed at restoring peace in Sierra Leone.⁶²⁹ Article IX of the Lomé Agreement granted amnesty and absolute pardon to Corporal Foday Sankoh- leader of Revolutionary United Front the forces and all combatants for crimes

⁶²⁶ Megan M. Westberg, *Rwanda's Use of Transitional Justice After Genocide: The Gacaca Courts and the ICTR*, *Kansas Law Review*, Vol 59, 2010,331

⁶²⁷ The Amnesty Act 200 supra note 281

⁶²⁸ Cecily Rose, supra note 427, at 359

⁶²⁹ Julissa Mantilla Falcon, supra note 490, at 223

committed during the conflict.⁶³⁰ However, given the heinous crimes committed during the conflict, it was agreed that some sort of accountability although not punitive (given the amnesty) was necessary.⁶³¹ This resulted into the parties agreeing to establish a Truth and Reconciliation Commission.⁶³² Article XXVI (1) of the agreement provided that:

A Truth and Reconciliation Commission shall be established to address impunity, break the cycle of violence, provide a forum for both the victims and perpetrators of human rights violations to tell their story, get a clear picture of the past in order to facilitate genuine healing and reconciliation.⁶³³

The agreement tasked the Commission with investigating human rights violations committed during the conflict and recommending measures for the rehabilitation of victims.⁶³⁴ The Commission was to be established within ninety (90days) after signing the agreement and was expected to conclude its work within one year.⁶³⁵ Although the ninety (90) days proved rather too ambitious, the Parliament of Sierra Leone enacted the Truth and Reconciliation Act (TRC Act) which legally established the Commission in February 2000.⁶³⁶

The TRC Act, mandated the Commission “to create an impartial historical record of violations and abuses of human rights and international humanitarian law related to the armed conflict in Sierra Leone, from the beginning of the conflict in 1991 to the signing of the Lome Peace Agreement; to address impunity, to respond to the needs of the victims, to promote healing and

⁶³⁰ William A. Schabas, *supra* note 620, at 149 Article IX provides that “In order to bring lasting peace to Sierra Leone, the Government of Sierra Leone shall take appropriate legal steps to grant Corporal Foday Sankoh absolute and free pardon...After the signing of the present Agreement, the Government of Sierra Leone shall also grant absolute and free pardon and reprieve to all combatants and collaborators in respect of anything done by them in pursuit of their objectives, up to the time of the signing of the present Agreement...” see the Lome Peace Agreement at <http://www.sierra-leone.org/lomeaccord.html> accessed 18 September 2014

⁶³¹ *Ibid*, William A. Schabas, at 149

⁶³² *Ibid* at 150

⁶³³ *Ibid*, at 150 see also Agreement at <http://www.sierra-leone.org/lomeaccord.html>

⁶³⁴ *Ibid* see also Art. XXVI(2) Lome Peace Agreement *supra* note 630

⁶³⁵ *Ibid* at 151, *see* Art. XXVI (3) Lome Peace Agreement *supra* note 630

⁶³⁶ *Ibid* at 150 *see* also, the Truth and Reconciliation Act 2000 herein after the TRC Act available at <http://www.sierra-leone.org/Laws/2000-4.pdf> accessed 18 September 2014

reconciliation and to prevent a repetition of the violations and abuses suffered.”⁶³⁷ In that regard, the Commission was required to;

... investigate and report on the causes, nature and extent of the violations and abuses... to the fullest degree possible, including their antecedents, the context in which the violations and abuses occurred, the question of, whether those violations and abuses were the result of deliberate planning, policy or authorisation by any government, group or individual, and the role of both internal and external factors in the conflict... [and] to work to help restore the human dignity of victims and promote reconciliation by providing an opportunity for victims to give an account of the violations and abuses suffered and for perpetrators to relate their experiences, and by creating a climate which fosters constructive interchange between victims and perpetrators...⁶³⁸

The Act recognized to the role of traditional and religious leaders and urged the Commission to seek their assistance in reconciliation processes.⁶³⁹ It also emphasized the need for public education campaigns⁶⁴⁰ and witness protection in the Commissions.⁶⁴¹ The Act also provided for the appointment of seven commissions, consisting of four citizens and three non-citizens.⁶⁴²

The plans towards establishing the commission were stalled when fighting broke out again in Sierra Leone. As a result, the government of Sierra Leone reassessed its position on the amnesty and requested the United Nations to establish a tribunal to try perpetrators.⁶⁴³ On 14th August 2000, the Special Court of Sierra Leone "to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996”⁶⁴⁴ was established.

⁶³⁷ TRC Act, section 6(1)

⁶³⁸ Ibid, sections 6(2a), 6(2a) (1) and 6(2) (b)

⁶³⁹ Ibid, section 7(2)

⁶⁴⁰ Ibid, section 5(3) and 5(4)

⁶⁴¹ Ibid, section 7(3)

⁶⁴² Ibid, section 3(1)

⁶⁴³ William Schabas, *supra* note 305, at 1036

⁶⁴⁴ Cecily Rose, *supra* note 427, at 380

The court did not become operational until April 2002 when the parliament enacted the Special Court Agreement (Ratification) Act 2002 which guided the operations of the Court.⁶⁴⁵ At about the same time in 2002, the processes of establishing of the SLTRC got back on track. In July 2002, seven commissioners (three of whom were women),⁶⁴⁶ were appointed by the President and sworn into office.⁶⁴⁷ In early December 2002, the commissioners began their work.⁶⁴⁸

The commission conducted public hearings and recorded testimonies of victims, perpetrators and witnesses.⁶⁴⁹ The hearings conducted in each of the twelve Sierra Leone districts were widely attended with over 450 witnesses and widely broadcast.⁶⁵⁰ Closed hearings were also held, for victims of sexual violence and children.⁶⁵¹ About 7,000 victims and perpetrators testified before the commission,⁶⁵² and 7707 statements were collected.⁶⁵³ The commission concluded its work in August 2003 and submitted its final report entitled *Witness to Truth: Report of the Sierra Leone Truth and Reconciliation Commission*, to the President in early 2004.⁶⁵⁴

4.1.1 The Commission's work on Conflict-related Sexual violence

Inspired by the South African Truth and Reconciliation Commission, the SLTRC unlike its predecessor from the outset had a specific objective of investigating sexual crimes that occurred during the conflict.⁶⁵⁵ The TRC Act mandated the Commission to give “special attention to the

⁶⁴⁵ William Schabas, supra note 305, at 1036

⁶⁴⁶ Megan Bastick et al, supra note 2, at 159

⁶⁴⁷ William A. Schabas, supra note 620, at 152

⁶⁴⁸ Ibid

⁶⁴⁹ Binaifer Nowrojee, supra note 6, at 93

⁶⁵⁰ Augustine S.J. Park, supra note 436, at 101

⁶⁵¹ Ibid, at 101

⁶⁵² Cecily Rose, supra note 427, at 380

⁶⁵³ SLTRC Witness to Truth: Report of the Sierra Leone Truth and Reconciliation Commission, herein after referred to as the SLTRC Report, Chapter Four, Reparations, Par 30 available at <http://www.sierraleonetr.com/index.php/view-the-final-report> accessed 19 September 2014

⁶⁵⁴ William A. Schabas, supra note 620, at 152, see the full SLTRC Report Ibid

⁶⁵⁵ Julissa Mantilla Falcon, supra note 490, at 222

subject of sexual abuses and to the experiences of children within the armed conflict...’’⁶⁵⁶ In that regard, the commission was required to implement special procedures to address the needs of child victims, child perpetrators and victims of sexual abuse.⁶⁵⁷

Indeed, the SLTRC took this responsibility seriously. At the beginning of its work, it trained witness statement-takers on topics relating to handling cases of sexual violence and trauma among victims.⁶⁵⁸ Taking into account the fact that majority of the victims of sexual violence were women and girls, it ensured that more than 40% of the statement takers were women.⁶⁵⁹ It also emphasized that only women statement-takers trained to deal with accounts of sexual violence would take statements from female victims of sexual violence except where a victim wished otherwise.⁶⁶⁰ In December 2002, the commission deployed these statement-takers in various regions reaching out to as many women and girls as possible.⁶⁶¹

The commission dedicated three days for special hearings on violence against women.⁶⁶² Before these hearings commenced, the United Nations Fund for Women (UNIFEM) and the Urgent Action Fund conducted a two-day training for the commissioners on topics including international laws on sexual violence, interviewing rape victims, witness protection and other related issues.⁶⁶³ According to Binaifer Nowrojee, “attendance throughout the training by the commissioners and relevant staff sent a strong message within the institution that the issue of gender violence was an institutional priority.”⁶⁶⁴

⁶⁵⁶ The TRC Act, supra note 636, at Section 6(2)(b)

⁶⁵⁷ Ibid, Section 7(4)

⁶⁵⁸ SLTRC Report, supra note 653, par16-30

⁶⁵⁹ Ibid, par16-30

⁶⁶⁰ Ibid, par16-30

⁶⁶¹ Ibid

⁶⁶² Binaifer Nowrojee, supra note 6, at 86

⁶⁶³ Ibid, at 93

⁶⁶⁴ Ibid

In order to provide a comfortable environment for women victims to come forward and testify freely, during the public hearings for female victims, the commissioners provided three options for the victims to choose from: testifying openly in public where they could be seen, testifying in public where their voices would be heard but their identities shielded by a screen and testifying in camera before the commissioners.⁶⁶⁵ The initial plan of the commissioners was to conduct camera hearings but the approach changed to the above options after the commissioners underwent training.⁶⁶⁶ Binaifer Nowrojee applauded the commissioners' move and stated that the decision to conduct public hearings for survivors of sexual violence was significant since the "... goal of gender justice is to shatter the silence and stigma surrounding rape."⁶⁶⁷

While all commissioners had been trained to deal with cases of female victims, they allowed only female commissioners to pose questions to female victims. Thus where a victim in a session not designated for gender crimes began testifying about rape while a female commissioner was absent, she would be duly notified of the possibility of testifying at another time in the presence of a female commissioner.⁶⁶⁸ The Commission also ensured that a counselor, the Red Cross team, an ambulance and a nurse were present at the public hall where the hearings were held to provide assistance to any victims who became distressed during the hearings.⁶⁶⁹ The commission worked closely with women organizations offering support to victims. These organisations tremendously supported the commission's work through raising awareness about its work, filing

⁶⁶⁵ Ibid, at 94

⁶⁶⁶ Ibid at 94

⁶⁶⁷ Ibid

⁶⁶⁸ Ibid

⁶⁶⁹ Ibid

writing submissions and providing oral testimonies to the commission. The organisations also mobilized women to attend the special sessions for female survivors of sexual violence.⁶⁷⁰

In 2004, the commission released its report and quite commendably, a chapter of the report was reserved for the experiences of women during the conflict.⁶⁷¹ The report went beyond the confines of the war and addressed some of the causal factors or backgrounds issues that exacerbated violations. It emphasized that the victimization that women and girls faced during the conflict was greatly related to pre-conflict gender inequalities and exclusion in various sectors in Sierra Leone including the economic, social and political sectors.⁶⁷² The report noted further that the continued existence of these inequalities hampered effective healing for female survivors.⁶⁷³ The commission made recommendations to address structural inequalities including repealing discriminatory laws and involving women in politics.⁶⁷⁴ It also recommended reparation measures for survivors of sexual violence including psycho-social support, free HIV/AIDS testing and treatment, gynecological services and re-constructive surgery.⁶⁷⁵

4.1.2 Successes and Challenges faced by the SLTRC

Success/achievements of the Commission

The Truth Commission has been credited for its dedication and sensitive efforts at providing justice for the numerous rape victims in Sierra Leone. The special sessions from women, specially trained statement takers and availability of counselors during the hearings revealed the commissions' commitment to addressing the plight of survivors. Binaifer Nowrojee argues that

⁶⁷⁰ Ibid, at 95

⁶⁷¹ SLTRC Report, supra note 653, Chapter Three, Women and the Armed Conflict in Sierra Leone

⁶⁷² Ibid

⁶⁷³ UN Women, supra note 548, at 12

⁶⁷⁴ Ibid

⁶⁷⁵ Megan Bastick et al supra note 2, at 161 *see* the SLTRC Report, Chapter four, Reparations

during the conflict “sexual violence was Sierra Leone's invisible war crime,”⁶⁷⁶ because it was not given the necessary attention and coverage by the media and international observers despite its widespread nature.⁶⁷⁷ The commission’s focus on women and girls’ experiences is considered the commission’s greatest strength.⁶⁷⁸ The Commission provided an environment through which female victims broke the silence about their victimization and received acknowledgment for their suffering.⁶⁷⁹

The SLTRC is also commended for being the first institution to link pre-conflict gender inequalities with the gendered nature of victimizations that occur during conflict.⁶⁸⁰ The commission explained at great length how the lower status ascribed to women in the Sierra Leone community made them a vulnerable target during the conflict.⁶⁸¹ The commission proposed reforms in the legal, education, and political sectors to address these inequalities.⁶⁸²

The commission believing that a truth process without reparations was an incomplete process unable to guarantee healing to victims, made recommendations for reparation programs for survivors of sexual violence in its final report.⁶⁸³ The TRC recommended material and symbolic reparations including apologies from all combatant factions involved in the war.⁶⁸⁴ The recommendation for apologies was acted upon as leaders of combatant groups apologized for gender crimes committed by their fighters thereby acknowledging the suffering of survivors.⁶⁸⁵

⁶⁷⁶ Binaifer Nowrojee, *supra* note 6, at 87

⁶⁷⁷ *Ibid*

⁶⁷⁸ Augustine S.J. Park, *supra* note 436, at 101

⁶⁷⁹ UN Women, *supra* note 548, at 12

⁶⁸⁰ *Ibid*

⁶⁸¹ *See* SLTRC Report, *supra* note 653, Chapter Three, Women and the Armed Conflict in Sierra Leone, Status of Women before the conflict

⁶⁸² *See Ibid*

⁶⁸³ *See* SLTRC Report, *supra* note 653, Chapter Four, Reparations, Paragraph 41

⁶⁸⁴ Megan Bastick et al *supra* note 2, at 161

⁶⁸⁵ *Ibid*

The Commission, in trying to make its final report widely accessible, published secondary school and child-friendly versions.⁶⁸⁶ Unfortunately though, the versions were in English and yet majority of the people were illiterate.⁶⁸⁷ It is nonetheless asserted that the SLTRC made women's experiences visible and provided an avenue to acknowledge the plight of female survivors and providing accountability to thousands of rape victims in Sierra Leone.

Challenges or failures of the SLTRC

The SLTRC despite its achievement faced a number of challenges. In the Commission's initial stages, controversy arose over the appointment of staff. There were concerns that the national commissioners and the interim Executive Secretary of the Commission had strong ties with the ruling party.⁶⁸⁸ Further, the United Nations Development Programme (UNDP) found that majority of the staff were unqualified and their appointments were politically influenced.⁶⁸⁹ This controversy raised questions about the independence and impartiality of the commission, delayed the statement taking phase and impacted donor relations.⁶⁹⁰

The SLTRC began its operations at almost the same time as the Special Court for Sierra Leone (SCSL). This negatively impacted the commission's work as people failed to distinguish the institutions despite outreaches by officials from both institutions.⁶⁹¹ Many believed that the two institutions were working together.⁶⁹² This belief discouraged people from participating in the commissions' activities for fear of self-incrimination. Despite the Commission's and the court's

⁶⁸⁶ See SLTRC Report, supra note 653

⁶⁸⁷ Augustine S.J. Park, supra 436, 101

⁶⁸⁸ Ibid, at 102

⁶⁸⁹ Ibid

⁶⁹⁰ Ibid

⁶⁹¹ The SLTRC was established by the Lome peace Agreement in 1999 but became operational in 2002. The Special Court for Sierra Leone was established by an Agreement between the government of Sierra Leone Government and the United Nations on 16th January 2002, Elizabeth M. Evenson, supra note 492, at 738

⁶⁹² Augustine S.J. Park, supra note 436, at 105

constant reassurance that the institutions were not sharing information, the people's suspicion remained and some perpetrators refused to testify.⁶⁹³

Since the Commissions public hearings were restricted to major towns, The SLTRC also failed to reach the grassroots population.⁶⁹⁴ Further, the time allocated for the hearings was inadequate and only a few people were chosen.⁶⁹⁵ While, the limited public hearings were inevitably a result severe underfunding faced by the commission it greatly inhibited the cathartic impact of the commission among majority Sierra Leoneans.⁶⁹⁶

The SLTRC has also been criticized for failing to adequately facilitate reconciliation in the Sierra Leone Community.⁶⁹⁷ About 88% of the survivors testifying before the commission were willing to meet with their perpetrators with the supported of the commission and many hoped that traditional purification ceremonies during proceedings to restore victims' dignity and community harmony.⁶⁹⁸ Unfortunately, although the commission tried to integrate these processes, they were very few, given the funding and time pressures.⁶⁹⁹ One of the commissioners stated that use of traditional mechanisms could have been pursued as a separate program of the commission but this was impossible given the limited time and funding.⁷⁰⁰

Quite strikingly, the commission largely neglected the plight of male survivors of sexual violence. While special sessions were held for female survivors of sexual violence, none were held for men. This is attributed to the narrow interpretation of the Commission's mandate by the

⁶⁹³ Cecily Rose, *supra* note 427, at 382

⁶⁹⁴ Lotta Teale, *supra* note 616, at 86

⁶⁹⁵ Augustine S.J. Park, *supra* note 436, at 102

⁶⁹⁶ Lotta Teale, *supra* note 616, at 86

⁶⁹⁷ Augustine S.J. Park, *supra* note 436, at 103-102

⁶⁹⁸ Lotta Teale, *supra* note 616, at 86

⁶⁹⁹ Augustine S.J. Park, *supra* note 436, at 103-104

⁷⁰⁰ *Ibid* at 104

Commissioners. The SLTRC final report explains that “while women are not explicitly mentioned in the TRC Act, given that they were the overwhelming victims of sexual abuse, the Commission interpreted this provision to mean that it should pay special attention to the experiences of women and girls.”⁷⁰¹ The section on reparations also define victims of sexual violence as “those *women and girls* who were subjected to such acts as rape, sexual slavery, mutilation of genital parts or breasts, and forced marriage.”⁷⁰² It however makes mention of men and boys survivors of suffered sexual violence as would be beneficiaries of health services.⁷⁰³ Although the mention of male survivors showed that the commission was aware that male survivors existed, its focus on women must have discouraged male survivors from opening up.

4.1.3 Recommendations for Uganda’s Truth-telling and Truth-seeking process

The Transitional Justice Policy proposed the establishment of a National Truth institution as discussed above. Learning from SLTRC’s successes and challenges in ensuring justice to survivors of conflict-related sexual violence, the following recommendations are made for Uganda.

The mandate of the institution: The SLTRC’s success at providing justice to survivors of female sexual violence is generally attributed to its explicit mandate to investigate cases of sexual violence. Modeled after the South African Truth and Reconciliation Commission, the SLTRC unlike its predecessor specifically investigated crimes on sexual abuse.⁷⁰⁴ While the failure to include gender crimes in the South African Commission’s mandate initially inhibited investigations into women’s experience, the early inclusion of gender-crimes into the SLTRC’s

⁷⁰¹ SLTRC Report supra note 653, Chapter Three, Women and the Armed Conflict in Sierra Leone, par 10

⁷⁰² Ibid, Chapter Four, Reparations, par 95

⁷⁰³ Ibid

⁷⁰⁴ The South African Truth and Reconciliation Commission did not have a specific mandate to investigate gender crimes. It instead was required to “investigate human rights abuses and crimes committed in the apartheid era.” See Julissa Mantilla Falcon, supra note 490, at 222

mandate facilitated investigations into these violations.⁷⁰⁵ Thus the inclusion of gender crimes in a commissions' mandate is essential for capturing survivors' experiences.

Uganda should therefore through the proposed Transitional Justice Act give the proposed institution the mandate to investigate and document sexual violence committed in the conflict in Northern Uganda. It should however, task the institution to investigate sexual violence against men and women in order to avoid excluding male survivors from the process and to avoid the problem of narrow interpretation of the mandate encountered by the SLTRC.

The composition: The composition of the SLTRC greatly enriched its work with survivors of sexual violence. The presence of commissioners with prior experience on gender issues and dealing with victims of sexual violence ensured the creation of a safe and sensitive environment to address survivors' psychological needs. "Commissioner Jow had previously worked with women's nongovernmental groups in her home country of Gambia and Commissioner Sooka had served on the South African TRC and had helped to organize the gender hearings of that commission."⁷⁰⁶ These commissioners greatly steered the commission into fulfilling its mandate.⁷⁰⁷ The presence of female commissioners also made the environment comfortable for female survivors. The existence of both national and international commissioners gave the commission varied expertise. The national commissioners advised on cultural norms while international commissioners giving an international outlook to the commission.

Similarly, Uganda should in appointing staff for the truth-telling institution take into account their prior experience and commitment to addressing gender crimes. The staff should come from diverse professional disciplines so as to enrich the discussion. The institution should also be

⁷⁰⁵Ibid at 222

⁷⁰⁶ Binaifer Nowrojee, *supra* note 6, at 93

⁷⁰⁷ Ibid

made up of both male and female commissioners and some of the commissioners should be non-citizens preferably those who have previously worked with Truth Commissions. In selecting Ugandan commissioners, the government should ensure that some commissioners (at least one male and a female) come from Northern Uganda.

Gender training for staff: The training conducted by UNIFEM and Urgent Action Fund before the SLTRC's hearings guided the commission's work and alerted them to the sensitivity required in handling these cases. Uganda should adopt this training approach. Such trainings will among others de-mystifying popular beliefs about the sexual violence of men and women.

Independence of the commission: Sierra Leone's experience shows that the independence and autonomy of a truth institution is crucial in gaining trust among the population. The appointment of national commissioners by the president raised questions about their impartiality given their alleged ties with the ruling party. Questions regarding the independence and autonomy of the commission affected its work and credibility especially in its early stages. Uganda's past experience with truth commissions has shown that government interference affects the performance of these bodies.

Learning from Sierra Leone, Uganda's appointment process should not be done by the President since his forces were involved in the conflict. Instead the Parliament could appoint a selection committee which shall appoint commissioners from nominated candidates from various institutions and regions. In order to meet the survivors' desire to become involved in processes of setting up the commission, the survivors should be continuously consulted and allowed to propose candidates to the selection committee and the truth institution. Further, processes for

filing a complaint against or investigation and removal of a member said to be partial should be clearly enshrined in the proposed Transitional Justice Act or rules guiding the institution.

Witness protection and support: Survivors of sexual violence in Northern Uganda, cited fear of reprisals and stigma as factors that inhibit their access to justice. Uganda's institution should create a safe environment to enable for survivors participate in the proceedings. The institution could conduct special hearings for survivors of sexual violence as was done in Sierra Leone. These hearings should include camera hearings, only women and only men hearings.

It has been argued that only women hearings shield male perpetrators from shame and the general public from appreciating the seriousness of these crimes.⁷⁰⁸ In this case, Uganda should allow those willing to testify in general hearings to do so but also avail them the options of testifying openly in public where they could be seen or testifying in public where their voices would be heard but identities shielded by a screen. Such hearings should be widely publicized. Further, the institution should ensure that during these hearings, medical personnel and counselors are available to provide assistance to the victims in case of trauma.

Collaboration with Civil Society Organisations: The role of civil society in Uganda in providing assistance to survivors of sexual violence in Northern Uganda should not be underestimated. The Sierra Leone's experience with women's organisations clearly illustrates this. The proposed institution should work closely with these organisations during its outreaches because through these organisations the institution will gain legitimacy among the survivors. Further, these organisations will provide additional support counselors and social workers to the

⁷⁰⁸ Justice Law and Order Sector et al, Conference Report, Securing Accountability for Conflict Related Sexual and Gender-based Crimes in Uganda: Lessons Learned from International Experiences, December 2011 (on file)

truth institution and finally when the institutions mandate is closed, they will continue to provide psychosocial assistance to the survivors that testified before the institution. These organisations have also undertaken extensive research on gender crimes and will provide the truth institution with vast back ground information.

Reconciliation: The SLTRC was criticized for failing to integrate traditional justice mechanisms of reconciliation in its work. As earlier explained, survivors in Northern Uganda perceive a truth-telling process as one that consists of traditional practices of *mato oput*.⁷⁰⁹ Thus to avoid the SLTRC's dilemma, the truth institution should consist of a Traditional Justice unit. Survivors and perpetrators who wish to reconcile should be sent to this unit who will then follow up these processes with Traditional leaders at the community level. This unit should have a flexible tenure that can be extended beyond the time frame of the truth institution so as to continue the work even after the mandate of the truth institution comes to an end.

Recommendations of the Commission: Like Sierra Leone, the mandate of the truth institution should allow the commission to recommend reparations and other rehabilitative measures. Further, Uganda's Transitional Justice Policy recommends for a mapping exercise to be carried out in order to identify categories of survivors for a comprehensive reparations program. The SLTRC was able to identify the categories of victims and possible reparation measures through the information collected.⁷¹⁰ The proposed body will therefore assist in identifying categories of survivors and making recommendations for a reparations program. Notably however, many

⁷⁰⁹ See Chapter two, Alternative Justice mechanisms, Traditional Justice mechanisms in Northern Uganda

⁷¹⁰ See SLTRC Report, supra note 653, Chapter Four, Reparations available

organisations and institutions have already conducted research in these areas thus collaboration with these institutions is significant.⁷¹¹

In addition to reparation measures, the commission should have the right to name persons or institutions suspected of being responsible for sexual violence. The naming should however be corroborated with sufficient evidence and the suspects given an opportunity during the proceedings to provide their own version of events within a particular time frame. Such information and evidence could facilitate prosecution before the International Crimes Division.

Dissemination of report findings of the commission: Uganda's truth institution should like the SLTRC endeavor to disseminate its findings as widely as possible by publishing it in languages commonly understood in Northern Uganda and Uganda as a whole. Wide distribution of the report will raise awareness sexual victimizations during the conflict and will create a basis for educational and institution campaigns against non-repetition. It will provide survivors with information upon which they can demand implementation of recommendations.

4.1.4 Conclusion

Sierra Leone's experience shows that a Truth Commission can co-exist with an amnesty process and a formal criminal justice process in place without necessarily conflicting. The mandate, structure and composition of the commission are crucial in ensuring justice for survivors of conflict-related sexual violence because they enable the creation of a safe environment for survivors of sexual violence to share their experiences.

Further, some of the challenges faced by the SLTRC such as distinction between the court and the commission are unlikely to occur in Uganda. Unlike Sierra Leone where the two institutions

⁷¹¹ The research and work done by Refugee Law Project, the International Centre for Transitional Justice and Uganda Human Rights Commission with survivors in Northern Uganda as used in this thesis is very important.

were established at almost the same time, the International Crimes Division is already operational. Uganda is therefore capable of establishing a truth commission following the above recommendations drawn from Sierra Leone's experience. However, given the time and funding constraints that truth institutions often encounter, the use of traditional justice mechanisms to complement is important. The proposed Traditional Justice unit of the commission shall link the commission to TJM mechanisms on the ground and ensure that reconciliation processes take place at the community level.

4.2 Traditional Justice Mechanisms: Learning from Rwanda's experience with Gacaca

Courts

It is impossible to have all survivors testify or submit statements before the proposed truth institution given the time frame. As a result, the draft Transitional Justice Policy recommends the use of Traditional Justice mechanisms as a complement to a truth institution.⁷¹² It proposes the enactment of a legislation that shall establish the jurisdiction and guiding principles of these mechanisms.⁷¹³ It also recommends training of staff and sensitization communities on the processes of these mechanisms as provided for under the proposed legislation.⁷¹⁴ Rwanda provides an example of how a traditional justice system can be transformed after a conflict to address conflict-related sexual violence.

4.2.1 Rwanda's Gacaca Courts

In contrast with Sierra Leone, the truth and reconciliation process in Rwanda was not achieved through the establishment of a Truth Commission. Instead, the government revived and modified

⁷¹² The Transitional Justice Policy, *supra* note 241, at Par 41,42 and 65

⁷¹³ *Ibid* at Par 65

⁷¹⁴ *Ibid*

the already existing traditional dispute resolution system to address the communities' justice and reconciliation needs.

After the genocide, the new government -the Rwandan Patriotic Front (RPF) started arresting persons suspected of having participated in the genocide. Tens of thousands were imprisoned, many on hearsay and unsubstantiated accusations.⁷¹⁵ By 1996, approximately 120,000 persons were charged and imprisoned for genocide related offences.⁷¹⁶ However, many judges and lawyers had been killed during the conflict and the formal justice system was unable to appropriately handle these cases.⁷¹⁷ By 1999, the formal courts had only tried 5,000 out of the 120,000 cases.⁷¹⁸ Meanwhile, the conditions in the prison were appalling. Prisons built to hold about 45,000 inmates now accommodated about 120,000 suspects.⁷¹⁹ The government expenditure on maintaining suspects became extensive with 1,500,000,000 Frw (half the Ministry of Justice's budget) spent on food alone in 1999.⁷²⁰ Moreover, reparation and rehabilitation programs for victims were non-existent.⁷²¹

These challenges made the need for an alternative form of justice apparent. The then President (Pasteur Bizimungu) held a series meetings with national leaders between 1998 and 1999 in search of a solution.⁷²² These meetings resulted into a proposal to modernize and use the traditional mechanism of gacaca to relieve the national court system of its overwhelming workload.⁷²³ The "new" gacaca system would have five objectives: "[to] establish the truth about

⁷¹⁵ Timothy Longman, *supra* note 623, at 306

⁷¹⁶ Megan M. Westberg, *supra* note 626 at 331

⁷¹⁷ Timothy Longman, *supra* note 623, at 305

⁷¹⁸ Megan M. Westberg, *supra* note 626, at 332

⁷¹⁹ Emily Amick, *supra* note 5, at 23

⁷²⁰ *Ibid*, at 23 *see* footnote 112

⁷²¹ *Ibid* 23

⁷²² Timothy Longman, *supra* note 623, at 306

⁷²³ Bert Ingelaere, *supra* note 494, at 37

what happened; accelerate the legal proceedings for those accused of genocide crimes; eradicate the culture of impunity; reconcile Rwandans and reinforce their unity; and use the capacities of Rwandan society to deal with its problems through a justice based on Rwandan custom.”⁷²⁴ Unlike the Sierra Leone Truth and Reconciliation Commission which provided only restorative justice, Gacaca aimed at providing punitive justice through prosecution of thousands of detainees in Rwanda’s prisons and restorative justice through a public process where victims share their experiences and confront perpetrators.⁷²⁵

The modification of gacaca courts was formalized in 2000 through Organic Law No. 40/2000 and implemented in January 2001.⁷²⁶ The gacaca courts traditionally known for dealing with marriage, property rights and livestock disputes were now mandated to prosecute Crimes of Genocide and Crimes against Humanity Committed Between October 1, 1990 and December 31, 1994 (2001).⁷²⁷ While in the old gacaca, the local judges (*inyangamugayo*) were appointed on the basis of lineage or status,⁷²⁸ in the new gacaca the local judges were to be appointed through an election organised by the government.⁷²⁹ They were not required to have any form of legal training but like in the old gacaca, they were required to be persons of high integrity and without a criminal record.⁷³⁰ While in the old gacaca men dominated the process with limited women

⁷²⁴ Ibid, at 38

⁷²⁵ Timothy Longman, *supra* note 623, at 306

⁷²⁶ Organic Law No. 40/2000 of 26/01/2001, The Setting up Gacaca Jurisdictions and Organizing Prosecutions for Offences Constituting the Crime of Genocide or Crimes Against Humanity Committed Between October 1, 1990 and December 31, 1994 (2001) here in after Organic Law No. 40/2000 of 26/01/2001 available at <http://jurisafrika.org/docs/statutes/ORGANIC%20LAW%20N0%2040.pdf> accessed 24 September 2014, *see* Emily Amick, *supra* note 5, at 32, Emily also explains that that this law has undergone five modifications; in June 2001, June 2004, June 2006, March 2007 and May 2008

⁷²⁷ Ibid Organic Law No. 40/2000 of 26/01/2001, at Art 1

⁷²⁸ Kamashazi Donnah, Dealing with Rape as a Human Rights Violation under Gacaca Justice system, LLM thesis, University of Pretoria, 29 available at http://repository.up.ac.za/bitstream/handle/2263/1034/kamashazi_d_1.pdf?sequence=1 accessed 24 September 2014

⁷²⁹ Organic Law No. 40/2000 of 26/01/2001, *supra* note 726

⁷³⁰ Nyseth Brehm et al, Genocide, Justice, and Rwanda’s Gacaca Courts, *Journal of Contemporary Criminal Justice* 2014, Vol. 30(3), 336

participation, in the new gacaca, women and youth could act as judges as long as they were aged 21 years and above.⁷³¹ The modified gacaca system was largely different from the old gacaca. Phil Clark notes that the only similarity between the two is that they both involved “local and non-professional judges.”⁷³²

Following the enactment of the 2000 organic law, the government carried out massive sensitization campaigns about the new process.⁷³³ In October 2001, elections for a panel of nineteen judges were conducted in each of Rwanda’s 9,013 cells (smallest administrative unit), these then selected judges for the 1,545 sector gacaca courts.⁷³⁴ In total 260,000 male and female judges were elected.⁷³⁵ The judges underwent training in April 2002 and a pilot phase was kicked off in June 2002.⁷³⁶ By December 2002, approximately 600 gacaca courts were operating.⁷³⁷ In 2004, the government amended the 2000 Organic law to improve the functioning of the courts in preparation for a countrywide launch of the system⁷³⁸ which happened in January 2005.⁷³⁹

⁷³¹ Ibid

⁷³² Phil Clark as quoted by Emily Amick, *supra* note 5, at 28

⁷³³ Ibid at 33

⁷³⁴ Timothy Longman, *supra* note 623, at 307, Bert Ingelaere, *supra* note 494, at 41 explains that “A cell in Rwandan society coincides with a small face-to-face community, comparable to a neighborhood in an urban setting. This is the lowest administrative level. It consists of 200 people or more. These people make up what is called the general Assembly) A sector is like a small village and groups together several cells.”

⁷³⁵ Megan M. Westberg, *supra* note 626 at 338

⁷³⁶ Nyseth Brehm et al, *supra* note 730, at 336

⁷³⁷ Megan M. Westberg, *supra* note 626, at 338

⁷³⁸ Organic Law No. 16/2004 of 19/6/2004 Establishing the Organisation, Competence and Functioning of Gacaca Courts Charged with Prosecuting and Trying the Perpetrators of the Crime of Genocide and Other Crimes Against Humanity, Committed Between October 1, 1990 and December 31, 1994 *here in after* Organic Law No. 16/2004 of 19/6/2004 available at <http://jurisafrika.org/docs/statutes/ORGANIC%20LAW%20N0%2040.pdf> accessed 24 September 2014

⁷³⁹ Timothy Longman, *supra* note 623, at 307

Phases and procedures in gacaca courts

The Gacaca courts functioned in two phases. The first phase known as the information collection phase took place at the cell level between January 2005 and July 2006.⁷⁴⁰ During this phase, information regarding the people that lived in an area before the genocide, those killed during the genocide, property lost, crimes committed during the genocide, accusations and confessions was collected.⁷⁴¹ The local judges then categorized the suspects according to the alleged crimes.

Under Organic Law of 2004, category 1 comprised of those suspected to have; planned, organised and supervised commission of crimes, occupied positions of leadership, well-known murders, tortures, rapists and persons who committed dehumanizing acts on a dead body.⁷⁴² Category 2 consisted of those suspected of committing attacks causing death or those who with the intention of killing committed attacks but failed to kill and those suspected of aiding and abetting such attacks.⁷⁴³ Category 3 consisted of those suspected of committing property offences.⁷⁴⁴ The category determined the court before which the suspect would appear and the type of sentence they were likely to receive.⁷⁴⁵

The second phase, the trial stage, started in July 2006 and category 1 suspects were tried by ordinary courts while category 2 and 3 took place at the sector and cell levels respectively.⁷⁴⁶

Trials by gacaca courts were conducted in the accused's locality based on information collected

⁷⁴⁰ Bert Ingelaere, supra note 494 at 41

⁷⁴¹ Bert Ingelaere, *The Gacaca Courts in Rwanda in Traditional Justice and Reconciliation after Violent Conflict, Learning from African Experiences*, International IDEA, (2008), 41

⁷⁴² Organic Law No. 16/2004 of 19/6/2004, supra note 738, at Art 51

⁷⁴³ Ibid, at Art 51

⁷⁴⁴ Ibid

⁷⁴⁵ See details in table 1, *The Gacaca court system in Rwanda: categorization and sentencing* in Bert Ingelaere supra note 494, at 40-41

⁷⁴⁶ Organic Law No. 16/2004 of 19/6/2004 supra note 738, at Art 2

in the first phase.⁷⁴⁷ The court sessions were conducted in classrooms and compounds, and attendance was compulsory for all adults. Non-attendance often resulted into fines.⁷⁴⁸ Moreover, testifying in gacaca was an obligation from which no person could refrain.⁷⁴⁹ Before the trial, the parties to the case (victims, witnesses and accused) were summoned by the judges and where an accused was in detention, he would be presented for trial at the local judges' orders.⁷⁵⁰

During trial, the judges read out the case files and both the victim and the accused were given time to present their cases.⁷⁵¹ Other accusers, witnesses and whoever else wished to speak were given an opportunity.⁷⁵² After sufficient examination of the file, the judges deliberated among themselves and publicly passed a verdict.⁷⁵³ The parties to category 3 crimes (property crimes) had an opportunity for an amicable settlement for restitution.⁷⁵⁴ But restitution for these crimes was a family affair based on customary practice rather than individualized restitution.⁷⁵⁵

Because gacaca was aimed at soliciting the truth, during sentencing, the judges took into account confessions (if any) and time at which they were made.⁷⁵⁶ An accused who confessed before trial, received a lighter sentence than one who confessed during trial.⁷⁵⁷ The convicts had a right of appeal to the Gacaca Sector Appeal Court composed of judges from the same locality.⁷⁵⁸

⁷⁴⁷ Megan M. Westberg, *supra* note 626, 339

⁷⁴⁸ Nyseth Brehm et al, *supra* note 730, at 338

⁷⁴⁹ Organic Law No. 16/2004 of 19/6/2004 *supra* note 738, at Preamble

⁷⁵⁰ Bert Ingelaere, *supra* note 494, at 42

⁷⁵¹ *Ibid*, 42

⁷⁵² Megan M. Westberg, *supra* note 626, at 340

⁷⁵³ Bert Ingelaere, *supra* note 494, at 42

⁷⁵⁴ Megan M. Westberg, *supra* note 626, at 340

⁷⁵⁵ Bert Ingelaere, *supra* note 494, at 42

⁷⁵⁶ See also *Table 1, The Gacaca court system in Rwanda: categorization and sentencing* in Bert Ingelaere *Ibid*, at 40-41

⁷⁵⁷ Nyseth Brehm et al, *supra* note 730, at 337 See also *Table 1, The Gacaca court system in Rwanda: categorization and sentencing* in Bert Ingelaere, *Ibid*

⁷⁵⁸ Megan M. Westberg, *supra* note 626, at 340

In March 2007, the government through Organic Law no. 10/2007 of 01/03/2007 amended the gacaca sentencing procedures, officially abolishing the death sentence and replacing it with life imprisonment for category 1 offenders.⁷⁵⁹ Further, those sentenced to imprisonment were instead sent for community service since the prisons were still overcrowded.⁷⁶⁰ The trial procedure was also modified to allow for a speedy trial process and completion of by the end of 2007. With the new law, about 3,000 courts were added to the existing 12,103 courts⁷⁶¹ and the days for hearings were increased to two days per week in localities with numerous cases.⁷⁶² Monthly gacaca progress reports for the period July 2006 to February 2007 indicate that the courts tried approximately 10,000 persons per month.⁷⁶³

While the gacaca courts concluded cases quickly, the national courts were still struggling with a backlog of cases. In order to assist the formal courts further, the government in 2008, amended the Gacaca law to transfer some category one crimes (including sexual violence) tried by national courts into gacaca jurisdiction.⁷⁶⁴ By April 2009, (four years after their launch) the gacaca courts had concluded 1.1 million cases as compared to the ordinary courts which completed 10,026 cases between 1997 and 2004.⁷⁶⁵ The Gacaca courts eventually closed on June 18th 2012 after completing majority of the cases assigned to them.⁷⁶⁶

⁷⁵⁹ Organic Law No. 10/2007 of 01/03/2007 Modifying and Complementing Organic Law No. 16/2004 of 19/6/2004 Establishing the Organisation, Competence and Functioning of Gacaca Courts Charged with Prosecuting and Trying the Perpetrators of the Crime of Genocide and Other Crimes Against Humanity, Committed Between October 1, 1990 and December 31, 1994 cited in Megan M. Westberg, *Ibid* at 340

⁷⁶⁰ Bert Ingelaere, *supra* note 494, at 43

⁷⁶¹ *Ibid*

⁷⁶² *Ibid*

⁷⁶³ See Monthly progress report, table 3: Activities during the Gacaca trials in Rwanda, July 2006–February 2007 in Bert Ingelaere, *Ibid*, at 42

⁷⁶⁴ Megan M. Westberg, *supra* note 626, at 339

⁷⁶⁵ *Ibid*, at 341

⁷⁶⁶ Nyseth Brehm et al, *supra* note 730, at 337

4.2.2 Gacaca courts and conflicted-related sexual violence

The gacaca courts did not from the onset have the jurisdiction to try crimes of sexual violence because these crimes were classified under category one offences triable only by the ordinary Rwandan courts.⁷⁶⁷ Notably, this revealed the seriousness with which the Rwandan government treated such crimes. This categorization was driven by Rwandan women organisations who believed wanted perpetrators to receive a heavy punishment commensurate to the horrific crimes they had committed.⁷⁶⁸ Unfortunately, the judiciary, faced with a huge backlog of cases, focused on other crimes and pushed sexual violence cases aside.⁷⁶⁹ Out of approximately 7,000 genocide rape cases filed in the national courts, less than 100 cases were heard.⁷⁷⁰

In 2008, the government amended the law giving gacaca courts jurisdiction over crimes of sexual violence.⁷⁷¹ The amendment provided that “Any person or an accomplice prosecuted for an act that puts him or her in the first category, paragraph 3, 4 and 5... as provided in article 9 of this law, shall be tried by Gacaca Courts...”⁷⁷² Crimes of sexual violence fell under paragraph 5 of article 9.⁷⁷³ Following this amendment, about 6,608 cases of rape or sexual torture were transferred from the national courts to the gacaca jurisdiction.⁷⁷⁴

⁷⁶⁷ Organic Law No. 40/2000 of 26/01/2001, supra note 726

⁷⁶⁸ Emily Amick, supra note 5, at 161

⁷⁶⁹ Ibid

⁷⁷⁰ Ibid, at 43

⁷⁷¹ Organic Law N0 13/2008 of 19/05/2008 modifying and complementing Organic Law No. 16/2004 of 19/6/2004 Establishing the Organisation, Competence and Functioning of Gacaca Courts Charged with Prosecuting and Trying the Perpetrators of the Crime of Genocide and Other Crimes Against Humanity, Committed Between October 1, 1990 and December 31, 1994 as modified and complemented to date, Art. 1, *herein after* Organic Law N0 13/2008 of 19/05/2008 available at http://www.geneva-academy.ch/RULAC/pdf_state/2008-Gacaca-Courts-Organic-Law-13.2008.pdf

⁷⁷² Ibid, Art. 1

⁷⁷³ Ibid, Article 9, Par 5, provides for “any person who committed the offence of rape or sexual torture, together with his or her accomplice

⁷⁷⁴ Emily Amick, supra note 5, at 3

Before the proceedings began, the local judges underwent training on legal provisions relating to sexual violence and psychological assistance to victims from July to September 2008.⁷⁷⁵ Given the large number of gacaca judges, training for 250 trainers including lawyers, gacaca co-ordinators and trauma counselors was conducted and these trained the 16,974 judges in different gacaca localities.⁷⁷⁶ Although the local judges had at the beginning of the gacaca process in 2001 undergone training, these trainings were focused at encouraging women participation in gacaca processes rather than dealing with the gender crimes and victims of sexual violence.⁷⁷⁷ The trainings were nonetheless important given the fact that the judges received reports on sexual violence during the information collection phase.⁷⁷⁸

The government had during the pilot phase realized that false allegations had been made about persons being rape victims so as to humiliate them and their families.⁷⁷⁹ As a result, the 2004 amendment that aimed at addressing the challenges identified in the pilot phase, prohibited public accusations, confessions and proceedings in regard to sexual violence.⁷⁸⁰ It provided that *only* victims of rape or sexual torture shall during the information phase submit their complaints to a local judge of their choosing or to the public prosecutor. And a complaint could *only* be lodged by another party on behalf of the victim where the victim was deceased or incapacitated.⁷⁸¹ Moreover, the complaint had to be lodged secretly to the public prosecutor.⁷⁸²

⁷⁷⁵ National Service of Gacaca Courts, Administrative Report of the National Service of gacaca Courts 2012, at 138 available at <http://www.rwandapedia.rw/archive/gacaca>

⁷⁷⁶ Emily Amick, *supra* note 5, at 49

⁷⁷⁷ *Ibid* at 49

⁷⁷⁸ Organic Law No. 16/2004, June 19, 2004, *supra* note 738, Article 34 (1)(f) provided for collection of information on those victimized during the genocide and a victim included anybody who “suffered acts of torture against his or her sexual parts, suffered rape, injured or victim of any other form of harassment..., because of his or her ethnic background or opinion against the genocide ideology.”

⁷⁷⁹ National Service of Gacaca Courts, Administrative Report of the National Service of gacaca Courts 2012

⁷⁸⁰ Organic Law No. 16/2004, June 19, 2004 *supra* note 738, at Art 38

⁷⁸¹ *Ibid*, at Art 38

⁷⁸² *Ibid* at Art 38

Worth noting is that fact that other crimes such as looting, murder and destruction of property could be reported by any person including third parties.⁷⁸³

The 2008 amendment which transferred sexual violence cases to gacaca courts did not change the above requirements but added the judicial office as another venue where survivors could report their cases.⁷⁸⁴ It however established camera proceedings for cases of sexual violence and extended secrecy measures to these proceedings.⁷⁸⁵ As a result, only six people were allowed to attend camera proceedings namely; the victim, accused, the judge, a trauma counselor, a gacaca co-ordinator and a security officer.⁷⁸⁶ These persons were prohibited from disclosing information arising during the proceedings and were liable to prosecution and imprisonment for one to three years upon disclosing any information.⁷⁸⁷

Further, camera proceeding were held where a person was charged with sexual crimes and other crimes against the same victim while in circumstances where a person was charged with sexual crimes against a victim and other crimes against other victims, the other crimes were heard in public and sexual crimes heard in camera.⁷⁸⁸ Also pertinent to note is that the amendment allowed trauma counselors to attend and provide support to victims during camera proceedings and a victim was allowed to choose a trauma counselor to attend the proceedings with them.⁷⁸⁹

⁷⁸³ Emily Amick, *supra* note 5, at 45

⁷⁸⁴ Organic Law N0 13/2008 of 19/05/2008 modifying and complementing Organic Law No. 16/2004 of 19/6/2004, Art 6

⁷⁸⁵ Organic Law N0 13/2008 of 19/05/2008 *supra* note 771, Art 6

⁷⁸⁶ Emily Amick, *supra* note 5, at 34 and Art 6 Organic Law No, 13/ 2008 of 19/05/2008, *Ibid*

⁷⁸⁷ Organic Law N0 13/2008 of 19/05/2008 *supra* note 771, Art 5

⁷⁸⁸ Emily Amick, *supra* note 5 at 53

⁷⁸⁹ The counselors were not professional counselors but community volunteers that had undergone training to provide psychological support to victims during proceedings. Emily Amick, *supra* note 5, at 53 also *see* Organic Law N0 13/2008 of 19/05/2008 *supra* note 771, Art 6,

4.2.3 Achievements and challenges of Gacaca courts in addressing conflict-related sexual violence

Successes/achievements of Gacaca Courts in addressing conflict-related sexual violence

The gacaca courts provided an avenue for quick dispensation of justice to numerous survivors of sexual violence who had waited for over 10 years to have their cases heard in the formal justice system.⁷⁹⁰ Through gacaca, the survivors shared their pain, confronted perpetrators and received acknowledgement for their suffering. Survivors who participated in the proceedings expressed feelings of relief and empowerment and felt that justice was done.⁷⁹¹

Generally, the gacaca system in search for truth encouraged perpetrators to confess their wrong doing. Perpetrators of sexual crimes were allowed to confess during closed hearings.⁷⁹² While it has been argued that only a few suspects confessed, these confessions amounted to acknowledgment of wrongdoing which empowered victims.⁷⁹³ They were also a form of symbolic reparation to victims.

The gacaca process is also credited for having provided a safe environment for victims of sexual violence and their families to break the silence on their abuse without fear of stigma and humiliation through closed proceedings and secret reporting. The training of judges, the emphasis on camera proceedings and secrecy in filing cases protected the dignity and privacy of victims. Further, the government ensured that the system was victim sensitive by allowing trauma counselors to provide support to victims during camera proceedings.

⁷⁹⁰ In 1996 the government passed a law to allow prosecution of genocide crimes in national courts and the first trial took place in December 1996. This law classified rape and sexual torture under category 1 triable by national courts. After the 2008 amendment, gacaca courts heard the cases beginning in 2009-2012(3years) *see*, Emily Amick, *supra* note 5, at 26-27

⁷⁹¹ Emily Amick, *Ibid*, at 73

⁷⁹² Organic Law N0 13/2008 of 19/05/2008 *supra* note 771, Art 6

⁷⁹³ Emily Amick, *supra* note 5, at 73

Failures/challenges of gacaca courts

The system faced challenges in its initial stage when some perpetrators elected genocide suspects as local judges in order to manipulate the system and avoid prosecution.⁷⁹⁴ The government replaced several judges after receiving these complaints.⁷⁹⁵ Despite these changes, women activists still alleged that sometimes victims sometimes found their perpetrators on the panel of judges during sexual violence proceedings.⁷⁹⁶ This occurrence threatened many victims and several claimed receiving threats from community members after testifying before gacaca.⁷⁹⁷ Further, because the local judges were also members of the community, there was often a conflict of interest as the victims or perpetrators were likely to be known or related to the judges thus bringing the independence of the courts into question.⁷⁹⁸

The Rwandan gacaca laws lacked definitions and elements of the crimes of sexual torture or rape to guide judges during proceedings. Articles 6 and 9 of the 2008 amendment simply provided for the offence of rape or sexual torture without definitions. Unfortunately the 1997 Rwandan Penal code did not offer much guidance. The penal code prohibited the crimes of rape, sexual torture, defilement and torture. It defined rape as unlawful sexual intercourse and in Article 316 stated that “a person who commits torture or acts of barbarity during the commission of a crime incurs the same punishment as one who commits murder.”⁷⁹⁹ The absence of definitions in the gacaca and genocide laws caused confusion and led to adoption of different standards by judges in gacaca courts.

⁷⁹⁴ National Service of Gacaca Courts , *supra* note 779, at 173

⁷⁹⁵ *Ibid*

⁷⁹⁶ Emily Amick, *supra* note 5, at 47

⁷⁹⁷ For a detailed account on insecurity and trauma suffered by women victims who testified before gacaca *see* Karen Brounéus, *Gacaca Courts, Truth-Telling as Talking Cure? Insecurity and Retraumatization in the Rwandan, Security Dialogue*,(2008)39, Jan 10, 2008, 55-76

⁷⁹⁸ Emily Amick, *supra* note 5, at 47

⁷⁹⁹ *Ibid*, at 40

The Gacaca system with the aim of protecting victims and their families from stigmatization established camera proceedings and secrecy in reporting cases. Although the intention of the law was good given the social context, these proceedings unfortunately depicted survivors' experiences as unbearable and unspeakable and only worth closed hearings.⁸⁰⁰ Such an approach is likely to increase sense of guilt and shame among victims. Emily Amick adds that "[b]y offering women the option to shield themselves from severe pain through *in camera* proceedings, the court also institutionalized the idea that women should be fearful or ashamed of speaking about crimes of sexual violence and kept these women's experiences outside of the community narrative."⁸⁰¹ Women who were willing to testify should have been given the option of sharing their experiences in public like in Sierra Leone and victim protection and support systems should have been put in place.

Quite striking, despite the gender neutral provisions on the offence of rape and sexual torture in the 2008 gacaca law, no single case of male sexual abuse was reported or even tried by the gacaca courts and yet men were also victims.⁸⁰² The exclusive focus on women as the only victims presents sexual violence as a women's problem and ignores the suffering of male survivors. Further, although the official narrative about gacaca has been that they have promoted reconciliation and forgiveness, there is a widespread feeling of injustice because crimes committed by the current government were not tried.⁸⁰³ Moreover, the focus of gacaca courts on

⁸⁰⁰ Usta Kaitesi, *Genocidal Gender And Sexual Violence : The Legacy Of The ICTR, Rwanda's Ordinary Courts And Gacaca Courts*, Cambridge, U.K. ; Portland [Ore.] : Intersentia, (2014), 239

⁸⁰¹ Emily Amick, *supra* note 5, at 54

⁸⁰² See experiences of a male survivor of sexual violence in De Brouwer A-M and Chu SKH (2009) *The Men Who Killed Me: Rwandan Survivors of Sexual Violence 91-97*. Vancouver, Douglas and McIntyre As cited by Nicole Ephgrave, *Women's testimony and collective memory: Lessons from South Africa's TRC and Rwanda's gacaca courts*, *European Journal of Women's Studies* 1–14

⁸⁰³ Nicole Ephgrave, *Ibid* at 5

crimes that targeted the Tutsi community led to allegations that the process was a form of victor's justice and only the experiences of Tutsi women were considered worthy.⁸⁰⁴

4.2.4 Recommendations for Uganda's Traditional Justice System

Modification of Traditional justice systems: The Rwandan experience shows that a traditional justice system known for reconciliation was completely transformed to a somewhat formal judicial process. The system became largely punitive and was controlled by the state. This invoked fear and the cultural aspects of gacaca such as trust and voluntariness were largely lost. As Uganda envisages transforming and using traditional justice mechanisms such *Mato oput* to address conflict human rights violations, it should maintain the major components of trust, voluntariness, truth-telling and compensation which make up these systems.⁸⁰⁵ Further the government should not completely take over the process of modifying these systems but should instead consult the communities and traditional leaders on how best modify the process as this will facilitate community acceptance and success of the mechanisms.

Jurisdiction of Traditional Justice Mechanisms: The government of Rwanda through legislation clearly defined the jurisdiction of gacaca courts. It defined the criminal jurisdiction and sentencing powers of the courts in crimes of rape and sexual torture. In Uganda, the Transitional Justice Policy cites the lack of recognition and regulation as challenges of TJM. Uganda's proposed law should like Rwanda clearly establish the personal, criminal and sentencing jurisdictions of Traditional justice mechanisms in order to enhance complementarity with already existing and proposed mechanisms of justice. It is already clear that the International Criminal Court (ICC) will try those with the 'greatest' responsibility given the fact

⁸⁰⁴ Ibid at 5, see also Emily Amick, *supra* note 5, at 8 Hutu women were also victims of sexual violence because of their affiliation with Tutsi through marriage or through providing protection and by rejecting the genocide ideology.

⁸⁰⁵ James Ojera Latigo, *supra* note 420

that the LRA leaders had already indicted by the court. The ‘second’ highest category will most likely be tried before the International Crimes Division of Uganda or indicted by the ICC given the current challenges with amnesty provisions in Uganda. The lower ranking fighters who are back in the communities should therefore be handled by the Traditional Justice Mechanisms.

In regard to sexual violence, the law could provide that Traditional Justice processes such as *Mato oput* handle crimes of sexual violence that are not being investigated by the court or have been investigated but lack evidence which would reasonably make them successful in court. Perpetrators who appear before the truth commission and want to face their victims, perpetrators who have been granted amnesty and victims who are unwilling to appear in court should be given the option of going to Traditional Justice Mechanisms. It has been argued that the Acholi system has established procedures and penalties for crimes including rape, murder and arson.⁸⁰⁶

The government should modify these procedures to bring them in line with the Constitution of Uganda and international human rights standards. A categorization in crimes to be adjudicated by the traditional justice system will assist the process with the gravest crimes under the jurisdiction of the traditional courts being handled by the paramount chiefs

Uganda should however take a different route when it comes to sentencing powers in Traditional Justice Mechanisms. Sentences such as life imprisonment for sexual violence or commutation of sentence in case of a confession as used in Rwanda should not be employed. Instead material compensation as a form of punishment in *Mato oput* for individual victims should be encouraged. However, offering a girl as restitution should be abolished and replaced with a symbolic ceremony to represent restitution. It has also been argued that the Acholi have written

⁸⁰⁶ Jean-Rodolphe W. Fiechter , The Role of Traditional Justice in Uganda, given Rwanda's Experience of Gacaca July 2009 available at: http://works.bepress.com/jean_rodolphe_fiechter/2, 18

rules that specify the amount symbolic that should be given depending on the nature and extent of the crime.⁸⁰⁷ The option of community service as used by gacaca courts should be provided for by the proposed legislation to allow ex-combatants who are unable to pay compensation to offer their services to the community as a form of symbolic reparation to the survivors.

Time frame: In Rwanda, gacaca proceedings were held once a week and later extended to twice a week in certain localities. This to a certain extent hindered people from attending the proceedings if they were busy on those particular days. In Uganda, the processes should be allowed to run freely without time or weekly constraints so that the survivors can access them at anytime. However, the Traditional Justice Mechanisms should have a time frame within which to operate say for example 5 years.

Further, regarding participation, it is important that members of the community attend these sessions. However making attendance compulsory as in Rwanda will be counterproductive as people will attend out of fear instead of respect for the process. Given that majority of the people in Northern Uganda have to work, or to go to their gardens, members of the community should be allowed to determine with their traditional leaders the most convenient time.

Catering for various ethnicities and tribes: While gacaca was a system understood by all Rwandans, *Mato Oput* and other traditional practices of the Acholi in Northern Uganda are not understood by all Ugandans. Perpetrators in Northern Uganda were not all Acholi, some perpetrators were from neighboring tribes and the government UPDF soldiers hail from several regions in Uganda. In order for the traditional justice systems to provide meaningful justice to survivors, it should be understood and respected by all parties involved. The parliament in the

⁸⁰⁷ Ibid at 19

proposed law should through consultations find middle ground or introduce a blend of different traditional practices in situations where perpetrators are not Acholi.⁸⁰⁸

Gender balance: Traditional justice systems have been cited for promoting gender inequalities since they are largely dominated by men. Rwanda addressed this issue by allowing women to participate as judges in the gacaca system. Similarly, Uganda's proposed law establishing TJM should address gender inequalities by allowing females to actively participate in the processes.

Independent and unbiased processes: The gacaca process was marked with distrust and malicious allegations because the Rwanda Patriotic Front Crimes were not tried. This created a belief that gacaca was a system designed by the Tutsi dominated government against the Hutu. In Uganda, a situation of mistrust between clans is unlikely to occur in Northern Uganda because the process is controlled by mediators chosen by clan heads. Further, unlike Rwanda, the conflict was not a result of hate propaganda against a particular clan or clans. However, government soldiers and officers should equally participate in these processes.

Truth-telling: The Rwandan experience shows that the truth may not necessarily be told and yet truth is a key pre-requisite for forgiveness in many traditional practices such as *Mato oput*. Since the clan leaders command respect in their clans, they should be used to implore people to participate in this process and confess to the crimes they committed. They should also hold closed sessions with returnees to find out the crimes that they committed, since there is no life imprisonment like in Rwanda; people are likely to tell the truth.⁸⁰⁹

⁸⁰⁸ Ibid at 18

⁸⁰⁹ Jean-Rodolphe W. Fiechter, *supra* note 806 19-20

4.3 Reparations: Learning from experience of Sierra Leone and Rwanda

4.3.1 SLTRC and Reparations

The Lome peace agreement between the Government and the Revolutionary United Front provided for the establishment of a special fund to provide rehabilitation for war victims.⁸¹⁰

Following this, the TRC Act establishing the SLTRC mandated the truth commission to provide information and recommendations to guide the operation of the special fund for war victims.⁸¹¹

The power to implement recommendations, control operations and disbursement of the funds was left to a “follow-up committee” to be established by the government.⁸¹² Section 17 of the TRC Act provided that the government shall faithfully and expeditiously implement recommendations directed to state organs and encourage implementations of recommendations directed to other institutions.⁸¹³ As a fulfillment of its mandate, the SLTRC in its final report went to great length to provide detailed information about categories and eligibility of victims and to make extensive recommendations for a reparations system.⁸¹⁴ Unlike the South African TRC, the SLTRC provided recommendations covering all survivors and not only those who testified before the commission.⁸¹⁵ The commission listed female survivors of sexual violence, amputees and children among the special categories of victims that were in critical need of urgent care and attention given the lasting effect of the violations they suffered.⁸¹⁶

Given the wide-spread nature of sexual and gender based violence recorded by the commission during the conflict, the Commission made various recommendations divided into three categories

⁸¹⁰ The Lome Peace Agreement supra note 630, Article XXIX

⁸¹¹ The TRC Act, supra note 636, section 7(6)

⁸¹² Ibid, section 7(6) and 18(1)

⁸¹³ Ibid section 17

⁸¹⁴ SLTRC Report, supra note 653, Chapter Four, Reparations, Par 87-89

⁸¹⁵ Ibid, Chapter Four, Reparations, Par 54

⁸¹⁶ Ibid, Chapter Four, Reparations, Par 57-64

for victims of gender-based violence: those that addressed the tangible needs of survivors, symbolic reparations and community reparations. The first category included health care services, education and skills-training.⁸¹⁷ Symbolic reparations included apology and memorials.⁸¹⁸ Community reparations were aimed at reconstructing the communities affected by conflict.⁸¹⁹ The commission also made recommendations on the structure of the implementing body and the reparation program proposing a registration procedure for potential beneficiaries and a time frame within which to establish the implementing body.⁸²⁰

Despite the detailed recommendations, the reparations program in Sierra Leone generated dissatisfaction among survivors of sexual violence because the government was too slow in establishing a follow-up committee to implement the commission's recommendations. Since the commission's final report in 2004, it was not until 30th January 2009 that the government launched a reparations program within its National Commission for Social Action (NaCSA).⁸²¹ Unfortunately, inadequate resources by government affected program implementation. According to Helen Scanlon and Kelli Muddell, in April 2009, the government had only twenty five percent of the required funds to compensate victims and it had to decide on who was to receive compensation. This meant that some victims would remain uncompensated until 2010.⁸²²

Further, despite the creative reparation measures proposed by the commission, the reparations measures were criticized for failing to address the issue of children born of rape.⁸²³ In spite of these obstacles, some recommendations in the legal reform sector have been achieved. In June 2007,

⁸¹⁷ Ibid, Chapter Four, Reparations, Par 103-194

⁸¹⁸ Ibid, Chapter Four, Reparations, Par 195-205

⁸¹⁹ Ibid, Chapter Four, Reparations, Par 206-209

⁸²⁰ Ibid, Chapter Four, Reparations, Par 215, Specific Recommendations Regarding the Implementing body

⁸²¹ Lotta Teale, *supra* note 616 at 86

⁸²² Helen Scanlon and Kelli Muddell, *Gender and transitional justice in Africa: Progress and prospects*, *African Journal on Conflict Resolution* Vol 9, No 2 (2009), 20

⁸²³ Ibid, at 20

three Gender bills namely the Domestic Violence Act, the Devolution of Estates Act and the Registration of Customary Marriage and Divorce Act were passed into law.⁸²⁴ These provide justice to survivors, for example through enabling widows to inherit the property of their deceased spouses husbands. These Acts therefore represent progress in ending discrimination against women as recommended by the commission.⁸²⁵

4.3.2 Rwanda's Gacaca Courts and reparations

By contrast, Rwanda developed a reparation system linked to its traditional justice system of gacaca. In terms of material reparations, the 2000 law which formalized and established gacaca courts required the courts to forward copies of their judgments to the Compensation Fund for Victims of the Genocide and Crimes against humanity.⁸²⁶ The judgments or rulings were to indicate: “the identity of persons who have suffered material losses and the inventory of damages to their property; the list of victims and the inventory of suffered body damages; as well as related damages fixed in conformity with the scale provided for by law.”⁸²⁷ Based on the total damages, the fund would then grant compensation. The 2004 amendment however narrowed these provisions by limiting compensation and restitution to damage that occurred to property. The element of bodily harm was removed from the category⁸²⁸ and left to be determined by another law to be enacted by parliament.⁸²⁹ The 2008 amendment transferring category 1 crimes to gacaca jurisdiction did not alter this. However, the 2008 amendment upheld the need for symbolic reparations to victims of sexual violence as perpetrators had the option of confessing to

⁸²⁴ Lotta Teale, *supra* note 616, at 83

⁸²⁵ *Ibid*, at 84

⁸²⁶ Organic Law No. 40/2000 of 26/01/2001, *supra* note 726, Art. 90

⁸²⁷ *Ibid*, Art. 90

⁸²⁸ Organic Law No. 16/2004 of 19/6/2004 *supra* note 738, Art. 95

⁸²⁹ *Ibid*, Art.96

their crimes and apologising to victims,⁸³⁰ which resulted into commutation of sentences depending on whether the victims accepted their apologies.⁸³¹ Community service was an option for perpetrators who confessed to their crimes.⁸³² Community service depended on the needs of the community and it included building houses for survivors, creating terraces and repairing roads.⁸³³ Finally, Rwanda in addition to compensating victims carried out extensive poverty eradication schemes.⁸³⁴ Unfortunately, these schemes have been criticized for not being reparatory measures because they are aimed at developing the country and not attached to addressing the needs of survivors of sexual violence.

4.3.3 Recommendations for Uganda's reparation program

The common feature about both approaches is the fact that there was an independent institution outside both mechanisms to implement the reparation programs namely the follow-up committee for Sierra Leone and the body managing the compensation fund in Rwanda. Uganda can adopt a similar approach of having an independent body to implement a reparations program. However in order to minimize resources spent in establishing a new institution, an already existing institution could be used. The Amnesty Commission for example could implement a reparations program. Section 9(d) of the Amnesty Act gives the commission the function of promoting dialogue and reconciliation within the communities.⁸³⁵ Providing reparations can be an additional task and extension of its operations. The commission is a fit institution to carry out this mandate because it is well known in the communities since it has been reintegrating former combatants. Just like the Demobilization and Resettlement Team (DRT) which exists in the amnesty

⁸³⁰ Organic Law N0 13/2008 of 19/05/2008 *supra* note 771, Art.12

⁸³¹ *Ibid* , Arts.11,17 and 20

⁸³² Nyseth Brehm et al, *supra* note 730, at 343

⁸³³ *Ibid see also* Table 3. Frequency Distribution of Category 1 and Category 2 Sanctions at 343

⁸³⁴ Cecily Rose, *supra* note 427, 392

⁸³⁵ The Amnesty Act *supra* note 281, section 9(d)

commission to carry out demobilization and re-integration of reporters-amnesty recipients, a reparation team could be created within the commission to specifically compensate victims and run other reparation programs.

A mixture of both Sierra Leonean and Rwandan approaches could be used with the Truth commission providing extensive recommendations as was the case in Sierra Leone and the traditional justice leaders sending detailed records and lists to this reparation team for compensation. The compensation received under the traditional justice system from LRA perpetrators should not preclude survivors from receiving compensation from this reparations fund since the government has an obligation to provide reparations for victims of human rights violations. This way survivors that do not know their perpetrators or whose perpetrators have refused to participate in the traditional justice practices can still benefit from individual reparations from government. This will also help to address the current negative perception about amnesty packages given to former LRA which the survivors consider as reward to LRA perpetrators for the crimes they committed.⁸³⁶ This negative perception has arisen because the survivors have not received any form of individual reparation from the government.⁸³⁷ The traditional Justice Unit which I proposed to be established under the proposed truth institution could receive these lists and send them to Amnesty Commission.

After the conflict, Uganda like Rwanda embarked on development and poverty eradication schemes in Northern Uganda through its Peace Recovery and Development Plan (PRDP) established in 2007. These efforts have been disregarded by communities as forms of reparation because lack a recognition or acknowledgment of victims element in them. Rwanda too faced a

⁸³⁶ Cecily Rose, *supra* note 427

⁸³⁷ *Ibid*

similar challenge. The government of Uganda could therefore adopt creative approaches such as naming of schools, roads and hospitals after victims in consultation with the communities or alternatively monuments in remembrance of victims should be attached to these infrastructures.

4.4 Conclusion

Sierra Leone and Rwanda provide good precedents which Uganda can use to develop and establish alternative justice mechanisms to ensure justice for survivors of conflict-related sexual violence. Uganda' Transitional Justice Policy proposes measures such as enactment of legislation, establishment of a truth forum and developing a reparations program. Sierra Leone and Rwanda show how each of these measures can be achieved and specifically designed to address justice for survivors of conflict-related sexual violence. However the most important element for successful implementation of all these measures is the government political will. The governments' desire to address the plight of survivors of sexual violence was evident in both Sierra Leone and Rwanda through the establishment and reform of institutions.

CHAPTER FIVE: GENERAL RECOMMENDATIONS AND CONCLUSIONS

The study sought to investigate whether alternative forms of justice can effectively provide justice to survivors of conflict-related sexual violence in Northern Uganda compared to formal criminal prosecution before Ugandan and international courts. It established that alternative justice mechanisms provide a holistic form of justice in which survivors find a sense of remedy because it takes into account both their punitive and restorative need through punishing perpetrators and at the same time taking into account issues such as basic survival of survivors, cohabitation with alleged perpetrators after conflict.

To reach this conclusion, the study analyzed the international and regional institutional and legal frameworks and established that international practice has relied on the use of criminal prosecutions through international tribunals and special courts, yet the international and regional legal frameworks prescribe other alternative mechanisms such as compensation and rehabilitation. It also established that international and regional frameworks have focused on females as the only survivors of conflict-related sexual violence to the exclusion of men. It further established that, international criminal prosecution denies survivors of conflict-related sexual violence justice because the system focuses on punishing only a few perpetrators, only delivers justice when the perpetrators are apprehended and has limited rehabilitation measures for victims. The study used the situation of Northern Uganda before the ICC to examine the effectiveness of the court at providing justice to survivors of conflict-related sexual violence in Northern Uganda. The study found that the ICC is currently failing to deliver justice to survivors given the fact that nine years after referring the case to the court, the perpetrators are still at large and no rehabilitation measures exist for the victims until prosecution begins. Several scholars

were also skeptical about the court delivering justice to survivors given the lack of convictions on sexual violence in the cases from the DRC that have been handled by the court.

The study then examined Uganda's formal criminal justice systems and established that despite genuine efforts by the government to ensure justice for survivors the system is unable to deliver justice to the survivors of conflict-related sexual violence in Northern Uganda because of the amnesty process, the lack of evidence for successful prosecution, retrospectivity issues and lack of legal recognition of male rape. The study however recognized Uganda's initiative to use alternative forms of justice as a complement to the formal criminal justice system. An analysis of alternative forms of justice in Uganda found that indeed these forms of justice contain elements and procedures that take into account the victim's desire to see a perpetrator punished while at the same time addressing their rehabilitation and restitution needs. These elements included compensation as a form of punishment, acknowledgment and apology. The study also found that these mechanisms accommodate both male and female survivors and their use is widely supported by survivors.

The study however, cautioned of challenges that Uganda might face while using these mechanisms such as gender inequalities in the traditional justice mechanisms, designing an appropriate reparations program and absence or non-cooperation by alleged perpetrators. It used the case studies of Sierra Leone and Rwanda to show how alternative forms of justice can be used to specifically address justice for survivors of conflict-related sexual violence and to address the above challenges. It established that the success of these mechanisms in addressing conflict-related sexual violence is highly dependent on constant consultation with affected communities and establishing of gender-sensitive and victim-centred systems. It also recognized the role played by civil society organisations in the journey towards ensuring justice to survivors

of conflict-related sexual violence. Above all, the government's political will is important for successful establishment and functioning of these mechanisms. In this regard, it is recommended that in order to effectively provide justice to survivors of conflict-related sexual violence in Northern Uganda, the government should focus on the establishment and use of alternative forms of justice namely a truth forum, traditional justice mechanisms and reparations. This approach will address the survivors' punitive and restorative needs and also provide an alternative avenue as we wait for the formal criminal justice system to function upon the arrest of LRA commanders and expiration or reform of the amnesty process in Uganda. The government should maintain close consultation with civil society organisations as it develops alternative justice mechanisms.

Justice for survivors of conflict-related sexual violence in Northern Uganda is a complex and serious issue. This research does not pretend to offer a perfect answer to this issue, but is a modest contribution to the discussions aimed at ensuring justice for survivors of conflict-related sexual violence in Northern Uganda. It has based on the works of legal researchers and scholars to show that the formal criminal justice system is unable to holistically address the justice needs of survivors of conflict-related sexual violence. Case studies have also been used to suggest how alternative forms of justice can be employed in Uganda. It is my sincere hope that the ideas presented in this paper will be used in designing interventions to solve this issue, because justice to survivors of conflict related sexual violence in Northern Uganda is crucial in ensuring healing, lasting peace and non-recurrence of conflict. As one scholar puts it:

... the neglect of justice has serious implications for the attitudes on Acholi people towards the current Uganda government, for it perpetuates the perceived sense of marginalisation felt by many Acholi ... which was a contributor to the LRA rebellion.⁸³⁸

⁸³⁸ Bruce Baker, *supra* note 25 abstract

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