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**CAN ALTERNATIVE JUSTICE MECHANISMS SATISFY THE  
AIMS OF INTERNATIONAL CRIMINAL JUSTICE? THE  
CASES OF *MATO OPUT* AND THE SOUTH AFRICAN TRUTH  
AND RECONCILIATION COMMISSION**

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**AUGUST 2017**

## DECLARATION

I hereby declare that this thesis has not been and will not be, submitted in whole or in part to another University for the award of any other degree and the work produced here is my own except where stated otherwise.

Signature .....  
Wendy Marie André

Dated ..... 31<sup>st</sup> August 2017

## DEDICATION

In Loving Memory of Derek

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## ACRONYMS

AA	Amnesty Act
AAA	American Anthropological Association
AAR	Agreement on Accountability and Reconciliation
AC	Amnesty Committee
ACh	Appeal Chamber
ACHPR	African Commission on Human and Peoples' Rights
Afr.JI&CL	African Journal of International & Comparative Law
AFP	Agence France-Presse
AHC	<i>Ad Hoc</i> Committee
AJIL	American Journal of International Law
AJM	Alternative Justice Mechanism
ANC	African National Congress
ASP	Assembly of State Parties
AZAPO	Azanian People's Organization
BiH	Bosnia and Herzegovina
CAR	Central African Republic
CEJISS	Central European Journal of International and Security Studies
CLF	Criminal Law Forum
CODESA	Convention for a Democratic South Africa
Colum. J. Transnat'l L	Columbia Journal of Transnational Law
Comp. & ILJ S.Afr	Comparative and International Law Journal of South Africa
CONADEP	National Commission on the Disappeared
CUP	Cambridge University Press
DRC	Democratic Republic of Congo
Duke J. Comp. & IL	Duke Journal of Comparative and International Law
ECtHR	European Court of Human Rights
Ed(s)	Editor(s)
EJ Dev Research	European Journal of Development Research
EJIL	European Journal of International Law
EJIR	European Journal of International Relations
FAP	Formerly-Abducted Person
GA	General Assembly
GAOR	General Assembly Ordinary Resolution
GoU	Government of Uganda
GoS	Government of Sudan
GoSS	Government of South Sudan

HiiL	Hague Institute for the Internationalisation of Law
HR	Human Rights
HRC	Human Rights Council
HRLR	Human Rights Law Review
HRVC	Human Rights Violation Committee
HRQ	Human Rights Quarterly
HRR	Human Rights Review
HRW	Human Rights Watch
HSM/F	Holy Spirit Movement/Force
IACommHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
I&CLQ	International & Comparative Law Quarterly
IAPL	International Association of Penal Law
ICC	International Criminal Court
ICCSt	International Criminal Court Statute
ICJ	International Criminal Justice
ICtJ	International Court of Justice
ICL	International Criminal Law
ICLR	International Criminal Law Review
ICTJ	International Centre for Transitional Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IDASA	Institute for a Democratic Alternative for South Africa
IDEA	Institute for Democracy and Electoral Assistance
IDLO	International Development Law Organisation
IDP	Internally Displaced Person
IFP	Inkatha Freedom Party
IJTJ	International Journal of Transitional Justice
ILA	International Law Association
ILC	International Law Commission
ILJ	International Law Journal
ILR	International Law Review
IPU	Inter-Parliamentary Union
JHR	Journal of Human Rights
JICJ	Journal of International Criminal Justice
JIL	Journal of International Law
JIT	Justice in Transition
JLP&UL	Journal of Legal Pluralism and Unofficial Law
JMAS	Journal of Modern African Studies
JPR	Journal of Peace Research
JRP	Justice and Reconciliation Project
JSRP	Justice and Security Research Programme

KKA	Ker Kwaro Acholi
L&CP	Law & Contemporary Problems
LoN	League of Nations
LRA	Lord's Resistance Army
LJ	Law Journal
LQR	Law Quarterly Review
LR	Law Review
Melb. JIL	Melbourne Journal of International Law
Mil.LR	Military Law Review
MK	ANC's military wing, <i>Umkhonto we Sizwe</i>
MOD LR	Modern Law Review
MPYUNL	Max Planck Yearbook of United Nations Law
NEC	National Executive Committee
NGO	Non-Governmental Organization
NIMT	Nuremberg International Military Tribunal
NP	National Party
NRA/M	National Resistance Army/Movement
NYULR	New York University Law Review
NYUJIL&P	New York University Journal of International Law and Politics
Nw.ULR	Northwestern University Law Review
NSW	New South Wales
OHCHR	Office of the High Commission for Human Rights
OJLS	Oxford Journal of Legal Studies
OTP	Office of the Prosecutor
OUP	Oxford University Press
PAC	Pan-African Congress
PCIJ	Permanent Court of International Justice
PNURA	Promotion of National Unity and Reconciliation Act
PrepCom	Preparatory Committee
PrepC	Preparatory Commission
PRI	Penal Reform International
PTC	Pre-Trial Chamber
PUP	Princeton University Press
RJ	Restorative Justice
RLP	Refugee Law Project
RPE	Rules of Procedure and Evidence of the ICC
RPF	Rwandan Patriotic Front
R&RC	Reparations and Rehabilitation Committee
RSt	Rome Statute

SA	South Africa
SADF	South Africa Defence Force
SAJHR	South African Journal of Human Rights
SATRC	South African Truth and Reconciliation Commission
SC	Security Council
SL	Sierra Leone
SLTRC	Sierra Leone Truth and Reconciliation Commission
SP	State Party
SUP	Stanford University Press
TC	Truth Commission
TCh	Trial Chamber
TIMT	International Military Tribunal for the Far East
TJ	Transitional Justice
TRC	Truth and Reconciliation Commission
TWAIL	Third World Approaches to International Law
UCICC	Uganda Coalition for the ICC
UDF	United Democratic Front
UDHR	Universal Declaration of Human Rights
UHDR	Ugandan Human Development Report
UN	United Nations
UNCHR	UN Commission on Human Rights
UNDA	United Nations Development Agency
UNDP	United Nations Development Programme
UNGA	United Nations General Assembly
UNICEF	United Nations Children's Emergency Fund
UNLA	Ugandan National Liberation Army
UNSC	United Nations Security Council
UNSG	United Nations Secretary General
UoPP	University of Pennsylvania Press
UP	University Press
UPDF	Ugandan People's Defence Force
US	United States of America
Wash. ULR	Washington University Law Review
WBG	World Bank Group
WBLR	World Bank Legal Review
WJP	World Justice Project
WW1	World War One
WW2	World War Two
YBILC	Yearbook of the International Law Commission
YJIL	Yale Journal of International Law

YLJ  
YUP

Yale Law Journal  
Yale University Press

## ABSTRACT

The role of alternative justice mechanisms (AJMs) in international criminal justice (ICJ) has been the subject of rigorous debate in recent years. This thesis joins the discussion by investigating whether AJMs can achieve the aims of ICJ that are attributed to criminal prosecutions. If AJMs can attain ICJ goals, there are important implications for the entire complementarity regime at the International Criminal Court (ICC), requiring ICC judges to defer prosecutions in their favour. By establishing a framework against which ICC trials and AJMs can be evaluated, the thesis contributes to the debate and aims to provide an element of consistency in an area which is dominated by creative ambiguity.

Arguing that criminal prosecutions have a limited impact on ICJ aims, the thesis considers AJMs generally before undertaking an in-depth historical and comparative analysis of the *Mato Oput* process in Uganda and the South African Truth and Reconciliation Commission (SATRC). It concludes that *Mato Oput* does not satisfy the goals of ICJ and therefore would be unlikely to persuade the Court to defer prosecutions. It suggests, however, that an AJM based on the SATRC model would have the potential to attain many ICJ goals and therefore the ICC should declare a situation where the state adopts this method of justice and accountability inadmissible to the ICC.

Finally, the thesis examines the decisions of the ICC judges in previous admissibility challenges and argues that they must demonstrate a broader and more flexible approach when interpreting the ICC's mandate if AJMs are to satisfy the complementarity principle. Doing so would also help to avert the growing antipathy of many African states towards the ICC and ensure the future support and co-operation of states parties.

## CHAPTER ONE

### INTRODUCTION

#### Introduction

When the Rome Conference ended on 17th July 1998 ‘amid an atmosphere of euphoria’,<sup>1</sup> the expectations for the International Criminal Court (ICC) were very high and the subsequent ratification of the Rome Statute (RSt or the statute) within a shorter time than anticipated was described as a ‘milestone in humankind’s efforts towards a more just world’ in the Court’s founding documents.<sup>2</sup> Yet within fifteen years of the ICC’s establishment in 2002, criticisms of the Court are widespread, particularly from Africa, a continent that once had heralded the Court’s potential to bring accountability to its conflict-ridden nations.

With 33 African states having ratified the treaty,<sup>3</sup> Africa comprises the largest regional bloc of the 123 countries to have accepted the ICC’s jurisdiction<sup>4</sup> and the ICC was widely supported by African governments until it began investigating African Presidents, such as Bashir of Sudan and Kenyatta of Kenya.<sup>5</sup> African leaders began to denounce the ICC’s style of international criminal justice (ICJ),<sup>6</sup> with criticisms ranging from allegations of ‘neo-colonialism’ arising from the perception that the ICC is concentrating on African states for investigation, through tensions over the selection of cases to prosecute, particularly the indictment of sitting heads of state; to accusations of cultural insensitivity and interference with ongoing peace processes.<sup>7</sup> The dissatisfaction led to

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<sup>1</sup> Kirsch, P. and Robinson, D. (2002) ‘Reaching Agreement at the Rome Conference’ in Cassese, A., Gaeta, P., Jones, J.R.W.D. *The Rome Statute of the International Criminal Court: A Commentary Volume 1* (Oxford: OUP) p77

<sup>2</sup> See ‘Founding treaty: The Rome Statute’ [Online] Available: <https://www.icc-cpi.int/about> [Accessed 13.03.17]

<sup>3</sup> Burundi was the 34<sup>th</sup> African State to ratify the Rome Statute (making 124 member states) but withdrew on 27 October 2017

<sup>4</sup> Annan, K. (2016) ‘African Exodus from ICC must be stopped, says Kofi Annan’ *The Guardian* 18 November [Online] Available: <https://www.theguardian.com/world/2016/nov/18/african-exodus-international-criminal-court-kofi-annan> [Accessed 27.04.17]

<sup>5</sup> Roth, K. (2014) ‘Africa Attacks the International Criminal Court’ *NY Review of Books* 14 January

<sup>6</sup> See e.g. Kimani, M. (2009) ‘Pursuit of Justice or a Western plot? International indictments stir angry debate in Africa’ 23(3) *AfricaRenewal* October

<sup>7</sup> Murithi, T. (2013) ‘The African Union and the International Criminal Court: An Embattled Relationship?’ *The Institute for Justice and Reconciliation: Policy Brief Number 8* March pp1-9 at pp2-4; see also York, G. (2017) ‘African Union’s mass withdrawal strategy mounts pressure on ICC’ *The Globe and Mail* 1 February [Online] Available: <http://www.theglobeandmail.com/news/world/african-unions-mass-withdrawal-strategy-a-fresh-blow-to-international-court/article33869212/> [Accessed 22.02.17]

several African states indicating their intention to withdraw from the ICC in late 2016<sup>8</sup> and to African leaders adopting a strategy for withdrawal from the ICC at the conclusion of the African Union (AU) summit in January 2017.<sup>9</sup>

This move by the AU appears to be a reversal of views expressed at the Assembly of State Parties' (ASP) 'open bureau meeting' on Friday, 18th November 2016 to discuss the ICC-Africa relationship<sup>10</sup> when many states expressed a desire for genuine discussions about the future of ICJ. The three withdrawing states (South Africa, Burundi and The Gambia) explained their experiences and criticisms and whilst others indicated they were considering withdrawal, still more affirmed their support for the Court.<sup>11</sup> The view that the core principles and purpose of the statute should not be undermined was widely expressed but it was stressed also that where accountability meets important issues such as peace, governance and pluralism, there should be flexibility and negotiation about how these incommensurable values can best be reconciled.<sup>12</sup> This was encouraging but the ICC clearly has been given a serious wake-up call: it must be less prescriptive and more ready to adapt and compromise.

These will not be easy tasks for the ICC, with its strong emphasis on retributive justice. For centuries, criminal justice ethics have been dominated by retributivism and consequentialism and although their justifications differ, both hold that punishment should be the main response to crime.<sup>13</sup> At the international level, demands for the truth about past human rights abuses and punishment of those responsible for perpetrating them are viewed as pre-requisites for the establishment of democracy and

---

<sup>8</sup> South Africa and Gambia have submitted notices of withdrawal to the United Nations (UN) and Kenya and Namibia seem ready to follow. However, the newly-elected President of Gambia has recently formally informed the UN that Gambia is reversing its request to withdraw from the ICC and South Africa has issued a notice to formally revoke its withdrawal after the Gauteng High Court ruled in February 2017 that the initial process to withdraw from the ICC was unconstitutional and invalid

<sup>9</sup> Associated Press in Addis Ababa (2017) 'African leaders plan mass withdrawal from international criminal court' 31 January [Online] Available: <https://www.theguardian.com/law/2017/jan/31/african-leaders-plan-mass-withdrawal-from-international-criminal-court> [Accessed 22.02.17]

<sup>10</sup> 15<sup>th</sup> session of the Assembly of States Parties, 16 to 24 November 2016, World Forum, The Hague

<sup>11</sup> Informal summary by the President on the "Relationship between Africa and the International Criminal Court" ICC-ASP/15/36 24 November 2016 paras. 5-9

<sup>12</sup> See statement of Mr. Sidiki Kaba, President of the ASP of the ICC at the Open Bureau meeting "Relationship between Africa and the ICC" 18.11.2016

<sup>13</sup> Tallgren, I. (2002) 'The Sensibility and Sense of International Criminal Law' 13 *EJIL* pp561-595 at p568



respect for the rule of law.<sup>14</sup> The ten years after 1993, for example, saw the establishment of *ad hoc* international tribunals for the former Yugoslavia and Rwanda, the ICC in The Hague and hybrid tribunals in Kosovo, Sierra Leone, Timor-Leste, Bosnia-Herzegovina and Cambodia, which indicates the unparalleled importance of criminal trials and reflects the contemporary dominance of transatlantic jurisprudence.

However, in spite of this dominance, in 'affluent democratic societies'<sup>15</sup> the alternative model of restorative justice (RJ) also became 'immensely popular from the 1990s onwards [...] viewed by many as a social movement of global dimensions.'<sup>16</sup> RJ offered fresh hope for 'progressive change in criminal justice, despite a continuing conservative landscape.'<sup>17</sup> Interest in RJ had first emerged in the 1970s, as part of a 'major development in criminological thinking'.<sup>18</sup> Social change in the 1960s and 1970s<sup>19</sup> had led to questions about punishment and society, with early advocates of RJ being generally 'against punishment', their views reflecting 'the optimism of the times, when it seemed possible to shift criminal justice toward a more constructive and less punitive direction.'<sup>20</sup> Rising imprisonment rates and conservatism in penal politics caused the optimism to falter in the 1980s and 1990s but RJ 'emerged as a new term in the late 1980s.'<sup>21</sup>

For Braithwaite, RJ is 'most commonly defined by what it is an alternative to',<sup>22</sup> although both he and Daly quote a definition by Tony Marshall, a well-known advocate of RJ: 'Restorative justice is a process whereby all the parties with a stake in a particular offense come together to resolve collectively how to deal with the aftermath of the

---

<sup>14</sup> See e.g. Report of the Secretary-General *The rule of law and transitional justice in conflict and post-conflict societies* S/2004/616 23 August 2004

<sup>15</sup> Daly, K. (2013) 'The Punishment Debate in Restorative Justice' in Simon, J. and Sparks, R. *The SAGE Handbook of Punishment and Society* (London: SAGE Publications Ltd) p356

<sup>16</sup> *Ibid* p360

<sup>17</sup> *Ibid* p357

<sup>18</sup> Braithwaite, J. (1999) 'Restorative Justice: Assessing Optimistic and Pessimistic Accounts' 25 *Crime and Justice* pp1-129 at p1

<sup>19</sup> For example, the emergence in Europe and the US of a politics of law and order, an increase in violent crime, a wave of social and political unrest, violent police responses to protest and widespread demands for greater social justice for minorities

<sup>20</sup> Daly, K. (2013) p356

<sup>21</sup> *Ibid* p357

<sup>22</sup> Braithwaite, J. (1999) p4

offense and its implications for the future.’<sup>23</sup> Within domestic criminal justice processes, RJ can entail a ‘variety of [...] practices, which normally bring victim and offenders (and others) together in a process in which both lay and legal actors make decisions and whose (stated) aim is to repair the harm for victims, offenders, and perhaps other members of ‘the community’ in ways that matter to them.’<sup>24</sup> In the context of international crimes involving gross breaches of human rights, RJ may involve recourse to alternative justice mechanisms (AJMs) as a means of dealing with the past and effecting reconciliation between former enemies. Although it dealt only with abuses that were crimes under its domestic law, the South African Truth and Reconciliation Commission (SATRC) is an example of how restorative justice can be used to address system-wide offences that affect a major section of society. It demonstrates that a Truth Commission (TC) has the potential, if implemented properly, to be an effective RJ approach for international crimes, as will be discussed in Chapter Six.

For states emerging from violent intrastate conflict or repressive authoritarian rule, the option to forgo justice in the form of trials and punishment in favour of truth-telling and acknowledgment of wrong-doing may be expedient if the outcome is a peaceful transition for the new nation. Thus, in recent years, alternative, restorative justice mechanisms are more often being considered the preferred means of achieving ICJ in transitional situations, as reflected in various UN reports,<sup>25</sup> international workshops,<sup>26</sup> academic conferences and research<sup>27</sup> and NGO and intergovernmental focus.<sup>28</sup>

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<sup>23</sup> *Ibid* p5, see also Daly, K. (2013) p361

<sup>24</sup> Daly, K. (2001) ‘Restorative Justice: the real story’ Paper revised from that presented to the Scottish Criminology Conference, Edinburgh, 21-22 September 2000 p9

<sup>25</sup> For example, Guidance Note of the Secretary-General (2010) *United Nations Approach to Transitional Justice*, March [Online] Available: [https://www.un.org/ruleoflaw/files/TJ\\_Guidance\\_Note\\_March\\_2010FINAL.pdf](https://www.un.org/ruleoflaw/files/TJ_Guidance_Note_March_2010FINAL.pdf) [Accessed 14.03.17]

<sup>26</sup> The ICTJ conducts a wide range of workshops and courses on Transitional Justice as does the Transitional Justice Institute at Ulster University

<sup>27</sup> Such as the Conference: ‘Transitional Justice and Alternative Mechanisms for Peace’ hosted by Stockholm Centre for the Ethics of War and Peace and the University of Johannesburg Stellenbosch Institute for Advanced Studies, South Africa, 8<sup>th</sup>-9<sup>th</sup> April 2016

<sup>28</sup> See, for example, Amnesty International (2010) ‘Commissioning Justice: Truth Commissions and Criminal Justice’; also see Harper, E. (ed) (2011) ‘Working with Customary Justice Systems: Post-Conflict and Fragile States’ (International Development Law Organization)

### What is meant by 'International Criminal Justice'?

It can be surprisingly difficult to articulate all that ICJ involves. Basically, the phrase describes 'the response of the international community - and other communities - to mass atrocity.'<sup>29</sup> The atrocities are frequently the legacy of states emerging from periods of violent internal conflict or repressive, authoritarian rule. International lawyers may argue that the appropriate response is international trials and there is no doubt that criminal prosecutions are strong weapon against the perpetrators of international crimes. However, ICJ is not merely international criminal law (ICL) but 'the extent to which some degree of 'justice' can be brought to situations where international crimes have been or are being committed'.<sup>30</sup> As discussed in the preceding paragraph, there exist a range of other responses which reflect a less retributive and more reconciliatory approach to justice. These 'other' or 'alternative' responses can take into consideration socio-economic, political and historical concerns that are absent from a one-size-fits-all blanket application of criminal prosecutions.

Truth commissions are one such alternative response to demands for ICJ. Almost half of Africa's 55 countries have established truth commissions since the mid-1970s and more may be established in the aftermath of the Arab Spring.<sup>31</sup> Other, community-based approaches, include *Mato Oput* in Northern Uganda, the *Gacaca* courts in Rwanda and *Fambul Tok* in Sierra Leone. These AJMs demonstrate a more culturally specific response to ICJ and focus primarily on social repair through acknowledgement and reconciliation as opposed to retribution.

It is clear therefore that the answer to the question 'what is meant by ICJ?' cannot be answered simply by reference to ICL. As Richard Goldstone has stated, although the

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<sup>29</sup> Boas, G. (2012) 'What is in a Word: The Nature and Meaning of International Criminal Justice' in Boas, G., Schabas, W. and Scharf, M. (eds.) *International Criminal Justice: Legitimacy and Coherence* (Cheltenham: Edward Elgar) p1

<sup>30</sup> Garkawe, S. (2012) 'Have recent changes designed to benefit victims of international crimes added to the legitimacy of international criminal justice' in Boas, G., Schabas, W. and Scharf, M. (eds.) *International Criminal Justice: Legitimacy and Coherence* (Cheltenham: Edward Elgar) p270

<sup>31</sup> Fombad, C.M.F. (2017) *Update: Transitional Justice in Africa: The Experience with Truth Commissions* [Online] Available: [http://www.nyulawglobal.org/globalex/Africa\\_Truth\\_Commissions1.html](http://www.nyulawglobal.org/globalex/Africa_Truth_Commissions1.html) [Accessed 21.01.18]

‘most common form of justice’, prosecutions are ‘not the only form, nor necessarily the most appropriate form in every case.’<sup>32</sup> The subject requires a broader analysis and an engagement with other disciplines beyond the law itself to ensure that the justice sought and obtained is relevant to the victims of the atrocities and is not simply satisfying the demands for retribution expressed by the international community.<sup>33</sup>

### **Transitional Justice – A Brief Overview**

Transitional justice (TJ) is a relatively new field of study, emerging after the Cold War amid hopes for global respect for humanitarianism, human rights and international law.<sup>34</sup> TJ mainly concerns how states in transition from war to peace or from authoritarian rule to democracy address their legacies of mass abuse.<sup>35</sup> Whilst there are many variations of transitional situations, the one similarity is the legacy of widespread violence and repression and it is this aspect that led to the development of the field of TJ. Part of the broader topic of human rights, the TJ field of study has burgeoned over the last two decades, engaging a wide range of disciplines and professions encompassing aspects of law, policy, ethics and social science.<sup>36</sup> Within the debate on the theoretical and ethical issues surrounding TJ norms and its institutions, there is concern over whether TJ structures other than criminal trials are merely political compromises, ‘second best’ options where ‘[j]ustice becomes the casualty of a political calculation’,<sup>37</sup> whether they have a consistent set of goals and whether they fulfil the claim to heal victims and nations and effect reconciliation between former enemies. These secondary issues also will be addressed in this thesis.

TJ focusses on four main mechanisms: trials, fact-finding bodies, reparations and justice reforms and encompasses features such as amnesty, reconciliation, memorialisation,

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<sup>32</sup> Goldstone, R. (1996) ‘Justice as a Tool for Peace-Making: Truth Commissions and International Criminal Tribunals’ 28 *NYUJIL&P* pp485-503 at p491

<sup>33</sup> To illustrate this point, see ‘Report of the African Union High Level Panel on Darfur (AUPD) 29 October 2009 PSC/AHG/2(CCVII) paras.203-205

<sup>34</sup> Hinton, A.L. (2007) *Transitional Justice: Global Mechanisms and Local Realities after Genocide and Mass Violence* (London: Rutger UP) p2

<sup>35</sup> Freeman, M. (2006) *Truth Commissions and Procedural Fairness* (Cambridge: CUP) p4

<sup>36</sup> *Ibid* p4

<sup>37</sup> Allen, J. (2001) ‘Balancing Justice and Social Unity: Political Theory and the Idea of a Truth and Reconciliation Commission’ 49 *U. Toronto LJ* pp315-353 at p315

lustration, democratisation and peacebuilding.<sup>38</sup> Clearly, TJ includes criminal prosecutions but it extends far beyond, mainly due to the sheer numbers of victims and perpetrators but also because frequently those who perpetrated the abuses still retain some element of political authority and police or military power. Other impediments to domestic criminal trials can result from the states' justice systems being weakened and/or corrupt, the destruction of evidence by the previous regime and the scarcity of resources which are needed for immediate social needs such as housing, health and education rather than costly prosecutions. The fundamental issue, however, is the imperative of securing peace which sometimes necessitates a political realism that minimises accountability for crimes to ensure a successful transition process.

The central aims of TJ emphasise the recognition of the dignity of individuals, redressing and acknowledging violations of their human rights and ensuring their future prevention.<sup>39</sup> Additional TJ aims, which vary according to context, include promoting respect for the rule of law, facilitating peace processes and durable conflict resolution and advancing reconciliation.<sup>40</sup> Whereas TJ scholars envisage holistic approaches to justice which promote possibilities for peace, reconciliation and democracy for countries emerging from periods of conflict or repression, advocates for the ICC promote it as having a central role in achieving TJ through a fixed, judicial response to atrocities and they call for the ICC to intervene 'frequently, liberally and robustly', particularly (to date) in Africa.<sup>41</sup>

As a field of study, TJ is most often associated with political science and academic debate appears to be intra-disciplinary with political scientists seeing TJ as a conceptually separate discipline from law, the two developing mutually-exclusively as either non-judicial (flexible) or judicial (rigid) responses to HR violations.<sup>42</sup> The fundamental objective of the ICC is to ensure that the crimes within its jurisdiction do not go

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<sup>38</sup> Freeman, M. (2006) p5-6; see also Hinton, A.L. (2007) p4

<sup>39</sup> ICTJ (2017) 'What is Transitional Justice?' [Online] Available: <https://www.ictj.org/sites/default/files/ICTJ-Global-Transitional-Justice-2009-English.pdf> [Accessed 21.02.18]

<sup>40</sup> *Ibid*

<sup>41</sup> Okafor, O.C., Ngwaba, U. (2015) 'The International Criminal Court as a 'Transitional Justice' Mechanism in Africa: Some Critical Reflections' 9 *IJTJ* pp90-108 at p90

<sup>42</sup> Flory, P. (2015) 'International Criminal Justice and Truth Commissions: From Strangers to Partners?' 13 *JICJ* pp19-42 at p20

unpunished but as will be discussed in Chapter Three, in addition, the ICC has been given aims which extend beyond the demands of domestic criminal justice systems (that is, retribution, deterrence, incapacitation and rehabilitation) to incorporate TJ goals. This was made clear in the UN Secretary General's 2004 report to the UN Security Council (UNSC) in which the objectives for trials at the ICC were stated to include (*inter alia*) the TJ aims of securing justice and dignity for victims, preventing a recurrence of violations of their HR, promoting national reconciliation and contributing to the restoration of peace.<sup>43</sup>

The ICC is often criticised as being an ineffective TJ mechanism on the grounds that it is distanced both geographically and contextually from those for whom it is seeking justice.<sup>44</sup> Furthermore, detractors argue, trials at the ICC undermine state and/or local justice systems and are subject to the vagaries of international political influence as can be seen, for example, in the contrasting approaches of the UNSC to the situations in Libya and Syria.<sup>45</sup> Clearly, the ICC is the primary 'global' institution for achieving justice in situations of transition but in this thesis, the ICC will be examined not specifically from the TJ viewpoint but to determine whether trials at the ICC successfully achieve the numerous justice aims attributed to them and before then appraising the capacity of AJMs to attain the same justice aims.

One has only to compare the situations in Uganda (a post-conflict situation) and South Africa (the demise of an authoritarian government) to appreciate that there is no 'one-size-fits-all approach'<sup>46</sup> to a lasting peace and democracy. The issue of 'the local' has gained prominence over the years, with the argument widely expressed among scholars and practitioners that each situation is different and demands a locally-attuned response.<sup>47</sup> Desmond Tutu, for example, has referred to retributive justice as 'western',

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<sup>43</sup> *The rule of law and transitional justice in conflict and post-conflict societies*: Report of the Secretary-General 23 August 2004 UN Doc. S/2004/616 para. 38

<sup>44</sup> Flory, P. (2015) p19

<sup>45</sup> Okafor, O.C., Ngwaba, U. (2015) p95-96

<sup>46</sup> Foreword (2016) 'Symposium' 14 *JICJ* pp21-23

<sup>47</sup> See, for example, Drumbl, M.A. (2003) 'Towards a Criminology of International Crime' *Ohio State Journal on Dispute Resolution* pp263-282 at p267

with African understanding of justice being more restorative, to 'restore a balance that has been knocked askew'.<sup>48</sup>

The area that is of central concern in this thesis is whether the ICC has demonstrated intractability regarding the issue of AJMs when dealing with African states and should be more sensitive to context and cultural identity. Whilst the Court is clearly mandated to 'put an end to impunity',<sup>49</sup> this thesis questions whether the Court should be prepared to be pragmatic and carry its supporters (and detractors) with it by means of engagement, support and compromise. Further and based on African experience, the thesis examines whether this requires the Court to be open to AJMs which genuinely seek to achieve many of the same goals of ICJ that are attributed to prosecutions at the ICC and may even satisfy them more successfully.

In considering when and in what circumstances the ICC should defer to an AJM, this thesis is not seeking to introduce an AJM through the back door by persuading the Prosecutor to use her discretion not to prosecute the case by relying on the Interests of Justice provisions set out in Article 53 of the RSt.<sup>50</sup> Rather it argues that it should be possible under the RSt's complementarity regime to persuade the ICC that any AJM that attains the goals of ICJ that are attributed to criminal trials should make the case inadmissible to the ICC. Whether the admissibility provisions of Article 17 as currently drafted and interpreted by the ICC Judges would enable an AJM to satisfy the Court's complementarity principle is questioned more fully in Chapter Eight. Ultimately, however, it will be argued that for an AJM that does fulfil the same ICJ aims as criminal prosecutions at the ICC to trump prosecutions at the ICC, either the Court must be much more flexible in its interpretation of the RSt's admissibility provisions or the Statute will have to be amended by the ASP to enable an AJM to meet the admissibility criteria.

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<sup>48</sup> Minow, M. (1998) *Between Vengeance and Forgiveness* (Boston: Beacon Press) p81

<sup>49</sup> Preamble to the RSt, para. 5

<sup>50</sup> Article 53(1)(c) gives the Prosecutor the discretion to decline to initiate an investigation if there are 'substantial reasons to believe that an investigation would not serve the interests of justice' and Article 53(2)(c) enables her to conclude that a 'prosecution is not in the interests of justice', provided certain criteria listed in the article are met

## Thesis Research Questions

This thesis will discuss an issue which the ICC has not yet had to address but which it may well have to face in the future, whether from Africa or another continent and it directly relates to the issues of peace, governance and pluralism that African states stressed at the ASP open bureau meeting in November 2016 as being of concern to them. Whilst the ICC has faced several admissibility challenges, it has not faced a challenge based on a state wishing to deal with the perpetrators of the international crimes within the Court's jurisdiction by means of an AJM. The main research question for this thesis is whether AJMs can satisfy the same ICJ aims that are required of trials at the ICC and in what circumstances should the ICC be prepared to defer to that state. Drawing on the analysis of the examples of *Mato Oput* in Uganda and the SATRC, the thesis will develop a framework that could be used by a state in an admissibility challenge to the ICC in relation to its proposed AJM and by the ICC in its assessment of the state's proposed AJM.

In seeking to answer the main research question, this thesis will address the following sub-questions:

1. How did the international community come to choose an international criminal court based on western notions of 'justice' rather than another means of accountability for international crimes?
2. What are the ICJ aims of prosecutions at the ICC?
3. How can an admissibility challenge based on an AJM be made to the ICC and what are its chances of success under the Court's current interpretation of the complementarity regime?

Two case studies will be used to answer the questions posed by this thesis and to more clearly illustrate the factors it is argued should be considered in the Court's determination of issues of admissibility and complementarity. The first case study is *Mato Oput*, the ceremony of reconciliation traditionally used by the Acholi people of



northern Uganda in cases of inter-clan deliberate or accidental killings.<sup>51</sup> For the second case study, the SATRC was chosen because truth commissions have ‘become the most prominent government initiative to respond to past abuses and the starting point from which other methods of accountability, reparations and reforms may be developed.’<sup>52</sup> In the next section, more detailed reasoning is given for choosing these particular AJMs as case studies.

### **Why *Mato Oput* and the South African TRC?**

The situation in northern Uganda involving the conflict between the government and the Lord’s Resistance Army (LRA) led by Joseph Kony was chosen as a case study for several reasons. First, the conflict is ongoing and the case, which was self-referred by President Museveni in December 2003 remains at the ICC.<sup>53</sup> Second, after issuing arrest warrants for five LRA leaders, the Prosecutor was asked by representatives of the Acholi people (who arguably have suffered most from the LRA conflict) to defer prosecutions and allow the Acholi to deal with the LRA leaders themselves using *Mato Oput*, their traditional method of conflict resolution. The Prosecutor refused to accede to these requests which led to the failure of peace talks between the government of Uganda (GoU) and the LRA. As a result, Uganda’s President Museveni became a vocal critic of the Court, calling it a ‘useless institution’ and encouraging support in the African Union for a mass withdrawal from the RSt.<sup>54</sup> Third, is the nature of *Mato Oput* itself, a traditional Acholi justice mechanism said by their Elders to have cultural relevance for the Acholi people.<sup>55</sup> The GoU has not suggested *Mato Oput* as the appropriate accountability mechanism, the suggestion has come from the Acholi Elders who insist that it is the way the Acholi people traditionally deal with conflict resolution and therefore it is preferable to trials.<sup>56</sup> Investigating *Mato Oput* will enable an assessment

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<sup>51</sup> Baines, E. (2007) ‘The Haunting of Alice: Local Approaches to Justice and Reconciliation in Northern Uganda’ 1 *IJTJ* pp91-114 at p104

<sup>52</sup> Hayner, P.B. (2011) *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions* (Abingdon: Routledge) pxi-xii

<sup>53</sup> Situation in Uganda ICC-02/04

<sup>54</sup> Buchanan, E. (2016) ‘Ugandan President Museveni praises African nations for withdrawing from ‘useless’ ICC’ *International Business Times*, 26 October [Online] Available: <http://www.ibtimes.co.uk/ugandan-president-museveni-praises-african-nations-withdrawing-useless-icc-1588328> [Accessed 18.02.17]

<sup>55</sup> Afako, B. (2002) ‘Reconciliation and justice: ‘*Mato Oput*’ and the Amnesty Act’ *Accord* 11 pp64-67

<sup>56</sup> These claims will be examined in Chapter Five and it will be seen they are open to challenge

of whether a grass-roots justice mechanism, suggested by the representatives of the victims of international crimes themselves, would satisfy the aims of ICJ.

In contrast, the SATRC was not a 'traditional' grass-roots justice mechanism but a top-down mechanism of justice, established by a democratically-elected government. There have been several truth commissions in Africa but none are as well-known and internationally praised as the SATRC, which has been credited with helping to facilitate a smooth transition from the repressive apartheid regime to democracy and to create a culture of respect for human rights in South Africa.<sup>57</sup> One interesting aspect of the SATRC is the conditional amnesty that was offered to the individual perpetrators of gross violations of human rights in return for their full and frank admissions before the Commission.<sup>58</sup> This is clearly the antithesis of the ICC's principle that such crimes 'must not go unpunished and that their effective prosecution must be ensured'.<sup>59</sup> It is therefore instructive to consider whether the ICC would insist on prosecutions if South Africa were in the same position of transition today as it was in 1994/5 when the TRC was in the process of being established.

### **Thesis Structure**

The thesis will begin in Chapter Two by investigating the rise and development of ICJ and will consider why, when seeking to deal with perpetrators of 'atrocities that deeply shock the conscience of humanity',<sup>60</sup> the international community (as represented by the United Nations) chose to promote retributive justice in the form of an international criminal court rather than alternative means of accountability, for example, one that favours restorative justice. It will argue that the drive for a court came predominantly from Western powers for which retributive justice has long been the norm.

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<sup>57</sup> Wilson, R.A. (2001a) *The Politics of Truth and Reconciliation in South Africa: Legitimizing the Post-Apartheid State* (Cambridge: CUP) p223

<sup>58</sup> Hayner, P. (2011) p13

<sup>59</sup> Preamble, para. 4

<sup>60</sup> *Ibid* para. 2

Chapter Three will identify the ICJ goals that the ICC was established to achieve and will assess how successful prosecutions at the Court have been in satisfying these goals. It will argue that as well as the domestic aims of retributive justice such as punishment, deterrence, expressivism and rehabilitation, the ICC has been over-burdened with additional transitional justice goals including, for example, attaining peace, effecting reconciliation and writing a historical record. Several of these ICC goals conflict, resulting in the power of each being diluted which can lead to dissatisfaction with the ICC's achievements.

Chapter Four will then examine the strengths and weaknesses of AJMs, using mainly African examples, to assess their capacity to achieve the same ICJ aims accredited to trials at the ICC. Having considered AJMs as a general topic, Chapter Five will focus on northern Uganda's *Mato Oput*, an AJM used by the Acholi people. This chapter examines *Mato Oput* processes to establish whether it does achieve ICJ aims and therefore could potentially make a successful admissibility challenge at the ICC. It finds that despite the assertions of Acholi Elders to the contrary, the traditional *Mato Oput* ceremony is no longer in common usage. Further, the modern (abridged) version of *Mato Oput* being promulgated by the Elders does not satisfy the goals of ICJ, either locally for the Acholi people or nationally for the citizens of Uganda who are not Acholi but whose lives often have been affected by the government's conflict with LRA.

Chapter Six will then consider whether a TC can satisfy the aims of ICJ and will focus on the work of the SATRC, despite it having completed its work prior to the establishment of the ICC. The issue of interest for this thesis is whether the SATRC, which was lauded by the international community at the time, satisfies the requirements of ICJ and thus could persuade the Court to defer prosecutions in its favour today. The chapter will conclude that a TC can satisfy the requirements of ICJ provided it meets specific criteria. This finding can suggest a framework for a state proposing a TC rather than domestic trials in an admissibility challenge to the ICC should the Prosecutor refuse to defer in the state's favour.

Chapter Seven examines the likelihood of an AJM being accepted by the ICC as an alternative to prosecutions at the Court pursuant to the Court's principle of complementarity. It discusses the procedure to be followed by any state wishing to challenge the admissibility of a case at the ICC where the Prosecutor has declined to defer to the state and insists on proceeding with prosecutions. The chapter examines the Court's judgments (and dissenting judgments) in admissibility challenges previously heard by the court, to ascertain how flexible (or otherwise) the Judges have been in their interpretation of the provisions of the RSt and the Rules of Procedure and Evidence (RPE).

All the admissibility challenges to date have been based on proposed domestic prosecutions but the judges' findings are of relevance to this thesis as they give an indication of the potential for success of a challenge based on an AJM rather than trials. The chapter will find that far from acting flexibly, the Judges have demonstrated an inclination to make robust decisions even when the Court's intervention is opposed by states declaring themselves willing and able to conduct domestic criminal proceedings. It will conclude that a state wishing to rely on AJMs rather than trials will have an uphill struggle to persuade the Court to declare the case inadmissible to the ICC and will suggest changes that may be required for the Court to be willing to defer to an AJM, not least, for example, in the judges' narrow interpretation of the RSt.

Finally, Chapter Eight will conclude this thesis by drawing together all the macro and micro arguments in support of the central contention that AJMs are potentially capable of attaining the goals of ICJ and therefore the ICC's complementary principle should work in their favour. It will provide a framework for the State and for the ICC to facilitate the assessment of the proposed AJM's capacity to satisfy the goals of ICJ identified in Chapter Three. It will conclude that if it can be shown within this framework that the proposed AJM satisfies the requirements of ICJ at least to the standard achieved by ICC trials, the Court should defer to the state, even if it means offenders are 'unpunished'. It will reassert the intention of the drafters of the RSt and of the delegates at the Rome Conference that the ambiguity of some of the RSt's provisions permit their flexible interpretation and will close with the warning that if the ICC maintains its current

intractability, there could be further withdrawals and setbacks for ICJ. Instead, the ICC should respect and engage with the genuine desire of states to do justice differently, accepting that ICJ is a living, organic and holistic concept

## Conclusion

It will be suggested in this thesis that the history of international criminal justice has been driven forward by ideas of legal rationality that are almost exclusively European. Thus, it cannot be argued with any conviction that the ICC is a truly global legal process with universal relevance and authority. This does not mean that the ICC does not represent a valuable and paradigmatic justice system, developed in Europe over an extended period and influenced by important and universal values of due process and human rights before these were spread to other continents. The thesis questions, however, whether the procedures adopted by the ICC represent the *only* way the global values of justice, human rights and the rule of law can be upheld, or whether AJMs can satisfy the requirements of ICJ.

There is, of course, extensive literature on African AJMs and on the ICC, particularly regarding the principle of complementarity.<sup>61</sup> The question of amnesties and ICJ is also well-rehearsed,<sup>62</sup> as is the issue of whether transitional justice mechanism could persuade the ICC to defer prosecutions, both often within the ‘peace versus justice’ debate. For example, Linda Keller’s article on western retributive justice versus traditional restorative justice based on *Mato Oput* and her proposal that these two conceptions of justice should be harmonised in the context of ICC deferrals to traditional justice mechanisms was the initial catalyst for the research in this thesis.<sup>63</sup> However, the ‘interests of justice’ debate is not the focus of this thesis which seeks instead to coalesce many of the arguments in existing literature and add to the scholarship by specifically identifying the ICJ aims of prosecutions at the ICC and then, using this same

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<sup>61</sup> See, for example, Waldorf, L. (2006) ‘Mass Justice for Mass Atrocity: Rethinking Local Justice as Transitional Justice’ 79 *Temple LR* pp1-88

<sup>62</sup> See, for example, Scharf, M.P. (1999) ‘The Amnesty Exception to the Jurisdiction of the International Criminal Court’ 32 *Cornell ILJ* pp507-527

<sup>63</sup> Keller, L.M. (2008) ‘Achieving Peace with Justice: The International Criminal Court and Ugandan Alternative Justice Mechanisms’ 23 *Connecticut JIL* pp209-279

framework to assess *Mato Oput* and the SATRC. It is argued that where a proposed AJM equals or betters the performance of the ICC in achieving the ICJ aims, there are strong grounds for successfully persuading the ICC that a case is inadmissible within the RSt's complementarity regime.

Transitional justice has successfully engaged a wide range of disciplines which has added to the knowledge and understanding of local justice needs of victims as opposed to the universal justice demands that have predominated over the last two or three decades. More research on AJMs is needed: closer case studies over longer periods, deeper legal analysis of the link with courts, broader studies across more countries to evaluate their impact on trauma and healing to mention just a few areas. The ICC is necessary for the specific cases where only prosecution and punishment will suffice but as Daryl Robinson has commented, '[s]ome recalibrations, based on African experiences, could make the ICC better not just for Africa but for the world.'<sup>64</sup>

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<sup>64</sup> Robinson, D. (2016) 'Feeling a Way Forward for International Justice – ICC, Africa and the World' *EJIL: Talk!* [Online] Available: <http://www.ejiltalk.org/feeling-a-way-forward-for-international-justice-icc-africa-and-the-world/#more-14771> [Accessed 16.02.17]

## CHAPTER TWO

### THE DEVELOPMENT OF A COLLECTIVE CONSCIENCE

#### Introduction

For those pressing for an International Criminal Court (ICC) during the latter half of the 20<sup>th</sup> century, its establishment in 2002 was ‘a cultural achievement of historic importance in the realisation of common and long-held aspirations’<sup>1</sup> to bring an end to impunity for the perpetrators of ‘unimaginable atrocities that deeply shock the conscience of humanity.’<sup>2</sup> The consciousness that some crimes are so serious that they concern ‘the international community as a whole’<sup>3</sup> had advanced gradually during the 20<sup>th</sup> Century, described as ‘the bloodiest era in history.’<sup>4</sup> ‘Mindful that during this century millions of children, women and men have been victims’<sup>5</sup> the collective conscience of the international community was pricked into action and the idealistic notion of states coming together to call to account and punish the guilty seemingly came to fruition at the Rome Conference in 1998. The establishment of the Court was described as ‘a major break-through in the effective enforcement of international criminal law’<sup>6</sup> signifying the ‘values of global justice, human rights and the rule of law’.<sup>7</sup>

Several factors contributed to this ‘major break-through’, most of which, it is argued in this chapter, were driven by western governments. For example, the International Military Tribunals at Nuremberg (1945) and for the Far East (1946) had expanded the application of international law towards individual rather than state accountability. They

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<sup>1</sup> Fouladvand, S. (2014) ‘Complementarity and Cultural Sensitivity: Decision-making by the International Criminal Court Prosecutor in the Darfur Situation’ 14 *ICLR* pp1028-1066 at p1029

<sup>2</sup> Rome Statute of the International Criminal Court 1998, (RSt) Preamble, para. 2

<sup>3</sup> *Ibid* para. 4

<sup>4</sup> Ferguson, N. (2006) ‘The Next War of the World’ 85 *Foreign Affairs* pp61-74 at p61

<sup>5</sup> Preamble, para. 2

<sup>6</sup> Cassese, A. (2002) ‘From Nuremberg to Rome: International Military Tribunals to the International Criminal Court’ in Cassese, A., Gaeta, P., Jones, R.W.D., (eds.) *The Rome Statute of the International Criminal Court: A Commentary* (Oxford: OUP) p3

<sup>7</sup> McGoldrick, D. (2004) ‘Criminal Trials Before International Tribunals: Legality and Legitimacy’ in McGoldrick, D., and Donnelly, E., (eds.) *The Permanent International Criminal Court. Legal and Policy Issues* (Portland: Hart Publishing) p42

also had prioritised international over domestic law, thereby undermining the principle of state sovereignty which had been recognised as the basis for international relations since the Treaty of Westphalia in 1648. International human rights laws and treaties had proliferated in the period as had the establishment of human rights organizations such as Amnesty International and Human Rights Watch.<sup>8</sup> Another important factor was the collapse of the Soviet Union and the ending of the Cold War in 1991 which had led to greater co-operation between world powers, particularly regarding the establishment of *ad hoc* international tribunals in the aftermath of genocidal conflicts in the 1990s. Also significant was the transition from authoritarian rule or intra-state conflict to peace and democracy of a number of states in South America, Africa and the Far East during this period, which left a legacy of abuses to be addressed by the successor regime.

The purpose of this chapter is to examine whether, rather than reflecting global ideals of justice, human rights and the rule of law, the rise and development of international criminal law (ICL) during the 20<sup>th</sup> century, which culminated in the establishment of the ICC, was driven by western enlightenment ideas of universality. It seeks to argue that intellectual and institutional development in the field of ICL was dominated by the western powers which promulgated their values to the exclusion of other approaches to justice. To establish that no justice mechanisms other than a criminal court were considered as a potential global means of accountability, the records of the meetings of the International Law Commission (ILC), the United Nations (UN), the Preparatory Commission (PrepCom) and the Rome Conference are reviewed. The chapter ultimately questions whether the ICC truly reflects the justice values of the global community or whether its existence attests to the dominance of European influence at precisely the time when demands for justice and accountability were actively addressed. By examining the origins of the moves to end impunity for the crimes within the jurisdiction of the Court, the chapter explores the argument that the ICC reflects support for the retributive concept of justice that is fundamental in Europe and America to the exclusion

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<sup>8</sup> In 1961 and 1978 respectively



of possible alternative mechanisms which are favoured by nations where restorative justice is the norm.

In the first section and in order to explain Europe's global dominance, the medieval origins of ICL will be considered. Often described as 'euro-centric', they arose from the 16<sup>th</sup> century European system of states which, through colonial expansion and domination, spread to other continents.<sup>9</sup> Given the criticisms of the ICC from several African states and the threats of mass African withdrawal from the Rome Treaty, this chapter considers whether the establishment of the ICC signifies a 'soft-colonial' or 'neo-colonial' approach by Europe towards Africa. It is also relevant to consider how far Europe's colonial history contributed to African states' initial acceptance of the western-inspired, formal method of adjudication.

### **The (European) Origins of International Law<sup>10</sup>**

According to Grewe, 'the medieval world had neither States nor a State system in the modern sense of these terms.'<sup>11</sup> The political face of Europe was dominated by Pope and Emperor<sup>12</sup> each fighting for supremacy in the exercise of authority over Christian princes who ruled autonomous communities, which were unified by a common faith (Christianity), language (Latin) and culture and regularly engaged in legal relations with one another.<sup>13</sup> The ecclesiastical supremacy of the Pope was acknowledged by these rulers and the sanctity of their treaties was upheld by fear of excommunication in the event of a breach of an oath given.<sup>14</sup>

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<sup>9</sup> See, for example, Schwarzenberger, G. (1957) *International Law as applied by International Courts and Tribunals: 1* (London: Stevens & Sons Ltd) p21; Cassese, A. (2012) 'States: Rise and Decline of the Primary Subjects of the International Community' in Fassbender, B., and Peters, A. (eds.) *The Oxford Handbook of the History of International Law* (Oxford: OUP) pp49-69; Brownlie, I. (1963) *International Law and the Use of Force by States* (Oxford: OUP) pp14-18

<sup>10</sup> For a contrary view of the origins, see Orakhelashvili, A. (2006) 'The Idea of European International Law' 17 *EJIL* pp315-47 who argues that viewing international law as the product of European tradition is conceptually flawed since 'European international law is an ideology based not on evidence but on prejudice and chauvinism generated from a sense of racial, cultural and religious superiority over those who are different' p347

<sup>11</sup> Grewe, W.G., (2000) (translated by Michael Byers), *The Epochs of International Law* (Berlin: Walter de Gruyter), p37; see also Strayer, J.R., (1970) *On the Medieval Origins of the Modern State* (Princeton: PUP), p40

<sup>12</sup> Grewe, W.G., (2000) p40

<sup>13</sup> *Ibid* p12

<sup>14</sup> de Vitoria, F. in Pagden, A. & Lawrence, J. (eds.) (1991) *Vitoria Political Writings* (Cambridge: CUP), pp295-327; see also Keeton, G.W. & Schwarzenberger, G. (1939) *Making International Law Work* (London: Peace Book Company (London) Ltd), p20

Towards the end of the sixteenth century, however, there was a movement away from this classically-based, medieval legal order.<sup>15</sup> The authority of the church and its teachings waned as, conversely, the independent and autonomous communities in Christendom increasingly became more distinct, well-organised and monarchical.<sup>16</sup> Although Christianity remained the common faith, the 'unity' of Christendom was irreparably damaged by both the Protestant Reformation and the rise of powerful European nations which continually pitted themselves against each other, pursuing their own interests and not acting with the authority of the Church for the good of Christendom.<sup>17</sup>

After thirty years of war in Europe between Protestant and Catholic rulers fighting for dominance, the 1648 Peace of Westphalia brought an end to the conflicts and is widely credited with originating modern international law.<sup>18</sup> The treaties incorporated principles promulgated by Grotius,<sup>19</sup> which are recognised as providing the foundation of the modern state system, as they articulated the concept of state sovereignty and the fundamental right of self-determination, legal equality between states and non-intervention by one state in the internal affairs of another.<sup>20</sup> The act of affirming these rights reformulated not only the political structure of Europe but its 'conception of the universe on which that structure was laid.'<sup>21</sup> Chesterman states that the 'idea of the State [...] can be seen [...] as a corollary of the emergent European mind: conceiving of [...] the world as conquerable and *possessible*.'<sup>22</sup>

This is significant because the re-moulding of the European outlook led to a period of global colonialist expansion by the competing European powers and to the

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<sup>15</sup> Grewe (2000) p141-2; see also Chesterman, S. (1995-96) 'Law, Subject and Subjectivity in International Relations: International Law and the Postcolony' 20 *Melbourne ULR* pp979-1022 at p989

<sup>16</sup> Brownlie, I. (1963) p11; see also Keeton, G.W. & Schwarzenberger, G. (1939) p20

<sup>17</sup> Grewe, W.G. (2000) p143

<sup>18</sup> The Treaties of Münster and Osnabrück commonly are known as the Peace of Westphalia

<sup>19</sup> Hugo Grotius (1583-1645), Dutch Jurist, philosopher and theologian described as the 'father' of international law

<sup>20</sup> In 1625 Grotius published *De jure belli ac Pacis libri tre* wherein he argued the right and authority of the sovereign, independent State as opposed to the rights of the individual, with each State being legally equal to the other

<sup>21</sup> Chesterman, S. (1995-6) p989

<sup>22</sup> *Ibid* p990 (emphasis in original)

corresponding spread of European influence over their colonies in several areas, including the administration of law and 'justice'. Grotius' view that international law was universal and that secular natural law applied to all states was not reflected in the expansionist ambitions of European states, however.<sup>23</sup> Bowden argues that the foundation of the Westphalian states system prompted the European 'classical standard of civilisation'<sup>24</sup> in international law and society, the importance of which 'cannot be underestimated in terms of the violent European civilising missions that it helped give rise to.'<sup>25</sup>

It is arguable that the 'classical standard of civilisation' that emerged and took root following European encounters with the non-European world during this colonial expansionist period greatly influenced the attitudes of Western powers in later debates about human rights in general and the appropriate form of justice mechanism to deal with international crimes, in particular. Bowden states that any nation or peoples that did not share the laws and customs of Europe was automatically excluded from international society and it was assumed that it was the task of the civilised nations of Europe to assist with the training of the uncivilised (i.e. non-European) in their aspirations to enter the civilised world should they demonstrate the propensity to do so.<sup>26</sup> Furthermore, he argues that such attitudes have been 'deployed "by western powers in their suppression of the non-western world and [...] are still regularly employed in contemporary international relations in the supposedly post-imperial world."' <sup>27</sup> It certainly helps to explain the propensity of Europe to further its own values as universally applicable norms with which the colonial peoples had to conform if they were to avoid sanctions and achieve full membership of the international community.

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<sup>23</sup> See Phillipson, C. (1916) *Wheaton's Elements of International Law* (London: Stevens and Sons Ltd) arguing that international law had always been limited to civilised and Christian people of Europe or to those of European origin and that although the law of nations could apply outside Europe, it was necessarily inferior to European international law (pp14-18); see also Lorimer, J. (1833) *The Institutes of the Law of Nations* (London: William Blackwood and Sons) arguing that 'the same rights and duties do not belong to savages and civilised men' p13

<sup>24</sup> That is, the means by which people's or nations have historically been admitted into or barred from the international society of states, based on shared values and norms

<sup>25</sup> Bowden, B. (2005) 'The Colonial Origins of International Law. European Expansion and the Classical Standard of Civilization' 7 *Journal of the History of International Law* pp1-23 at p1

<sup>26</sup> Bowden, B. (2005) p15

<sup>27</sup> *Ibid* p23

The period of Enlightenment that followed the ending of the European religious and civil wars of the 17<sup>th</sup> century had seen the development of theories of natural rights (i.e. that people are born free and equal) which became the main concern of European thinkers and philosophers during the 17<sup>th</sup> and 18<sup>th</sup> centuries. John Locke, for example, argued that natural rights did not rely on citizenship or on any state law, nor were they necessarily limited to one particular ethnic, cultural or religious group.<sup>28</sup> Immanuel Kant suggested that every individual has 'citizenship of the world'<sup>29</sup> and that world peace could be attained 'as a consequence of increased communication among human beings'.<sup>30</sup> Kant's view, however, that Europeans were the only mature species of humanity<sup>31</sup> helped to reinforce the Enlightenment's link with colonial expansionism. Hegemonic notions of global unity were justifications for Europe's Christian, civilising and modernising missions from the conquest of the Americas in the 16<sup>th</sup> and 17<sup>th</sup> centuries to the colonisation of Asia and Africa in the 19<sup>th</sup> and early 20<sup>th</sup> centuries.<sup>32</sup> Arguing the universality of their ideas, Enlightenment thinkers denied cultural differences and moral and social relativity. Using its doctrine of progress, colonial conquest was legitimated under the guise of the civilising mission and Enlightenment's celebration of reason prompted the labelling of all alternative belief systems as irrational or superstitious.<sup>33</sup>

The first half of the 19<sup>th</sup> century then witnessed one of the longest periods of peace in European history, creating conditions for unprecedented economic growth and serving, so it appeared, to affirm the superiority of European civilisation.<sup>34</sup> The period is characterised by the gradual acceptance of norms justified by theories of natural law about sovereignty and property rights as they applied to relations between European

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<sup>28</sup> See John Locke's *Second Treatise of Government* published in 1689

<sup>29</sup> Benhabib, S. (2012) 'Cosmopolitanism after Kant: Claiming rights across borders in a new century' in Tunstall, K. E. (ed) *Self-Evident Truths? Human Rights and the Enlightenment (The Oxford Amnesty Lectures)* (London: Bloomsbury Publishing) p78

<sup>30</sup> *Ibid* p81

<sup>31</sup> Fine, R. (2011) 'Enlightenment Cosmopolitanism: Western or Universal?' in Adams, D. and Tihanov, G. (eds.) *Enlightenment Cosmopolitanism* (Cambridge: Legenda) p159

<sup>32</sup> *Ibid* p157

<sup>33</sup> Nonetheless, the ideals of Enlightenment thinkers were transformative, being at the core of the American and French Revolutions at the end of the 18<sup>th</sup> century and providing the rational basis for the later emancipation of slaves and enfranchisement of women

<sup>34</sup> Koskenniemi, M. (2001) *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (Cambridge: CUP) p11

states.<sup>35</sup> The emergence of an 'international society', by which is meant the European system of interrelations and customs of international law, was therefore formulated in the context of the demands of colonisation.<sup>36</sup>

European liberalism, which sought to prolong the somewhat precarious peace<sup>37</sup> through the uniting of nations via the mechanism of free trade and increased popular enlightenment, was radically activist and internationally organised within peace societies and movements.<sup>38</sup> Humanitarian moves to limit excesses of war began to be initiated in Europe and the United States (US). In the US, for example, in 1863 Francis Lieber wrote a code of conduct for the treatment of prisoners, wounded soldiers and civilians under occupation.<sup>39</sup> In Europe, also in 1863, Gustave Moynier and Henri Dunant co-founded the International Committee for Relief to the Wounded (renamed the International Committee of the Red Cross in 1876)<sup>40</sup> and persuaded the Swiss Government to hold international negotiations which led to the Geneva Convention of 1864, when rules were established for the treatment of wounded soldiers and for the protection of medical personnel, vehicles and equipment.<sup>41</sup>

Only six years later, the 1870 Franco-Prussian War led to violations of the Geneva Convention being alleged by both sides, including widespread misuse of Red Cross insignia.<sup>42</sup> Making the first serious proposal for an international tribunal to judge violations of internationally agreed rules on the conduct of war,<sup>43</sup> Moynier proposed that future violations be discouraged by the establishment by treaty of a permanent international tribunal, which would be convened as soon as war broke out, with

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<sup>35</sup> Varadarajan, L. (2015) 'The Trials of imperialism: Radhabinod Pal's dissent at the Tokyo tribunal' 2 *EJIR* pp793-815 at p802

<sup>36</sup> *Ibid*

<sup>37</sup> As demonstrated by the Crimean War 1853-1856, although this was not viewed at the time as a threat to the European peace system as it primarily involved the ambitions of Russia, only a marginally European country

<sup>38</sup> Koskeniemi, M. (2001) p35

<sup>39</sup> Lieber's *Instructions for the Government of Armies of the United States in the Field* was the forerunner for other governments to follow, the first British Manual of Military Law being published in 1884

<sup>40</sup> Dunant had witnessed the plight of dead and wounded after the battle of Solferino in 1859 and had written a book on his experience which was read by Moynier in 1862

<sup>41</sup> The Convention was signed by the major states of Europe

<sup>42</sup> Hall, C.K. (1998) 'The first proposal for a permanent international criminal court' *International Review of the Red Cross* No. 322 (unnumbered pages) [Online] Available:

<https://www.icrc.org/eng/resources/documents/article/other/57jp4m.htm> [Accessed 03.03.17]

<sup>43</sup> *Ibid*

adjudicators from the warring and neutral states passing sentences to be carried out by states.<sup>44</sup> The proposal resulted in much debate, with some experts in international law welcoming the initiative to enforce the Geneva Convention but most criticising the idea of an international tribunal, preferring other means of enforcement such as arbitration or commissions of enquiry and the strengthening of humanitarian aid agencies.<sup>45</sup> In 1899 and 1907, the Hague Conventions expanded the Geneva Convention and incorporated Lieber's rules of war. These conventions were the first major source of international humanitarian law in a treaty. Linked with liberal-humanitarian ideals and theories about the natural evolution of European societies, they demonstrated a growing awareness in the 'civilised' nations of those states' humanitarian responsibilities.<sup>46</sup>

The brutality of the First World War (WW1) led to calls for an international criminal tribunal to try war criminals being voiced at the Paris Peace Conference in January 1919.<sup>47</sup> The conference was attended by leaders of 32 states, representing about 75% of the world's population but negotiations were dominated by the 'Big Three': France, Britain and the US.<sup>48</sup> Unsurprisingly, therefore, when reporting on potential means of accountability for war criminals, the Commission on the Responsibility of the Authors of War and on the Enforcement of Penalties convened by the Allies, proposed that an *ad hoc* international tribunal be created to deal with two categories of crimes: 'acts which provoked the World War and accompanied its inception' and 'violations of the laws and customs of war and the laws of humanity'.<sup>49</sup> It stated that *not* to punish those responsible, including heads of state, notably Kaiser Wilhelm II, 'would shock the

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<sup>44</sup> *Ibid* The proposal was made at a meeting of the International Committee for Relief to the Wounded on 3<sup>rd</sup> January 1872

<sup>45</sup> *Ibid*

<sup>46</sup> Chesterman, S. (1997) 'Never Again ... and Again: Law, Order, and the Gender of War Crimes in Bosnia and Beyond' 22 *Yale JIL* pp299-343 at p303

<sup>47</sup> Schabas, W. (2017) *An Introduction to the International Criminal Court* (Cambridge: CUP) p3; see also Adatci, M. (1920) 'Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties: Report Presented to the Preliminary Peace Conference March 29, 1919' 14 *AJIL* pp95-154 at p122

<sup>48</sup> Thompson, D. (1966) *Europe Since Napoleon* (Middlesex: Penguin Books) p570, 616-617; Thompson states that Japan and Italy were 'at first included out of courtesy [but] soon gave up the unequal struggle.'

<sup>49</sup> Adatci, M. (1920) p116; see also Hudson, M.O. (1938) 'Editorial Comments: The Proposed International Criminal Court' 32 *AJIL* pp549-554 at p549; Alfaro, R.J. (1950) 'Report on the Question of International Criminal Jurisdiction' Documents of the Second Session including the Report of the Commission to the General Assembly, *YBILC* Vol II, UN Doc. A/CN.4/15, pp1-18, para. 7

conscience of civilized mankind.<sup>50</sup> The Commission called for the tribunal to try individuals from Germany, Austria, Turkey and Bulgaria for alleged violations of the laws of war.<sup>51</sup> Turkey's massacre of Armenians had caused the Allies to issue a joint declaration of condemnation on 24<sup>th</sup> May 1915, stating 'In view of these new crimes of Turkey against humanity and civilization, the Allied governments announce publicly ... that they will hold personally responsible ... all members of the Ottoman government and those of their agents who are implicated in such massacres.'<sup>52</sup> Unfortunately, the Allies did not follow up this threat, a failure which apparently was not unnoticed by Hitler when he pursued his genocidal policies.<sup>53</sup>

The Treaty of Versailles 1919 which formally ended WW1 required Germany to surrender suspected war criminals for trial by Allied Military Tribunals.<sup>54</sup> However, Germany was conscious of the need to maintain respect for its sovereignty by retaining its national criminal jurisdiction and so persuaded the Allies to permit it to try the offenders itself, before the Supreme Court in Leipzig.<sup>55</sup> To ensure that Germany was 'sincerely resolved to administer justice in good faith', the Allies reserved 'in the most express manner the right to bring the accused before their own tribunals' if the trials 'did not result in just punishment being awarded to the guilty'.<sup>56</sup> However, despite most of the suspected war criminals managing to avoid prosecution and those who were prosecuted either being acquitted or receiving very short sentences, the Allies reservation was not activated, possibly because the thirst for prosecutions had waned by this time.<sup>57</sup>

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<sup>50</sup> Adatci, M. (1920) p116

<sup>51</sup> *Ibid* p98

<sup>52</sup> Dadrian, V.N. (1989) 'Genocide as a Problem of National and International Law: The World War 1 Armenian Case and Its Contemporary Legal Ramifications' 14 *Yale JIL* pp221-334 at p262

<sup>53</sup> Scharf, M.P. (1999) 'The Amnesty Exception to the Jurisdiction of the International Criminal Court' *Cornell ILJ* pp507-527 at p514

<sup>54</sup> Articles 228-230

<sup>55</sup> Anon. (1922) Current Notes 'German War Trials: Report of the Proceedings before the Supreme Court in Leipzig. August 8, 1921' 16 *AJIL* pp628-645

<sup>56</sup> *Ibid* p629

<sup>57</sup> Of the 895 Germans initially accused by the Allies, only 45 were selected to be prosecuted by the Germans, 12 indictees were brought to trial at Leipzig and six were acquitted. Of those six, one was immediately released and the others received light sentences. The Kaiser, who under Art. 227 was to be tried for supreme offences against international morality and the sanctity of treaties, fled to Holland where he was granted political asylum. An extradition request was refused and he eventually died there in 1941, the international community having given up hope of ever getting him into court.

Ultimately, therefore, the Allies' attempt to punish WW1 war criminals 'was a complete failure'<sup>58</sup> but their efforts did serve to stimulate interest in the development of international criminal justice (ICJ) and specifically, in the possibility of a forum 'competent to try crimes constituting a breach of international public order or against the universal law of nations.'<sup>59</sup> The atrocities committed during wars started in Europe and fought predominantly on the European continent became the catalyst for the humanitarian development of international laws of war and led to calls for the punishment of those guilty of causing wars and committing war crimes. Since in Europe and America criminal trials were the established means of holding people to account, the proposal that offenders should be prosecuted was uncontested after WW1. The idea of considering any justice mechanism other than its own certainly would not occur to a Europe convinced of its political and intellectual superiority.

In this section, it has been argued that Europe's global pre-eminence began with the post-Westphalian growth of autonomous and independent states and was followed by a period of colonial expansion and unprecedented economic growth which underpinned European belief in the superiority of its own civilisation. The Enlightenment thinkers argued the universality of their theories which provided justification for colonialist claims that their activities facilitated the spread of European values and norms to the uncivilised peoples of the world. The distinction between 'civilised' and 'uncivilised' peoples had become so embedded in the legal, political and intellectual debate from the end of the 18<sup>th</sup> to the early 20<sup>th</sup> century that it was virtually unassailable<sup>60</sup> and indeed, persisted to some degree until the end of the Second World War (WW2).<sup>61</sup>

In the next section, progress made in the codification of international crimes and in reaching agreement on the appropriate forum for holding perpetrators of those crimes to account will be discussed. The dominant role played by the West in both of these areas will be highlighted.

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<sup>58</sup> Bassiouni, M.C. (1999) *Crimes Against Humanity in International Criminal Law* (London: Kluwer Law International) p72

<sup>59</sup> Hudson, M.O. (1938) p550

<sup>60</sup> Bowden, B. (2005) p17

<sup>61</sup> *Ibid* p21



## Early Calls for an International Criminal Jurisdiction

As already mentioned, negotiations at the Paris Peace Conference in 1919 were dominated by three big Western powers, France, Britain and the US. In keeping with Kant's theory that greater communication between human beings promotes world peace, the Conference agreed to the foundation of a League of Nations (LoN).<sup>62</sup> WW1 had interfered with European global exploitation and the aim now was to ensure the continuity of pre-war forms of rule and the avoidance of open conflict between the major powers.<sup>63</sup> Article 14 of the Versailles Treaty had envisaged a Permanent Court of International Justice and in 1920, the Council of the LoN appointed an Advisory Committee of Jurists<sup>64</sup> to draft plans for its establishment. The committee recommended that a High Court of International Justice should be set up alongside the International Court of Justice (ICtJ), with jurisdiction over 'crimes against international public order and against the universal law of nations' which had been referred to it by the LoN Assembly or by the Council of the League due to their exceptional gravity.<sup>65</sup> However, the recommendation was not taken up as the Third Committee of the LoN Assembly argued that it was premature since there was no defined notion of international crimes and no international penal law, that the principle *nulla poena sine lege* would be disregarded and since only States were subjects of international law, individuals could only be punished in accordance with their national law.<sup>66</sup> It was further argued that 'if it were possible to refer certain crimes to any jurisdiction, it would be more practical to establish a special chamber' in the ICtJ.<sup>67</sup>

The decision of the Third Committee led to a decline of interest in the project among the LoN member states. However, the inference drawn from their comments was not that it was undesirable or impossible to punish crimes against the international public

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<sup>62</sup> Thompson, D. (1966) p639

<sup>63</sup> Varadarajan, L. (2015) p802

<sup>64</sup> Members were representatives from Belgium, Japan, Spain, Brazil, Norway, France, GB, Netherlands, Italy and the USA.

<sup>65</sup> Procès-Verbaux of the Proceedings of the Advisory Committee of Jurists p49

<sup>66</sup> Alfaro, R.J. (1950) paras. 16-17

<sup>67</sup> Historical Survey of the Question of International Criminal Jurisdiction 1949, UN Doc A/CN.4/7/Rev.1 (Historical Survey) p12

but that 'if the difficulties could be overcome, an international criminal jurisdiction was necessary and desirable.'<sup>68</sup> Accordingly, several non-governmental organisations (NGOs) met in the 1920s<sup>69</sup> and resolved that '*the creation of an International Court is essential in the interests of justice*' (ILA);<sup>70</sup> to 'draw up a preliminary draft and an International Legal Code' (IPU)<sup>71</sup> and to draft a statute for an international court (IAPL).<sup>72</sup>

It was not until the atrocities of WW2 that the minds of Allied Governments were again concentrated on how best to deal with war criminals, the main question being over what crimes and to what extent should an international court exercise jurisdiction? The Allies had begun seriously to address the issue of war crimes and their investigation in the early 1940s. At a meeting of representatives of seventeen of the Allied nations<sup>73</sup> on 20<sup>th</sup> October 1943, the UN War Crimes Commission<sup>74</sup> was officially established with a mandate to collect, record and investigate evidence of war crimes and their perpetrators, to liaise with governments on their findings and to advise on the legal procedures to be adopted in bringing offenders to trial. The question of establishing an international court for the trial of war criminals was also considered.<sup>75</sup> The final draft of the Convention for the Establishment of a UN War Crimes Court was approved on 26<sup>th</sup> September 1944 and whilst '[r]ecognising that in general the appropriate tribunals for the trial and punishment of such crimes will be national courts' but 'mindful of the possibility that cases may occur in which such crimes cannot conveniently or effectively be punished by a national court' its jurisdiction extended to all war criminals.<sup>76</sup>

In the event, the plan to establish a UN War Crimes Court by treaty came to nothing and the preferred method of dealing with war criminals was by mixed military tribunals. In

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<sup>68</sup> Alfaro, R.J. (1950) para. 17

<sup>69</sup> For example, the International Law Association (ILA) held a conference in Buenos Aires in 1922; the Inter-Parliamentary Union (IPU) met in Washington in 1925 and the International Association of Penal Law (IAPL) met in Brussels in 1926

<sup>70</sup> Alfaro, R.J. (1950) para. 18 (emphasis in original)

<sup>71</sup> *Ibid* para. 21

<sup>72</sup> *Ibid* para. 53

<sup>73</sup> Excluding the USSR which refused to participate

<sup>74</sup> The Commission began its work prior to the formal establishment of the UN itself in October 1945

<sup>75</sup> Bathurst, M.E. (1945) 'The United Nations War Crimes Commission' 39 *AJIL* pp567-570

<sup>76</sup> Paragraphs 2 and 3 of the Preamble to the draft Convention, the full text of which can be found at Appendix 10 to the Historical Survey p112

the Moscow Declaration of 30<sup>th</sup> October 1943,<sup>77</sup> it was stated that those responsible or involved in German atrocities would be 'sent back to the countries in which their abominable deeds were done in order that they may be judged and punished according to the laws of these liberated countries'.<sup>78</sup> However, major criminals 'whose offences had no particular geographical localization' were to be 'punished by joint decision of the government of the Allies'.<sup>79</sup>

In furtherance of this Declaration, the Nuremberg International Military Tribunal (NIMT) was established on 8<sup>th</sup> August 1945 by the Allied Powers to try those major war criminals 'whose offences had no particular geographical location'.<sup>80</sup> The crimes covered by the Tribunal were conspiracy to commit crimes against peace; planning, initiating and waging wars of aggression; war crimes and crimes against humanity (CAH).<sup>81</sup> The Hague Conventions gave guidance on the definition of war crimes and the Kellogg-Briand Pact on crimes against peace.<sup>82</sup> CAH were included as a category of offences to enable the indictment of German perpetrators of crimes against German citizens.<sup>83</sup> The NIMT eventually tried 22 accused (of whom 19 were convicted) for crimes against peace, war crimes and CAH. Additionally, in occupied Germany, the four major Allies prosecuted the same crimes in their own zones of occupation. On 19<sup>th</sup> January 1946, an International Military Tribunal for the Far East (TIMT) was established in Tokyo to try the Japanese perpetrators of atrocities during WW2 and it functioned almost identically to the NIMT, prosecuting crimes against peace, war crimes and CAH.<sup>84</sup>

The Nuremberg and Tokyo trials were the first time in world history that individuals accused of crimes against world peace and against humanity had been brought before international criminal tribunals to answer for their actions.<sup>85</sup> The trials were important

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<sup>77</sup> The three principle Allied Powers (UK, USA and USSR) met in Moscow between 19-30 October 1943

<sup>78</sup> Joint Four-Nation Declaration, October 1943, Statement on Atrocities

<sup>79</sup> *Ibid*

<sup>80</sup> Charter of the (Nuremberg) International Military Tribunal 1945, 82 UNTS 279

<sup>81</sup> *Ibid* Article 6

<sup>82</sup> The Kellogg-Briand Pact (officially General Treaty for Renunciation of War as an Instrument of National Policy) 1928 was drafted by France and the US and signatory states promised not to use war to resolve 'disputes or conflicts of whatever nature or of whatever origin they may be, which may arise ...'

<sup>83</sup> CAH could not be described as War Crimes in the strictest sense, see Bassiouni, M.C. (1999) pp72-74

<sup>84</sup> Charter of the (Tokyo) International Military Tribunal for the Far East 1946, 14 State Dept. Bull 391, 890; TIAS No 1589, Article 5

<sup>85</sup> Alfaro, R.J. (1950) p7

because they established new legal norms and standards of individual responsibility which served to advance the international rule of law and promote ICJ. However, the dilemma faced by the Tribunals (i.e. whether a breach of strict legal positivism by permitting the retrospective extension of international criminal responsibility to perpetrators of crimes under the Tribunals charters was justifiable, given the atrocities committed by the perpetrators) was 'resolved by moral [...] rather than strictly legal arguments'.<sup>86</sup> For example, German defence counsels' objections that the Tribunal should not apply *ex post facto* law was countered by the argument that 'substantive justice punishes acts that harm society deeply and are regarded as abhorrent by all members of society, even if these acts were not prohibited as criminal conduct when they were performed.'<sup>87</sup>

Similarly, criticisms have been levelled that the tribunals imposed 'victor's justice', that the judges and prosecutors all came from the Allied nations with no neutral or German/Japanese judges on the bench, that allegations of Allied war crimes were not prosecuted and that the trials were unfairly run<sup>88</sup> in that they curtailed the ability of the accused to access documents and conduct investigations.<sup>89</sup> The independence of TIMT was also questioned when, for example, the US ordered Prosecutors not to bring charges against the Emperor or members of his family.<sup>90</sup> However, great efforts were made, at least at the NIMT, to ensure the proceedings were fair and the running of the trials is 'generally considered to have been professional and defensible, certainly by the standards of the day', thus, 'overall, the judgment of history on the Tribunal has been basically positive.'<sup>91</sup>

Minow states that the Nuremberg and Tokyo trials came to 'represent the possibility of

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<sup>86</sup> Chesterman, S. (1997) p305; see also, Bassiouni, M.C. (1999) pp80-82

<sup>87</sup> Cassese, A. (2009) 'Nullum Crimen Sine Lege' in Cassese, A. (ed-in-chief) *The Oxford Companion to International Criminal Justice* (Oxford: OUP) p439; see also Sellars, K. (2010) 'Imperfect Justice at Nuremberg and Tokyo' 21*EJIL* pp1085-1102 at p1089

<sup>88</sup> Cryer, R. (2009a) 'Nuremberg Military Tribunal' in Cassese, A. *et.al.* p443; see also Varadarajan, L. (2015) p794 stating that two of the 11 judges (Justices Bernard (France) and Röling (The Netherlands)) filed dissenting opinions expressing specific reservations about the conduct of the TIMT trial

<sup>89</sup> McGonigle Leyh, B. (2016) 'Nuremberg's Legacy Within Transitional Justice: Prosecutions Are Here to Stay' 15 *Wash. U. Global Stud. LR* pp559-574 at p560

<sup>90</sup> Cryer, R. (2009b) 'Independence and Impartiality of Tribunals' in Cassese, A. *et.al.* p375

<sup>91</sup> *Ibid*

legal responses [to war crimes and mass atrocity], rather than responses grounded in sheer power politics or military aggression.<sup>92</sup> It is argued, however, that although the tribunals were innovatory and were intended to introduce a new and progressive world order based on the ideals of a world committed to the common values of humanity, the material interests underpinning them were embedded in imperialism.<sup>93</sup> It is this argument that is at the core of Justice Pal's dissenting opinion at the TIMT<sup>94</sup> which 'provides crucial insights into the nature of the world order that was being rearticulated by the post-war international tribunals.'<sup>95</sup> Pal asserted that global politics of the mid-20<sup>th</sup> century was still fundamentally defined by imperialism, as characterised by the violent acquisition of territories and thereafter by military, political and economic domination of much of the world by Western powers by the late 19<sup>th</sup> century.<sup>96</sup> Pal's dissenting judgment therefore highlights the 'connections between the development of seemingly universally applicable international legal norms and the perpetuation of a highly unequal and fundamentally unjust "international society" as they appeared at the historical crossroads of the post-Second World War order.'<sup>97</sup>

For many in the West, the pre-war order was 'legitimate and moral' and had emerged due to the superior culture of some nations which had 'assumed control of others for the benefit of all'.<sup>98</sup> Kantian institutions such as the LoN and indeed the two IMTs, promulgated the existence of an international community bound together by shared norms which governed interactions between its members, based on their 'common humanity'.<sup>99</sup> As Falk comments, '[t]he West has been particularly proficient at mythologizing its experiences as the foundation for a beneficial order for the whole of humanity.'<sup>100</sup> Ignoring their own violence in establishing their colonies, the attempt to

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<sup>92</sup> Minow, M. (1998) *Between Vengeance and Forgiveness* (Boston: Beacon Press) p27

<sup>93</sup> Varadarajan, L. (2015) p795

<sup>94</sup> Justice Radhabinod Pal of India disagreed with all aspects of the TIMT and found all defendants not guilty of the charges against them

<sup>95</sup> Varadarajan, L. (2015) p800

<sup>96</sup> *Ibid* p795

<sup>97</sup> *Ibid* p800; Pal referred in his dissenting judgment to a meeting of the Committee drafting resolutions for the establishment of the LoN when Japan moved a resolution for the declaration of equality of nations as a basic principle of the League, which was opposed by Britain because it 'raised extremely serious problems within the British Empire'. The resolution was declared lost.

<sup>98</sup> Sellars K. (2010) p1095; it should be noted that the US was hostile to European imperialism (whilst ignoring its own in the Philippines, Panama etc.) and a majority of voters supported Atlee in 1945 with his agenda to decolonize India

<sup>99</sup> Chief Prosecutor Joseph Keenan stressed this in his opening statement at the TIMT

<sup>100</sup> Falk, R. (1999) 'Telford Taylor and the Legacy of Nuremberg' 37 *Colum. J. Transnat'l L.* pp693-723 at p695

upset the *status quo* through violent conflict was termed 'aggression' by these imperialist powers.<sup>101</sup> Such aggression would not be tolerated since if a nation 'had the right to change its geographical and economic status suddenly by war, then every other nation as badly situated, from the economic standpoint, had the same right.'<sup>102</sup>

For Pal, however, this 'common humanity' claim was a fallacy since no moral consensus for the pre-war nature of international relations could exist given that they were grounded in violent subjugation.<sup>103</sup> He argued that if an international community based on its common humanity did exist, then domination of one nation by another nation against its will was the worst example of aggression. Therefore it was the Western powers (four of which were represented on the bench of the TIMT and who between them controlled significant colonies in Asia at the end of WW2)<sup>104</sup> who had initiated the aggression which had then provoked a violent response from colonised nations wishing to challenge the *status quo*.<sup>105</sup> Pal stated that to argue otherwise, as the majority judgment appeared to do, 'required a wilful blindness to the violent history of modern imperialism' and amounted to 'the drawing of arbitrary historical timelines to determine what constituted aggression', judging it differently, depending on who had perpetrated it.<sup>106</sup>

Falk has questioned why, given the problems of retroactivity and of the Allies' own wartime conduct, they validated international criminal accountability of leaders for war crimes. He states it only makes sense 'if the imposition of accountability is understood to be a *particularly* advantageous response to a given geopolitical challenge whose wider implications can be avoided'.<sup>107</sup> It is suggested, therefore, that equating 'peace' with maintaining the *status quo* was a political decision, intended to perpetuate the

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<sup>101</sup> Varadarajan, L. (2015) p806; neither of the two IMTs defined the term 'aggression' although the majority judgment at the TIMT accepted Keenan's suggestion, taken from Webster's new international dictionary, that it was 'a first or unprovoked attack, or act of hostility' by a nation that also refused to accept arbitration or any other peaceful means of dispute resolution. For a full discussion, see Boister, N. and Cryer, R. (2008) pp122-125

<sup>102</sup> Sellars, K. (2010) p1095 quoting Keenan in Keenan, J.B. Keenan and Brown, B.F. (1950) *Crimes Against International Law* p63

<sup>103</sup> Boister, N. and Cryer, R. (2008) *The Tokyo International Military Tribunal – A Reappraisal* (Oxford: OUP) p131

<sup>104</sup> The Netherlands, France, Britain and the US

<sup>105</sup> Varadarajan, L. (2015) p805

<sup>106</sup> *Ibid*

<sup>107</sup> Falk, R. (1999) p710 (emphasis in original)

imperialist world order until the colonial powers were ready to accept change which, according to Keenan, must occur by 'evolutionary means', not violent conflict.<sup>108</sup>

In the next section, the efforts of the ILC, established by the UN General Assembly (UNGA) to progress the codification of international crimes and the establishment of an international criminal court, will be discussed. Unsurprisingly, Pal's arguments were pointedly ignored and although the status of the West as a leader of the 'civilised' world was damaged by the atrocities committed by the West during WW2,<sup>109</sup> it will be seen that it clearly retained sufficient global authority to enable it to assert its influence during debates concerning the means of holding those responsible to account.

### **The Work of the ILC**

The onset of WW2 proved that the LoN had failed in its primary purpose of preventing war and in 1945, it was replaced by the UN. As with the LoN, the UN is an institution grounded in Kant's philosophy of global citizenship which promotes the universalist ideals of the Enlightenment Age. In establishing the UN, the dominant Western powers aimed to create and maintain global order through peace, security and co-operation between states. In a repudiation of historical colonialism, this new global order recognised the right of self-determination of non-European states which were to be run in accordance with human rights.<sup>110</sup> However, a new form of colonialism emerged which confirmed that the political independence of former colonial nations was largely illusory, since they remained bound to the West politically, legally and economically.<sup>111</sup>

In 1947, the UNGA established the ILC<sup>112</sup> for the 'promotion of the progressive development of international law and its codification'.<sup>113</sup> Chaired by Manley Hudson (US), the ILC comprised 15 members from Europe (5), South America (4) and one each

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<sup>108</sup> Varadarajan, L. (2015) p807

<sup>109</sup> Bowden, B. (2005) p22, stating that in the wake of WW2 came the rapid emergence of numerous anti-colonial movements in many of Europe's colonial possessions

<sup>110</sup> Mutua, M. (2000) 'What is TWAIL' 94 *American Society of International Law* p30-38 at p34

<sup>111</sup> *Ibid*

<sup>112</sup> GA Res 174(II) 21 November 1947

<sup>113</sup> Statute of the ILC Article 1(1)

from India, Syria, China, Czechoslovakia and USSR. The following year, the UNGA adopted the Convention on the Prevention and Punishment of the Crime of Genocide.<sup>114</sup> The final wording of draft Article VII, adopting the principle of complementarity, required that persons charged should be tried by a 'competent tribunal of the State in the territory of which the act was committed or by a competent international tribunal'.<sup>115</sup> In furtherance of its Kantian aspirations, the UN had resolved that 'in the course of the development of the international community there will be an increasing need for an international judicial organ for the trial of certain crimes under international law'.<sup>116</sup>

It was the lack of any 'competent international tribunal' that led to the UNGA inviting the ILC 'to study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with *genocide or other crimes*' and to consider 'the possibility of establishing a Criminal Chamber of the International Court of Justice'.<sup>117</sup> After a full debate, the Commission voted that it was both desirable<sup>118</sup> and possible<sup>119</sup> to establish an international judicial organ but it did not recommend that it should be a Criminal Chamber of the ICtJ.<sup>120</sup> Review of the ILC meetings confirms that members were determined to keep firmly to the UNGA resolution and discuss only the desirability and possibility of establishing an 'international judicial organ', thus possible alternative justice mechanisms (AJMs) were not debated.

During the 1950s, the ILC continued to work on a draft Code of Offences against the Peace and Security of Mankind (draft code) alongside work on a draft Declaration of the Rights and Duties of States<sup>121</sup> and formulation of the Nuremberg principles.<sup>122</sup> In its second report to the UNGA, the ILC outlined seven Nuremberg Principles, which subsequently have formed the basis of much of the development of international

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<sup>114</sup> GA Res 260 (III) A 9 December 1948, entered into force on 12 January 1951

<sup>115</sup> The draft and report of the *Ad hoc* Committee can be found at Appendix 14 of the Historical Survey

<sup>116</sup> Pella, V. (1950) 'Towards an International Criminal Court' 44 *AJIL* pp36-68 at p37

<sup>117</sup> GA Res 260 (III) B 9 December 1948 (emphasis added)

<sup>118</sup> *Ibid* p23, para. 47 (UK voted against; USA and Sweden abstained)

<sup>119</sup> *Ibid* para. 53 (Brazil, USA and Sweden voted against)

<sup>120</sup> *Ibid* p28, para. 62

<sup>121</sup> A/CN.4/2

<sup>122</sup> A/CN.4/5 (The Nuremberg principles were a set of guidelines for determining what constitutes a war crime and were the legal principles underlying the NIMT trials)



criminal law.<sup>123</sup> The ILC finally completed the draft code in 1954, submitting it to the UNGA with its report of its work of its sixth session. The UNGA postponed its consideration of the draft code, ostensibly to await an agreed definition of 'aggression', which was proving notoriously difficult to achieve.<sup>124</sup> Schabas comments that 'political tensions associated with the Cold War had made progress on the international criminal court agenda virtually impossible.'<sup>125</sup> It was not until December 1978 that the UNGA returned to the 1954 draft code and requested the UN Secretary General (UNSG) to invite Member States and relevant organisations to submit their comments.<sup>126</sup>

In the meantime, to fulfil the UN intention that all states should be governed in accordance with human rights, there were advances in this field. In 1948, in addition to the Genocide Convention, the UNGA adopted the Universal Declaration of Human Rights (UDHR).<sup>127</sup> In 1973, the Apartheid Convention categorised apartheid as a crime against humanity, providing that persons charged 'may be tried by a competent tribunal of any State Party to the Convention [...] or by an international penal tribunal having jurisdiction with respect to those States Parties which shall have accepted its jurisdiction.'<sup>128</sup> The 1960s and 1970s also saw a burgeoning of NGOs such as Amnesty International (founded in 1961), Human Rights Watch (an amalgamation of several civilian human rights groups which had flourished since the mid-1970s) and many other organisations with aims of monitoring and confronting breaches of human rights.<sup>129</sup>

This period also saw developments in the organisation of former colonial nations opposed to the regime and discourse of domination and subordination that had historically characterised international law. Referred to as Third World Approaches to International Law (TWAIL), Matua describes the TWAIL movement as reactive in that it responds to international law as an imperial project but proactive because it seeks

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<sup>123</sup> YBILC 1950, Vol. II, UN Doc. A/CN.4/34 paras. 95-127

<sup>124</sup> UNGA Res 688 (VII) 20 December 1952. The UNGA had appointed a Special Committee to define 'Aggression' in 1952. It was not until 1974 that the UNGA finally approved the definition submitted in 1967

<sup>125</sup> Schabas, W. (2017) *An Introduction to the International Criminal Court* (Cambridge: CUP) p9

<sup>126</sup> UNGA Res 33/97 16 December 1978

<sup>127</sup> UNGA Res 217 (III) 10 December 1948

<sup>128</sup> International Convention on the Suppression and Punishment of the Crime of Apartheid, Article V

<sup>129</sup> Hinton, A.L. (2010) 'Introduction: Towards an Anthropology of Transitional Justice' in Hinton, A.L. (ed)

*Transitional Justice: Global Mechanisms and Local Realities after Genocide and Mass Violence* (London: Rutgers UP) p3

internal transformation of conditions in the Third World.<sup>130</sup> The opposition had begun with the decolonisation movement that swept the globe after WW2, its intellectual roots originating in the Afro-Asian anti-colonial struggles of the 1940s to 1960s.<sup>131</sup> It formally emerged from a 1955 Conference in Bandung, Indonesia, which created a coalition of Third World states that would force political and economic issues of specific reference to them on to the international agenda.<sup>132</sup> As mentioned above, these states found themselves still bound to Western states through their control of, for example, multi-national corporations and institutions such as the World Bank, International Monetary Fund and the General Agreement on Tariffs and Trade.<sup>133</sup> This continued dependency upon and exploitation by the former imperial powers has been defined as 'neo-colonialism' and encroaches also into the area of international justice, as Mamdani has argued:

The emphasis on big powers as the protectors of rights internationally is increasingly being twinned with an emphasis on big powers as enforcers of justice internationally. [...] Its name notwithstanding, the ICC is rapidly turning into a Western court to try African crimes against humanity. It has targeted governments that are US adversaries and ignored actions the United States doesn't oppose, like those of Uganda and Rwanda in eastern Congo, effectively conferring impunity on them.<sup>134</sup>

In the area of ICJ, TWAIL may question, for example, whether the ICC is the only suitable justice mechanism for Africa, whether it is effective as a transitional justice mechanism in African contexts and having examined the positives and negatives of ICC intervention, TWAIL scholars may attempt to reconceptualise the ICC's role on the continent.<sup>135</sup>

The attention of the UNGA again turned to the issue of international justice in 1981, when it invited the ILC to recommence its work on the draft code which would be

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<sup>130</sup> Mutua, M. (2000) 'What is TWAIL' 94 *American Society of International Law* pp30-38 at p31

<sup>131</sup> Okafor, O.C. and Ngwaba, U. (2015) 'The International Criminal Court as a 'Transitional Justice' Mechanism in Africa: Some Critical Reflections' 9 *IJTJ* pp90-108 at p91; see also Mutua, M. (2000) p31 stating that the North-South confrontation also draws heavily from Latin-American opposition to the domination of the Third World by the industrialised West

<sup>132</sup> *Ibid*

<sup>133</sup> *Ibid* p35

<sup>134</sup> Mamdani, M. (2008) 'Darfur, ICC, and the new humanitarian order: How the ICC's "responsibility to protect" is being turned into an assertion of neo-colonial domination' 17 Sept *Pambazuka News* [Online] Available: <https://www.pambazuka.org/governance/darfur-icc-and-new-humanitarian-order> [Accessed 25.08.17]

<sup>135</sup> Okafor, O.C. and Ngwaba, U. (2015) p91

accorded 'priority and the fullest possible consideration'.<sup>136</sup> The ILC included the draft code item in the agenda for its 1982 session and appointed Doudou Thiam (Senegal) as Special Rapporteur.<sup>137</sup> By 1982, ILC membership had expanded to 34, the majority coming from Africa (9), Europe (7) and South America (5).<sup>138</sup> In 1989, after a UN special session on the subject of drug trafficking<sup>139</sup> during which Trinidad and Tobago had proposed a motion<sup>140</sup> entitled 'International criminal responsibility of individuals and entities engaged in illicit trafficking in narcotic drugs across national frontiers and other transnational criminal activities; establishment of an international criminal court with jurisdiction over such crimes',<sup>141</sup> the UNGA asked the ILC to work on this proposal alongside its work on the draft code, something which the ILC had in fact been doing for some time.<sup>142</sup>

In response to the UNGA's request, on 16<sup>th</sup> May 1990, the ILC established a Working Group under the chairmanship of Mr Thiam and its report on its work during the session details a general discussion on the advantages and disadvantages of the possible establishment of an international criminal court but as compared, in particular, to the system of universal jurisdiction based on prosecutions by national tribunals rather than to any alternative (non-retributive) means of accountability.<sup>143</sup> It notes, for example, comments that developments in international relations and international law had contributed to the feasibility of such a court<sup>144</sup> and that, whilst curtailing national sovereignty, the court would ensure uniform application of the law with the best possible guarantees of objectivity to try these kinds of crimes.<sup>145</sup> Apart from a general comment that a court would combat international crime which 'can endanger the very existence of states and seriously disturb international peaceful relations',<sup>146</sup> review of

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<sup>136</sup> UNGA Res 36/106 10 December 1981

<sup>137</sup> YBILC 1982, Vol. II (2), UN Doc. A/37/10, para. 252

<sup>138</sup> *Ibid* para. 3

<sup>139</sup> UNGA Res 44/16 1 November 1989

<sup>140</sup> Prime Minister Arthur Robinson, a lawyer and between 1972-1987, the executive director of an NGO called the Foundation for the Establishment of the International Criminal Court, drafted the motion with the help of Robert Woetzel, Benjamin Ferencz and M. Cherif Bassiouni (see p37)

<sup>141</sup> GAOR, forty-fourth session, Annexes, Vol. II, agenda item 152, UN Doc. A/44/195

<sup>142</sup> UN Res 44/39 4 December 1989

<sup>143</sup> *Ibid* para. 116

<sup>144</sup> *Ibid* para. 117

<sup>145</sup> *Ibid* para. 118

<sup>146</sup> *Ibid* para. 117

the ILC records for the 1990 (42<sup>nd</sup>) session reveals no specific references to ICJ goals or debates about potential alternative justice methods.

In December 1991, the UNGA repeated its invitation to the ILC to work on the issue of an international criminal jurisdiction within the framework of the draft code,<sup>147</sup> and during its 43<sup>rd</sup> session, several ILC members spoke in favour of the establishment of a court which:

would mark a step forward in developing international law and which, if it enlisted broad support from the international community, would strengthen the rule of law throughout the world, [...] could alone guarantee the required objectivity and impartiality in applying the Code, and without those factors there could be no valid and lasting international order.<sup>148</sup>

On 19<sup>th</sup> May 1992, the ILC established another Working Group, chaired by Abdul Koroma (Sierra Leone), specifically tasked with considering the issue of an international criminal jurisdiction.<sup>149</sup> The group comprised representatives from Europe (4), Africa (3), Eastern-bloc (2) and one each from Australia, USA, South America, Asia, the Middle East and the Caribbean.<sup>150</sup> In its report to the UNGA of its work during the session, the ILC stated it 'had concluded the task of analysing the question of establishing an international criminal court or *other international criminal trial mechanism*'<sup>151</sup> and that it could not envisage any such mechanism other than a 'criminal court', although some members did 'caution against the temptations of drawing too closely on models from internal criminal codes' and advise 'flexibility in any approach'.<sup>152</sup> Alternatives to a court that members had mentioned included an international mechanism simply stating the law with national courts conducting the trial; *ad hoc* tribunals; advisory opinions of ICJ and regional tribunals.<sup>153</sup> However, the ILC decided a court 'could provide a workable system' and proposed that the UNGA should authorise it to commence work on a draft

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<sup>147</sup> UNGA Res 46/54 9 December 1991

<sup>148</sup> YBILC 1991, Vol. II (2), UN Doc. A/46/10, para. 111

<sup>149</sup> YBILC 1992, Vol. II (2), UN Doc. A/47/10, para. 6

<sup>150</sup> *Ibid*

<sup>151</sup> *Ibid* para. 104(a) (emphasis added)

<sup>152</sup> *Ibid* para.30

<sup>153</sup> *Ibid*

statute.<sup>154</sup>

In 1992, the UNGA requested the ILC to start work on a draft statute based on the Working Group's report 'as a matter of priority'.<sup>155</sup> Mr Thiam prepared a draft consisting of 37 articles divided into three parts: (1) the establishment of the court, (2) its organisation and functioning and (3) its procedure.<sup>156</sup> After considering the draft statute, the ILC re-established the Working Group chaired by Mr Koroma and its report, comprising draft articles and commentaries, was presented to the ILC on 21<sup>st</sup> July 1993. It was decided to submit the draft statute for UNGA consideration at its 1993-4 session and in the meantime, to Governments for their comments via the UNSG.<sup>157</sup> Thirty Member States (only two from Africa: Algeria and Tunisia, the rest predominantly from the West)<sup>158</sup> submitted their observations on the draft statute, all largely constructive and supportive of the establishment of an international criminal court.<sup>159</sup>

After further work to review and refine the draft statute the following year, a final version plus detailed commentaries was adopted by the ILC in July 1994, when it was decided to recommend to the UNGA that an international diplomatic conference be convened to study the draft and 'conclude a convention on the establishment of an international criminal court'.<sup>160</sup> It was then realised that the two should be co-ordinated and encouraged by the UNGA to complete the draft code as soon as possible, the ILC returned to work on the draft code of crimes it had adopted in 1991 but subsequently had left to concentrate on the draft statute for an international criminal court.<sup>161</sup> The ILC's work on the draft code concluded in 1996, with the adoption of the final text of 20 articles constituting the code of crimes against the peace and security of mankind together with commentaries.<sup>162</sup> In order to reach a consensus, the scope of the code had been considerably reduced and regarding the form the draft code should take (i.e.

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<sup>154</sup> *Ibid* para. 104(d)

<sup>155</sup> UNGA Res 47/33 para. 6 25 November 1992

<sup>156</sup> YBILC 1993, Vol. II (2), UN Doc. A/48/10 para. 37

<sup>157</sup> *Ibid* paras. 96-100; see also UNGA Res 48/31 9 December 1993

<sup>158</sup> For a full list of these states, please see Appendix 3, post

<sup>159</sup> UN Doc. A/CN.4/448 and Add.1-8

<sup>160</sup> YBILC 1994, Vol. II (2), UN Doc. A/49/10, paras. 87-90

<sup>161</sup> UNGA Res 49/53 9 December 1994

<sup>162</sup> YBILC 1996, Vol. II (2), UN Doc A/51/10, para. 50

a separate international convention, incorporation into the statute of an international criminal court or a declaration by the UNGA), the ILC left it to the UNGA to select the form which would achieve the highest possible acceptance of the code.<sup>163</sup>

In this section, the work of the ILC appointed by the UNGA to codify international crimes and ultimately to draft a statute for an international court has been outlined, revealing how fundamental its efforts were to the success of the project. It was seen that the composition of the ILC substantially changed over the decades, increasing from 15 members in 1947 (none of whom came from the African continent), to 34 members in 1982, nine of whom came from Africa, making them the largest contingent on the ILC. Africans also played leading roles within the ILC, with Mr Koroma chairing the Working Group and Mr Thiam being appointed Special Rapporteur and primarily responsible for the draft statute of the international criminal court. It would appear therefore that the Enlightenment ideas of global citizenship and the homogeneity of mankind had successfully been absorbed by the educated elite of former colonies, who were actively supportive of the universal human rights discourse and silent on the issues of cultural diversity and relativity.

The UNGA had acted with a degree of procrastination during the period but as with the two IMTs, the incentives for moves to codify international criminal law and establish an international criminal court in the 1990s can be attributed to 'geo-political convenience'.<sup>164</sup> As stated in the Introduction to this chapter, the end of the Cold War ushered in a period of co-operation between the major powers. Falk goes further, arguing that it led also to a perception that allegations of criminality would not automatically be viewed as 'an exercise in hostile propaganda that dangerously inflamed efforts to sustain [...] "peaceful co-existence", which was a necessity given the large arsenals of nuclear weapons possessed by both superpowers.'<sup>165</sup> Rogue states were also posing security threats to the established order, as mentioned above regarding drug trafficking and other transnational criminal activities. It also became necessary for

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<sup>163</sup> *Ibid* paras. 46-48

<sup>164</sup> Falk, R. (1999) p713

<sup>165</sup> *Ibid*

liberal democracies to be seen to be doing something for the victims of genocidal conflicts that erupted during the 1990s, especially given the growing engagement of their societies with humanitarian concerns. These issues will be discussed further in the next two sections of this chapter.

### **The United Nations Security Council**

When the UN was established in 1945, it was proclaimed by the Western powers to be a neutral, universal institution that would act as guardian of the global new order.<sup>166</sup> However, Matua comments that ‘the use of the UN as a front by the big powers “simply changed the form of European hegemony, not its substance.”’<sup>167</sup> European hegemony over global affairs was transferred to the UNSC, the permanent members of which are the US, Britain, France, Russia and China. As the most powerful organ in the UN, the Security Council has primacy over the UNGA, a situation which clearly calls into question the notion of equality of states, subordinating Third World countries, particularly, to the vagaries of power politics.

The collapse of the Berlin Wall in 1989 was followed in 1991 by the dissolution of the Soviet Union into separate republics, which in turn led to the fall of communism across the Eastern-bloc. Whilst widely welcomed by the West, the dissolution of the Soviet Union and the ending of the Cold War had some dire consequences, caused by the security vacuum.<sup>168</sup> The former multi-ethnic Yugoslavia disintegrated with rival ethnic groups declaring their independence as sovereign states and seeking to unify or expand their territories.<sup>169</sup> Ethnic minorities were subjected to horrific crimes by all sides of the conflict and in 1993 the UNSC created the International Criminal Tribunal for Yugoslavia (ICTY) to prosecute and punish those who had committed serious violations of international humanitarian law since 1991.<sup>170</sup> The ICTY was created pursuant to Chapter VII of the UN Charter which authorises the UNSC to take measures to maintain or restore

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<sup>166</sup> Matua, M. (2000) p34

<sup>167</sup> *Ibid*

<sup>168</sup> Šimonović, I. (1999) ‘The Role of the ICTY in the Development of International Criminal Adjudication’ 23 *Fordham ILR* pp440-459 at p441

<sup>169</sup> *Ibid*

<sup>170</sup> UNSC Res 827 25 May 1993. The SC adopted the statute of the Tribunal in the same resolution

international peace and security and under which, the decisions of the UNSC are legally binding on members of the UN.<sup>171</sup> The tribunal was given primary (concurrent) jurisdiction to prosecute grave breaches of the 1949 Geneva Conventions, war crimes, genocide and crimes against humanity.<sup>172</sup>

Just over a year later, in Rwanda, the genocidal slaughter of Tutsis by Hutus which began on 6<sup>th</sup> April 1994 and lasted 100 days, left approximately 800,000 dead. Again using its Chapter VII powers, the UNSC established an *ad hoc* tribunal. The International Criminal Tribunal for Rwanda 1994 (ICTR)<sup>173</sup> was based substantially on the ICTY model, with primacy over domestic courts and jurisdiction over the crimes of genocide, crimes against humanity and violations of Article 3 of the Geneva Conventions and Additional Protocol II.<sup>174</sup>

Following the creation of the ICTY and ICTR, there were many calls for the UNSC to establish other *ad hoc* tribunals<sup>175</sup> but the UNSC demurred using its Chapter VII powers for this purpose,<sup>176</sup> possibly due to the waning of the spirit of co-operation that had accompanied the end of the Cold War but also due to the political interests of permanent members of the UNSC in specific international situations.<sup>177</sup> There was also considerable 'tribunal fatigue' felt by the UNSC and those nations, frustrated with the ever-increasing costs of the two *ad hoc* tribunals, who were contributing the most financially.<sup>178</sup> Furthermore, the UNSC was regularly forced to deal with issues and difficulties arising out of the events at and administration of the tribunals, which it found distracting and time-consuming.<sup>179</sup>

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<sup>171</sup> Article 39

<sup>172</sup> Statute of the International Criminal Tribunal for the Former Yugoslavia 1993, UN Doc. S/RES/827 (1993), Articles 2, 3, 4 and 5 respectively

<sup>173</sup> UNSC Res 955 8 November 1994. The SC adopted the statute of the tribunal in the same resolution.

<sup>174</sup> Statute of the International Criminal Tribunal for Rwanda 1994, UN Doc. S/RES/955 (1994), Articles 2, 3 and 4 respectively

<sup>175</sup> For example, for Cambodia, East Timor, Sierra Leone, Burundi and Sudan

<sup>176</sup> Other mechanisms and models have since been used, e.g. a Special Court for Sierra Leone was established in 2002 by means of a bilateral treaty between the Government of Sierra Leone and the UN.

<sup>177</sup> For example, China, Russia and France were opposed to the establishment of an *ad hoc* tribunal for Cambodia.

<sup>178</sup> Scheffer, D. (2011) 'The International Criminal Court' in Schabas, W.A. and Bernaz, N. (eds.) *Routledge Handbook of International Criminal Law* (Abingdon: Routledge) p68

<sup>179</sup> Cassese, A. (2002) p15



However, the events in Yugoslavia and Rwanda had shocked the world and the concept of prosecuting those who had committed the atrocities was gaining wide acceptance.<sup>180</sup> It was largely due to the influence of Habermas that in the 1990s there was a revival of interest in Kant's universalist ideas of a cosmopolitan community.<sup>181</sup> Habermas argued that the devastating impact of unrestrained nationalism in the 20<sup>th</sup> century, together with the increasing influence of the interconnected global economy necessitated a radical new interpretation of Kant's theories.<sup>182</sup> Habermas' solution was 'a modern, institutional framework for perpetual peace based upon the protection of human rights' and he and other European scholars who held similar views made timely and positive contributions to the debate regarding the feasibility of an ICC.<sup>183</sup>

Indeed, human rights activists were campaigning at grassroots public opinion level to pressure governments to support the establishment of an international criminal court 'that could operate as an integral element in any viable scheme for global governance.'<sup>184</sup> Certainly, as the *ad hoc* tribunals settled into their roles, they gained international recognition and credibility which also assisted the cause of a permanent international criminal court, which it was hoped, would have all of the benefits but few of the problems of the *ad hoc* tribunals.<sup>185</sup>

In the next section, the establishment by the UNGA of *Ad Hoc* Committee (AHC) and Preparatory Committee (PrepCom) to advance the proposed international criminal court will be discussed. It was argued by the AHC particularly that the establishment of a single permanent court would obviate the need for *ad hoc* tribunals for particular crimes such as those established for Yugoslavia and Rwanda, thereby ensuring stability and consistency in international jurisdiction.<sup>186</sup> The two *ad hoc* tribunals had drawn extensively on the ILC's draft statute for the international criminal court and although there were substantial difficulties in getting them 'up and running', they showed that

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<sup>180</sup> *Ibid* p16

<sup>181</sup> Fouladvand, S. (2014) p1036

<sup>182</sup> *Ibid*

<sup>183</sup> *Ibid* p1037

<sup>184</sup> Falk, R. (1999) p718

<sup>185</sup> Cassese, A. (2002) p16

<sup>186</sup> UN Doc A/5/22

the UN could create the means whereby perpetrators of international crimes would be brought to justice. This alone was a substantial development in the realm of ICL. In addition, the tribunals acted as a guide as to what would and would not work, highlighting problems and successes and offering a mass of experience and jurisprudence as the work of the PrepCom continued. Representatives from both tribunals regularly attended meetings with those involved in the negotiations and were regularly invited to address meeting on their experiences of the subjects under discussion.<sup>187</sup>

### **The United Nations General Assembly**

Although some States supported the ILC's recommendation of an international diplomatic conference, others believed it was premature as there was still so much work outstanding, particularly on agreeing the various provisions. Therefore, rather than convening a conference, the UNGA established an AHC 'to review the major substantive and administrative issues arising out of the draft statute' and to consider arrangements for the convening of the conference.<sup>188</sup> The AHC was open to all UN members or members of Specialised Agencies and chaired by Adrian Bos (The Netherlands),<sup>189</sup> its meetings in April and August 1995 proved to be an excellent forum for engaging the minds of governments.<sup>190</sup>

Regarding the perceived objectives of an international criminal court, a review of the AHC's report to the UNGA reveals that 'there was broad recognition' its establishment 'could ensure that perpetrators of serious international crimes were brought to justice and deter future occurrences of such crimes.'<sup>191</sup> For the first time, the issue of national amnesties was raised by some delegations<sup>192</sup> which no doubt reflects the reality of several nations having, in recent years, granted amnesty to members of a former regime that had committed international crimes.<sup>193</sup> In four of these countries (Cambodia, El

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<sup>187</sup> See Bos, A. (2002) 'From the ILC to the Rome Conference (1994-1998)' in Cassese, A. *et. al.* p62

<sup>188</sup> UNGA Res 49/53 9 December 1994

<sup>189</sup> Report of the *Ad Hoc* Committee on the Establishment of an International Criminal Court, (AHC Report) GAOR 50<sup>th</sup> Session Supplement No.22 (A/50/22) 6 December 1995 paras. 2-5

<sup>190</sup> Pace, W.R. and Schense, J. (2002) 'The Role of Non-Governmental Organizations' in Cassese, A. *et. al.* p112

<sup>191</sup> AHC Report, para. 12

<sup>192</sup> *Ibid* para. 46

<sup>193</sup> Argentina, Cambodia, Chile, El Salvador, Guatemala, Haiti, Uruguay and South Africa.

Salvador, Haiti and South Africa), the UN had 'pushed for, helped negotiate, and/or endorsed the granting of amnesty as a means of restoring peace and democratic government.'<sup>194</sup> Concerned delegations suggested that the statute 'should address the issue of national amnesties and provide guidelines on the matter, indicating the circumstances in which the international criminal court might ignore, or intervene ahead of, a national amnesty.'<sup>195</sup> No decisions on the issue were made by the AHC and the question of national amnesties was again raised during PrepCom meetings and at the Rome Conference.

The AHC concluded that further work on the draft statute was necessary prior to the calling of an international conference but 'aware of the interest of the international community in the establishment of an international criminal court which would be widely accepted, the committee recommends that the GA take up the organization of future work with a view to its early completion'.<sup>196</sup> The committee encouraged participation by the 'largest number of States in future work'.<sup>197</sup>

Accordingly, on 11<sup>th</sup> December 1995, the UNGA established a PrepCom to work on the ILC draft statute (taking into account the report of the AHC, States' comments on the draft statute and contributions from relevant organisations). The meetings were open to all States or members of specialised agencies as recommended in the AHC report and the UNGA urged the active participation of the largest number of states in order to promote universal support for an international criminal court.<sup>198</sup> Chaired by Mr Adrian Bos, the PrepCom met in March/April and August 1996.<sup>199</sup> The number of governments involved in this stage of negotiating and drafting new texts increased from sixty to over 120 delegations after the PrepCom commenced its work.<sup>200</sup> Three further sessions were

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<sup>194</sup> Scharf, M. (1996) 'The Letter of the Law: The Scope of the International Legal Obligation to Prosecute Human Rights Crimes' 59 *Law and Contemporary Problems* pp41-61 at p41; see also Roht-Arriaza, N. (1995) 'Conclusion: Combating Impunity' in Roht-Arriaza, N. (ed) *Impunity and Human Rights in International Law and Practice* (Oxford: OUP) p299-300

<sup>195</sup> AHC Report, para. 46

<sup>196</sup> *Ibid* para. 258

<sup>197</sup> *Ibid* para. 259

<sup>198</sup> UNGA Res 50/46

<sup>199</sup> Vice-Chairmen: Mr Bassiouni (Egypt), Mrs Fernández de Gurmendi (Argentina) and Mr Madej (Poland); Rapporteur: Mr Yoshida (Japan); see 'Summary of the Proceedings of the Preparatory Committee during the period 25 March-12 April 1996' UN Doc. A/AC.249/1, 7 May 1996

<sup>200</sup> *Ibid* p50

held in 1997 and one in March/April 1998.<sup>201</sup> At its final session, the PrepCom adopted a consolidated draft statute<sup>202</sup> largely based on the draft agreed at an inter-sessional meeting in Zutphen (The Netherlands) in January 1998.<sup>203</sup> The UNGA now decided the diplomatic conference should be held in Rome from 15<sup>th</sup> June to 17<sup>th</sup> July 1998 for the purpose of ‘finalizing and adopting a convention on the establishment of an international criminal court’.<sup>204</sup> Rome was an interesting choice, since potential criticism from non-Europeans that the whole ICC project was grounded in European Enlightenment ideals of universality would doubtless have been buttressed by selecting Rome, the centre of Western Christianity, as the birthplace of the Court.<sup>205</sup>

A study of the summary of the PrepCom proceedings in March-April 1996<sup>206</sup> reveals that during discussions on the draft statute approved by the ILC in 1994 there was no mention of AJMs, particularly regarding complementarity and admissibility issues.<sup>207</sup> However, at a meeting of the Working Group on Complementarity and Trigger Mechanisms in August 1997, national amnesties were mentioned and several delegations expressed the view that the issue of pardons and amnesties was not adequately addressed for the purposes of complementarity.<sup>208</sup>

This point had concerned the US delegation which had circulated a ‘nonpaper’ in August 1997, suggesting that the proposed court should take into account ‘such amnesties in the interest of international peace and national reconciliation when deciding whether or not to exercise jurisdiction over a situation or to prosecute a particular offender’.<sup>209</sup> This was required, the US text argued, to balance prosecution against ‘the need to close “a door on the conflict of a past era” and “to encourage the surrender or reincorporation

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<sup>201</sup> Schabas, W.A. (2010) p20

<sup>202</sup> UN Doc. A/AC.249/1998/CRP.19

<sup>203</sup> See Bos, A. (2001) ‘The Experience of the Preparatory Committee’ in Politi, M. and Nesi, G. (eds.) *The Rome Statute of the International Criminal Court. A challenge to impunity* (Aldershot: Dartmouth Publishing Co), pp17-27

<sup>204</sup> UNGA Res 51/207 16 January 1997; Report of the Sixth Committee, UN Doc A/52/652; UNGA Res 52/160 15 December 1997

<sup>205</sup> Fouladvand, S. (2014) p1039

<sup>206</sup> Summary of the Proceedings of the Preparatory Committee during the period 25 March-12 April 1996; Rapporteur: Mr Jun Yoshida (Japan), Doc. A/AC/249/1, 7 May 1996

<sup>207</sup> *Ibid* paras. 109-120

<sup>208</sup> Preparatory Committee on the Establishment of an International Criminal Court 4-15 August 1997 Working Group on Complementarity and Trigger Mechanisms A/AC/249/1997/WG.3/CRP.2 13 August 1997 (WGR August 1997) para. 6

<sup>209</sup> Scharf, M.P. (1999) p508

of armed dissident groups,” and thereby facilitate the transition to democracy.<sup>210</sup> Scharf comments that the US proposal met with much criticism<sup>211</sup> and it is noted from the Working Group’s report that it was agreed ‘these questions should be revisited in light of further revisions [...] to determine [...] whether additional language was needed [...] to address these situations.’<sup>212</sup> Dugard suggests that the amnesty issue was ‘raised, but not seriously considered’ by the PrepCom.<sup>213</sup> As shall be seen in the next section, at the Rome Conference, it was also evaded with the result that the Rome Statute (RSt) is silent on the issue of amnesties.

In this section, the efforts of the UNGA to finalise the codification of international crimes and progress the establishment an international court have been outlined and examination of the records of discussions in the AHC and PrepCom has established that whilst the work is dedicated to the establishment of a Court, the question of national amnesties granted to former regimes does arise within the context of admissibility to the Court of situations resulting from the transition of states from conflict or authoritarian rule to peace and democracy but is deferred for later consideration.

### **The Rome Diplomatic Conference**

The Rome Conference opened on 15<sup>th</sup> June 1998 with 160 States in attendance<sup>214</sup> plus specialised agencies, intergovernmental organisations and NGOs with observer status. The draft statute contained over 14000 square-bracketed points for discussion<sup>215</sup> and to save time, it was decided to establish informal working groups, each simultaneously working on a section of the draft statute.<sup>216</sup> Unfortunately, this decision disadvantaged smaller or non-English-speaking delegations which were unable to cover all of the working groups, many of which were conducted in English only, thus leaving larger, richer and more powerful delegations potentially able to dominate negotiations.<sup>217</sup> It

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<sup>210</sup> *Ibid*

<sup>211</sup> *Ibid*

<sup>212</sup> WGR August 1997 para. 6

<sup>213</sup> Dugard, J. (2002) ‘Possible Conflicts of Jurisdiction with Truth Commissions’ in Cassese, A. (*et.al*) p700

<sup>214</sup> See Report of the Credentials Committee UN Doc A/Conf.183/7 paras. 5,6 and 7

<sup>215</sup> Kirsch, P. and Robinson, D. (2002) ‘Reaching Agreement at the Rome Conference’ in Cassese, A. *et.al.* p68

<sup>216</sup> *Ibid* p73

<sup>217</sup> Bassiouni, M.C. (1998) *The Statute of the International Criminal Court: A Documentary History* (New York: Transnational Publishers) p28

did result in 111 Articles being completed by 15<sup>th</sup> July, which left the contentious Part 2 Articles 5 to 21 (unassigned to working groups due to their politically sensitive character) to be dealt with in the last two days.<sup>218</sup> These included the definition of crimes, jurisdiction, triggering mechanisms, the role of the Prosecutor and the role of the UNSC.

In the context of Article 17 and decisions not to prosecute, the relationship between the ICC and national AJMs coupled with amnesties was raised during the Rome Conference<sup>219</sup> and was debated at length.<sup>220</sup> The delegation from South Africa regularly reminded conference that their country's much-acclaimed approach to post-conflict justice had been to reject criminal trials in favour of a Truth and Reconciliation Commission and conditional amnesties.<sup>221</sup> The South Africans were very concerned that such an approach now would be viewed by the Court as a decision not to prosecute, thereby opening the door to international prosecution.<sup>222</sup> While there was 'widespread sympathy with the South African model',<sup>223</sup> views on the issue of AJMs and amnesties were diametrically opposed. Some advocated that trials were the only response to the crimes within the jurisdiction of the Court and others that AJMs were acceptable if it meant the restoration of peace and democracy, such as had occurred in South Africa.<sup>224</sup> Robinson effectively explains the dilemma facing delegations:

Even among those delegations most committed to prosecution of all international crimes, many had misgivings about laying down an iron rule for all time mandating prosecution as the *only* acceptable response in all situations. On the other hand, creating an explicit exception allowing amnesties was equally untenable. Some delegations opposed any exceptions in principle, whereas others were concerned that any exception would be immediately exploited and abused.<sup>225</sup>

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<sup>218</sup> *Ibid*

<sup>219</sup> Contrary to the assertion in Wedgwood, R. (1999) 'The International Criminal Court: An American View' *EJIL* pp93-107 that 'no plenary discussion of this vexing problem was had in Rome' at p96

<sup>220</sup> Robinson, D. (2003) 'Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court' 14 *EJIL* pp481-505 at p483; see also Williams, S./Schabas, W.A. (2008) 'Issues of Admissibility' in Triffterer, O. (ed) *Commentary on the Rome Statute of the International Criminal Court – Observers' Notes, Article by Article* (Oxford: Hart Publishing) p617

<sup>221</sup> Williams, S./Schabas, W.A. (2008) p617

<sup>222</sup> *Ibid*

<sup>223</sup> *Ibid*

<sup>224</sup> Scharf, M.P. (1999) p521; see also Robinson, D. (2003) p483

<sup>225</sup> Robinson, D. (2003) p483

Part of the problem was delegates' recollection of the amnesties granted by South American dictators to themselves and their cohorts.<sup>226</sup> The main difficulty, however, even if there had been a general consensus on the acceptability of AJMs, was codifying guidelines that would enable the Court to use its discretion in favour of a particular AJM.<sup>227</sup> The answer at the Rome Conference, therefore, was to adopt provisions that reflected 'creative ambiguity',<sup>228</sup> thus enabling the Prosecutor and the Court to use discretion and 'to develop an appropriate approach when faced with concrete situations',<sup>229</sup> on a case-by-case basis. Indeed, for Scharf, the final text of the RSt 'contains several ambiguous provisions which could be interpreted as codifying the US (1997) proposal.'<sup>230</sup>

According to Robinson, 'it is at least conceivable that the ICC could conclude that it would not be in the 'interests of justice' to interfere with a democratically adopted, good faith alternative programme that creatively advanced accountability objectives.'<sup>231</sup> Therefore, it has been argued that the complementarity principle does not exclude local demands for justice<sup>232</sup> and in the final paragraph of the first of his bi-annual reports to the UNSC on the Situation in Darfur, the ICC Prosecutor confirmed that such demands would be accommodated:

Additional international and national efforts will be required to bring to justice other offenders and to promote the rule of law and reconciliation through traditional and other mechanisms. This has particular significance ... where ...tribal and traditional systems exist for the promotion of dispute resolution. The ICC will cooperate with and support such efforts, the combination of which will mark a comprehensive response to the need for peace, justice and reconciliation.<sup>233</sup>

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<sup>226</sup> For example, in Chile, Uruguay, Peru and Argentina

<sup>227</sup> Robinson, D. (2003) p483; see also Scharf, M. (1999) p522; Morris, M.H. (1996) 'Foreword' *Law and Contemporary Problems* pp1-3 for discussion on difficulties in drafting guidelines for AJMs

<sup>228</sup> Scharf, M. (1999) p522

<sup>229</sup> Robinson, D. (2003) p483

<sup>230</sup> Scharf, M. (1999) p508 (see p46-47 *ante*)

<sup>231</sup> Robinson, D. (2003) p481

<sup>232</sup> Roach, S.C. (2013) 'Legitimizing negotiated justice: the ICC and flexible governance' *IJHR* pp619-632 at p627

<sup>233</sup> Report of the Prosecutor of the International Criminal Court, Mr Luis Moreno Ocampo, to the Security Council pursuant to UNSCR 1593 (2005) 29 June 2005 p9

## Conclusion

A brief examination of the medieval international legal order in this chapter has demonstrated that the assertion of euro-centricity is reflected in certain aspects of Western historiography and evidenced by the movement away from the unifying ideals of Christendom with its adherence to natural law, towards an emphasis on the States and State sovereignty. The post-Westphalian colonial expansion that followed was supported by the ideas of the Enlightenment era, with the development of international law being linked to ideologies of toleration in relations between European states and a so-called civilising mission in their encounters with non-European states.

The first attempts to limit the horrors of war which preceded calls for an international criminal tribunal stemmed from concern for good international relations and this helps to explain the early focus on war crimes committed during the violent disputes between competing European States<sup>234</sup> and accounts for the predominantly Atlanticist focus in the development of international justice.

The establishment of the two IMT's in the aftermath of WW2 signified great advances in the development of ICL but it has been argued here that they were linked to an intention on the part of the West to restore and maintain peace on the pre-war model, reinforcing their supremacy rather than heralding in a new and progressive world order based on the ideals of the equality of humankind. However, the rise of independence movements after the war resulted in changes to the global order as imperialist nations lost their colonies and were obliged to adopt alternative means of exerting their influence.

Post-WW2 there was a shift in ICJ focus to reflect the increasingly intra-state nature of armed conflicts, as is evidenced not only by the *ad hoc* and hybrid tribunals established after the end of the Cold War which prosecuted crimes committed predominantly during

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<sup>234</sup> Greenwalt, A.K. (2011) 'The Pluralism of International Criminal Law' 86 *Indiana LJ* pp1064-1130 at p1087



internal armed conflicts<sup>235</sup> but also by the development of new jurisdictions being equally applicable to internal as to international conflicts.<sup>236</sup>

It is the work of the ILC between 1982 and 1996 to which most progress towards the codification of international crimes and the establishment of the ICC can be attributed. An examination of the composition of the ILC during this period reveals that its work was not driven by Europeans or Americans but by representatives from every continent. In 1994, the ILC membership of 34 was dominated by Africa (9) with Europe (6) and South America (5) also well represented. Mr Thiam, a Senegalese diplomat, politician and lawyer, in his role as Special Rapporteur worked tirelessly to assist the ILC to complete the draft code of crimes and later, on the topic of an international criminal jurisdiction, writing a total of 13 reports which substantially contributed to the achievements of the ILC in these areas. Likewise, Mr Koroma, a Sierra Leonian Judge chaired the ILC Working Group which finalised the wording of the Draft Statute between 1992 and 1994.

It appears, therefore, that far from being dominated by Europeans demanding western-style justice, by this stage, the work towards the establishment of the ICC was being driven forward predominantly by Africans. However, it could be argued that these Africans were drawn from the educated elite in their societies and were 'Europeanised'. Mr Thiam, for example, graduated from the University of Poitiers in France, before becoming Minister of Foreign Affairs in Senegal and then a member of the ILC in 1970. Likewise, Mr Koroma graduated with a Master's degree in International Law from King's College, London, worked as a Barrister and then in the Ministry of Foreign Affairs for Sierra Leone, before becoming a member of the ILC in 1982. The fact remains, therefore, that the key drafters of the RSt were immersed in the West's intellectual and cultural traditions. This 'European-isation' of the educated and social elite of nations formerly under the yoke of European colonialism may explain their enthusiasm for a Western justice system that initially had been imposed upon them.

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<sup>235</sup> For example, the former Yugoslavia, Rwanda, Sierra Leone and Cambodia

<sup>236</sup> Greenwalt, A.K. (2011) p1087

Today, African states are well-represented in the ICC: four of 18 Judges are African,<sup>237</sup> Fatou Bensouda from Gambia, having been Deputy Prosecutor since 2004, became the Prosecutor in 2012 and Phakiso Mochochoko from Lesotho is head of the 'Jurisdiction, Complementarity and Cooperation Division'. African civil society also appears to offer broad support for the ICC, with more than 800 African NGOs being members of the Coalition for the ICC, amounting to approximately one-third of its member organisations.<sup>238</sup> Furthermore, it can be argued that until it began investigating presidents, the ICC was broadly supported by African governments, indeed the first three situations before the Court were self-referrals from African nations.<sup>239</sup>

It has been suggested that Africa's initial enthusiasm for the ICC was borne out of frustration and despair at the lack of success of other international organisations to bring peace and stability to their conflict-ridden continent and the hope that the ICC, with its apparently universalist precepts would succeed where others had failed.<sup>240</sup> This may well have contributed to African acceptance of the western-inspired, formal, legal-rational method of adjudication but it has been relevant to investigate whether any other options for ICJ were considered during the crucial period when practical plans for an international criminal jurisdiction were first proposed and to question how much influence was exercised by the less powerful States such as those in Africa in the debates and negotiations which led to the establishment of the ICC.

The difficult relationship existing today between the ICC and some nations in Africa gives cause for alarm as many Africans remain vulnerable to violations of their human rights. The ICC has a mandate to investigate and prosecute crimes within its jurisdiction but the problem remains, however, that criminal prosecutions are inherently a western justice mechanism and may not be the best option for every State transitioning from conflict or repressive rule to peace and democracy. Indeed, it could be argued that in some

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<sup>237</sup> From Kenya, Nigeria, Botswana and the Democratic Republic of Congo [Online] Available: <https://www.icc-cpi.int/about/judicial-divisions/biographies#> [Accessed 10.03.17]

<sup>238</sup> Ambos, K. (2013b) 'Expanding the Focus of the 'African Criminal Court'' in Schabas, W.A., McDermott, Y. and Hayes, N. (eds.) *The Ashgate Research Companion to International Criminal Law: Critical Perspectives* (Farnham: Ashgate Publishing Ltd) p509

<sup>239</sup> Uganda in January 2004, DRC in April 2004, CAR in January 2005

<sup>240</sup> Schabas, W.A. (2013) 'The Banality of International Justice' 11 *JICJ* pp545-551 at p548

transitional contexts, criminal prosecutions fail to satisfy the ICJ goals of ordinary citizens, who may be more desirous of peace, reconciliation and social stability than punishment and retribution. Therefore, it is argued, this may require the ICC to demonstrate far more flexibility in its interpretation of the complementarity provisions of the RSt than it has to date, so as to enable a State to deal with its legacy of human rights abuses by justice methods other than criminal trials. This issue will be examined in later chapters of this thesis.

## CHAPTER THREE

### THE AIMS OF INTERNATIONAL CRIMINAL JUSTICE AND THE INTERNATIONAL CRIMINAL COURT

#### Introduction

In the last chapter, it was seen that it was the atrocities committed during wars started in the 20<sup>th</sup> Century that triggered moves to codify international crimes and establish an international criminal court where offenders could be prosecuted. The Rome Statute (RSt) of the International Criminal Court (ICC) was adopted by the Rome Conference on 17<sup>th</sup> July 1998 and having received the required sixty ratifications by April 2002, entered into force on 1<sup>st</sup> July 2002.<sup>1</sup> The Preamble declares that in establishing the ICC and thereby affirming that those responsible for atrocities will be prosecuted and punished,<sup>2</sup> the international community is determined to end impunity for the perpetrators of grave crimes,<sup>3</sup> contribute to the prevention of such crimes in the future<sup>4</sup> and guarantee lasting respect for and the enforcement of international justice.<sup>5</sup> The Preamble reveals, therefore, that the international criminal justice (ICJ) aims of trials at the ICC are punishment, deterrence and respect for and enforcement of the rule of law. These are what Branch refers to as a “scaled-up” version of liberal domestic law<sup>6</sup> in that they reflect theories of justice, (namely retribution, deterrence, incapacitation and rehabilitation) that are conventionally applied in liberal western domestic criminal justice systems, for which reason they have been also termed the ‘domestic-criminal-law-styled’ aims of ICJ.<sup>7</sup> One question for this chapter is whether these aims for domestic criminal justice can be applied effectively at the international level.

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<sup>1</sup> Schabas, W.A. (2010) *The International Criminal Court: A Commentary on the Rome Statute* (Oxford: OUP) p26

<sup>2</sup> Rome Statute of the International Criminal Court 1998, Preamble, para. 4

<sup>3</sup> *Ibid* para. 5

<sup>4</sup> *Ibid*

<sup>5</sup> *Ibid* para. 11

<sup>6</sup> Branch, A. (2011b) ‘Neither Liberal nor Peaceful? Practices of ‘Global Justice’ by the ICC’ in Campbell, S., Chandler, D. and Sabaratnam, M. (eds.) *A Liberal Peace? The Problems and Practices of Peacebuilding* (London: Zed Books) p123

<sup>7</sup> Galbraith, J. (2009-2010) ‘The Pace of International Criminal Justice’ 31 *Michigan JIL* pp79-155 at p83

Contemporaneous with the discourse about international justice based on the ideals drawn from Nuremberg arose the 'revolutionary international aspirations of the human rights movement in the new world order.'<sup>8</sup> The emergence of transitional justice (TJ) as a multidisciplinary field of study in the late 1980s and early 1990s<sup>9</sup> led to justice becoming more victim-focussed, emphasising seeking redress for victims and recognition of their dignity as citizens and human beings.<sup>10</sup> From the late 1980s, TJ increasingly gained a foothold in international law with decisions imposing obligations on states to protect human rights.<sup>11</sup> Equally important was an emerging recognition that justice in the international context of 'systematic or widespread violations of human rights' may not be satisfied by a 'domestic-criminal-law-styled' response but instead may require an holistic approach, promoting possibilities for peace, reconciliation and democracy.<sup>12</sup>

As part of this holistic approach, the recognition of the dignity of individuals and redressing and acknowledging violations and ensuring their future prevention<sup>13</sup> are constant aims of TJ but they are supplemented by complementary aims which can vary according to context and include:

- Establishing and restoring confidence in accountable institutions (such as the police, judiciary, military)
- Enabling access to justice for society's most vulnerable in the aftermath of violations
- Ensuring that women and marginalised groups participate in the pursuit of a just society
- Respect for the rule of law
- Facilitating peace processes and fostering durable resolutions of conflicts

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<sup>8</sup> Byrne, R. (2006) 'Promises of Peace and Reconciliation: Previewing the Legacy of the International Criminal Tribunal for Rwanda' 14 *European Review* pp485-498 at p486

<sup>9</sup> Primarily due to political events in Latin America and Eastern Europe

<sup>10</sup> ICTJ (2017) 'What is Transitional Justice?' [Online] Available: <https://www.ictj.org/about/transitional-justice> [Accessed 10.03.17]

<sup>11</sup> For example, decisions in the Inter-American Court of Human Rights and the European Court of Human Rights, United Nations (UN) treaty bodies such as the Human Rights Commission and the establishment of the ICC itself

<sup>12</sup> ICTJ (2009) 'What is Transitional Justice?' Factsheet [Online] Available: <https://www.ictj.org/sites/default/files/ICTJ-Global-Transitional-Justice-2009-English.pdf> [Accessed 10.03.17]

<sup>13</sup> ICTJ (2017) (see fn10)

- Establishing a basis to address underlying causes of conflict and marginalisation
- Advancing the cause of reconciliation<sup>14</sup>

Expectations of trials at the ICC, which had been expressed in predominantly retributive terms, gradually began to reflect TJ aims, demonstrating the extent to which human rights issues had shifted ‘from the margins of policy formation to assume an influential role [...] on the international stage.’<sup>15</sup> For example, when Kofi Annan, the UN Secretary General (UNSG) reported to the UN Security Council (UNSC) in August 2004 that the establishment of the ICC was ‘the most significant recent development in the international community’s long struggle to advance the cause of justice and rule of law’,<sup>16</sup> expectations of prosecutions at the ICC had expanded beyond those expressed in the RSt Preamble into a long list of objectives for the court which clearly drew on TJ aims. The combined ‘domestic-criminal-law-style’ and TJ-influenced objectives were summarised by the UNSG in his report as including:

- bringing to justice those responsible for serious violations of human rights and humanitarian law
- putting an end to such violations and preventing their recurrence
- securing justice and dignity for victims
- establishing a past record of events
- promoting national reconciliation
- re-establishing the rule of law
- contributing to the restoration of peace<sup>17</sup>

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<sup>14</sup> *Ibid*

<sup>15</sup> Byrne, R. (2006) p491

<sup>16</sup> *The rule of law and transitional justice in conflict and post-conflict societies*: Report of the Secretary-General 23 August 2004 UN Doc. S/2004/616 para. 49 (UNSG Report)

<sup>17</sup> *Ibid* para. 38

Ambos describes these objectives as having “*an individualistic and a collective side*” in that they aim to protect individual human rights and additionally to contribute to world peace, security and wellbeing.<sup>18</sup>

It is these combined (and sometimes conflicting) objectives of international criminal justice (ICJ) and the focus on individual prosecutions at the ICC as the means of achieving them, that is the topic of this chapter. To assess the capacity of the ICC to achieve the ICJ goals set for it, the seven objectives outlined in Mr Annan’s report will be used as a framework. For consistency, the same framework will then be used to assess the capacity of *Mato Oput* and the South African Truth and Reconciliation Commission (SATRC) to achieve those goals, in chapters five and six respectively.

In the following sections, each of the seven ICJ objectives for the ICC outlined by Mr Annan in his 2004 report to the UNSC will be discussed individually and the performance or potential of prosecutions at the ICC to satisfy the objective will be assessed. Since the Court’s primary objective of ‘bringing those responsible for serious violations of human rights and humanitarian law to justice’ emphasises the previously-mentioned four objectives of domestic criminal justice systems (retribution, deterrence, incapacitation and rehabilitation), the Court’s capacity to achieve each of these will be considered separately. In fact, the retributive and deterrent objectives of criminal trials are covered by Mr Annan’s specified objectives for the ICC of ‘bringing those responsible to justice’ and ‘ending violations and preventing their recurrence’. However, the domestic criminal justice system objectives of incapacitation and rehabilitation relate to the perpetrators of crimes as opposed to victims and survivors and neither Mr Annan’s report nor the stated aims of TJ mention these functions of trials as objectives for ICJ. However, because they are a fundamental feature of criminal prosecutions, the ICC’s capacity to achieve these objectives also will be considered. The chapter will conclude that the ICC cannot hope to satisfy the many conflicting goals attributed to it and thus

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<sup>18</sup> Ambos, K. (2013a) ‘Punishment without a Sovereign? The *Ius Puniendi* Issue of International Criminal Law: A First Contribution towards a Consistent Theory of International Criminal Law’ *OJLS* pp293-315 at p294 (emphasis in original)

should prioritise its objectives on a case by case basis, taking account of the contextual demands of each situation referred to it.

### **Part One: Bringing Those Responsible to Justice**

In this section, the retributive qualities of trials at the ICC will be examined since, as previously stated, the objective of bringing those responsible to justice through criminal prosecutions prioritises an objective of western-liberal domestic criminal justice. According to Kantian deontology of criminal punishment, 'even if society were on the verge of dissolution, it has the duty to punish the last offender'.<sup>19</sup> Drumbl states that the deontological retributive approach is '*au courant* among international lawyers, [and] posits that trials of selected individuals (preferably undertaken at the international level) constitute the favoured and often exclusive remedy to respond to all situations of genocide and crimes against humanity'.<sup>20</sup>

Orentlicher is regarded as one such advocate of prosecutions, insisting that successor governments have a duty to prosecute the human rights violations of a prior regime as prosecutions are the 'most effective insurance against future repression'<sup>21</sup> and may 'inspire societies that are re-examining their basic values to affirm fundamental principles of respect for the rule of law and for the inherent dignity of individuals'.<sup>22</sup> Orentlicher's argument was criticised for taking no account of the varied and often difficult realities faced by successor governments.<sup>23</sup> However, although she argued that governments 'should be expected to assume reasonable risks associated with

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<sup>19</sup> Drumbl, M. (2000) 'Punishment, Postgenocide: From Guilty to Shame to *Civis* in Rwanda' *NYULR* pp1221-1326 at p1228; Nino, C.S. (1996) *Radical Evil on Trial* (New Haven and London: YUP) p112

<sup>20</sup> Drumbl, M. (2000) p1228

<sup>21</sup> Orentlicher, D.F. (1990-1991) 'Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime' 100 *YLI* p2537-2615 at p2542

<sup>22</sup> *Ibid*

<sup>23</sup> Nino, C.S. (1990-1991) 'Duty to Punish Past Abuses of Human Rights put into Context: The Case of Argentina' 100 *YLI* pp2619-2640 at p2619



prosecutions, including a risk of military discontent',<sup>24</sup> she did not assert that this should be to the point of provoking their own collapse.<sup>25</sup>

Other supporters of prosecutions, such as Cassese, emphasise their essential role in dissipating calls for revenge,<sup>26</sup> thereby avoiding what Minow describes as 'a downward spiral of violence or an unquenchable desire that traps people in cycles of revenge, recrimination and escalation'.<sup>27</sup> Minow describes retribution as 'vengeance curbed by the intervention of someone other than the victim and by principles of proportionality and individual rights'.<sup>28</sup> Aukerman agrees that trials serve 'to channel vengeance, thereby both discouraging less controlled forms of victims' justice, such as vigilantism and restoring the moral and social equilibrium that was violently disturbed by the offender'.<sup>29</sup>

However, the results of her empirical study in Bosnia and Herzegovina (BiH) in 2008 led Clark to question faith in trials themselves as dissipaters of revenge.<sup>30</sup> She found that, despite high levels of discontent with the retributive justice achieved by the International Criminal Tribunal for the Former Yugoslavia (ICTY), it was the tribunal's existence that dissipated calls for revenge at a normative level, with criminal justice being identified as the most legitimate response to war crimes.<sup>31</sup>

Adherence to the retribution theory demands that every guilty person should get their 'just deserts', which poses a difficulty for the ICC where prosecutions have to be limited and selective. The crimes within the ICC's jurisdiction, by definition, can involve

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<sup>24</sup> Orentlicher, D.F. (1990-1991) p2549 Orentlicher subsequently re-examined her assertions, describing 'an evolution in [her] thinking' as, rather than promulgating the relevant rule of international law, she now emphasised victims' agency 'in defining their own interests and preferences and in participating in national processes aimed at designing policies of transitional justice.' See Orentlicher, D.F. (2007) 'Settling Accounts Revisited: Reconciling Global Norms with Local Agency' *IJTJ* pp10-22 at p19

<sup>25</sup> Orentlicher, D.F. (1990-1991) p2548

<sup>26</sup> Cassese, A. (1998) 'Reflections on International Criminal Justice' 61 *Mod LR* pp1-10 at p6

<sup>27</sup> Minow, M. (1998) *Between Vengeance and Forgiveness* (Boston: Beacon Press) p10

<sup>28</sup> *Ibid* p12

<sup>29</sup> Aukerman, M.J. (2002) 'Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice' 15 *Harvard JHR* pp39-97 at p55

<sup>30</sup> It is noteworthy that despite the existence of the ICTY, Kosovo Albanians carried out 'revenge killings' against Serbs in 1999 and despite the existence of the International Criminal Tribunal for Rwanda (ICTR), the RPF committed violent reprisals against Hutus.

<sup>31</sup> Clark, J.N. (2009) 'The Limits of Retributive Justice. Findings of an Empirical Study in Bosnia and Hercegovina' *7JICJ* pp463-487 at p471

widespread violence perpetrated by many, who are all deserving of punishment, whereas the ICC can cope only with a small number of prosecutions. Acknowledging this problem, the Office of the Prosecutor (OTP) initially adopted a policy of ‘focusing its efforts on the most serious crimes and on those who bear the greatest responsibility for these crimes.’<sup>32</sup> It was later realised, however, that the evidentiary standards required to target those ‘most responsible’ could put the chances of a successful conviction in jeopardy, so a strategy of ‘gradually building upwards’ was initially envisaged<sup>33</sup> and subsequently implemented,<sup>34</sup> whereby mid-and high-level perpetrators will be investigated and prosecuted in the hope of securing evidence sufficient to convict those most responsible.<sup>35</sup> The OTP also indicated that it will even ‘consider prosecuting lower level perpetrators where their conduct was particularly grave and has acquired extensive notoriety’.<sup>36</sup>

Some welcomed this policy adaptation on the grounds that targeting the most responsible singles out those in elevated positions who plan and orchestrate the atrocities rather than the people on the ground who execute them.<sup>37</sup> Certainly, those in command are morally responsible<sup>38</sup> but it can be argued that the individuals who enthusiastically carry out their orders should not be absolved from responsibility simply because they are lower down the command-chain. It is important that they too are held accountable because of the central role they play in mass atrocities. A policy of prosecuting only those ‘most responsible’ enables the vast majority who participated to ‘reframe their actions in ways that excuse their activity.’<sup>39</sup> This point also impacts on the controversial issue of individual versus collective responsibility.

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<sup>32</sup> OTP ‘Report on Prosecutorial Strategy’ 14 September 2006 p5

<sup>33</sup> OTP ‘Strategic plan June 2012-2015’ 11 October 2013 p14 para. 22

<sup>34</sup> OTP ‘Strategic Plan 2016-2018’ 6 July 2015 p16 para. 34

<sup>35</sup> *Ibid*

<sup>36</sup> *Ibid*

<sup>37</sup> Robinson, D. (2003) ‘Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court’ 14 *EJIL* pp481-505 at p494

<sup>38</sup> Akhavan, P. (2001) ‘Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?’ 95 *AJIL* pp7-31 at p10 insisting ‘Prevention and punishment should focus primarily on those unscrupulous leaders who goad and exploit the forces advocating a spiral of violence.’

<sup>39</sup> Fletcher, L. and Weinstein, H. (2002) ‘Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation’ 24 *HRQ* pp573-630 at p605

Akhavan argues that 'individual accountability for massive crimes is an essential part of a preventative strategy'.<sup>40</sup> Cassese also extols the virtue of trials on the grounds that they individualise rather than collectivise guilt.<sup>41</sup> Clearly, the notion of collective guilt is unattractive<sup>42</sup> but individualising guilt is contentious in situations of wide-scale participation in mass killings such as occurred in Rwanda in 1994, since 'the focus on individual crimes has been used by many to claim collective innocence'.<sup>43</sup> Fletcher and Weinstein suggest that focussing on individual autonomy leaves 'no room for those social processes that collectively influence thinking and behaviour.'<sup>44</sup> They argue that:

while the legal system focuses on individual behaviour and addresses issues of motivation or criminal intent, it lacks the capacity to address the consequences of the many individual acts that characterize genocide or ethnic cleansing where perpetrators are swept up in the group violence.<sup>45</sup>

They state that there is a communal engagement with mass violence which is not addressed by criminal trials, since individual autonomy is challenged in 'group' situations, with membership of the group becoming the controlling influence and norms of behaviour shifting with community sanction.<sup>46</sup> Thus individuals who participate in mass violence which has become the norm are ostensibly relieved of even moral responsibility for their acts.<sup>47</sup>

Fletcher and Weinstein also discuss the culpability of those who do not actually involve themselves in the violence but nor do they do anything to prevent it, a situation they term the 'bystander phenomenon'.<sup>48</sup> They argue that the influence of societal and cultural factors can pressure bystanders into remaining passive because fear inhibits action and produces conformity, especially if others are present.<sup>49</sup> They demonstrate the power of the collective to influence behaviour and argue that by individualising guilt

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<sup>40</sup> Akhavan, P. (2001) p10

<sup>41</sup> Cassese, A. (1998) p6

<sup>42</sup> Clark, J.N. (2009) p473

<sup>43</sup> Fletcher, L. and Weinstein, H. (2002) p604

<sup>44</sup> *Ibid*

<sup>45</sup> *Ibid*

<sup>46</sup> *Ibid* p611; see also Tallgren, I. (2002) 'The Sensibility and Sense of International Criminal Law' 13 *EJIL* pp561-595 at p573

<sup>47</sup> Fletcher, L. and Weinstein, H. (2002) p611 (of course, this argument can equally apply in a domestic setting)

<sup>48</sup> *Ibid* p613

<sup>49</sup> *Ibid* p613-4

in criminal trials, the 'legal paradigm reinforces the use of denial as a psychological defence mechanism within the population at large and supports the bystanders' claim that they did nothing wrong, that is collective innocence.'<sup>50</sup>

Clark also has concerns about the 'contentious issue' of individualising guilt in situations of mass participation in violence, concluding from her findings in BiH regarding ethnic-cleansing crimes, that prosecutions of a few did not dispel the resentment against the whole group, including bystanders who did nothing to help or warn, which led to many making their own judgments about the other ethnic groups' culpability.<sup>51</sup> Victims wanted much broader responsibility addressed, Clarke concluded and since, in situations of mass participation in violence, trials cannot be complete and comprehensive, this calls into question the assumption that individualising guilt is efficacious and that trials of a few can dispel allegations of collective guilt.<sup>52</sup>

In this section, the ability of trials at the ICC to bring offenders to justice has been discussed and it has been seen that supporters of prosecutions uphold the Court's retributive qualities, its capacity to make those who commit great crimes 'face truth, be held accountable, and serve justice.'<sup>53</sup> Clearly, as with domestic criminal justice, trials at the ICC fulfil the requirements of retribution by establishing guilt and imposing punishment on those who have committed heinous crimes. There is no doubt that a head of state or warlord would wish to avoid an appearance before the ICC and that a conviction of any crime within the court's jurisdiction would entail universal stigmatisation and condemnation. In this respect, the ICC successfully fulfils its retributive function and it does so more overtly than other means of transitional justice. However, as noted, there are serious limitations to what the ICC can achieve by way of bringing those responsible to justice primarily due to its selection of cases to prosecute, its inability to prosecute large numbers of offenders and the individualisation of criminal responsibility in situations of mass atrocity which, by their definition, encompasses the crimes within the jurisdiction of the ICC.

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<sup>50</sup> *Ibid* p615

<sup>51</sup> Clark, J.N. (2009) p472-3

<sup>52</sup> *Ibid*

<sup>53</sup> Neier, A. (1998) *War Crimes. Brutality, Genocide, Terror and the Struggle for Justice* (New York: Times Books) p260

## Part Two: Ending Violations and Preventing their Recurrence

This ICJ objective relates to the deterrent function of domestic criminal trials which, according to David Wippman, for many is the most important justification and the most important goal of criminal justice, national or international.<sup>54</sup> Payam Akhavan defines deterrence as ‘the ability of a legal system to discourage or prevent certain conduct through threats of punishment or other expressions of disapproval.’<sup>55</sup>

Deterrence is premised on two notions: first that the offender is likely to be caught and punished and second, that punishment will prevent a rational decision-maker from committing the crime. Taking a utilitarian approach to offending, the assumption is that the potential offender will make a ‘risk-reward’ calculation and will commit a crime only when the potential reward outweighs the attendant risk. It is anticipated, therefore, that risk in the form of probability of prosecution, conviction and sentence can deter crime. Deterrence operates on two levels: it is directed at the offender who has already committed a crime with the intention of preventing future offending (‘specific deterrence’) and against society at large with the intention of discouraging potential criminal behaviour (‘general deterrence’).<sup>56</sup>

It is difficult to estimate the preventative effect of international trials for, as Tallgren notes, ‘[t]here are no grounds to exclude the possibility of such an effect. Neither is there evidence in its favour.’<sup>57</sup> Although we have experienced nothing on the scale of the Nazi genocide since, the Nuremberg trials did not deter the crimes subsequently perpetrated in, for example, Algeria, Cambodia, Vietnam, East Timor, Iraq (against the Kurds), former Yugoslavia or Rwanda. Indeed, as Judge Richard Goldstone, the first Chief Prosecutor of the ICTY and ICTR reportedly commented “[t]he hope of “never

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<sup>54</sup> Wippman, D. (1999-2000) ‘Atrocities, Deterrence and the Limits of International Justice’ 23 *Fordham ILJ* pp473-488 at p474

<sup>55</sup> Akhavan, P. (1998) ‘Justice in The Hague, Peace in the Former Yugoslavia? A Commentary on the United Nations War Crimes Tribunal’ 20 *HRQ* pp737-816 at p741

<sup>56</sup> *Ibid* p746

<sup>57</sup> Tallgren, I. (2002) p569

again” became the reality of again and again”.<sup>58</sup> In the opinion of Meron, despite the widely publicised warnings of punishment of those committing atrocities during the second World War and the UNSC warnings regarding crimes committed in the former Yugoslavia ‘there is no empirical evidence of effective deterrence in either case’.<sup>59</sup> Although it perhaps should be conceded that the lack of pre-existing forum in which to try these crimes could have undermined the deterrent effect of Nuremberg and subsequent warnings, it is noteworthy that the existence of the ICC has not prevented atrocities being committed in, for example, Syria,<sup>60</sup> Yemen<sup>61</sup> and South Sudan,<sup>62</sup> among many other possible examples.

Given the argument that deterrence is often ineffective to prevent crimes in domestic situations, even with the support of states’ law enforcement apparatus,<sup>63</sup> the deterrent effect in international situations is more questionable because the sheer scale and gravity of the offending behaviour transcends deviance or aberration to become what Kant describes as ‘radical evil’.<sup>64</sup> Reisman argues international tribunals have a ‘fit’ problem because ‘in liberal societies, the criminal law model pre-supposes some moral choice or moral freedom’ on the offender’s part but in cases of atrocious international crimes, many of those directly responsible ‘operate within a cultural universe that inverts our morality and elevates their actions to the highest form of group, tribe or national defence’.<sup>65</sup> After years or generations of imbibing these views, he argues, the

<sup>58</sup> Anonymous (1996) ‘Were they just obeying orders?’ *The Guardian (1959-2003)* [London (UK)] 7 May, 10. ISSN 02613077 [Online] Available: [https://www-nexis-com.ezproxy.sussex.ac.uk/results/enhdocview.do?docLinkInd=true&ersKey=23\\_T25868369466&format=GNBFI&startDocNo=0&resultsUrlKey=0\\_T25868369468&backKey=20\\_T25868369469&csi=138620&docNo=14](https://www-nexis-com.ezproxy.sussex.ac.uk/results/enhdocview.do?docLinkInd=true&ersKey=23_T25868369466&format=GNBFI&startDocNo=0&resultsUrlKey=0_T25868369468&backKey=20_T25868369469&csi=138620&docNo=14) [Accessed 30.10.15]

<sup>59</sup> Meron, T. (1995) ‘From Nuremberg to The Hague’ 149 *Mil.LR* pp107-112 at p110. Of course, the difficulty with this view is that we have no way of knowing if the warnings deterred others who were potential offenders as it is difficult to prove they prevented something that has not happened.

<sup>60</sup> Smith-Spark, L. (2016) ‘Syria civil war: Will anyone be prosecuted for war crimes?’ CNN 16 December [Online] Available: <http://edition.cnn.com/2016/12/16/middleeast/syria-aleppo-war-crimes-claim/> [Accessed 19.03.17]

<sup>61</sup> HRW (2017) ‘Yemen: No accountability for War Crimes: Saudi-Led Coalition, Houthi-Saleh Forces Abuses Persist’ *World Report 2017* [Online] Available: <https://www.hrw.org/news/2017/01/12/yemen-no-accountability-war-crimes> [Accessed 24.03.17]

<sup>62</sup> Jones, S. (2016) ‘UN report: South Sudan allowed soldiers to rape civilians in civil war’ *The Guardian* 11 March [Online] Available: <https://www.theguardian.com/global-development/2016/mar/11/south-sudans-soldiers-allowed-to-rape-civilians-civil-war-says-un-government-torture> [Accessed 19.03.17]

<sup>63</sup> Meron, T. (1995) p110; see also Tallgren, I. (2002) p569 stating that ‘empirical studies of the national systems have met with considerable criticism and are of very limited value’ to the international context.

<sup>64</sup> Kant, I. ‘Religion within Boundaries of Mere Reason’ in *Immanuel Kant: Religion and Rational Theology* (1996) trans. and ed. by Wood, A.W. and diGiovanni, G. (Cambridge: CUP) p83; see also Nino, C.S. (1996) pvii

<sup>65</sup> Reisman, W.M. (1996) ‘Legal Responses to Genocide and other Massive Violations of Human Rights’ 59 *L&CP* pp75-80 at p77

offender 'may not have the moral choice that is central to our notion of criminal responsibility'.<sup>66</sup>

Nonetheless, the determination to contribute to the prevention of the crimes within the jurisdiction of the ICC places deterrence at the heart of the Court's *raison d'être*<sup>67</sup> and gives the ICC 'its distinctive rationale.'<sup>68</sup> Some scholars and human rights activists frame their argument for prosecutions around the message transmitted to would-be perpetrators by a failure to prosecute, which, for example, Kritz warns 'can be expected not only to encourage new rounds of mass abuses in the country in question but also to embolden the instigators of crimes against humanity elsewhere.'<sup>69</sup> Orentlicher agrees that exemplary prosecutions can send a message to the future of non-toleration since 'if law is unavailable to punish widespread brutality of the past, what lesson can be offered for the future?'<sup>70</sup>

Whilst general assertions have been expressed regarding the potential of international prosecutions to deter future atrocities,<sup>71</sup> there has been very little empirical study to ascertain the impact of the ICC or other international tribunals in either specific or general deterrence, so it is difficult to establish the efficacy of the ICC in this regard.<sup>72</sup> The Court has been functioning for 15 years and even a brief review of current and recent conflicts reveals that hopes for its strong deterrent role may have been

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<sup>66</sup> *Ibid*

<sup>67</sup> Preamble para. 5

<sup>68</sup> Ku, J. and Nzelibe, J. (2006) 'Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities' 84 *Wash ULR* pp777-833 at p789

<sup>69</sup> Kritz, N. (1996) 'Coming to Terms with Atrocities: A Review of Accountability Mechanisms for Mass Violations of Human Rights' 59 *L&CP* pp127-52 p129

<sup>70</sup> Orentlicher, D. (2007) p15

<sup>71</sup> See, for example, Drumbl, M. (2004-5) 'Collective Violence and Individual Punishment: The Criminality of Mass Atrocity' 99 *Nw.ULR* pp539-610 at p.560 stating 'the general deterrence purpose of prosecuting and punishing those who commit mass atrocity is to dissuade others from doing so in the future'; Bassiouni, M.C. (1996) 'Searching for Peace and Achieving Justice: The Need for Accountability' 59 *L&CP* pp9-28 at p18 stating 'the relevance of prosecution ... is that through their effective application, they serve as deterrence, and thus prevent further victimization.'

<sup>72</sup> Ku, J. and Nzelibe, J. (2006) p780; Meron, T. (2011) 'Does International Criminal Justice Work?' in Meron, T. (ed) *The Making of International Criminal Justice: The View from the Bench: Selected Speeches* (Oxford: OUP) p149; Cronin-Furman, K. (2013) 'Managing Expectations: International Criminal Trials and the Prospects for Deterrence of Mass Atrocity' 7 *IJTJ* pp434-454 at p435; but see Hyeran, J. and Simmons, B.A. (2014) 'Can the International Criminal Court Deter Atrocity?' 18 December [Online] Available: <http://ssrn.com/abstract=2552820> [Accessed various dates Oct/Nov 2015] This study presents empirical data supporting a significant impact of prosecutorial and social deterrence factors on the number of civilians killed and examines the impact of the ICC on violence levels in countries affected by civil war. As they acknowledge, therefore, the evidence that the ICC deters future perpetrators is not conclusive.

overstated. Since 2011, for example, the UN has regularly issued reports on Syria<sup>73</sup> detailing abuses amounting to crimes against humanity allegedly committed by government and rebel forces but neither appear to have been deterred from committing further atrocities on civilians despite the risk of future prosecutions at the ICC.<sup>74</sup> Also, in Mali,<sup>75</sup> although the Court is already investigating alleged crimes committed since January 2012,<sup>76</sup> there has been a renewal of fighting since mid-2014 leading to Human Rights Watch (HRW) calling on the Malian government to curtail abuses against civilians and aid workers carried out by armed groups and state security forces.<sup>77</sup>

The HRW documentation of serious human rights abuses is repeated in Nigeria, Burundi, CAR, South Sudan, DRC, Uganda, Sudan and Somalia to mention just some of those reported on the continent of Africa alone.<sup>78</sup> Given this depressing record, one could question whether a prosecution at the ICC has any deterrence capacity but it is impossible to know the answer. The ICC cannot be expected to deter every perpetrator of international crimes but it is possible that potential offenders could have been deterred.<sup>79</sup>

Some scholars doubt that fanatical and genocidal leaders can be deterred from committing international crimes,<sup>80</sup> suggesting that perpetrators of mass atrocities are so 'irrational and motivated by bloodlust, religious fervour or ancient ethnic hatreds'<sup>81</sup> that they are incorrigible. However, Ku and Nzelibe assert that 'offenders commit more

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<sup>73</sup> See e.g. Report of the Independent International Commission of Inquiry on the Syrian Arab Republic A/HRC/27/60 13 August 2014; A/HRC/30/48 13 August 2015; A/HRC/28/69 5 February 2015; A/HRC/30/48 13 August 2015; A/HRC/33/55 11 August 2016; A/HRC/34/CRP.3 13 March 2017

<sup>74</sup> Although Syria is not a party to the RSt, a referral to the ICC could be made by the UNSC

<sup>75</sup> Mali ratified the RSt on 16 August 2000 and self-referred to the ICC the situation on its territory since January 2012

<sup>76</sup> Statement: 16/01/2013, ICC Prosecutor opens investigation into war crimes in Mali: "The legal requirements have been met. We will investigate" ICC-OTP-20130116-PR869

<sup>77</sup> HRW (2015) 'Mali: Lawlessness, Abuses Imperil Population: Government Needs to Restore Security, Justice System' [Online] Available: <https://www.hrw.org/news/2015/04/14/mali-lawlessness-abuses-imperil-population> [Accessed 20.03.17]

<sup>78</sup> HRW 'World Report 2017: Events of 2016'; see also Amnesty International Report 2016/17: 'The State of the World's Human Rights: Africa Regional Overview' pp16-23

<sup>79</sup> Akhavan, P. (2011) 'Preventing Genocide: Measuring Success by What Does not Happen' 22 *CLF* pp1-33 at p28 suggesting that a threat to involve the ICC averted a descent into mass violence in Côte D'Ivoire in 2004.

<sup>80</sup> Meron, T. (2011) p149; see also Drumbl, M. (2004-5) stating 'deterrence is based on the essentially unproven assumption of perpetrator rationality...' p590

<sup>81</sup> Cronin-Furman, K. (2013) p439



atrocities in weak states because they have more *opportunities* to do so, and not because they have a greater *inclination* to commit such atrocities’,<sup>82</sup> an insight that could provide possibilities for deterrence. Moreover, Cronin-Furman supports ‘an assumption of perpetrator rationality, at least at the command level’,<sup>83</sup> arguing that the decision to commit seemingly “wanton and senseless’ atrocities ‘can be understood as part of a rational strategy.’”<sup>84</sup> She discusses the motivation of those who order mass atrocities and argues that ‘overriding interests’ such as avoiding defeat, territorial control and survival outweigh the threat of prosecution ‘regardless of its certainty.’<sup>85</sup> She also observes that leaders of groups that commit atrocities can be separated into commanders who order the commission of mass atrocities and those who permit or fail to punish subordinates for these crimes and argues that the latter group is more likely to be deterrable, so the ICC should target prosecutions accordingly, since this could result in ‘improved oversight in armed groups’.<sup>86</sup>

One factor which can affect the risk-reward calculation for deterrables is the perceived certainty of prosecution. For Meron, this point is fundamental: ‘Instead of despairing over the prospects of deterrence, the international community should enhance the probability of punishment’.<sup>87</sup> At the ICC, this ‘probability’ is hampered by its capacity to handle only a small number of cases. In the 15 years since the ICC was established, despite an increase in the number of internationalised armed conflicts between 2004 and 2014,<sup>88</sup> the Prosecutor has conducted ten investigations (nine in Africa)<sup>89</sup> and has issued 29 arrest warrants and nine summonses to appear.<sup>90</sup> Of the arrest warrants, 14 have been implemented and six individuals are in custody, 13 being still at large.<sup>91</sup> Twenty- three cases have been brought before the Court of which five are currently at

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<sup>82</sup> Ku J. and Nzelibe, J. (2006) p780 (emphasis in original)

<sup>83</sup> Cronin-Furman, K. (2013) p440

<sup>84</sup> *Ibid*

<sup>85</sup> *Ibid* p445

<sup>86</sup> *Ibid* 447

<sup>87</sup> Meron, T. (1995) p110-1

<sup>88</sup> Pettersson, T. & Wallenstein, P. (2015) ‘Armed conflicts, 1946-2014’ 52 *JPR* pp536-550 at p539 using data obtained from the Uppsala Conflict Data Program and stating that in 2014, 40 armed conflicts were active in 27 locations worldwide, an 18% increase on 2013

<sup>89</sup> Ten preliminary examinations are also currently underway, four of which are in Africa

<sup>90</sup> ICC Factsheet ‘The Court Today’ ICC-PIDS-TCT-01-081/16\_Eng Updated: 28 December 2016. All nine summoned suspects appeared before the court voluntarily and are not in detention

<sup>91</sup> *Ibid*; Three arrest warrants were withdrawn following the death of the suspects

the trial stage, one is at the appeal stage and three are at the reparations stage. Clearly, on this record, the risk of being prosecuted at the ICC is almost negligible and arguably is unlikely to figure prominently in a potential offender's risk-reward analysis.

Another factor that undermines the deterrent effect of the ICC is that it does not have any means of compelling state co-operation, upon which it is wholly reliant, since it has no police force or other enforcement mechanism at its disposal and it has no power to compel the production of evidence or to enforce judgments. If states refuse to co-operate, the Court can only refer the matter to the ICC Assembly of State Parties (ASP) or to the UNSC (if a UNSC referral) for sanctions to be imposed against the non-co-operating state(s).<sup>92</sup>

Unfortunately, both the ASP and UNSC have consistently chosen not to support the ICC by taking action against non-co-operating states, some of which have openly obstructed the court.<sup>93</sup> For example, certain SPs have ignored requests to arrest and transfer to the ICC Sudan's President al-Bashir<sup>94</sup> whose two arrest warrants have been outstanding since 2009 and 2010.<sup>95</sup> Indeed, the African Union (AU) has called upon its members to refuse co-operation with the Court<sup>96</sup> and as previously mentioned, has recently called for a mass withdrawal of member states from the ICC following a dispute arising from the ICC indicting sitting heads of state, including Kenyan President Kenyatta and his deputy, William Ruto for crimes against humanity following the 2007 post-election violence.<sup>97</sup>

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<sup>92</sup> RSt, Article 87(7)

<sup>93</sup> Ngari, A. (2017) 'The real problem behind South Africa's refusal to arrest al-Bashir: The ICC relies on states to do its work, but what sanctions are there when they don't cooperate?' (Institute for Security Studies) 10 July [Online] Available: <https://issafrica.org/iss-today/the-real-problem-behind-south-africas-refusal-to-arrest-al-bashir> [Accessed 15.07.17]

<sup>94</sup> *Ibid* The situation in Darfur, Sudan was referred to the ICC by the UNSC, see UN Doc. S/RES/1593 (31 March 2005)

<sup>95</sup> Crimes against humanity, war crimes and genocide are alleged against President Bashir. For a full discussion on the question of immunities of a serving head of state, see Akande, D. (2009) 'The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir's Immunities' 7 *JICJ* pp333-352

<sup>96</sup> Assembly of the AU, 13<sup>th</sup> Ordinary Session, 1-3 July 2009, Decision No.3, Assembly/AU/Dec.245(XIII) Rev.1, para. 10

<sup>97</sup> Associated Press in Addis Ababa (2017) 'African leaders plan mass withdrawal from international criminal court' The Guardian 31 January [Online] Available: <https://www.theguardian.com/law/2017/jan/31/african-leaders-plan-mass-withdrawal-from-international-criminal-court> [Accessed 19.03.17]

In December 2014, the Prosecutor criticised the UNSC for failing to support the ICC in securing Bashir's arrest when she announced she was halting the Darfur investigations after five years.<sup>98</sup> A week earlier, the Prosecutor had also dropped the case against President Kenyatta citing the Kenyan government's obstruction of the ICC's efforts to gather sufficient evidence to mount a prosecution.<sup>99</sup> This lack of support from the UNSC and resistance from SPs could suggest that if states obstruct the ICC for long enough, they can thwart the court's attempts to fulfil its ICJ objectives, a situation which clearly diminishes any deterrent effect the Court may have exerted.

It is also suggested that the ability of the ICC to fulfil its deterrence mandate is seriously curtailed by three of the five permanent members of the UNSC not being parties to the RSt<sup>100</sup> and by UNSC decisions relating to the maintenance or restoration of international peace and security<sup>101</sup> being greatly influenced by power politics and the national interests of the permanent five.<sup>102</sup> For example, although the UNSC co-operated in the referral of Sudan in 2005 and Libya in 2011, accountability for the atrocities committed in Syria since Spring 2011 remains unachievable despite concerted efforts by the international community to persuade a divided, reluctant UNSC to refer the Syrian situation to the ICC.<sup>103</sup>

Finally, it has been argued that the atrocities of the 20<sup>th</sup> century (even those committed by the Nazis) arose not from criminal intent but from ideologies that strove for the

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<sup>98</sup> Smith, D. (2014) 'ICC chief prosecutor shelves Darfur war crimes probe' *The Guardian* 14 December [Online] Available: <http://www.theguardian.com/world/2014/dec/14/icc-darfur-war-crimes-fatou-bensouda-sudan> [Accessed 15.11.15]

<sup>99</sup> ICC Press Release: 05/12/2014, Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the withdrawal of charges against Mr Uhuru Muigai Kenyatta. Kenyan authorities had initially co-operated, holding intensive negotiations with the Prosecutor prior to his *proprio motu* intervention to ensure their willingness to co-operate once a formal investigation began, see Ambos, K. (2013b) pp518, 519

<sup>100</sup> US, Russia and China are not SPs.

<sup>101</sup> UN Charter, Chapter VII; see also UNSC Report 'The Rule of Law: The Security Council and Accountability', 18 January 2013 [Online] Available: <http://www.securitycouncilreport.org/cross-cutting-report/the-rule-of-law-the-security-council-and-accountability.php> [Accessed 19.11.15] discussing how 'the rule of law has become integral to the peacekeeping and peacebuilding efforts of the Security Council'

<sup>102</sup> McGreal, C. (2015) 'UN security council is failing Syria, Ban Ki-moon admits' *The Guardian* 7 September [Online] Available: <http://www.theguardian.com/world/2015/sep/07/un-security-council-is-failing-syria-ban-ki-moon> [Accessed 20.03.17]

<sup>103</sup> Black, I. (2014) 'Russia and China veto UN move to refer Syria to international criminal court' *The Guardian* 22 May [Online] Available: <http://theguardian.com/world/2014/may/22/russia-china-veto-un-draft-resolution-refer-syria-international-criminal-court> [Accessed 20.03.17]

betterment of society or to save the world from a perceived danger,<sup>104</sup> which implies that the threat of criminal prosecution would offer no deterrence. It could, therefore, be more apposite to consider the Court's deterrent potential lying in a didactic and motivational role over the long term. Indicted leaders of government and rebel forces who remain in power and continue to commit egregious crimes in the 'shadow' of the ICC<sup>105</sup> have the Sword of Damocles hanging over their heads, which may gradually enter their risk-reward analysis and possibly deter them from perpetrating human rights violations and mass atrocities. This effect was noted by a HRW Congo researcher, for example, whom Lurnet Nkunda, once a high-profile leader of a vicious Rwandan-backed rebel group in eastern Congo, regularly called in 2007 and 2008 to discuss his fears that he might be targeted by the ICC because of abuses committed by his troops.<sup>106</sup> Thus, it appears fear of investigation by the ICC can have a deterrent effect but as Wippman has commented, it 'seems likely to be modest and incremental, rather than dramatic and transformative.'<sup>107</sup>

### Part Three: Incapacitation and the ICC

Although not specifically included in the list of objectives for the ICC by Kofi Annan in his 2004 report, incapacitation is a feature of retributive justice and therefore, by analogy, of prosecutions at the ICC. As one of the four objectives of domestic criminal justice systems, the aim of incapacitation involves punishing offenders in a way that prevents re-offending by removing them from society, usually by incarceration or in certain jurisdictions, capital punishment. However, since punishment is founded on combating deviant behaviour, the challenge for ICJ is responding to radical evil with domestic penalties that arguably are insufficient.<sup>108</sup>

<sup>104</sup> Koskeniemi, M. (2002) 'Between Impunity and Show Trials' 6 MPYUNL pp1-35 at p8

<sup>105</sup> Moreno-Ocampo, L. (2010) 'Pursuing International Justice: A Conversation with Luis Moreno-Ocampo' February 4 [Online] Available: <http://www.cfr.org/human-rights/pursuing-international-justice-conversation-luis-moreno-ocampo/p34702> [Accessed 01.05.17]

<sup>106</sup> Roth, K. (2014) 'Africa Attacks the International Criminal Court' *NY Review of Books* 14 January (stating also that Nkunda had been under house arrest since 2009)

<sup>107</sup> Wippman, D. (1999-2000) p488

<sup>108</sup> Drumbl, M. (2000) p1253

Arendt was of the opinion that extreme evil, whether considered radical or banal,<sup>109</sup> was unpunishable and unforgivable, arguing that ‘these deeds def[y] the possibility of human punishment’<sup>110</sup> and ‘explode the frame of our legal institutions.’<sup>111</sup> For Nino, radical evil involves ‘offences against human dignity so widespread, persistent, and organized that normal moral assessment seems inappropriate.’<sup>112</sup> Osiel agrees: ‘the intellectual architects of administrative massacre may possess an evil so “radical” as to exceed our capacity to punish it’.<sup>113</sup> He elaborates ‘[b]ecause we possess no punishment more severe than execution, we have none that captures and corresponds to the full severity of the wrongdoer’s acts in such cases. Because his evil is so “radical”, it mocks our efforts to punish it.’<sup>114</sup> As Arendt points out, however, ‘this [cannot] conceivably mean that he who ha[s] murdered millions should for this very reason escape punishment.’<sup>115</sup>

The sentencing options available to the ICC immediately reveal just how rooted the Court is in the domestic criminal law of liberal western justice systems. There were heated debates at the Rome Conference on both capital punishment and life imprisonment; the debate on capital punishment, according to Schabas, ‘threatened to undo the Rome Conference.’<sup>116</sup> Many states opposed life imprisonment on the grounds that it ‘neglected rehabilitation’, was ‘cruel, inhuman and degrading’ and was ‘prohibited by principles of international human rights law’.<sup>117</sup> Eventually agreement was reached but the ‘price to be exacted for a consensus on excluding the death penalty was to be provisions on imprisonment that were far more rigorous than many states would have liked.’<sup>118</sup>

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<sup>109</sup> Arendt, H. (1982) ‘Cura Posterior: Eichmann in Jerusalem (1961-1965)’ in Young-Bruehl, E. *Hannah Arendt: For the Love of the World* (New Haven and London: YUP). Arendt argued that ‘evil is never “radical” ... it is only extreme. It is “thought-defying” ... and the moment [thought] concerns itself with evil, it is frustrated because there is nothing. That is its “banality”.’ p369

<sup>110</sup> Arendt, H. (1963) *Eichmann in Jerusalem. A report on the Banality of Evil* (New York: Viking Press) p250

<sup>111</sup> Arendt, H. (1982) p371

<sup>112</sup> Nino, C.S. (1996) p*vii*

<sup>113</sup> Osiel, M. (2000a) ‘Why Prosecute? Critics of Punishment for Mass Atrocity’ 22 *HRQ* pp118-147 at p120

<sup>114</sup> *Ibid* p129

<sup>115</sup> Arendt, H. (1963) p250

<sup>116</sup> Schabas, W. (2017) *An Introduction to the International Criminal Court* (Cambridge: CUP) p322

<sup>117</sup> Schabas, W. (2010) p893

<sup>118</sup> *Ibid*

The Court can sentence an offender to a maximum of 30 years custody<sup>119</sup> with the possibility of 'life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person'.<sup>120</sup> In sentencing, the Court must take into account mitigating<sup>121</sup> or aggravating<sup>122</sup> factors and the sentence must 'reflect the culpability' and 'consider the circumstances' of the convicted person and the crime.<sup>123</sup> Schabas argues, the ICC's sentencing options fail:

to take into account the essential and fundamental aggravating circumstance, namely that the offences [...] are crimes against humanity or war crimes. The [ICC has] been created precisely to deal with crimes that are inherently more serious than the underlying common law offences committed in peacetime. If the crimes are not the same, why should sentences be the same?<sup>124</sup>

Indeed, Ku and Nzelibe have found from their study of data relating to 'coup plotters in Africa'<sup>125</sup> that in those regions, rather than 'perpetrators operat[ing] in a culture of impunity ... [they] routinely face sanctions which are likely to be more severe and certain' than any imposed by the ICC.<sup>126</sup> For perpetrators of international crimes, it has been suggested that a trial and sentencing at the ICC may be the preferable option, especially when taking account of the better detention facilities, access to funds for legal representation, high welfare standards and guaranteed due process. Stahn states that the 'transfer of defendants to 'The Hague' is often perceived as a reward rather than as a punishment by victims or even defendants', who prefer to be tried at the ICC rather than domestically.<sup>127</sup>

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<sup>119</sup> RSt, Article 77(1)(a)

<sup>120</sup> *Ibid* Article 77(1)(b) Additionally the Court can impose a fine or order forfeiture of proceeds, property and assets derived from crime and can order these to be transferred to a Trust Fund established for the benefit of victims.

<sup>121</sup> RPE 145(2)(a)(i) and (ii)

<sup>122</sup> RPE 145(2)(b)(i)-(vi)

<sup>123</sup> RPE 145(1)(a) and (b) respectively. Time spent on remand counts towards the sentence and when a prisoner has served two-thirds of the sentence (or 25 years, if life imprisonment), the Court must review the sentence 'to determine whether it should be reduced' for what amounts to good behaviour.

<sup>124</sup> Schabas, W. (1996-1997) 'Sentencing by International Tribunals: A Human Rights Approach' 7 *Duke J. Comp. & IL* pp461-517 at p478

<sup>125</sup> Ku, J. and Nzelibe, J. (2006) p798

<sup>126</sup> *Ibid* p807

<sup>127</sup> Stahn, C. (2012) 'Between 'Faith' and 'Facts': By What Standards Should We Assess International Criminal Justice?' 25 *Leiden JIL* pp251-283 at p269

Without proposing any alternative, Drumbl complains that ‘despite the extraordinary nature of this criminality’ punishment is ‘disappointingly ordinary’<sup>128</sup> and ‘uninspiring’<sup>129</sup> as it ‘overwhelmingly takes the form of incarceration in accordance with the classic penitentiary model.’<sup>130</sup> He laments that the “‘enemy of all humankind” is punished no differently than a car thief, armed robber or cop killer’<sup>131</sup> and finds it absurd that ‘[l]egal scholars have demarcated normative differences between extraordinary crimes against the world community and ordinary crimes against the local community’ and yet are ‘largely content to subject both to the same process.’<sup>132</sup> In answer to this criticism, it could be argued that the very banality of incarceration for years is its power, removing the perpetrator from society and at the same time forestalling any suggestion of martyrdom.

When reflecting on the sentencing of international crimes of ‘enormous moral, historical, or political significance’,<sup>133</sup> Koskenniemi remarks ‘if the trial has significance, then that significance must lie elsewhere than in the punishment handed out’.<sup>134</sup> In fact, there does exist some evidence that international justice can contribute to incapacitation in the form of assisting in the de-legitimation of politics. For example, because he had been indicted by the ICTY, Radovan Karadžić was prevented from participating in the 1995 Dayton Peace Talks, which ‘clearly reduced [his] influence on the General Framework Agreement for Peace in BiH’.<sup>135</sup> Furthermore, an expert study in 2008 on the impact of the ICTY found that the proceedings and evidence adduced ‘significantly ‘shrunk the public space’ in which political leaders could credibly deny the truth about notorious atrocities’<sup>136</sup> for example, the number of victims killed in Srebrenica.

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<sup>128</sup> Drumbl, M. (2004-5) p541

<sup>129</sup> *Ibid* p542

<sup>130</sup> *Ibid*

<sup>131</sup> *Ibid*

<sup>132</sup> *Ibid*

<sup>133</sup> Koskenniemi, M. (2002) p2

<sup>134</sup> *Ibid* p3

<sup>135</sup> Ryngaert, C. (2012) ‘Arrest and Detention’ in Reydam, L., Wouters, J. and Ryngaert, C. (eds.) *International Prosecutors* (Oxford: OUP) p672

<sup>136</sup> Orentlicher, D. (2008) ‘Shrinking the Space for Denial: The Impact of the ICTY in Serbia’ *Open Society Justice Initiative* (New York: Open Society Institute) p63

In this section, the discussion has highlighted the perceived inadequacy of the sentencing options available to the ICC given the heinous nature of the crimes it is dealing with. However, in the absence of rational alternatives which could satisfy these criticisms, it can simply be argued that long term incarceration is a serious punishment which diminishes the power of offenders by removing them from the formerly abused community.

In the next section, the domestic sentencing function of rehabilitation will be discussed to ascertain its relevance in the context of ICJ.

#### **Part Four: Rehabilitation and the ICC**

Again, the rehabilitation of offenders was not specifically mentioned by Mr Annan as an ICJ objective of criminal prosecutions at the ICC. However, it is an important feature of criminal trials in the domestic criminal justice scenario, which thus makes this aim a valid consideration when scaling up to international criminal trials. Rehabilitation of an offender focuses on their re-education and re-integration into society on the assumption that they acknowledge the error of their ways and intend to adhere to accepted social norms. However, this assumption can be challenged when, rather than an offender acknowledging his wrongdoing and wishing to atone, the retributive process fosters a defensive attitude with the offender denying involvement, disputing evidence and ignoring the harm caused.<sup>137</sup>

Some international and regional HR instruments stipulate that rehabilitation should be one of the primary concerns for a sentencing court<sup>138</sup> but in the context of international crimes, the weight given to rehabilitative factors may be limited. The RSt makes almost no reference to the purpose of sentencing<sup>139</sup> and during the drafting of the RSt, 'the issue of objectives in sentencing was rarely if ever considered'.<sup>140</sup> Certainly,

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<sup>137</sup> Drumbl, M. (2000) p1255

<sup>138</sup> See, for example, International Covenant on Civil and Political Rights, Article 10(3); American Convention on HR, Article 5(6); HR Committee, General Comment 21, Article 10 (44<sup>th</sup> Session, 1992) UN Doc. HR1/GEN/1/Rev.1 at 33 (1994) para. 11

<sup>139</sup> The preamble declares the aims of ending impunity and contributing to the prevention of such crimes

<sup>140</sup> Schabas, W. (2010) p899



rehabilitation is not mentioned in the RSt nor in the sentencing decisions in *Lubanga* and *Katanga*.

To Henman, this demonstrates 'that the overriding sentiment of punishment in the international arena consists of revenge and retribution tempered by poorly articulated allusions to deterrence (and occasionally rehabilitation and reconciliation)'.<sup>141</sup> Although he does add that '[w]here sentences fall short of retributive expectations they may be rationalised in terms of rehabilitation and reconciliation.'<sup>142</sup>

For many, restorative justice is a viable alternative to retributive justice and would more successfully achieve the rehabilitation of offenders. Braithwaite, a vociferous supporter of restorative justice, argues that 'reintegrative shaming' is a key feature and the rehabilitation of offenders can be achieved more successfully by instilling shame rather than imposing guilt.<sup>143</sup> Drumbl suggests that whilst Braithwaite 'does not contemplate the extension of shame-based restorative justice to "radical evil" [his] work provides a new lens through which to assess and approach' its criminality.<sup>144</sup>

The main issue affecting rehabilitation is the scale and nature of the crimes committed, which are unlikely to be repeated upon the offender's eventual release from prison which renders rehabilitation a secondary consideration to retribution and general deterrence so far as trials at the ICC are concerned.

## **Part Five: Securing Justice and Dignity for Victims**

Securing justice and dignity for the victims of abuses is a fundamental and constant aim of TJ and it has been stated that prosecutions and punishment of offenders give significance to victims' suffering and serve as a partial remedy by helping to restore their

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<sup>141</sup> Henman, R. (2003) 'Some Issues for Sentencing in the International Criminal Court' 52 *I&CLQ* pp81-114 at p88

<sup>142</sup> *Ibid* p89

<sup>143</sup> Braithwaite, J. (1989) *Crime, shame and reintegration* (Cambridge: CUP) p73; see also Braithwaite, J. (1999)

'Restorative Justice: Assessing Optimistic and Pessimistic Accounts' 25 *Crime and Justice* pp1-127

<sup>144</sup> Drumbl, M. (2000) p1260

dignity.<sup>145</sup> However, a victim faced with an offender who refuses to accept responsibility for his crimes, even after conviction in some cases, could instead suffer renewed anger and resentment towards the offender and perhaps even towards society at large for the perceived failure of the justice system, which can then reinforce feelings of victimhood and powerlessness.<sup>146</sup>

Furthermore, the distance of the court from the victim's home and location of the atrocities suffered could lead to the victim/witness feeling isolated, especially given the 'length and slow pace of proceedings [which] has become a feature of international criminal justice.'<sup>147</sup> Notwithstanding the 'familiarisation' process offered by court staff,<sup>148</sup> the strangeness of the formal procedure, atmosphere and language of the ICC could give rise to feelings of insecurity, intimidation and mistrust.<sup>149</sup> These feelings could then be compounded by the trial process which focusses on the defendant and his or her rights of due process as opposed to the victim, whose role is purely as a witness for the prosecution. The lack of opportunity for the victim to narrate their experience in their own words, to be constrained to yes or no answers by lawyers seeking to ensure the victim adheres to their script for proving or disproving the defendant's guilt and to be subject to evidential rules on what is admissible and what is not, could be frustrating and bewildering for victims and could seriously hamper the ICC's efforts to engender in them a sense of justice and dignity.

It is argued that justice and dignity for victims can be attained by less formal transitional justice methods, such as truth-telling and reparations. Stahn argues, for example, that 'for many victims, concrete factual elements such as the finding and recovery of bodies or the acknowledgement of specific facts, are often more important than elaborate procedural or legal assessments.'<sup>150</sup> It is suggested therefore that prosecutions at the ICC may not be the most effective way of achieving this particular ICJ objective.

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<sup>145</sup> Scharf, M.J. (1999) 'The Amnesty Exception to the Jurisdiction of the International Criminal Court' 32 *Cornell ILJ* pp507-527 at p513

<sup>146</sup> Minow, M. (1998) p92

<sup>147</sup> Byrne, R. (2006) p488

<sup>148</sup> For details of support offered to ICC witnesses see [Online] Available: <https://www.icc-cpi.int/about/witnesses> [Accessed 25.04.17]

<sup>149</sup> Wojkowska, E. (2006) 'Doing Justice: How informal justice systems can contribute' *UNDP* p12

<sup>150</sup> Stahn, C. (2012) p271

## Part Six: Establishing a Past Record of Events

It is generally accepted that a major contribution to peace and reconciliation is the establishment of a full and comprehensive historical record of the HR violations suffered by victims of mass atrocities. Fletcher and Weinstein confirm that 'transitional justice scholars largely agree that a necessary foundation for healing a society that has experienced mass violence is learning the truth about what happened'<sup>151</sup> and they list the salutary effects of publicising the truth as 'includ[ing] countering and condemning prior denials or partial disclosures of abuses and creating a new, authoritative and impartial record about the past that can serve as a basis for a new national consensus.'<sup>152</sup> Bassiouni argues that 'central truths must be established to provide an historic record to mitigate feelings of revenge, to educate and to prevent future victimization'.<sup>153</sup>

There is wide academic support for the capacity of trials to establish a past record of events. Cassese states that trial justice establishes a full record of atrocities and precludes societal amnesia which he argues, is wrong both morally and practically, as victims themselves do not forget and their memories can fester.<sup>154</sup> Booth also endorses the commemorative potential of international courts' capacity to build an objective and impartial record of events.<sup>155</sup> Orentlicher insists that 'the most authoritative rendering of the truth is possible only as a result of a judicial enquiry, and major prosecutions can generate a comprehensive record of past violations.'<sup>156</sup> Scharf agrees that '[w]hile there are various means to develop the historic record of such abuses, the most authoritative rendering of the truth is only possible through a trial that accords full due process.'<sup>157</sup> Wilson also suggests that the 'long-held assumption ... that courts are inappropriate

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<sup>151</sup> Fletcher, L. and Weinstein, H. (2002) p586

<sup>152</sup> *Ibid*

<sup>153</sup> Bassiouni, M.C. (1996) p24

<sup>154</sup> Cassese, A. (1998) pp2, 3

<sup>155</sup> Booth, C. (2003) 'Prospects and Issues for the ICC: Lessons from Yugoslavia and Rwanda' in Sands, P. (ed) *From Nuremberg to The Hague. The Future of International Criminal Justice* (Cambridge: CUP) p183

<sup>156</sup> Orentlicher, D.F. (1990-1991) p2546 fn32

<sup>157</sup> Scharf, M.J. (1999) p513

venues to construct wide-ranging historical explanations of past conflicts' can be challenged.<sup>158</sup>

The doubt about a criminal trial being the appropriate and best forum for producing a full and comprehensive record lies in the obvious tension between the accurate recording of history and the task of conducting the trial, with its demands of due process and its focus on the defendant. Arendt is clear that '[t]he purpose of a trial is to render justice and nothing else'<sup>159</sup> and any other task 'can only detract from the law's main business: to weigh the charges ... to render judgment and to mete out due punishment.'<sup>160</sup>

Aukerman considers a prosecution to be, at best, an imperfect means to develop a complete record of the past.<sup>161</sup> Clark agrees that '[t]rial "truths" can be partial and can get lost in the morass of juridical and evidentiary detail'.<sup>162</sup> Likewise, Minow warns that '[h]istory is never one story, and the telling of history involves a certain settling of accounts.'<sup>163</sup> For Koskeniemi, there is a 'difficulty in grappling with large political crises by means of individual responsibility [which] gives reasons to question the ability of criminal trial [*sic*] to express or conserve the 'truth' of a complex series of events involving the often erratic action by major international players'.<sup>164</sup>

International trials often use historical knowledge to support evidence and examine the broader questions of why a conflict occurred at a particular place and time and between specific groups. Oral evidence on the historical background from expert witnesses enables judges to understand the history and culture of the region in which the alleged crimes were committed and also to satisfy the definitions of the international crimes

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<sup>158</sup> Wilson, R.A. (2005) 'Judging History: The Historical Record of the International Criminal Tribunal for the Former Yugoslavia' 27 HRQ pp908-942 at p909

<sup>159</sup> Arendt, H. (1963) p253

<sup>160</sup> *Ibid*

<sup>161</sup> Aukerman, M.J. (2002) p74

<sup>162</sup> Clark, J.N. (2009) p474

<sup>163</sup> Minow, M. (1998) p143

<sup>164</sup> Koskeniemi, M. (2002) p1

charged.<sup>165</sup> For Wilson, the result can give ‘an authoritative account’<sup>166</sup> which is ‘much more comprehensive in scope’ than anything which would be produced in a domestic trial of mass atrocities.<sup>167</sup> He concedes, however, that the history does not satisfy everyone.<sup>168</sup> What is accepted as the truth depends on the particular viewpoint and there may be not just one truth but several, as Clark found in her research in BiH ‘where essentially three competing versions of truth exist’.<sup>169</sup> As Stahn explains ‘[f]act-finding is often a judgement of probability in a criminal process, based on competing narratives – and sometimes different layers of ‘truth’.’<sup>170</sup> Fletcher and Weinstein appear to think it naive to believe that international criminal trials confer heightened legitimacy to the truth or that the judicial record will outweigh individual and group rationalisations for an alternative interpretation of the past based upon philosophical, moral, or political allegiances.<sup>171</sup>

Ultimately, Clark argues, what is important is ‘not whether trials can establish the truth, whether they can and should create a historical record or whether trial truths ... are sufficiently comprehensive ... [but] whether those truths are accepted and internalized.’<sup>172</sup> She adds, ‘[h]owever thorough and meticulous the Tribunal’s judgments are, they cannot combat the problem of denial unless people are ready to accept the ‘truth’ and there are many ... who are not.’<sup>173</sup> Ignatiev agrees that ‘[r]esistance to historical truth is a function of group identity’<sup>174</sup> which is why a society is ‘so vehemently “in denial” about facts evident to everyone outside the society. War crimes challenge collective moral identities and when these identities are threatened, denial is actually a defence of everything one holds dear.’<sup>175</sup>

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<sup>165</sup> See e.g. *Prosecutor v. Ongwen* ICC-02/04-01/15 where Professor Tim Allen was called by the Prosecutor to give expert evidence on the conflict in northern Uganda on 16<sup>th</sup> January 2017

<sup>166</sup> Wilson, R.A. (2005) p924

<sup>167</sup> *Ibid* p925

<sup>168</sup> *Ibid* p933

<sup>169</sup> Clark, J.N. (2009) p476

<sup>170</sup> Stahn, C. (2012) p272

<sup>171</sup> Fletcher, L. and Weinstein, H. (2002) p588

<sup>172</sup> Clark, J.N. (2009) p475

<sup>173</sup> *Ibid* p476-7

<sup>174</sup> Ignatiev, M. (1998) *The Warrior's Honor. Ethnic War and the Modern Conscience* (London: Chatto & Windus) p185

<sup>175</sup> *Ibid* p184

Thus, despite Wilson's assertion that the definition and application of international crimes 'have elevated the place of history and context in the decisions, reports, and judgments of international courts' and 'alter[ed] the relationship between law and history',<sup>176</sup> it appears that the obstacle for the ICC in creating an acceptable and accurate historical record is that 'judicial truths' established during a trial can be very different from 'local truths', which again is indicative of the limitations of ICJ. ICL seeks to individualise roles and responsibility so selective evidence is presented to support either the prosecution or the defence version of events. Judicial fact-finding is hampered by the realities of evidential inconsistencies and competing narratives especially as the ICC predominantly relies on eye-witness testimony which can be affected by practical difficulties arising from educational, cultural or linguistic differences. For Stahn, the answer is 'to make 'best use' of the virtues of judicial fact-finding'<sup>177</sup> which, he suggests, would entail sharing all the evidence obtained with domestic jurisdictions or other fact-finding bodies and a post-trial analysis of judicial records to make them fully accessible for future research.<sup>178</sup>

### **Part Seven: Promoting National Reconciliation**

The ICJ aims of securing justice and dignity for victims and establishing a record of events (discussed in the previous two sections) are integral to requirement that trials at the ICC should promote national reconciliation, a goal which 'exemplifies our increasing expectations of war crimes tribunals'.<sup>179</sup> However it is difficult to quantify whether and to what extent the ICC has a beneficial influence on community healing<sup>180</sup> and the repair of relationships which, for the purposes of the discussion in this section, are equated with national reconciliation.

In support, Cassese argues that justice in the form of criminal prosecutions facilitates reconciliation<sup>181</sup> and Landsman suggests that 'prosecution may be essential to healing

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<sup>176</sup> Wilson, R.A. (2005) p941

<sup>177</sup> Stahn, C. (2012) p274

<sup>178</sup> *Ibid*

<sup>179</sup> Clark, J.N. (2009) p482

<sup>180</sup> Stahn, C. (2012) p278

<sup>181</sup> Cassese, A. (1998) p6

the social wounds caused by serious human rights violations' because 'society cannot forgive what it cannot punish'.<sup>182</sup> Osiel believes legal proceedings 'produce the kind of solidarity embodied in the increasingly respectful way that citizens can come to acknowledge the differing views of their fellows'.<sup>183</sup> For Robinson, prosecutions can facilitate reconciliation and nation-building by stigmatising and removing perpetrators of human rights violations and mass atrocities from society thus providing victims with the sense that justice has been done, which he considers 'a precondition for real reconciliation'.<sup>184</sup>

Some maintain that trials can aid reconciliation by establishing the truth<sup>185</sup> but reflecting the discussion in the previous section, Ignatief argues it is 'open to question whether justice and truth actually heals' since '[e]very society [...] manages to function with only the most precarious purchase on the truth of its own past'.<sup>186</sup> Reconciliation presupposes a community's willingness to enquire into its own collective responsibility but it can take a long time for a society to recognise the moral wrong committed and condemn its own involvement in it, if ever.<sup>187</sup> Ignatief argues '[t]he idea that reconciliation depends on shared truth presumes that shared truth about the past is possible'.<sup>188</sup> Making a similar point to Clark mentioned in the previous section,<sup>189</sup> Ignatief insists that it is essential to 'keep justice separate from reconciliation' because although justice [...] will serve the interests of truth [...] the truth will not necessarily be believed and it is putting too much faith in truth to believe that it can heal'.<sup>190</sup>

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<sup>182</sup> Landsman, S. (1996) 'Alternative Responses to Serious Human Rights Abuses: Of Prosecutions and Truth Commissions' 59 *L&CP* pp81-92 at p84. See also Arendt, H. (1982) 'It may well be impossible to punish adequately a person you cannot forgive ...' p372-3

<sup>183</sup> Osiel, M. (2000b) *Mass Atrocity, Collective Memory and the Law* (New Brunswick and London: Transaction Publishers) p22-3

<sup>184</sup> Robinson, D. (2003) p489

<sup>185</sup> Bassiouni, M.C. (1996) p24

<sup>186</sup> Ignatief, M. (1998) p184

<sup>187</sup> Stahn, C. (2012) p278

<sup>188</sup> Ignatief, M. (1998) p174

<sup>189</sup> See p79 *ante*

<sup>190</sup> Ignatief, M. (1998) p186

Indeed, Stover and Weinstein found that rather than effecting reconciliation, trials often divided and exacerbated suspicion and fear within small, multi-ethnic communities.<sup>191</sup> Ignatief agrees that the Balkan war 'created communities of fear, and these communities cannot conceive of sharing a common truth – and a common responsibility – with their enemies until they are less afraid'.<sup>192</sup> The research in the Balkans reveals that one potential problem for the ICC is that the attitudes of individuals are shaped by group identity and perception of victimhood, which holding particular individuals responsible for mass HR abuses does not address. For Drumbl, 'the structural simplicity avidly pursued by the prevailing paradigm of prosecution and punishment may squeeze out the complexity and dissensus central to meaningful processes of justice and reconciliation'.<sup>193</sup> Indeed, the underlying issues of group solidarities and group conflicts may even contribute to the myth of collective innocence plus there is a risk that an acquittal might easily be mistaken for innocence, which could increase tensions.<sup>194</sup> As Stahn says 'judicial fact finding and outreach alone do not achieve reconciliation and may even cause deeper divisions.'<sup>195</sup>

Akhavan suggests that 'the symbolic effect of prosecuting even a limited number of the perpetrators, especially the leaders who planned and instigated the genocide, would have considerable impact on national reconciliation',<sup>196</sup> but the fact remains that the absence of 'viable benchmarks'<sup>197</sup> by which to assess the court's performance, makes this objective of ICJ 'the most contentious [...] one of the least explored empirically'.<sup>198</sup> Reliance on the research conducted by Stover and Weinstein in BiH would tend to suggest the ICC would underachieve in this role, as they found 'no direct link between criminal trials (international, national, and local/traditional) and reconciliation' because 'survivors rarely, if ever, connected retributive justice with

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<sup>191</sup> Stover, E. and Weinstein, H.M. (2004) 'Conclusion: a common objective, a universe of alternatives' in Stover, E. and Weinstein, H.M. (eds.) *My Neighbor, My Enemy Justice and Community in the Aftermath of Mass Atrocity*, (Cambridge: CUP) p323

<sup>192</sup> Ignatief, M. (1998) p174-5

<sup>193</sup> Drumbl, M. (2004-5) p548

<sup>194</sup> Höhn, S. (2010) 'International Justice and Reconciliation in Namibia: The ICC Submission and Public Memory' *African Affairs* pp471-488 at p480

<sup>195</sup> Stahn, C. (2012) p278

<sup>196</sup> Akhavan, P. (1996) 'The International Criminal Tribunal for Rwanda: The Politics and Pragmatics of Punishment' 90 *AJIL* pp501-510 at p509

<sup>197</sup> Byrne, R. (2006) p493

<sup>198</sup> Clark, J.N. (2009) p482



reconciliation’ which they viewed as ‘mostly a personal matter to be settled between individuals’.<sup>199</sup>

### **Part Eight: Re-Establishing the Rule of Law**

Promoting the rule of law as a value in itself is argued to be of fundamental importance in a society previously stricken by mass atrocities and gross HR abuses, as holding violators accountable for their misdeeds makes clear to ‘all members of society that law’s authority is superior to that of individuals’ and that no prerogatives attach to individuals merely because of status or position.’<sup>200</sup> Expressivists argue that trials of offenders encourages public respect for the law<sup>201</sup> and their punishment sends a message of condemnation of their acts which instils important moral values into society.<sup>202</sup> Drumbl argues that although expressivist theory prioritises the message communicated by trials and convictions, punishment ‘communicates meaning ... about power, authority, legitimacy, normality, personhood, social relations, and a host of other tangential matters’ and operates as a moral educator by sending the message that ‘the law is to be taken seriously.’<sup>203</sup>

Orentlicher suggests that individual accountability for breaches of the law upholds the regularity, stability and adherence to settled law that the rule of law requires, whereas ‘a complete failure of enforcement vitiates the authority of law itself, sapping its power to deter proscribed conduct.’<sup>204</sup> Fletcher and Weinstein contend that trials are powerful and effective symbols of a new government’s intent to both break with and confront the past, ‘because a legitimate judicial process is the antithesis of violence’ and the judicial process re-establishes ‘the orderly function of the civil state’.<sup>205</sup> Additionally,

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<sup>199</sup> Stover, E. and Weinstein, H.M. (2004) p323

<sup>200</sup> Landsman, S. (1996) p83

<sup>201</sup> Drumbl, M. (2007) *Atrocity, Punishment, and International Law* (Cambridge: CUP) p173

<sup>202</sup> Keller, L.M. (2007-8) ‘Achieving Peace with Justice: The International Criminal Court and Ugandan Alternative Justice Mechanisms’ 23 *Connecticut JIL* pp209-279 at p273

<sup>203</sup> Drumbl, M. (2007) p174

<sup>204</sup> Orentlicher, D. (1990-1991) p2542

<sup>205</sup> Fletcher, L. and Weinstein, H. (2002) p595-6

prosecutions establish 'the legitimacy of the new democratic government, demonstrating that it respects HR and the rule of law.'<sup>206</sup>

The UNSG's 2004 Report links the concepts of transitional justice and the rule of law:

Our experience in the past decade has demonstrated clearly that the consolidation of peace in the immediate post-conflict period, as well as the maintenance of peace in the long term, cannot be achieved unless the population is confident that redress for grievances can be obtained through legitimate structures for the peaceful settlement of disputes and the fair administration of justice.<sup>207</sup>

However, the fact that the ICC must conform to powerful global and local political interests adversely affects perceptions that the ICC can facilitate global justice or the rule of law.<sup>208</sup> For example, the United States, despite not being a SP exercises a 'disproportionate influence' on prosecutorial policy as was noted when the ICC delayed issuing indictments in the Libyan situation until after the 2011 North Atlantic Treaty Organization-led military operation in that country.<sup>209</sup> Likewise, the ICC's concentration on one side of a conflict only, despite both being responsible for international crimes (as in the case of the LRA and the Ugandan government) serves to demonstrate unacceptable selectivity by the ICC, which disregards justice and the rule of law.<sup>210</sup>

Some 'liberal proponents of the ICC' take the long-term view of the court as 'helping to build a global rule of law in which criminal violence will be punished today for the sake of preventing it in the future.'<sup>211</sup> Whilst alternative justice mechanisms may better the ICC in, for example, truth-telling capacity or censure of an offender at local level, the global reach of legal proceedings at the ICC may possibly serve the wider didactic

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<sup>206</sup> Robinson, D. (2003) p489

<sup>207</sup> UNSG Report (2004) p3 para. 2

<sup>208</sup> Branch, A. (2007) 'Uganda's Civil War and the Politics of ICC intervention' 21 *Ethics and International Affairs* pp179-198 at p189

<sup>209</sup> Varadjarajan, L. (2015) 'The trials of imperialism: Radhabinod Pal's dissent at the Tokyo tribunal' 21 *EJIR* pp793-815 at p809

<sup>210</sup> Branch, A. (2007) p188

<sup>211</sup> Branch, A. (2011b) p121

purpose of asserting the importance of law, stigmatising offenders and highlighting the fact of justice being seen to be done.

### **Part Nine: Contributing to the Restoration of Peace**

The contribution of the ICC to the restoration of peace has been an area of considerable debate among practitioners and scholars in the field of transitional justice and in the UNGA, UNSC, AU and ICC ASP.<sup>212</sup> Advocates of ICJ extol the positives of the ICC collecting information and monitoring situations, motivating rebels to negotiate peace, isolating indicted individuals and 'its capacity to diffuse potentially tense situations that could lead to violence by setting a clear line of accountability.'<sup>213</sup> Peace can be guaranteed, they contend, 'by applying criminal law to individuals in such a way that ends current episodes of violence and prevents future episodes from occurring.'<sup>214</sup>

For some, however, it is inconceivable that the ICC, simply by imitating the domestic criminal law objective of ensuring peace within a community through the prosecution and punishment of transgressors, will contribute meaningfully to the aim of ensuring global peace.<sup>215</sup> Indeed, Branch argues that by targeting its prosecutions in a manner which reflects 'the Prosecutor's own pragmatic self-interest' and 'international power inequalities', the ICC institutionalises conflict rather than global liberal peace.<sup>216</sup> For Branch, 'the insistence that international criminal prosecutions will spread liberal, peaceful communities within states, as global norms triumph over national and sub-national identities' is unconvincing because the 'assumption that a global identity based on adherence to certain liberal norms will expand and consolidate through criminal trials fails to recognize [...] the collective and structural character of mass violence.'<sup>217</sup>

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<sup>212</sup> Gissel, L.E. (2015) 'Justice Tides: How and When Levels of ICC Involvement Affect Peace Processes' 9 *IJTJ* pp428-448 at p428

<sup>213</sup> Bensouda, F. (2013) 'International Justice and Diplomacy' *New York Times* 19 March

<sup>214</sup> Branch, A. (2011b) p121

<sup>215</sup> Branch, A. (2011b) p122

<sup>216</sup> *Ibid*

<sup>217</sup> *Ibid* p127-8

It certainly can be argued that the ICC's mandate, which requires it to 'engage in judicial proceedings [...] even before [conflicts] have ended'<sup>218</sup> far from contributing to the ending of an ongoing conflict, can prolong hostilities as leaders hold on to power and continue fighting precisely to avoid being brought to justice.<sup>219</sup> The case of Uganda demonstrates this point, for although ICC intervention is credited with bringing the LRA to the negotiating table in Juba, the issue of arrest warrants for LRA leaders is blamed for the subsequent failure of the peace talks and for renewed violence.<sup>220</sup> However, a 2007 OTP policy paper emphasised 'there is a difference between the interests of justice and the interests of peace' and the latter is not part of the Prosecutor's mandate.<sup>221</sup> Furthermore, as Fatou Bensouda reiterated in 2013, any peace initiative must conform to the RSt.<sup>222</sup> Indeed, it has been argued that the 'very idea [...] that a *criminal* court should have anything to do with issues of peace and security is rather strange',<sup>223</sup> because requiring the Prosecutor to make decisions based on political factors, such as peace and security undermines the perception and reality of the Prosecutor as an independent organ beyond political influence.

It is difficult to quantify whether and to what extent the ICC has a beneficial influence on the establishment of regional peace.<sup>224</sup> Although a consequence of ICC involvement can have a destabilising effect on a fragile post-conflict peace by worsening divisions between communities and hindering reconciliation,<sup>225</sup> its intervention has been said to have produced a range of different effects on domestic communities, in some situations, predominantly shaping political discourse or changing the political landscape. In the DRC in 2007, for example, there was talk of possible amnesties for senior commanders to encourage demobilisation of armed groups but following discussions with the OTP, a clause excluding amnesties for RSt crimes was incorporated into the January 2008 Goma

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<sup>218</sup> Moreno Ocampo, L. (2007) 'Transitional justice in ongoing conflicts' 1 *IJTJ* p8-9

<sup>219</sup> Damaska, M. (2008) 'What is the point of International Criminal Justice?' *Chi.-Kent LR* p329-365 at p332. Sudan is another example. The indictment of President Bashir halted peace talks and led to renewed violence.

<sup>220</sup> Keller, L.M. (2007-8) p217

<sup>221</sup> ICC-OTP (2007) 'Policy Paper on the Interests of Justice' September p1

<sup>222</sup> Bensouda, F. (2013)

<sup>223</sup> Fletcher, G.P. and Ohlin, J.D. (2006) 'The ICC – Two Courts in One?' 4 *JICJ* pp428-433 at p433 (emphasis in original)

<sup>224</sup> Stahn, C. (2012) p278

<sup>225</sup> Rodman, K.A (2014) 'Justice as a Dialogue Between Law and Politics: Embedding the International Criminal Court within Conflict Management and Peacebuilding' 12 *JICJ* pp437-469 at p443

Peace Agreement.<sup>226</sup> This exclusion of amnesties for RSt crimes was repeated in the CAR Global Peace Agreement following conversations between the OTP and the main negotiators in June 2008.<sup>227</sup> Furthermore, HRW noted that the prosecution of *Lubanga* led to the demobilisation of child soldiers by a CAR rebel group<sup>228</sup> and in the DRC, HRW observers 'noted the enormous educational impact of the *Lubanga* case'.<sup>229</sup> Additionally, the 2007 post-election violence in Kenya was not repeated after the 2013 elections, which some have attributed to the involvement of the ICC.<sup>230</sup>

Thus, although serious misgivings exist concerning the capacity of the ICC to contribute to the restoration of peace and the risk of politicisation of the court as it seeks to satisfy this part of its mandate, it seems that the existence and involvement of the ICC can have positive effects in some situations.

## Conclusion

This chapter has demonstrated that the ICC has been tasked with a range of goals, some of which may be unachievable in certain contexts. Furthermore, several of the goals conflict. There is tension, for example, between producing an accurate historical record and individualising guilt; between bringing perpetrators to justice and ending a conflict; between prosecuting those 'most responsible' and acknowledging collective responsibility and between protecting the rights of the Defendant and satisfying the demands of victims.

For Tallgren, the system of ICJ 'has no proper justification of its own' and uses the same methods as domestic justice systems: proscription, determination of responsibility and the intentional infliction of pain, which makes it 'an extension, by delegation, of state power to determine criminal law norms and to punish.'<sup>231</sup> Examination of ICJ's

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<sup>226</sup> Mendez, J.E. (2015) 'Justice and prevention' in Stahn, C. and El Zeidy, M. (eds.) *The International Criminal Court and Complementarity* (Cambridge CUP) p40

<sup>227</sup> *Ibid*

<sup>228</sup> HRW 'Selling Justice Short: Why Accountability Matters for Peace' 7 July 2009 [Online] Available: [https://www.hrw.org/sites/default/files/reports/ij0709webwcover\\_1.pdf](https://www.hrw.org/sites/default/files/reports/ij0709webwcover_1.pdf) [Accessed 28.11.15] p127

<sup>229</sup> *Ibid* p125

<sup>230</sup> International Crisis Group, (2013) 'Kenya after the Elections' Briefing No. 94 15 May

<sup>231</sup> Tallgren, I. (2002) p565

domestic-style-criminal-justice aims has revealed that trials at the ICC do fulfil the retributive requirements of establishing guilt and imposing punishment on those who have committed heinous crimes but in other respects, they do not 'scale up' effectively to the international forum. Also, there are justifiable concerns about the slow pace of proceedings which, for Stahn, reveals 'a number of areas in which the institutional architecture of ICJ may be in need of procedural reform'.<sup>232</sup> Stahn disagrees with Drumbl's assertion that the best way to assess the performance of the ICC is 'to treat the institutions that enforce ICL as subjects of study in the same way that domestic scholars treat domestic courts'.<sup>233</sup> Stahn contends that the assessment of pace should not be measured against domestic proceedings but instead should 'be placed in perspective in relation to the distinct goals of ICJ'.<sup>234</sup> What is required is 'a fuller and more nuanced matrix, which identifies appropriate objects of comparison and relates facts to individual goals and resources'.<sup>235</sup> In fact, empirical research conducted by Galbraith<sup>236</sup> has revealed that 'the pace of international criminal cases is only modestly slower' than complex domestic proceedings.<sup>237</sup>

Criticisms levelled herein at the court's inability to satisfy the many ICJ objectives it has been burdened with is not to suggest that the Court does not perform an important function in the field of transitional justice but that, because it has not prioritised its ICJ objectives, this has resulted in frustration, dissatisfaction and a perception of under-performance. By analysing its achievements in each of the roles it has been tasked to perform, the Court could focus on what it does well and thus bring a sense of realism to idealistic expectations.

Finally, having identified the objectives of ICJ for the purpose of assessing the ICC's performance in achieving these goals, it is useful to clarify that the complementarity principle, which forms the cornerstone of the RSt legal system, enables the ICC to achieve its objectives both directly, by conducting investigations and prosecutions itself

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<sup>232</sup> Stahn, C. (2012) p261

<sup>233</sup> Drumbl, M. (2009) 'International Criminal Law: Taking Stock of a Busy Decade' 10 *Melb. JIL* pp38-45 at p44

<sup>234</sup> Stahn, C. (2012) p262

<sup>235</sup> *Ibid* p264

<sup>236</sup> Galbraith, J. (2009-2010) pp112-127

<sup>237</sup> *Ibid* p142

and indirectly, by engaging with national authorities with a view to inducing and facilitating the compliance of states with their 'duty' to exercise their 'criminal jurisdiction over those responsible for international crimes.'<sup>238</sup> The existence of the ICC can act as a motivator for States to mount national prosecutions for, whilst it is the right of every state to investigate and prosecute the crimes within the Court's jurisdiction, in reality there is no duty or obligation to do either, unless the state has ratified a treaty that imposes such a duty, such as the Genocide Convention.<sup>239</sup> By granting states primacy, the complementarity principle established by Articles 17 and 20(3) acts as a catalyst to state action so as to avoid the ICC intervening should they fail to do so, which would seriously impact on their state sovereignty. To quote Mr Moreno-Ocampo:

As a consequence of complementarity, the number of cases that reach the Court should not be a measure of its efficiency. On the contrary, the absence of trials before this Court, as a consequence of the regular functioning of national institutions, would be a major success.'<sup>240</sup>

Further and as will be discussed in Chapter Seven, the RSt gives the ICC a monitoring function over state investigations and prosecutions, requiring the state to keep the Prosecutor informed of progress, under threat of ICC intervention at any stage of the state's investigation and prosecution if the state fails to co-operate or if the Court considers the state is demonstrating an unwillingness or inability to investigate or prosecute genuinely.

Second, the ICC seeks to encourage the establishment of domestic accountability mechanisms to address international crimes and the national adoption of laws proscribing international crimes, if not already in place.<sup>241</sup> Clearly, it is important for a

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<sup>238</sup> Preamble to the RSt, para. 6. For a discussion of the procedural aspects of complementarity/admissibility, please see Chapter Seven

<sup>239</sup> Nouwen, S.M.H. (2013) *Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan* (Cambridge: CUP) p37

<sup>240</sup> Moreno-Ocampo, L. (2003) Statement, Ceremony for the solemn undertaking of the Chief Prosecutor of the International Criminal Court, 16 June, The Peace Palace, The Hague, The Netherlands

<sup>241</sup> Kleffner, J.K. (2004) 'Complementarity as a catalyst for compliance' in *Complementary Views on Complementarity: Proceedings of the International Roundtable on the Complementary Nature of the International Criminal Court, Amsterdam, 25/26 June 2004* (The Hague: TMC Asser Press) p81

state wishing to avoid the intervention of the ICC by virtue of complementarity that it ensures its domestic law covers all the offences within the ICC's jurisdiction.<sup>242</sup>

Third, since the RSt is silent on the question of national amnesties, an additional feature of complementarity is its potential to discourage the use of domestic amnesties for the crimes within the ICC's jurisdiction so as to avoid the risk of the ICC disregarding the amnesties and proceeding with its own investigation and prosecution.<sup>243</sup> Likewise, the RSt is silent on the issue of AJMs and their capacity to satisfy the complementarity criteria set out in Article 17. From the perspective of AJMs, therefore, it would appear that the ICC's 'catalysing effect'<sup>244</sup> does not extend to the encouragement of a state to deal with its legacy of human rights violations and breaches of humanitarian law by means of an AJM coupled with amnesties. However, in the next chapter the nature of AJMs generally will be discussed and it will be seen that they can be capable of achieving many of the same ICJ goals as criminal prosecutions but from the perspective of restorative rather than retributive justice.

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<sup>242</sup> Although many offences will likely already be criminalised under ordinary penal law, offences such as the recruitment of child soldiers and modes of responsibility such as command responsibility may need to be specifically criminalised.

<sup>243</sup> Nouwen, S.M.H. (2013) p42

<sup>244</sup> *Ibid* (and throughout the book)



## CHAPTER FOUR

### ALTERNATIVE JUSTICE MECHANISMS AND THE AIMS OF INTERNATIONAL CRIMINAL JUSTICE

#### Introduction

Alternative justice mechanisms (AJMs) are the cornerstone of conflict resolution for the poor and disadvantaged in developing countries with some estimates that they account for 80% of all dispute resolutions, particularly in conflict and post-conflict communities, where the 'formal' justice system is either non-functioning or inaccessible.<sup>1</sup> Interest in the processes of individual AJMs developed in the 1980s and 1990s as many states began to emerge from their violent or authoritarian past and aspiring a more peaceful democratic future, sought responses for the widespread commission of heinous crimes against their citizens. As previously discussed, transitional justice was emerging as a new field of debate at this time,<sup>2</sup> examining how societies move from conflict to peace or from authoritarian rule to democracy and addresses issues of justice and social recovery.<sup>3</sup> The International Centre for Transitional Justice (ICTJ) defines transitional justice as 'finding legitimate responses to massive violations under real constraints of scale and societal fragility' which is also what distinguishes it from human rights (HR) promotion and defence in general.<sup>4</sup> As well as seeking acknowledgement for the victims of abuses, transitional justice 'seeks to contribute to promoting peace, reconciliation and democracy.'<sup>5</sup>

Between the mid-1940s and mid-1980s, the usual response of a transitioning state had

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<sup>1</sup> Johnstone, N. (2011) 'Bush Justice in Bougainville: Mediating Change by Challenging the Custodianship of Custom' in Harper, E. (ed) *Working with Customary Justice Systems: Post-Conflict and Fragile States* (Rome: International Development Law Organization (IDLO)) pp15-31 at p16

<sup>2</sup> See pp6-8 and p55-56 *ante*

<sup>3</sup> Quinn, J.R. (2014) 'Tradition?! Traditional Cultural Institutions on Customary Practices in Uganda' 49 *Africa Spectrum* pp29-54 at p30

<sup>4</sup> ICTJ (2017) 'What is Transitional Justice?' [Online] Available: <https://www.ictj.org/about/transitional-justice> [Accessed 03.04.17]

<sup>5</sup> Quinn, J.R. (2014) p30

been to overlook the crimes and injustices of the past, to 'close the books'<sup>6</sup> and move on, as had occurred, for example, in Cambodia after the fall of the Khmer Rouge<sup>7</sup>, in Spain after the death of Franco<sup>8</sup> and in Chile after the resignation of Pinochet.<sup>9</sup> However, from the mid-1980s, the global emergence of an increased awareness of human rights and a desire to fight impunity was reflected in the establishment of several *ad hoc* tribunals, the re-awakened movement within the United Nations (UN) for the establishment of an international criminal court and contemporaneously, in the search for alternative processes of accountability which would not endanger a state's transition from conflict or the abuses of a previous regime towards democracy.<sup>10</sup> The reason for the latter was that in some political, social, economic or cultural contexts, it was felt by successor governments that national prosecutions would endanger their fragile democracies but also it was recognised that the many needs of victims and communities affected by the strife had to be addressed. In South America, for example, former military juntas had granted themselves blanket amnesties before relinquishing power and the armed forces remained ever-alert to reassert their authority, Truth Commissions (TCs) were adopted as the response to this transitional dilemma, as in Argentina (1983-84), Chile (1990-91), El Salvador (1992-3), Guatemala (1997-99) and Peru (2001-03).<sup>11</sup>

The turning point for transitional justice came in 1995 with South Africa's rejection of prosecutions following the collapse of the apartheid state, in favour of the establishment of a Truth and Reconciliation Commission (TRC) with its policy of individualised amnesty for full disclosure of the truth. At the same time, in other post-conflict societies, consideration was being given to whether their own indigenous

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<sup>6</sup> Huyse, L. (2008a) 'Introduction: tradition-based approaches in peacemaking, transitional justice and reconciliation policies' in Huyse, L. and Salter, M. (eds.) *Traditional Justice and Reconciliation after Violent Conflict: Learning from the African Experience* (Stockholm: IDEA) pp1-22 at p2

<sup>7</sup> 1979

<sup>8</sup> 1975

<sup>9</sup> 1990

<sup>10</sup> Huyse, L. (2008a) p2

<sup>11</sup> The Argentinian Commission was and is still referred to as the National Commission on the Disappeared (CONADEP) and the term 'Truth Commissions' was not used until the National Commission on Truth and Reconciliation in Chile and the Commission on the Truth in El Salvador almost ten years later.

practices of conflict resolution and reconciliation could be a satisfactory response to the atrocities committed by a previous regime or during a violent conflict.<sup>12</sup>

Recognising this growing interest in alternative means of accountability, Kofi Annan, the former UN Secretary General (UNSG), in his 2004 Report to the UN Security Council (UNSC) entitled 'The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies' stated:

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.<sup>13</sup>

In this chapter, the 'indigenous and informal traditions for administering justice or settling disputes' referred to by Kofi Annan will be considered from a general perspective but ultimately to try to establish whether they have the capacity and/or potential to satisfy the goals of international criminal justice (ICJ) discussed in the preceding chapter. In the first and second sections of this chapter, an attempt will be made to define what (in this thesis) have been referred to as 'alternative justice mechanisms' (AJMs) and their historical origins and influences will be examined. In the third section, the global durability of AJMs will be discussed with particular reference to AJM practices in Africa. In the fourth and fifth sections, AJMs will be evaluated for their strengths and weakness respectively. In the sixth section, AJMs will be evaluated for their ability to satisfy the goals of ICJ identified in chapter three. The chapter will conclude by evaluating the relevance of AJMs to ICJ with a view to formulating a framework for the International Criminal Court (ICC) when assessing an AJM within its complementarity provisions.

Whilst, to date, no admissibility challenge pursuant to the principle of complementarity and based on an AJM being a State's chosen means of accountability has been made to the ICC, that day will surely come and the ICC should be prepared to be sensitive and

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<sup>12</sup> For example, Rwanda, Mozambique, Sierra Leone, Uganda, East Timor. See Waldorf, L. (2006) 'Mass Justice for Mass Atrocity: Rethinking Local Justice as Transitional Justice' 79 *Temple Law Review* pp1-88 at p3; Huyse, L. (2008a) p1

<sup>13</sup> UN Doc. S/2004/616, 23 August 2004, para. 36 (UNSG Report)

flexible in its approach. Initial remarks of the former Prosecutor, Luis Moreno-Ocampo, appeared supportive of AJMs<sup>14</sup> but ICC decisions in the admissibility challenges made by Kenya (2011), Libya (2012 and 2013) and Côte D'Ivoire (2013) have raised concerns that 'an increasingly hegemonic international criminal justice may displace and discourage national justice and reconciliation efforts.'<sup>15</sup> This chapter will therefore seek to assess the arguments for and against the contention that AJMs generally have the capacity to satisfy the goals of ICJ before, in the subsequent two chapters, studying the attributes and deficits of two specific AJMs, namely *Mato Oput*, a ritual of reconciliation favoured by the Acholi people of Northern Uganda and the South African Truth and Reconciliation Commission.

### Definition of AJMS

Before embarking on a discussion of AJMs in general, it is necessary to attempt to define what is meant by the term 'alternative justice mechanism' and to answer the question: alternative to what? The alternative to AJMs are justice mechanisms that are connected to the national (or an international) governing institution and have codified practices to ensure procedural fairness and standards of accountability, based on cultural norms.<sup>16</sup> In this thesis, such justice mechanisms are referred to as 'formal' justice mechanisms, of which trials are the best known, nationally and internationally. By contrast, AJMs tend not to be codified and are not subject to the same procedural and accountability requirements.<sup>17</sup> Although they are not codified, however, because they are founded on ceremonies and traditions that have evolved over centuries, they still may be practised in a precise, formulaic manner.

Unfortunately, drafting a satisfactory definition for AJMs is not straightforward as no one term can be both sufficiently precise and yet broad enough to encompass the range

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<sup>14</sup> See p49 *ante*

<sup>15</sup> Waldorf, L. (2006) p4; see also Drumbl M.A. (2000) 'Punishment, Post-Genocide: From Guilt to Shame to Civis in Rwanda' 75 *NYULR* pp1221-1326 at p1323-4; Alvarez, J.E. (1999) 'Crimes of States/Crimes of Hate: Lessons from Rwanda' 24 *Yale JIL* pp365-483 at p482

<sup>16</sup> Quinn, J.R. (2006) 'Comparing Formal and Informal Mechanisms of Acknowledgment in Uganda' p5 (Working paper prepared for presentation on the panel 'Africa as a subject of International Justice' at the International Studies Association Annual Meeting, 23 March 2006. Permission to cite on file)

<sup>17</sup> *Ibid*

of systems and processes that exist worldwide to deliver justice and governance, particularly where state authority is weak. Terms such as informal, traditional, customary, alternative, popular, local, grass-roots and indigenous have all been used to describe this form of direct popular justice and it is impossible to select one above others which successfully embodies all the features and norms that are present in the various processes these terms represent. Whatever the label, however, such justice processes are 'the oldest, most well-established and most widely distributed form of criminal process.'<sup>18</sup>

Acknowledging the difficulty of attempting a precise definition, Abel suggests some of 'the relevant parameters', describing informal justice as unofficial, non-coercive, non-bureaucratic, de-centralised, relatively undifferentiated and non-professional; with substantive and procedural rules that are imprecise, unwritten, democratic, flexible, *ad hoc* and particularistic.<sup>19</sup> Whilst such processes can encompass justice rooted in religious authority, local administrative authorities, specially constituted state customary courts (such as those in South Africa) or community projects for conflict resolution (mediation, for example), this chapter concentrates on AJMs which are rooted in customary and tribal or clan social structures in sub-Saharan Africa. Two important features that many such mechanisms have in common is that they are non-state administered and exist outside a state's formal justice system. However, state involvement does not preclude a process from being an AJM as in the cases, for example, of the South African TRC and Rwanda's *Gacaca*. A predominant claim is that they reflect the African view of justice which is aimed not at 'retribution or punishment but [...] the healing of breaches, the redressing of imbalances, the restoration of broken relationships'.<sup>20</sup> Its proponents contend that restorative justice 'seeks to rehabilitate both the victim and the perpetrator, who should be given the opportunity to be reintegrated into the community he or she has injured by his or her offence.'<sup>21</sup> Thus

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<sup>18</sup> Vogler, R. (2005) *A World View of Criminal Justice* (Aldershot, Ashgate Publishing Ltd) p197

<sup>19</sup> Abel, R.L. (1982) 'Introduction' in Abel, R.L. (ed) *The Politics of Informal Justice: Volume 2: Comparative Studies* (New York: Academic Press Inc.) p2

<sup>20</sup> Tutu, D. (1999) *No Future without Forgiveness* (London: Rider) p51

<sup>21</sup> *Ibid*

restorative justice is being served 'when efforts are being made to work for healing, for forgiveness and for reconciliation'.<sup>22</sup>

Waldorf states that AJMs may have 'greater legitimacy and capacity than devastated formal systems, and they promise local ownership, access and efficiency'.<sup>23</sup> A report published by Penal Reform International (PRI) describes the salient features of AJMs in sub-Saharan Africa as: viewing the problem as that of the whole community or group, emphasising reconciliation and restoration of social harmony, traditional arbitrators appointed from within the community overseeing a voluntary process with a high degree of public participation with decisions based on individual circumstances reached by agreement, flexible rules of evidence and procedure with no professional legal representation, emphasising restorative penalties which are enforced by social pressure and confirmed through re-integrative rituals.<sup>24</sup>

In the context of transitional justice, the term 'traditional justice' is widely-used and has been described as 'a catch-all to describe procedures in those places that other kinds of justice provision cannot reach'.<sup>25</sup> For Alie, however, the term 'traditional' has Eurocentric connotations and 'tends to suggest the existence of profoundly internalized normative structures, patterns followed in static economic and social circumstances',<sup>26</sup> whereas African traditional law is never static but is responsive to changes resulting from diverse factors and forces.<sup>27</sup> Indeed, Vogler describes traditional justice as 'a global phenomenon and one which is highly dynamic'<sup>28</sup> and Allen and MacDonald agree AJMs are 'highly dynamic and remarkably adaptable; they are rarely static and timeless'.<sup>29</sup> Colonizing authorities, modernisation, violent conflict or genocide have all profoundly affected the original practices to the extent that it can be validly questioned whether the term 'traditional justice' is appropriate for mechanisms which are unerringly

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<sup>22</sup> *Ibid* p52

<sup>23</sup> Waldorf, L. (2006) p3-4

<sup>24</sup> Stevens, J. (2001) *Access to justice in sub-Saharan Africa: the role of traditional and informal justice systems* (London: Penal Reform International) p22

<sup>25</sup> Allen, T. and Macdonald, A. (2013) *Post-Conflict Traditional Justice: A Critical Overview* (London: JSRP) p2

<sup>26</sup> Alie, J.A.D. (2008) 'Reconciliation and traditional justice: tradition-based practices of the Kpaa Mende in Sierra Leone' in Huyse, L. and Salter, M. pp123-146 at p133

<sup>27</sup> *Ibid*

<sup>28</sup> Vogler, R. (2005) p255

<sup>29</sup> Allen, T. and Macdonald, A. (2013) p9

vulnerable to change.<sup>30</sup>

The problem of terminology is also complicated by the risk that the instrumental use of the alternative mechanisms of accountability can bring them within the realm of state influence which, in turn, can affect their 'traditional' nature.<sup>31</sup> For example, the Rwandan government adapted and codified the traditional *gacaca* conflict resolution mechanism into national law to deal with *génocidaires*.<sup>32</sup> Furthermore, the term 'customary' has been deemed to be 'too close to 'traditional''<sup>33</sup> and whilst 'informal' does accentuate the separation between such processes and formal state systems, it is suggested that making such processes part of a policy of transitional justice can result in them acquiring formal attributes.<sup>34</sup> It is for these reasons that, in this thesis, the term 'alternative justice mechanisms' has been adopted.

### Historical Origins and Influences of AJMs in Africa

In this section, the origins of African AJMs and the concept of colonial legal pluralism will be discussed.

Many people living in fragile or war-torn states experience multiple rules systems and regulating institutions which emanate from diverse sources and attract varying degrees of 'authority, legitimacy, coherence and capacity', according to the issue at hand.<sup>35</sup> This results in legal pluralism, where 'two or more legal systems co-exist in the same social field.'<sup>36</sup> Legal pluralism where 'the transfer of whole legal systems across cultural boundaries'<sup>37</sup> is associated with the emergence of colonialism and the rapid imposition of legal systems from Europe and North America to South America, Asia and Africa

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<sup>30</sup> Huyse, L. (2008a) p8

<sup>31</sup> *Ibid*

<sup>32</sup> Bornkamm, P.C. (2012) *Rwanda's Gacaca Courts: Between Retribution and Reparation* (Oxford: OUP) p165

<sup>33</sup> *Ibid*

<sup>34</sup> *Ibid*

<sup>35</sup> Sage, C. and Woolcock, M. (2013) 'Introduction' in Tamanaha, B.Z., Sage, C. and Woolcock, M. (eds) *Legal Pluralism and Development Policy: Scholars and Practitioners in Dialogue* (Cambridge: CUP) p1

<sup>36</sup> Merry, S.E. (1988) 'Legal Pluralism' 22 *Law & Society Review* pp869-896 at p870

<sup>37</sup> Hooker, M.B. (1975) *Legal Pluralism: An Introduction to Colonial and Neo-Colonial laws* (Oxford: Clarendon Press) p1

between the 16<sup>th</sup> and 20<sup>th</sup> centuries.<sup>38</sup> However, MacDonald and Allen challenge what they view as ‘the unhelpful over-emphasis on European colonialism in the legal pluralism literature’<sup>39</sup> for, as Merry also points out, ‘the Europeans were not the first outside influence bringing a new legal system to many Third World peoples. Indigenous law has been shaped by conquests and migrations for centuries.’<sup>40</sup> Occurrences such as the growth of Islam, the slave trade and missionary exploration and proselytization<sup>41</sup> have all added to legal pluralism that has long existed in many Third World countries.<sup>42</sup>

Whilst 19<sup>th</sup> century European colonialists believed that in imposing their own legal systems on their colonies, they were benefitting their peoples, ‘freeing them from the scourges of war, witchcraft, and tyranny’,<sup>43</sup> early 20<sup>th</sup> Century research of indigenous justice systems existing among tribes and villages in colonised Africa, Asia and the Pacific revealed a ‘rich variety of social control, social pressure, custom, customary law and judicial procedure within small-scale societies that encompassed both indigenous and European law’.<sup>44</sup> Far from eradicating these alternative justice processes, the policies adopted by the colonial powers for the governance of their vast territories often contributed to their continued survival. Indeed, according to PRI’s 2001 report, ‘[w]hen most sub-Saharan African countries became independent in the 1960s, the majority of African citizens were resolving their disputes using traditional and informal justice forums.’<sup>45</sup>

Pre-colonial African law was not a single system with traceable roots, although there were similarities in procedures and principles which can be attributed to the commonality of environment and social systems.<sup>46</sup> As Oomen asserts, ‘[t]here is no such thing as a ‘system’ of customary law, there is a flexible pool of shared values, ideas about

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<sup>38</sup> MacDonald, A. and Allen, T. (2015) ‘Social Accountability in War Zones – Confronting Local Realities of Law and Justice’ 22 *International Journal on Minority and Group Rights* pp279-308 at p281

<sup>39</sup> *Ibid*

<sup>40</sup> Merry, S.E. (1988) p870

<sup>41</sup> MacDonald, A. and Allen, T. (2015) p283

<sup>42</sup> Merry, S.E. (1988) p870

<sup>43</sup> *Ibid*

<sup>44</sup> *Ibid* p869

<sup>45</sup> Stevens, J. (2001) p1

<sup>46</sup> Allott, A.N. (1968) ‘African Law’ in Derrett, J.D.M. (ed) *An Introduction to Legal Systems* (London: Sweet & Maxwell) p131



right and wrong, and acceptable sources of morality, that are commonly acknowledged and rooted in local cultural orientations'.<sup>47</sup> African 'traditional' societies tended to be small, family-based groups in which 'order' required compliance with a shared set of norms and in which the 'individual' was secondary to the community.<sup>48</sup> Unwritten and grounded in custom, legal principles were nonetheless widely-known and accepted by members of the community primarily because they were expressed in normal, everyday language.<sup>49</sup> By virtue of their heritage or status, legal 'specialists' were recognised and well-regarded.<sup>50</sup> For example, the *Kikuyu* of Kenya recognised the '*muthamaki*' as chief spokesman and judge in legal matters and as he gained experience, he could become '*muthamaki wa chira*' ('leader in law') presiding over a wider territorial area.<sup>51</sup> Likewise, every lineage and age group in the *Arusha* of Tanzania would have its own '*olaigwenani*' (counsellor and arbiter in disputes).<sup>52</sup> In most traditional societies, dispute management could go through a number of different stages of dispute settlement, for example, family members, co-residents, co-lineage members, age-mates, specialists in religion or magic or senior and influential members of the community.<sup>53</sup> Similarly, Allot agrees that the role of adjudicator of disputes would follow a chain of command commencing with the father of the family and passing through the lineage elder to the village headman or chief.<sup>54</sup>

As already stated, despite being the law of ancestors, it was not static or inflexible. Since the law and procedure was oral, it could be adapted as required to meet any changes to the moral code of the community, often following community discussion. The male members of the *Tswana* of Botswana, for example, would attend a general assembly in order to participate in discussions on proposed changes to the law.<sup>55</sup> Whilst not every

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<sup>47</sup> Oomen, B. (2003) 'Legal Syncretism in Sekhukhune: Local Law and the Power of Traditional Leaders in northern South Africa' in Van Binsbergen, W.M.J. and Pelgrim, R. (eds.) *The Dynamics of Power and the Rule of Law: Essays on Africa and Beyond* (Munster: LIT Verlag) and quoted in an undated publication commissioned by UNDP, UNICEF and UN Women entitled 'Informal Justice Systems: Charting a Course for Human Rights-Based Engagement' p37

<sup>48</sup> Roberts, S. (1984) 'Introduction: Some Notes on 'African Customary Law'' 28 *Journal of African Law* pp1-5 at p2

<sup>49</sup> Allott, A.N. (1968) p134

<sup>50</sup> *Ibid*

<sup>51</sup> *Ibid*

<sup>52</sup> *Ibid*

<sup>53</sup> Roberts, S. (1979) 'Tradition and Change at Mochudi: Competing Jurisdictions in Botswana' 17 *African Law Studies* pp37-51 at p43

<sup>54</sup> Allott, A.N. (1968) p135

<sup>55</sup> *Ibid*. See also Roberts, S. (1979) p40

tribe enjoyed such popular participation in law changing, the law was a matter of popular concern and not the privilege of the few.

In the late 19<sup>th</sup> Century and early 20<sup>th</sup> Century, the arrival of the European colonial powers and the swift application of their highly organised administrations and formal, rational legal systems reinforced by their military and police authorities could have threatened the continued existence of African traditional, customary law, forged, as it was, 'for industrial capitalism rather than agrarian or pastoral way of life [and] embod[ying] very different principles and procedures'.<sup>56</sup> However, as Vogler points out, '[c]olonial authorities rarely possessed the personnel or the resources to establish a network of courts throughout their territories and were obliged to tolerate the continuation of 'native' forms of local adjudication and criminal justice in the rural areas'.<sup>57</sup> Merry states that in Africa, the British and French superimposed their law on to indigenous law, incorporating customary law as long as it was not 'repugnant to natural justice, equity and good conscience' or 'inconsistent with any written law'.<sup>58</sup>

In British colonial Africa, for example, the native courts were officially recognised and became the lowest grade in the judicial system.<sup>59</sup> Furthermore, they were unsupervised by professional judges and magistrates out of concern that the traditional African laws might be subverted and forced into conformity with English law.<sup>60</sup> It was reasoned by the British that this 'radical policy of 'indirect rule''<sup>61</sup> which permitted the traditional chiefs and elders to govern rural areas using their own local customs and tribal procedures, 'would enable friendly chiefs to compel their followers to obey colonial regulations'.<sup>62</sup> For Rama Mani, this was the origin of legal dualism, 'a precursor to today's legal pluralism',<sup>63</sup> where one set of modern laws applied to the white, mainly urban colonisers and another set of customary law applied to the 'native' mainly rural

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<sup>56</sup> Merry, S.E. (1988) p869

<sup>57</sup> Vogler, R. (2005) p256

<sup>58</sup> Merry, S.E. (1988) p870; see also Hooker, M.B. (1975) p130-1; Roberts, S. (1979) p43-4; Mamdani, M. (1996b) *Citizen and Subject: Contemporary Africa and The Legacy of Late Colonialism* (Princeton: PUP) p115

<sup>59</sup> Allott, A.N. (1968) p138

<sup>60</sup> *Ibid*; see also Roberts, S. (1979) p43

<sup>61</sup> Vogler, R. (2005) p256

<sup>62</sup> *Ibid*

<sup>63</sup> See Griffiths, J. (1986) 'What is Legal Pluralism?' 24 *Journal of Legal Pluralism and Unofficial Law* pp1-55 at p5 and Vanderlinden, J. (1989) 'Return to Legal Pluralism: Twenty Years Later' 28 *JLP&UL* pp149-157 at p153

population'.<sup>64</sup> Although broadly supportive of the legal pluralist theory, Wilson offers an alternative view that '[p]luralism is but a legal fiction, a part of ideology of British indirect rule in African [...] territories' where 'colonial and customary law were welded into a single instrument of dispossession and were part of a wider administrative policy of creating and maintaining a particular type of peasantry' and was 'manufactured as a legitimating device for maintaining the status quo after dispossession by reinforcing the position of the chieftaincy'.<sup>65</sup>

Unfortunately, the co-opting of traditional leaders into the administration under the system of indirect rule had the effect of undermining the checks and balances that had regulated traditional decision-making, as the chiefs were no longer reliant on the acceptance or approval of their subjects.<sup>66</sup> Accordingly, some chiefs, endowed with virtually unchallenged authority and backed by the power of the colonial state, did not always act benignly and 'many manipulated this power to decide the content of customary law to suit their own purposes'.<sup>67</sup> Mamdani states that because the chiefs 'were assured of back-up support from colonial institutions – and direct force if need be – in the event they encountered opposition or defiance', customary law 'consolidated the non-customary power of colonial chiefs'<sup>68</sup> which did not always result in laws which were well-designed to achieve justice. Nonetheless, the decision of some colonial powers to administer their overseas territories with the assistance of the so-called 'native authorities' may well have contributed to the continued survival of the indigenous processes despite their 'dramatic transformation under indirect rule'.<sup>69</sup>

Following independence, post-colonial governments in sub-Saharan Africa frequently perceived local, informal justice processes as obstacles to nation-building and the centralisation of the state administrative apparatus and pursued a strategy of 'ironing

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<sup>64</sup> Mani, R. (2002) *Beyond Retribution: Seeking Justice in the Shadows of War* (Cambridge: Polity Press) p82

<sup>65</sup> Wilson, R.A. (2000) 'Reconciliation and Revenge in Post-Apartheid South Africa: Rethinking Legal Pluralism and Human Rights' 41 *Current Anthropology* pp75-98 at p77

<sup>66</sup> Stevens, J. (2001) p129

<sup>67</sup> *Ibid*

<sup>68</sup> Mamdani, M. (1996) p122 For Mamdani, present-day customary law is rooted in the history of colonialism and the strategy of indirect rule which has resulted in too much power being concentrated in the person of chiefs, a situation which contemporary authorities have failed to address or have manipulated to their advantage.

<sup>69</sup> Vogler, R. (2005) p256

out local legal systems and [c]entralizing and unifying justice institutions, often based on European law models'.<sup>70</sup> However, they met 'with pockets of intense resistance from groups whose law ha[d] been preserved in some fashion'<sup>71</sup> and the 'local justice mechanisms enmeshed in the everyday practices of individuals and groups'<sup>72</sup> were rarely displaced.<sup>73</sup> To demonstrate this point, Maru reflects that in Sierra Leone, 'of the two overlapping legal regimes, customary law has more practical relevance for the majority of Sierra Leoneans than the formal legal system'<sup>74</sup> which perhaps tends to support the observation that 'throughout the global south there are vast regions in which the power and authority of state law is 'nominal rather than operational''.<sup>75</sup>

### The Durability of AJMs

In this section, some statistics relating to the use of AJMs will be discussed and the reasons for the continuing global popularity of AJMs will be considered, predominantly concentrating on their role in African society.

Informal, customary or non-state forms of law are not restricted to the poorer countries of the world: alternative forms of justice operate in the majority of nations worldwide and much of human behaviour is shaped and influenced by informal and customary normative frameworks.<sup>76</sup> In countries where the state and non-state systems have developed alongside each other, they frequently serve to complement and reinforce accepted codes and rules whereas in fragile states, the state system may be rejected or ignored in favour of AJMs which act completely independently.<sup>77</sup> In many fragile states,

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<sup>70</sup> Waldorf, L. (2006) p11; see also Wilson, R. A. (2001a) *The Politics of Truth and Reconciliation in South Africa: Legitimizing the Post-Apartheid State* (Cambridge: CUP) p198; Merry, S. (1988) p871, Roberts, S. (1979) p49

<sup>71</sup> *Ibid* (Merry) p872

<sup>72</sup> Waldorf, L. (2006) p12

<sup>73</sup> In Ghana, for example, a viable traditional justice system survived attempts by the regime of President Kwame Nkrumah to abolish it; see Rathbone, R. (2000) *Nkrumah and the Chiefs: The Politics of chieftaincy in Ghana 1951-60* (Oxford: James Currey Ltd) pp140-60

<sup>74</sup> Maru, V. (2005) 'The Challenges of African Legal Dualism: An Experiment in Sierra Leone' *Human Rights and Justice Sector Reform in Africa* (Open Society Justice Initiative) pp18-22 at p20 [Online] Available: <https://namati.org/resources/the-challenges-of-african-legal-dualism-an-experiment-in-sierra-leone> [Accessed: 16 April 2016]

<sup>75</sup> Allen, T. and MacDonald, A. (2013) p3

<sup>76</sup> Chirayath, L., Sage, C. and Woolcock, M. (2005) 'Customary Law and Policy Reform: Engaging with the Plurality of Justice Systems' (a paper prepared as a background for the *World Development Report 2006: Equity and Development*) p2

<sup>77</sup> OECD (2007) *Enhancing the Delivery of Justice and Security: Governance, Peace and Security* p22 para. 69

traditional and religious processes have been written into national law, as in Sierra Leone, Rwanda, South Africa, Botswana, Malawi, Mozambique,<sup>78</sup> Lesotho and Swaziland,<sup>79</sup> which actually can make it difficult to distinguish whether the traditional or religious process is a state or a non-state justice system.<sup>80</sup>

A comparative study of 15 African legal systems in 1999 identified that ‘for the majority of Africans, customary law is the most important source of law with which they are likely to have first and most frequent contact’.<sup>81</sup> Indeed, it is estimated that informal or traditional law governs ‘the daily lives of more than three-quarters of the populations of most African countries’.<sup>82</sup> Others suggest that for up to 90% of the population in parts of Africa, the dominant form of regulation and dispute resolution are AJMs operating outside the state regime.<sup>83</sup> In Sierra Leone, for example, approximately 85% of the population falls under the jurisdiction of customary law,<sup>84</sup> defined in the Constitution as “the rules of law which, by custom, are applicable to particular communities in Sierra Leone”.<sup>85</sup> In Somalia, the *xeer* traditional justice systems was in use well before the colonial era and is still widely used to regulate inter-clan relationships.<sup>86</sup> In Nigeria, it is estimated that up to 90% of cases are settled by customary courts<sup>87</sup> and likewise, in Malawi, between 80-90% of all disputes are processed through customary justice forums.<sup>88</sup> It is estimated also that up to 80% of Burundians in the first or sometimes only instance take their cases to the *Bashingantahe* institutions.<sup>89</sup> Furthermore, customary land tenure accounts for 75% of land in most African countries, affecting 90% of all land transactions in Mozambique and Ghana<sup>90</sup> and in Kenya, ‘where land is

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<sup>78</sup> *Ibid*; It is similarly the case in the South American countries of Peru, Bolivia, Columbia, Ecuador, Nicaragua, Panama, Paraguay, Peru as well as in Yemen, Indonesia, Timor-Leste and Nepal.

<sup>79</sup> Odinkalu, C.A. (2006) ‘Poor Justice or Justice for the Poor? A Policy Framework for Reform of Customary and Informal Justice Systems in Africa’ in *WBLR: Law, Equity and Development (WBLR)* (Washington: The World Bank) pp141-165 at p151

<sup>80</sup> OECD (2007) p22 para. 69

<sup>81</sup> Odinkalu, C.A. (2006) p143

<sup>82</sup> *Ibid*

<sup>83</sup> Chirayath *et.al* (2005) p3

<sup>84</sup> *Ibid*

<sup>85</sup> The Constitution of Sierra Leone (1991) Chapter XII Article 170(3)

<sup>86</sup> Thorne, K. (2005) ‘Rule of Law through imperfect bodies? The informal justice systems of Burundi and Somalia’ (Geneva: Centre for Humanitarian Dialogue) (pages unnumbered)

<sup>87</sup> Odinkalu, C. A. (2006) p144

<sup>88</sup> Wojkowska, E. (2006) ‘Doing Justice: How informal justice systems can contribute’ (UNDP) p12

<sup>89</sup> Thorne, K. (2005) fn.3 The term *Bashingantahe* refers to men of integrity who seek to reach amicable resolutions to disputes, particularly those involving land

<sup>90</sup> Chirayath *et.al*. (2005) p3

frequently a source of private and communal disputes, traditional institutions are widely held to be more reliable in resolving conflicts than the state'.<sup>91</sup>

Globally, the use of AJMs is equally widespread, for example, an estimated 60-70% of local disputes in Bangladesh are resolved through a traditional form of dispute resolution known as the *Salish*<sup>92</sup> and in Afghanistan, the Ministry of Justice estimates that '90% of Afghans rely on customary law due to a lack of 'trust and confidence' in the nation's formal justice institutions as well as the justice institutions' 'physical absence and low capacity'.<sup>93</sup> There are comparable estimates for Mozambique, Lesotho, Somalia, Sudan, Yemen, Solomon Islands, Timor-Leste and Nepal.<sup>94</sup>

In Latin America, a variety of AJMs serve the poor in indigenous rural communities and in urban areas, in the large shantytowns that surround most cities.<sup>95</sup> Examples include remote areas such as the Amazon area of Peru, where AJMs flourish because state institutions are not there to interfere with their activities.<sup>96</sup> Likewise, in Bolivia, the *Ayllus*, a peasant community living the high plateau region, have always maintained their own customary law, which aims to re-establish harmony and re-integrate the accused into the community, because the state courts are difficult to reach.<sup>97</sup>

The issue of remoteness is one of the major factors accounting for the durability of AJMs. Stevens states that in Africa, for example, 'the vast majority continue to live in rural villages' which makes access to formal state justice very difficult.<sup>98</sup> The formal courts may be located many miles away and the physical distance and cost of transport can be prohibitive to the rural poor, particularly as formal proceedings are often protracted and require multiple court attendances. Not only are AJMs more accessible to those living

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<sup>91</sup> Allen, T. and MacDonald, A. (2013) p3

<sup>92</sup> Wojkowska, E. (2006) p12

<sup>93</sup> OECD (2007) p22, para.71

<sup>94</sup> *Ibid*

<sup>95</sup> Faundez, J. (2006) 'Should Justice Reform Projects take Non-State Justice Systems Seriously? Perspectives from Latin America' *WBLR* pp113-139 at p116

<sup>96</sup> *Ibid* (It could also be argued that AJMs flourish because people do not have access to a state alternative)

<sup>97</sup> Röder, T.J. (2012) 'Informal Justice Systems: Challenges and Perspectives' in Botero, J.C., Janse, R., Muller, S., Pratt, C. (eds.) *Innovations in Rule of Law: A Compilation of Concise Essays* (HiIL and The World Justice Project) pp58-61 at p60

<sup>98</sup> Stevens, J. (2001) p1

in rural areas, they reflect prevailing community norms and values<sup>99</sup> and deal with matters of concern to them, particularly issues relating to family and land.<sup>100</sup> It is contended that for these communities, traditional justice is culturally relevant since it ‘draws upon authentic indigenous identities and rituals and “taps into profound spiritual worlds” based on non-western concepts of community harmony and well-being.’<sup>101</sup> Therefore, the type of justice AJMs offer can be more appropriate for people living in close-knit communities where a breakdown of individual social relationships may result in conflict within the whole community and detrimentally affect social and economic co-operation.<sup>102</sup> In comparison, it is argued, the retributive justice provided by formal courts can be unsuitable for the resolution of such disputes and may even exacerbate tension between disputants.

There are many other reasons why formal justice systems can be unattractive to those living in poor, rural communities. For example, unfamiliarity and awkwardness with the formal procedures and atmosphere of the court together with an absence of understanding due to language issues can give rise to feelings of intimidation and mistrust.<sup>103</sup> The formal courts may also lack legitimacy, especially if they have been complicit in past oppression or conflict or if they are tainted with corruption.<sup>104</sup> The lengthy duration of proceedings and the requirement for legal representation may also act as disincentives to use the formal justice system.<sup>105</sup> In contrast, AJM procedures are familiar, local, swift, cheap and relevant to the communities in which they are practiced, factors which will be expanded upon in the next section.

This and the previous section discussed how and why AJMs, despite having been ‘adopted and then co-opted by colonial and post-colonial authorities’<sup>106</sup>, remain a

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<sup>99</sup> Wojkowska, E. (2006) p13

<sup>100</sup> Stevens, J. (2001) p1; see also Shaw, R. and Waldorf, L. (2010) ‘Introduction: Localizing Transitional Justice’ in Shaw, R. and Waldorf, L., with Hazan, P. (eds.) *Localizing Transitional Justice: Interventions and Priorities After Mass Violence* (Stanford: SUP) p15

<sup>101</sup> Allen, T. and MacDonald, A. (2013) p6

<sup>102</sup> *Ibid*

<sup>103</sup> Wojkowska, E. (2006) p13 In East Timor, for example, there are approximately 17 different languages and the scarcity of interpreters creates difficulties during formal court hearings

<sup>104</sup> *Ibid*

<sup>105</sup> *Ibid*

<sup>106</sup> Vogler, R. (2005) p255

dominant feature in the lives of those in poor, rural communities particularly. In the next section, the most common, positive, characteristics of AJMs will be outlined in order to illuminate their relevance and appeal to those communities.

### **Key Strengths of AJMs**

Within one country there can exist many different AJMs, each reflecting the norms and values of the particular tribe or community it serves, so it is difficult to generalise the features of AJMs. However, in this section, an overview of some of the more typical positive features of AJMs will be discussed.

First and foremost, AJMs are usually close to (or at least within walking distance of) the homes of the people they serve and they are normally free or affordable which makes them easily accessible, familiar and usable by those seeking dispute resolution.<sup>107</sup>

Another common feature is that the justice process is transparent and open and involves the whole community.<sup>108</sup> A dispute cannot be resolved unless both the victim and the offender accept the final decision which has been arrived at by the community at large.<sup>109</sup> This is because disputes arising in traditional communities where relationships are 'based on past and future economic and social dependence and which intersect ties of kinship'<sup>110</sup> are perceived to be problems affecting the whole community.<sup>111</sup> Stevens describes how:

[e]ach member of the community is tied to varying degrees to each of the disputants and, depending on the extent of these ties, will either feel some sense of having been wronged or some sense of responsibility for the wrong.<sup>112</sup>

Writing about dispute resolution procedures among the Ibo-speaking peoples of Eastern Nigeria, Igbokwe describes African law as 'group law which usually applies to micro-

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<sup>107</sup> Wojkowska, E. (2006) p19

<sup>108</sup> Alie, J.A.D (2008) p143

<sup>109</sup> Stevens, J. (2001) p26

<sup>110</sup> *Ibid* p22

<sup>111</sup> *Ibid*

<sup>112</sup> *Ibid*



societies: families, lineages, clans, ethnic groups, living as a 'closed circuit'.<sup>113</sup>

Therefore, in contrast to western judicial proceedings, which individualise guilt:

a law-breaking individual thus transforms his group into a law-breaking group, for in his dealings with others, he never stands alone. [Likewise] a disputing individual transforms his group into a disputing group and it follows that if he is wronged, he may depend upon his group for vengeance for in some vicarious manner, they too have been wronged.<sup>114</sup>

Resolution of the dispute is thus of paramount importance if communal harmony is to be restored and the process normally entails a high degree of public participation. Chimango describes proceedings in traditional courts in Malawi:

[A]lthough judgement was delivered by the chief on the advice of the elders, everybody had the right to speak in an orderly manner, to put questions to witnesses, and to make suggestions to the court. [...] The chief and his wise men would sit for hours listening to what by Western standards might be considered a mass of irrelevant details. This was done to settle the disputes once and for all so that the society could thereafter continue to function harmoniously.<sup>115</sup>

AJMs, therefore, in contrast to the formal Western-style court proceedings, involve no formal legal representation and the procedure is highly flexible with no strict rules of evidence: the disputants give their versions of events and everyone is then free to give their evidence and their opinion on even seemingly irrelevant issues.<sup>116</sup> Whilst it might be argued that a weaker party could be placed at a disadvantage in the negotiation process, the presence and bearing of the mediator and the participation of members of the community act as moderating influences and assist in achieving a settlement that is fair and reasonable.<sup>117</sup>

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<sup>113</sup> Igbokwe, V.C. (1998) 'Socio-Cultural Dimensions of Dispute Resolution: Informal Justice Processes among the Ibo-Speaking Peoples of Eastern Nigeria and their Implications for Community/Neighbouring Justice System in North America' 10 *Afr. JI&CL* pp446-471 at p449-50

<sup>114</sup> *Ibid* p450

<sup>115</sup> Chimango, L.J. (1977) 'Tradition and the traditional courts in Malawi' 10 *Comp. & ILJ S.Afr* pp39-66 at p40

<sup>116</sup> *Ibid*; see also Roberts, S. (1979) p39

<sup>117</sup> Stevens, J. (2001) p36

For the majority of AJMs, the emphasis during the negotiation process is not on punishment of the wrongdoer but on reconciliation and the restoration of peace and social harmony.<sup>118</sup> Accordingly, the aim is not only to compensate the victim for their loss and prevent the accused from offending again but also to reintegrate both the victim and the offender back into the community.<sup>119</sup> The consensual process also ensures that the decision reached is enforced through social pressure, since disobeying a final ruling effectively means disobeying the whole community which can result in social ostracism.<sup>120</sup>

Another common feature of AJMs is the important role played by traditional arbitrators in the conflict resolution process. Chiefs hold their position by virtue of their gender, age, inherited status or influence within the community and they represent the community in expressing the consensus on shared norms and values.<sup>121</sup> Although the exercise of their role does not equate with western views of 'accountable government',<sup>122</sup> Bennett, writing in the context of South Africa, suggests a wise leader would not dictate to his subjects since 'anyone who attempted tyrannical rule would soon face revolt or secession' and he quotes a common saying '*kgosi ke kgosi ka bathoi*' (a chief is a chief through his people).<sup>123</sup>

Having been appointed from within the community on the basis of status or lineage, therefore, the arbitrators will normally be familiar with the disputants, their relationship history and the facts of the dispute even before the matter is brought before them.<sup>124</sup> They cannot, accordingly, be described as impartial although as Merry states, 'their impartiality is secured by crosscutting ties that link them to both sides.'<sup>125</sup>

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<sup>118</sup> *Ibid* p24; see also Allott, A.N. (1968) p145

<sup>119</sup> Wojkowska, E. (2006) p17

<sup>120</sup> Stevens, J. (2001) p33

<sup>121</sup> Igboke V.C. (1998) p451

<sup>122</sup> Murray, C. (2004) 'South Africa's Troubled Royalty: Traditional Leaders after Democracy. Law and Policy Paper 23' (Federation Press: NSW/Centre for International and Public Law: Canberra) p17

<sup>123</sup> *Ibid* (quoting Bennett, T.W. (2004) *Customary Law in South Africa* (Lansdowne: Juta Publishing Co. Ltd); see also Roberts, S. (1979) p38

<sup>124</sup> Allott, A.N. (1968) p137

<sup>125</sup> Merry, S.E. (1982) 'The Social Organization of Mediation in Nonindustrial Societies: Implications for Informal Community Justice in America' in *The Politics of Informal Justice, Volume 2: Comparative Studies* (London: Academic Press) p31

A mediator's neutrality is also enhanced by his position as representative of an entire village or community or of an important component such as a lineage or age group.<sup>126</sup>

This familiarity also makes it difficult for either disputant to mislead the arbitrator or the community, thereby diminishing the 'gap between legal truth and actual fact'.<sup>127</sup> However, the role of the arbitrator 'is less to find the facts, state the rules of law and apply them to the facts than to set right a wrong in such a way as to restore harmony within the disturbed community.'<sup>128</sup> This appears to be borne out by Gluckman's description of the mediators in the Nuer (pastoral nomads of the Upper Nile region)<sup>129</sup> as:

ritual experts who are called 'men of the earth'. They have no forceful powers of coercion. They cannot command men to do anything and expect them to obey; but they are political as well as ritual functionaries. If a fight breaks out, the 'man of the earth' can restore peace ... will negotiate between the two groups [in the case of a killing] and try to induce the deceased's kin to accept compensation ... [which] eventually they will [accept] when the 'man of the earth' threatens to curse them.<sup>130</sup>

The power of the Nuer mediator, therefore, is the threat of a curse that supernatural forces will aid an intransigent disputant's enemies if he refuses to accept a reasonable settlement, the threat acting both as a deterrent to further violence and an inducement to settle the dispute.<sup>131</sup>

Ordinarily, the AJM process is voluntary and parties confirm their consent to the procedure before it commences.<sup>132</sup> If one side then fails to appear or leaves mid-adjudication, the process halts and unless there is a genuine acceptance of the ruling, the matter will not be resolved, although in practice, non-acceptance will simply lead to further negotiations and an increase in the compensation to be paid.<sup>133</sup> Formal coercion

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<sup>126</sup> *Ibid*

<sup>127</sup> Allott, A.N. (1968) p137

<sup>128</sup> *Ibid* p145

<sup>129</sup> Gluckman, M. (1955) 'The Peace in the Feud' 8 *Past and Present* pp1-14 at p2

<sup>130</sup> *Ibid* p8-9; see also Merry, S.E. (1982) p23

<sup>131</sup> Merry, S.E. (1982) p23

<sup>132</sup> Stevens, J. (2001) p32

<sup>133</sup> *Ibid*

to settle is rare whereas social pressure is a powerful tool.<sup>134</sup> Wilful refusal to settle or disobeying a final ruling can result in being ostracised by the community, a situation not to be desired, since it involves the withdrawal of social contact and economic co-operation by other members of the community, which has been likened to a 'living death'.<sup>135</sup> Some communities employ more coercive enforcement methods, however. For example, the chief of the Kgatla people of Botswana is able to enforce his decisions, if necessary, by means of corporal punishment, confiscation of stock or the withdrawal of land allocations.<sup>136</sup>

A further common key feature is that the AJM process is usually swift, avoiding the lengthy procedures and delays that can be so prevalent in formal judicial procedures. The communities involved are familiar with local problems and can achieve practical solutions, sometimes assisted, as seen with the Nuer, by 'supernatural powers [which enhance] their capacity to resolve local disputes and ensure enforcement'.<sup>137</sup> Each case is decided on its own facts and circumstances (a considerable divergence from the 'rule-based adjudication' of formal state systems<sup>138</sup>) and will take into account not only the specific issue between the disputants but also 'any indirect and underlying causes of the conflict and other factors which have a bearing on successful reconciliation such as the history of the relationship between the parties'.<sup>139</sup> This clearly leads to inconsistency, a situation which is wholly incompatible with western ideals of legal certainty and due process but because the decision is specific to the particular parties, it is highly relevant and contextual and reflects the importance of restoring good relations between them.

Finally, it is a common feature of AJMs that once a decision has been reached by consensus and accepted by the parties, it is confirmed through rituals aimed at reintegration such as cleansing ceremonies, eating and drinking together and/or songs and dance.<sup>140</sup> These rituals are intrinsic to the African AJM process and reflect the focus

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<sup>134</sup> *Ibid* p33

<sup>135</sup> *Ibid*

<sup>136</sup> Roberts, S. (1979) p42

<sup>137</sup> Wojkowska, E. (2006) p17

<sup>138</sup> Stevens, J. (2001) p28

<sup>139</sup> *Ibid*

<sup>140</sup> Alie, J.A.D. (2008) p133

on reconciliation.<sup>141</sup> The whole community is involved thereby confirming “the communal element inherently present in any individual conflict” and [...] their acceptance of the offender back into the community’.<sup>142</sup> In Sierra Leone, for example, rural communities use ceremonies based on practices that have been used for generations to restore relationships between the villagers and foster community cohesion:<sup>143</sup>

During the dancing, if somebody has hurt you before, during that time you hug yourselves, you eat together and then the person that have done wrong will feel happy – that the brothers that I hurt still love me<sup>144</sup>

In Mozambique, where ‘[t]o talk and recall the past is not necessarily seen as a prelude to healing or diminishing pain’,<sup>145</sup> instead, cleansing ceremonies are conducted by traditional healers (*‘curandeiros’*) who are found in every town and village and are widely relied upon and respected.<sup>146</sup> Ceremonies such as these are powerful events that bring people together to share experience and initiate a process of social recovery.<sup>147</sup>

In this section, an overview of the common, positive features of AJMs has been discussed and in the following section, the weaknesses of AJMs will be identified. These strengths and weaknesses are important as they are the features that potentially can satisfy several of the aims of ICJ outlined in the previous chapter, as will be explored in the penultimate section of this chapter.

### **The Weaknesses of AJMs**

There are aspects of AJMs which fall well short of realising the aim of achieving justice, even to the satisfaction of the people within the communities that use them. AJMs are

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<sup>141</sup> Stevens, J. (2001) p34

<sup>142</sup> *Ibid*

<sup>143</sup> Werkman, K. (2014) ‘Seeking Community Reconciliation Through Traditional Ceremonies: A Strategy of Conflict Management’ *CEJISS* pp115-136 at p127

<sup>144</sup> *Ibid*

<sup>145</sup> Chuter, D. (2003) *War Crimes: Confronting Atrocity in the Modern World* (London: Lynne Rienner Publishers) p251

<sup>146</sup> Hayner, P.B. (2011) *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions* (Abingdon: Routledge) p201

<sup>147</sup> Werkman, K. (2014) p127

largely unregulated and often lack procedural safeguards and accountability, which raises questions about their ability to achieve the standards and norms of criminal justice demanded both locally and by the international community. In this section, the common weaknesses of AJMs will be discussed in order to ascertain whether these weaknesses are insurmountable from the perspective of satisfying the goals of ICJ.

Whilst their proximity to the community they serve can be a strength of AJMs, it can also be one of their main weaknesses as, due to their cultural specificity, they operate effectively within homogenous but not within heterogeneous societies, where they can cause conflict.<sup>148</sup> For example, the Mozambique *gamba* spirit ceremony is a regional experience disliked by local Christians, who often refuse to co-operate with it<sup>149</sup> and Alie surmises that in Sierra Leone, the Mende practices for settling disputes may not be suitable for settling disputes between Mende and non-Mende people within the community.<sup>150</sup> Thus, whilst AJMs such as *Gacaca* in Rwanda and *Ubushingantahe* in Burundi cover all ethnic groups, others are limited to the ethnic, religious or regional communities in which they function.<sup>151</sup>

This last point is clearly demonstrated by the situation in Northern Uganda, where the Acholi have successfully used their own traditional healing mechanisms to cope with the effects of conflict within their society.<sup>152</sup> However, the LRA insurgency is not just a local Acholi affair but has national and international dimensions<sup>153</sup> with war crimes being committed between the Acholi and Langi,<sup>154</sup> between people of the north and the south of the country<sup>155</sup> and across Uganda's borders into neighbouring states,<sup>156</sup> areas where the Acholi rituals have no relevance or meaning.<sup>157</sup> Thus, it has been argued that many victims and perpetrators are beyond the ambit of these ceremonies as 'the dynamics of

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<sup>148</sup> Röder, T.J. (2012) p59

<sup>149</sup> Igreja, V. and Dias-Lambranca, B. (2008) 'Restorative justice and the role of magamba spirits in post-civil war Gorongosa, central Mozambique' in Huyse, L. and Salter, M. (eds.) pp61-83 at p75

<sup>150</sup> Alie, J.A.D. (2008) p143

<sup>151</sup> Huyse, L. (2008b) 'Conclusions and recommendations' in Huyse, L and Salter, M. (eds.) pp181-98 at p183

<sup>152</sup> Latigo, J.O. (2008) 'Northern Uganda: tradition-based practices in the Acholi region' in Huyse, L. and Salter, M. (eds.) pp85-120 at p112

<sup>153</sup> *Ibid* p114

<sup>154</sup> Huyse, L. (2008b) p189

<sup>155</sup> *Ibid*

<sup>156</sup> Latigo, J.O. (2008) p93

<sup>157</sup> *Ibid* p113

the conflict and its legacy, just as in Sierra Leone, go far beyond the territorial and personal reach of domestic tradition-based mechanisms.<sup>158</sup>

A cause for further unease with AJMs is that the involvement of the whole community and emphasis on social harmony can lead to a disregard for individual rights and undue pressure being placed on the parties to settle disputes, sometimes to the detriment of weaker parties in the negotiating process and to the reinforcement of discrimination against minorities and women.<sup>159</sup> AJMs generally do not work effectively where there is a power or authority imbalance between the disputing parties because the weaker party is vulnerable to exploitation.<sup>160</sup> Flexible and uncertain rules and the lack of procedural safeguards can add to the particular risks facing women, young people and other vulnerable groups.<sup>161</sup> Also, the need for consensus can prevent effective resolution and 'the language of consensus when not reached democratically becomes a means for suppressing dissent'.<sup>162</sup> Thus the ideal of consensus and social harmony frequently translates into the imposition of decisions that are far from consensual.<sup>163</sup> While public participation can be a necessary check and balance to the administration of the process, therefore, the antithesis is that it can lead to coercion and the reinforcement of social attitudes that support inequalities on the basis of age, gender or other status.<sup>164</sup>

This is borne out by a four-country study conducted by World Bank Indonesia which concluded that mediation is generally backed by coercion in the shape of social sanction or threats of violence and mediated settlements can reflect 'what the stronger is willing to concede and the weaker can successfully demand'.<sup>165</sup> It found that the Indonesian *Musyawarah*<sup>166</sup> is frequently an extremely patriarchal and elite-dominated process

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<sup>158</sup> Huyse, L. (2008b) p184

<sup>159</sup> Wojkowska, E. (2006) p21

<sup>160</sup> *Ibid* p20

<sup>161</sup> IDLO (2012) 'Customary Justice: Challenges, Innovations and the Role of the UN' in Botero, J.C. *et.al. Innovations in Rule of Law* pp55-57 at p56

<sup>162</sup> Wojkowska, E. (2006) p20

<sup>163</sup> *Ibid*

<sup>164</sup> Stevens, J. (2001) p127

<sup>165</sup> Wojkowska, E. (2006) p20

<sup>166</sup> 'Consensus deliberations'

‘where the weak are pushed into accepting an outcome [favouring] the powerful and are then coerced into not complaining about the decision.’<sup>167</sup>

Two major concerns regarding AJMS are that they involve processes which are inconsistent with established criminal justice standards and human rights norms and they have huge potential for discrimination. Customary norms and justice processes frequently result in ‘discriminatory outcomes and can reinforce the power structure that controls and administers them.’<sup>168</sup> Since they are usually dominated by local male elites or religious leaders, it is often the case that women, the poor, the young and ethnic minorities are unable to gain equal access or fair treatment.<sup>169</sup> In Burundi, for example, women are not allowed to become members of the *Ubushingantahe*, they can only participate in the proceedings as the wife or widow of a member<sup>170</sup> and in Sierra Leone, the justice system is biased against women, especially in marital relationships.<sup>171</sup> The Mozambique *gamba* spirit ceremony also carries a bias against women as only the spirits of men killed in the conflict are permitted to return to seek justice in the world of the living<sup>172</sup> and in Sierra Leone, young people often are excluded from traditional processes because they ‘are considered immature and not yet versed in the ways of the community’.<sup>173</sup>

Furthermore, although participation in an AJM is voluntary, it may be virtually impossible for accused women and the young to refuse to submit themselves to the process or to refuse to comply with its decision.<sup>174</sup> Sometimes the accused does not have a chance to be heard or is not adequately represented,<sup>175</sup> for example, in many AJMs, women have no right of representation other than through older male relatives who are expected to make decisions on their behalf.<sup>176</sup> Additionally, factors such as the

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<sup>167</sup> Wojkowska, E. (2006) p20

<sup>168</sup> IDLO (2012) p55

<sup>169</sup> Wojkowska, E. (2006) p21

<sup>170</sup> Allen, T. and MacDonald, A. (2013) p13; see also Naniwe-Kaburahe, A. (2008) ‘The institution of bashingantahe in Burundi’ in Huyse, L. and Salter, M. (eds.) pp149-179 at p155

<sup>171</sup> Allen, T. and MacDonald, A. (2013) p13; see also Huyse, L. (2008b) p183

<sup>172</sup> Allen, T. and MacDonald, A. (2013) p13; see also Igreja, V. and Dias-Lambranca, B. (2008) pp70-80

<sup>173</sup> Alie, J.A.D (2008) p133

<sup>174</sup> Stevens, J. (2001) p128

<sup>175</sup> Wojkowska, E. (2006) p23

<sup>176</sup> Stevens, J. (2001) p128



accused's or his or her family's past conduct may be taken into account, which clearly compromises the principle of innocent until proven guilty.<sup>177</sup>

Discrimination against women is a major issue because of AJM male-domination and cultural beliefs often result in gender-based decisions and the application of customary or religious norms which are heavily biased against women.<sup>178</sup> For example, in many traditional societies, women are denied rights 'to inherit capital assets' and a husband's domestic abuse is 'generally tolerated unless the harm becomes so physically damaging or persistent that it is socially disruptive'.<sup>179</sup>

An additional concern is that decisions can be made which are inconsistent with basic principles of human rights, for example, the imposition of cruel or inhuman forms of punishment such as flogging, banishment or decisions that perpetuate the exploitation of children or subordination of women.<sup>180</sup> Some extremely harsh decisions and punishments are imposed by AJM leaders and chiefs on women and girls in the name of culture and tradition. A recent example is an order by a village council (or *jirga*) in Pakistan that a 16-year-old girl should be publicly raped as punishment for her brother having raped a 12-year-old girl.<sup>181</sup> In Somalia, a woman who is raped is often forced to marry her attacker 'to protect her honour' and serves to ensure full payment of her dowry by the attacker's clan to the victim's clan, on the basis that marriage solidifies a bond between the clans of the man and woman and further violence is avoided.<sup>182</sup> Similarly, the *swara* tradition practiced by the *jirgas* in parts of Afghanistan and Pakistan, also involves the marrying of a girl to the man who raped her to save her honour and the honour of her family, or as compensation for killing, as a symbol of reconciliation. These examples give cause for concern<sup>183</sup> as do some of the brutal punishments inflicted

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<sup>177</sup> *Ibid*

<sup>178</sup> Röder, T.J. (2012) p59

<sup>179</sup> Wojkowska, E. (2006) p21

<sup>180</sup> *Ibid* p23; see also Faundez, J. (2006) p116

<sup>181</sup> BBC News (2017) 'Pakistan village council orders 'revenge rape of girl' 26 July [Online] Available: <http://www.bbc.co.uk/news/world-asia-india-40731035> [Accessed 24.08.17]

<sup>182</sup> Simojoki, M.V., (2011) 'Unlikely Allies: Working with Traditional Leaders to Reform Customary Law in Somalia' in Harper, E. (ed) pp33-49 at p39

<sup>183</sup> Röder, T.J. (2012) p59

on women from Islamic communities who have been accused of adultery, particularly in South Asia.<sup>184</sup>

Clearly, AJM leaders and chiefs can be unfamiliar or culturally disengaged with basic human rights standards, such as the right to protection against cruel and unusual punishments, with the result that violations occur. Other rights, including the right to fair trial, legal representation, due process of law, protection against self-incrimination or coerced confession, jury trial and of appeal can also be added to the list of human rights that are not routinely catered for in AJMs.<sup>185</sup>

Turning to the role of traditional mediators, their rulings often depend on the knowledge and moral values of the individual concerned and there can be criticism that they rule arbitrarily, with few checks and balances on their administration and that they give 'power considerations precedence over equity, fairness and overall justice.'<sup>186</sup> Generally, there are no minimum standards that have to be met in AJMs and the fairness of proceedings depends on the person conducting them.<sup>187</sup> Thus, although the AJM involves public participation, they are not generally accountable and frequently there is no right of appeal.

Areas of concern regarding the exercise of the leader's authority are that in resolving disputes, they may favour one party over another based on their political allegiance or power allied to wealth, education or status, particularly where not to do so may be threat to their own position.<sup>188</sup> They may also be susceptible to bribery because often they receive insufficient or no remuneration and therefore rely on gifts and bribes for income, which might then influence the outcome of a hearing.<sup>189</sup> In Burundi, a traditional gift of beer or other things is asked for before any hearing takes place which, it has been suggested, could be considered corruption.<sup>190</sup> However, it has been pointed

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<sup>184</sup> Stevens, J. (2001) p128

<sup>185</sup> IDLO (2012) p56

<sup>186</sup> *Ibid*; see also Wojkowska, E. (2006) p22; Kerr, R. and Morbeck, E. (2007) *Peace and Justice: Seeking Accountability After War* (Cambridge: Polity Press) p157

<sup>187</sup> Wojkowska, E. (2006) p22

<sup>188</sup> *Ibid*; see also Kerr, R. and Morbeck, E. (2007) p157

<sup>189</sup> Stevens, J. (2001) p.128

<sup>190</sup> Wojkowska, E. (2006) p22

out that since the informal process is voluntary, traditional arbitrators cannot risk accepting bribes on a wide scale since it would affect the perception of their even-handedness and further, that formal justice systems are more susceptible to corruption due to 'the lack of public participation and involuntary nature of proceedings.'<sup>191</sup>

Once a decision has been reached, there may be no specific means of enforcement beyond social pressure<sup>192</sup> which can benefit a stronger and discriminate against a weaker disputant. It has been asserted that in Somalia, for example, a militarily strong clan may openly refuse to comply with a judgement that favours a militarily weak clan, which serves to undermine the whole *xeer* decision-making process.<sup>193</sup>

The final area of concern to be discussed in this section is the appropriateness of using AJMs to deal with the crimes within the jurisdiction of the ICC. It is often argued that AJMs are used effectively within communities to deal with a relatively small number of minor crimes and disputes where their informality can be a strength but that they are inappropriate for post-conflict situations where heinous crimes have been committed and where it is important to protect the rights of victim and offender.<sup>194</sup> First, critics insist, these processes in their traditional form were not designed to cope with huge numbers of returning former abductees and ex-combatants who have committed war crimes and crimes against humanity.<sup>195</sup> Second, victims often cannot identify the perpetrator of the harm done to them, in which case traditional rituals are difficult to perform.<sup>196</sup> Even if the victim and perpetrator can be identified, payment of reparation in order to restore the status quo, a fundamental principle of AJMs, will often be impossible given the total impoverishment the conflict has caused.<sup>197</sup> Finally, it is asserted that middle- and high-level commanders of rebel and government forces may be beyond the scope of AJMs.<sup>198</sup>

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<sup>191</sup> Stevens, J. (2001) p128

<sup>192</sup> Wojkowska, E. (2006) p22

<sup>193</sup> *Ibid* p20

<sup>194</sup> Huyse, L. (2008b) p185; see also Wojkowska, E. (2006) p22; Baines, E. (2007) 'The Haunting of Alice: Local Approaches to Justice and Reconciliation in Northern Uganda' 1 *IJTJ* pp91-114 at p105

<sup>195</sup> Huyse, L. (2008b) p185

<sup>196</sup> *Ibid* p182

<sup>197</sup> *Ibid*

<sup>198</sup> *Ibid* p184

All these arguments are persuasive but AJMs can be and are being adapted to fit western vision of fair justice and in some instances, cleansing ceremonies and other rituals are already setting foundations for justice.<sup>199</sup> For all the criticism that has been levelled at the top-down ‘corruption’ of the *Gacaca* traditional process<sup>200</sup> (not least the government’s removal of RPF crimes from *Gacaca* jurisdiction<sup>201</sup> which has also limited the potential for long-term reconciliation), it did deal with huge numbers of *génocidaires* in a relatively short time and indisputably faster than the formal justice system could achieve.<sup>202</sup> Also, it could be countered that if an AJM cannot identify a particular victim and/or perpetrator, it is far less likely that formal court proceedings will have greater success, sufficient to achieve a conviction. Further, even if reparation is impossible, the perpetrator concerned can make restitution by other means, for example, community service geared specifically to benefit the victims. In this way, the prison population is kept down, the money that would be spent on maintaining a prisoner in custody can be diverted to other beneficial social projects and the offender is returned to and becomes a useful member of the community thus avoiding the economic and social dislocation of family life.<sup>203</sup>

Regarding middle- and top-level commanders of either rebel or government forces, it is clearly far more likely that they would be prepared to submit to an AJM as opposed to a formal prosecution and whilst blanket amnesties are never acceptable, a post-conflict society may refrain from prosecutions if certain conditions are satisfied, one of which is that the AJM must have an accountability dimension. It has been established in this chapter that many AJMs do have accountability elements and the offender must admit his guilt and express remorse: features commonly absent from defendants in formal trials.

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<sup>199</sup> Baines, E. (2005) *Roco Wat I Acoli: Restoring Relationships in Acholi-land: Traditional Approaches to Justice and Re-integration* (Gulu District: Lui Institute for Global Issues) p72-3

<sup>200</sup> Bornkamm, P.C. (2012) *Rwanda’s Gacaca Courts: Between Retribution and Reparation* (Oxford: OUP) p106-107

<sup>201</sup> *Ibid* p56-7

<sup>202</sup> Approximately ten per cent of the adult male Hutu population (130,000) were arrested and imprisoned between July and September 1994 and it was estimated that prosecutions would not be completed within 113 years

<sup>203</sup> Stevens, J. (2001) p126-7

### **Can AJMs satisfy the aims of International Criminal Justice?**

Traditional communal values inform practices that have been used for centuries to resolve conflicts and heal relationships. Although the practices differ between regions and between ethnic groups, they are all important elements in the process of post-conflict resolution. However, as discussed below, there is a different emphasis with the justice dispensed at an AJM that is at odds with the western liberal view of justice which is promulgated by the ICC.

Western justice systems focus on accountability and to a much lesser extent on reparation and healing and critics of AJMs point to their inability to deal adequately with the perpetrators of international crimes, due to their common aversion to retributive justice and emphasis on the restoration of social harmony. However, the restorative/retributive dichotomy is exaggerated as this chapter has demonstrated since there are accountability components to most AJM ceremonies of restitution and reconciliation: the processes of Mozambique, Rwanda, Sierra Leone, Burundi and Uganda, for example, all tend to require the offender to openly acknowledge their guilt before reconciliation can take place. Indeed, punitive measures are common within some AJMs used by Acholi people of Northern Uganda, depending on the crime, the perpetrator and who is arbitrating.<sup>204</sup> Thus, it has been argued that contemporary AJMs pursue the same ultimate objectives as western justice systems but favour a different means of achieving them.<sup>205</sup>

AJMs have more nuanced approaches to accountability than formal trials, which require an unequivocal plea to the accusation, a yes/no response to questions, a guilty or not guilty verdict and clear procedural and evidential rules to enable a verdict to be reached. Today's violent conflicts are not black and white and formal trials are ill-equipped to deal with the complexities of the grey areas, such as abducted children who are forced to become soldiers and to commit brutal crimes against their communities.<sup>206</sup> These

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<sup>204</sup> Allen, T. and MacDonald, A., (2013) p11

<sup>205</sup> *Ibid*

<sup>206</sup> Branch, A. (2017) 'Dominic Ongwen on Trial: The ICC's African Dilemmas' 11 *IJYJ* pp30-49 at pp35, 38-41

guilty/not guilty; victim/perpetrator dichotomies are sensitive territory for criminal law as they are difficult to categorise, can make reaching a clear verdict difficult, can misrepresent a situation and can endanger the success of post-conflict reconciliation.<sup>207</sup> In contrast, the flexibility of AJM's, the African way of prolonging discussions and the ritual elements create more opportunities for exploring issues of accountability, innocence and guilt that are integral to the legacy of violent conflict.<sup>208</sup> This is where AJMs have clear advantages.

The issue of whether AJMs can satisfy the deterrent function of ICJ is debatable although it will be recalled that similar questions arose concerning the deterrent potential of criminal prosecutions. The fact of the perpetrator of the violations voluntarily undergoing the AJM process within his or her community signals confidence regarding the ending of the violations and their non-recurrence. Further, since decisions regarding the outcome of the procedures are usually reached by agreement between the victim, the offender and the whole community, there is social pressure for compliance which also serves to ensure non-recurrence of the offending behaviour. As with all criminal justice processes, however, it is difficult to surmise whether international acceptance of AJMs would result in future conflict and atrocities being averted.

It could be argued that the transitional justice objective of achieving justice and dignity for victims is more assured with an AJM than with formal trials because of the more flexible, informal approach used to reach agreement and the focus on reparations and restitution for the victim. Clearly there are issues in patriarchal societies regarding the protection of the rights of women, the young and minorities but these could certainly be overcome through reform of both attitude and procedure.

The AJMs discussed in this chapter do not satisfy the 'historical record' requirement of ICJ, although it is unlikely that the nature of the atrocities suffered will be forgotten and the key feature of AJMs is the passing down of traditions through the centuries by word

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<sup>207</sup> *Ibid*; see also Baines, E. (2009) 'Complex political perpetrators: reflections on Dominic Ongwen' 47 *Journal of Modern African Studies* pp163-91; Baines, E. (2007) pp91-114

<sup>208</sup> Huyse, L. (2008a) p15

of mouth. It should also be noted that for some communities, not only is recollection of the past and establishing the truth not rooted in the local culture, it is positively discouraged as has been revealed by case studies in Sierra Leone, Burundi, Rwanda and Mozambique.<sup>209</sup>

Thus, it can be argued that many AJMs may have great potential for post-conflict accountability, truth telling, healing and social repair,<sup>210</sup> surpassing even formal truth commissions in societies where public revealing of the truth is not strongly rooted in the local culture.<sup>211</sup> Quinn, for example, argues that 'acknowledging past crimes can lead to participation and civic engagement, the generation of social capital, and ultimately social cohesion [and] reconciliation.'<sup>212</sup> Since they are based in established local values and traditions, ritualistic communal ceremonies can be more effective in creating a receptive attitude towards reconciliation.<sup>213</sup> Certainly, the *gamba* spirit ceremony of Mozambique is a powerful demonstration of the healing of community relations that can be achieved with victims and perpetrators as it 'creates social spaces where past can be worked through'.<sup>214</sup> The *Bashingantahe* in Burundi are also considered to have the same potential for reconciliation as the majority of the population see the institution as a credible instrument of dispute resolution even in context of dealing with crimes committed during civil war.<sup>215</sup> Likewise, in Sierra Leone and Northern Uganda, reintegration and cleansing ceremonies particularly for former child soldiers but also for ex-combatants have seen successful reconciliations with survivors.<sup>216</sup>

A difficulty for the AJM today, however, is the change in social structure brought about particularly by violent conflict. Whatever the scale of violence suffered, the potency of the AJMs in the countries concerned has been detrimentally affected.<sup>217</sup> The

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<sup>209</sup> Huyse, L. and Salter, M. (eds.) (2008) p187

<sup>210</sup> Huyse, L. (2008b) p192

<sup>211</sup> Huyse, L. and Salter, M. (eds.) (2008) p187

<sup>212</sup> Quinn, J.R. (2007) 'Social Reconstruction in Uganda: The Role of Customary Mechanisms in Transitional Justice' 8 *HRR* pp389-407 at p392

<sup>213</sup> Huyse, L. and Salter, M. (eds.) (2008) p187

<sup>214</sup> *Ibid* p188

<sup>215</sup> Naniwe-Kaburahe, A. (2008) p168-9

<sup>216</sup> Huyse, L. (2008b) p189

<sup>217</sup> *Ibid* p185

breakdown of traditional communities resulting from family displacement,<sup>218</sup> the mass migration of young people to the towns (as in Sierra Leone)<sup>219</sup> and large numbers of survivors and perpetrators still living in refugee camps (as in Northern Uganda) have all 'damaged the natural biotope of traditional practices.'<sup>220</sup> Taboos have been ignored, sacred places defiled and the legitimacy of chiefs and elders has been greatly harmed, especially in the eyes of the youth.<sup>221</sup> The 'spontaneous socialization of young people'<sup>222</sup> has almost disappeared, particularly for abducted children and camps for displaced persons are not locations conducive to holding cleansing, reintegration and reconciliation ceremonies or even to sit around the fire and teach the young the customs and traditions of the community. The resources needed to fulfil the reparative elements of the rituals are also missing due to extreme poverty and furthermore, civil war and genocide have engendered mutual mistrust in small-scale communities which could affect the willingness to be reconciled.<sup>223</sup> These factors have all had a devastating effect on the capacities of traditional leaders and chiefs to perform their justice and reconciliation rituals and this in turn casts doubt on their ability to adapt the original design of the AJM to the intricate task of dealing with mass human rights violations.<sup>224</sup>

While it has been suggested that AJMs potentially could be adapted to overcome some of the concerns raised by critics and to enable them more readily to achieve the objectives demanded by proponents of ICJ,<sup>225</sup> imposing 'reforms' in a top-down fashion risks destroying their strengths and benefits.

## Conclusion

In this chapter, some of the common strengths and weaknesses of AJMs have been outlined and the potential for AJMs to satisfy the aims of ICJ has been considered.

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<sup>218</sup> Alie, J.A.D. (2008) p144

<sup>219</sup> *Ibid* p145

<sup>220</sup> Huyse, L. (2008b) p185

<sup>221</sup> *Ibid* p186

<sup>222</sup> *Ibid*

<sup>223</sup> *Ibid*

<sup>224</sup> *Ibid* p189

<sup>225</sup> The NGO, Amnesty International, for example, actively campaigns for criminal prosecutions and against amnesties. See 'International Justice' [Online] Available: <https://www.amnesty.org/en/what-we-do/international-justice/> [Accessed 29.08.17]



Clearly, AJMs are found wanting in the area of protection of human rights and criminal justice standards. They are also more prone to discrimination and lack of due process than formal courts but to put this into context, there are countries where the state justice system is no better and there are examples of non-discriminatory AJMs as well as of discriminatory formal courts. For example, in a number of countries in Africa and Asia, wife beating is not considered to be a crime under national law and according to a 2016 World Bank report which studied 173 countries, approximately 155 have at least one law that discriminates against women, with countries in the Middle East, Asia and Africa being the worst offenders.<sup>226</sup> It can be misleading, therefore, to attribute discrimination to AJMs when it is the prevailing attitudes lying behind the discriminatory customary norms and laws that need to be addressed.

Furthermore, although very few women preside over AJMs, women are under-represented on the formal benches in Africa and in other parts of world, so the difference regarding equality of sexes should be seen as a matter of degree.<sup>227</sup> Just as attitudes towards women have changed over the last century and formal legal systems in many parts of world have become less discriminatory against women, change has also been reflected in AJMs, which have seen improvements in attitudes and steps to redress the gender imbalance. For example, in Sierra Leone provision is being made for female representation in dispute settlement cases and 'some truth-seeking mechanisms are actually headed by women'.<sup>228</sup> In Lesotho, chiefs have been delegating their authority to their wives or sisters due to male labour migration and low pay and as a result, decisions on inheritance issues have largely favoured women.<sup>229</sup> Unfortunately, these progressive steps are so far not mirrored in Burundi where efforts to increase the participation of women are being thwarted by the conservative attitudes of men.<sup>230</sup> In Rwanda, women have taken up an important role in the reconstruction efforts although *Gacaca* remains 'biased against women because of its inadequacy [to] fully address sexual crimes. Provisions have been made to allow women to testify on sexual crimes

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<sup>226</sup> World Bank Group, (2015) *Women, Business and the Law 2016: Getting to Equal* (Washington, DC: WBG) p2, 3

<sup>227</sup> Wojkowska, E. (2006) p21

<sup>228</sup> Alie, J.A.D. (2008) p133

<sup>229</sup> Wojkowska, E. (2006) p20

<sup>230</sup> Naniwe-Kaburahe, A. (2008) p170

[...] *in camera*. But the embedding of the *Gacaca* in local face-to-face community makes it difficult to tackle these crimes.<sup>231</sup> The experience of a former legal officer with the International Criminal Tribunal for Rwanda reveals it was difficult for women to speak about sexual violence because of the stigma attached to rape, which affected family relationships and marriage prospects, as 'no one wanted to marry or have anything to do with a rape victim'.<sup>232</sup>

However, in the right hands, chiefs and elders (who should comprise males and females) are custodians of customs and practices and serve as models in their environments for the promotion of virtues of mutual respect, dignity, integrity and truth.<sup>233</sup> As their communities begin to recover from the effects of violent conflict or repressive rule, if they are able to adapt to changing demands and conditions and make provision for wider participation and the inclusion of women, minorities and the young, it may be possible for the processes of AJMs to be modified sufficiently so as to enable them to deal with perpetrators of war crimes and crimes against humanity.<sup>234</sup>

In his 2004 report to the UNSC, Kofi Annan argued that 'we must learn to eschew one-size-fits-all formulas and the importation of foreign models and instead, base our support on national assessments, national participation and national needs and aspirations.'<sup>235</sup> Provided that an AJM is the democratic choice of the transitional society, a major benefit of AJMs is their proximity to victims and survivors as, in contrast to trials at The Hague, affected communities can be involved in their process of justice being done and seen to be done.<sup>236</sup> The question remains, therefore, whether a state proposing such an AJM has the potential to persuade the ICC to defer in its favour under the complementarity regime set out in the RSt. This question will be discussed further in Chapter Seven when the Court's interpretation to date of the RSt's complementarity provisions will be examined in detail.

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<sup>231</sup> Ingelaere, B. (2008) 'The Gacaca courts in Rwanda' in Huyse, L. & Salter, M. (eds.) pp25-59 at p52

<sup>232</sup> Author's discussion with Rosette Muzugo-Morrison, former Sexual Violence Investigator at the ICTR, on 20.04.16. Transcript on file.

<sup>233</sup> Naniwe-Kaburahe, A. (2008) p164

<sup>234</sup> Alie, J.A.D. (2008) p144

<sup>235</sup> UNSG Report, Summary, p1

<sup>236</sup> Huyse, L. (2008b) p187

In the next chapter, to consider further the issues raised in this chapter from the viewpoint of a specific AJM, *Mato Oput*, the Acholi ceremony traditionally used for conflict resolution between clans following an accidental or deliberate killing, will be examined in depth to ascertain whether it can satisfy the goals of ICJ and would be a viable alternative to prosecution at the ICC.

## CHAPTER FIVE

### UGANDA'S *MATO OPUT* AND THE REQUIREMENTS OF INTERNATIONAL CRIMINAL JUSTICE

#### Introduction

For 30 years, from 1986 when Yoweri Museveni, leader of the National Resistance Army/Movement (NRA/M) became President of Uganda, the population of northern Uganda has suffered from the effects of a brutal civil war. Indeed, conflict and violence have plagued much of Uganda since independence from Britain in 1962, which has had a profound effect on Ugandan politics and society. Museveni has faced at least 27 separate insurgencies since he seized power<sup>1</sup> but the war which started in 1987 in the Acholi sub-region of northern Uganda between the Government of Uganda (GoU) and the Lord's Resistance Army (LRA) led by Joseph Kony, has been the deadliest and most protracted. This war, which has spilled over Uganda's boundaries into South Sudan, the Democratic Republic of Congo (DRC) and the Central African Republic (CAR), has resulted in more than one hundred thousand civilian deaths,<sup>2</sup> the abductions of between 24,000 and 38,000 children and youth for forcible recruitment as child soldiers and of women to act as 'wives' and sex slaves,<sup>3</sup> the displacement of more than 1.8 million people,<sup>4</sup> egregious crimes against civilians and the virtual destruction of social, cultural and economic life in Acholiland.<sup>5</sup>

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<sup>1</sup> Quinn, J. (2014) 'Tradition?! Traditional Cultural Institutions on Customary Practices in Uganda' 49 *African Spectrum* pp29-54 at p33; see also Lomo, Z. and Hovil, L. (2004) *Behind the Violence: Causes Consequences and the Search for Solutions to the War in Northern Uganda* (Kampala: Refugee Law Project (RLP) Working Paper No 11) p1

<sup>2</sup> Lamunu, G. (2012) 'No More Amnesty for Uganda's LRA' Editorial Comment 20 June (Institute for War & Peace Reporting) [Online] Available: <https://iwpr.net/global-voices/no-more-amnesty-ugandas-lra> [Accessed 01.08.16]

<sup>3</sup> Shabdit, S. and Odiya, O. (2015) *Mapping Regional Reconciliation in Northern Uganda: A Case Study of the Acholi and Lango Sub-Regions* (Gulu: Justice and Reconciliation Project (JRP)) p2

<sup>4</sup> Uganda Human Development Report 2015: *Unlocking the Development Potential of Northern Uganda* (UHDR) (Kampala: UN Development Programme) p96

<sup>5</sup> Lomo, Z. and Hovil, L. (2004) p1

The Acholi people, who arguably have suffered most from the conflict,<sup>6</sup> have been vociferous in their calls for peace. In an effort to end the war, Acholi religious leaders and their supporters pressed a reluctant<sup>7</sup> Museveni to pass an Amnesty Act (AA) in 2000 which granted a blanket amnesty<sup>8</sup> to 'any Ugandan who has at any time since the 26<sup>th</sup> day of January 1986, engaged in or is engaging in war or armed rebellion against the government of the Republic of Uganda'.<sup>9</sup> Between 2000 and 2012 more than 26,000 rebels emerged from the bush to take advantage of the amnesty provisions, about one-half of whom were ex-LRA combatants<sup>10</sup> but Kony and some other top LRA commanders have not.

In December 2003, Museveni referred 'the situation regarding the LRA' to the International Criminal Court (ICC) and warrants for the arrest of five top leaders of the LRA were unsealed by the ICC in October 2005. Many civil society organisations, traditional and religious leaders, politicians and individuals in northern Uganda were aghast at the intervention of the ICC, pointing out that Museveni's referral was contrary to the provisions of the AA and would endanger peace prospects.<sup>11</sup> A delegation of Acholi leaders travelled to the ICC in March and April 2005 to appeal to the Prosecutor of the ICC to allow the Acholi to deal with the LRA rebels in their own, traditional way.<sup>12</sup> They argued that their traditional justice mechanisms were more appropriate and

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<sup>6</sup> War crimes have also been committed against other tribes of northern Uganda, such as the Langi, Madi and Teso, see Huyse, L. (2008b) 'Conclusions and recommendations' in Huyse, L. and Salter, M. (eds.) *Traditional Justice and Reconciliation after Violent Conflict: Learning from African Experiences* (Stockholm: IDEA) pp181-98 at p189

<sup>7</sup> Baines, E. (2007) 'The Haunting of Alice: Local Approaches to Justice and Reconciliation in Northern Uganda' 1 *IJTJ* pp91-114 at p101

<sup>8</sup> Although termed a 'blanket' amnesty, individual applications must be made to the Amnesty Commission

<sup>9</sup> The Ugandan Amnesty Act (Cap. 294, Laws of Uganda), Entry into force 21 January 2000, Clause (1) The act stipulates that it must be renewed every six months by Parliament and since it was passed, it has been regularly extended (last renewed for two years in June 2015)

<sup>10</sup> Lamunu, G. (2012); see also Okiror, S. (2015) 'Forgive and forget? Amnesty dilemma haunts Uganda' IRIN 12 June

<sup>11</sup> Hovil, L. and Lomo, Z. (2005) *Whose Justice? Perceptions of Uganda's Amnesty Act 2000: The Potential for Conflict Resolution and Long-Term Reconciliation* (Kampala: RLP) p22; see also Branch, A. (2004) 'International Justice, Local Injustice: The International Criminal Court in Northern Uganda' 51 *Dissent* pp22-26 at p22; RLP (2004) *The RLP Position Paper on the announcement of formal investigations of the Lord's Resistance Army by the Chief Prosecutor of the International Criminal Court and its implications on the search for peaceful solutions to the war in northern Uganda* pp1-12; Apuuli, K.P. (2006) 'The ICC Arrest Warrants for the Lord's Resistance Army Leaders and Peace Prospects for Northern Uganda' 4 *JICJ* pp179-187 at p180, 184; Human Rights Watch (HRW) (2005) *Uprooted and Forgotten: Impunity and HR abuses in Uganda* 9 Sept, Vol 17 No 12A p55

<sup>12</sup> Pham, P., Vinck, P., Wierda, M., Stover, E., di Giovanni, A. (2005) *Forgotten Voices: A Population-Based Survey of Attitudes about Peace and Justice in Northern Uganda* (ICTJ: University of California, Berkeley) p19; see also HRW (2005) p55

relevant to the local community than international trials.<sup>13</sup> They particularly singled out the Acholi traditional *Mato Oput* ceremony of reconciliation as the means by which accountability and reintegration of ex-LRA fighters would be achieved.<sup>14</sup>

Despite the ICC referral and outstanding arrest warrants, the GoU signed an Agreement on Accountability and Reconciliation (AAR) with the LRA at the Juba Peace Talks in 2007, which provided for traditional rituals, including *Mato Oput*, to be promoted, following necessary (albeit unspecified) modifications, as ‘a central part of the framework for accountability and reconciliation’ following cessation of hostilities.<sup>15</sup> The LRA later refused to sign the Comprehensive Peace Agreement whilst the ICC arrest warrants remained outstanding but the Prosecutor refused to accede to demands to withdraw the warrants, arguing that the real threat to peace was lack of enforcement of the Court’s decisions:

[A]llowed to remain at large, the criminals ask for immunity under one form or another as a condition to stopping the violence. They threaten to attack more victims. I call this extortion, I call it blackmail. We cannot yield.<sup>16</sup>

When asked specifically about *Mato Oput*, the Prosecutor commented:

If someone believes that the traditional system is enough to ensure justice and accountability, they can challenge the admissibility of the case. It is the defendant and the state party who have the responsibility for this and the judges will make the final decision.<sup>17</sup>

The question is whether such a challenge to the admissibility of a case based on an alternative justice mechanism (AJM) such as *Mato Oput* would have any chance of success. The aim of this chapter, therefore, is to consider whether the *Mato Oput*

<sup>13</sup> Allen, T. (2006) *Trial Justice: The International Criminal Court and the Lord’s Resistance Army* (London/New York: Zed Books) pp129, 132; see also Baines, E. (2007) p101

<sup>14</sup> Allen, T. (2006) p134

<sup>15</sup> 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 Clause 3.1.

<sup>16</sup> Moreno-Ocampo, L. (2007) “Building a Future on Peace and Justice” Nuremberg Address 24/25 June [Online] Available: [https://www.icc-cpi.int/NR/rdonlyres/4E466EDB-2B38-4BAF-AF5F-005461711149/143825/LMO\\_nuremberg\\_20070625\\_English.pdf](https://www.icc-cpi.int/NR/rdonlyres/4E466EDB-2B38-4BAF-AF5F-005461711149/143825/LMO_nuremberg_20070625_English.pdf) [Accessed 26.08.17]

<sup>17</sup> Osike, F. (2007) ‘Kony Must Face Trial – ICC’ *New Vision* July 12 [Online] Available: <https://www.globalpolicy.org/component/content/article/164-icc/28639.html> [Accessed 26.08.16]

ceremony promoted by those opposing the ICC intervention would satisfy the goals of international criminal justice identified in Chapter Two. The issue could become particularly pertinent if, for example, the outstanding ICC arrest warrants for the LRA leadership were executed<sup>18</sup> (or more were issued) and the GoU, referring to the provisions of the AA and AAR, challenged admissibility under the Rome Statute's (RSt) complementarity provisions.<sup>19</sup>

To conduct an evaluation of *Mato Oput* and its capacity to satisfy the aims of international criminal justice (ICJ) does not merely entail a comparison with western ideals of justice as epitomised by trials at the ICC and arguing how near or far *Mato Oput* comes to meeting those same standards. It is important to understand something of the Acholi, their cosmology and spiritual beliefs in order to place *Mato Oput* into context with regard to the LRA conflict. The first section of this chapter will therefore outline the origins of the Acholi tribe and their cultural and historical background and will discuss their belief systems surrounding spiritual interaction and death. The *Mato Oput* ritual and its significance in conflict resolution for Acholi society will then be discussed. The second section will discuss the historical and political background to the war and will attempt to establish its causes and effects from the viewpoint of the Acholi. This is necessary to establish whether the LRA conflict is a local, Acholi affair which demands local Acholi justice or whether it has wider dimensions and root causes which may make Acholi justice only partially legitimate and effective. In the third section, the steps taken in Northern Uganda to establish and adapt *Mato Oput* to deal with ex-LRA fighters and formerly-abducted persons (FAPs) will be outlined and in the fourth section, *Mato Oput* in its original and adapted forms will be assessed to ascertain whether they do satisfy the requirements of ICJ.

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<sup>18</sup> It is noteworthy that when Dominic Ongwen was arrested, the GoU handed him over to the ICC and did not attempt to challenge the ICC's jurisdiction in favour of *Mato Oput*

<sup>19</sup> Article 17

## Section One: The Acholi People of Northern Uganda and the *Mato Oput* Process

### Identity

The 1995 Constitution of Uganda recognises 56 indigenous communities in Uganda,<sup>20</sup> of which the Acholi are the eighth largest with a population of approximately 1.47 million in a total population of over 34 million.<sup>21</sup> The Acholi are mainly concentrated in four northern districts of Uganda: Amuru, Gulu, Kitgum and Pader, an area of approximately 11,000 square miles, with Amuru and Kitgum bordering Sudan.<sup>22</sup> The origins of the Acholi as a tribe has been the subject of considerable debate, some arguing that their ethnic identity came about due to colonialism.<sup>23</sup> Finnström agrees that ‘colonial practices were powerful instruments in the making of more rigid ethnic boundaries and divides’,<sup>24</sup> but questions the premise of colonial invention on the grounds that ‘historical forebears of the Acholi [...] lived and socialised with one another before Europeans discovered their land and put a name to it in writing or put borders on the map’.<sup>25</sup>

Finnström also asserts that it was ‘the colonialists’ inability to identify and recognise any indigenous socio-political organization’ that motivated them to impose their own ‘order and meaning’ upon northern Uganda.<sup>26</sup> Prior to colonial rule, there were approximately 60 chiefdoms in Acholiland, each ruled by a chief or *rwot* (*rwodi pl.*) of aristocratic descent (*kal*) who were anointed with oil from the shea butter tree and known as *rwodi moo*.<sup>27</sup> Under the British colonial administration,<sup>28</sup> the hereditary *rwodi moo* were

<sup>20</sup> Article 10(a) together with the Third Schedule

<sup>21</sup> National Population and Housing Census 2014, Ugandan Bureau of Statistics, Kampala.

<sup>22</sup> Finnström, S. (2008) *Living with Bad Surroundings* (Durham/London: Duke University Press) pp25, 33

<sup>23</sup> Branch, A. (2014) ‘The Violence of Peace: Ethnojustice in Northern Uganda’ 45 *Development and Change* pp608-630 at p621; see also Allen, T. (2007) ‘The International Criminal Court and the invention of traditional justice in Northern Uganda’ 3 *Politique Africaine* pp147-166 at para.32 (pages unnumbered); Behrend, H. (1999) *Alice Lakwena & the Holy Spirits: War in Northern Uganda 1986-97* (Oxford: James Currey Ltd) (asserting the ‘Acholi did not exist in precolonial times.’) p14; Allen, T. (2006) (stating ‘the Acholi did not exist as a discrete ‘tribal’ group until the early protectorate’) p162

<sup>24</sup> Finnström, S. (2008) p38

<sup>25</sup> *Ibid* p54

<sup>26</sup> *Ibid* p40

<sup>27</sup> *Ibid* p42; see also Latigo, J.O. (2008) ‘Northern Uganda: tradition-based practices in the Acholi region’ in Huyse, L. and Salter, M. (eds) pp85-120 at p102

<sup>28</sup> The British occupation of Acholi-land began in 1898 and colonial rule proper commenced in 1910 after they finally defeated the Acholi and set up headquarters in Gulu and Kitgum



removed from power and the British ensured that their elected replacements (who were commoners, *labong*), were willing to co-operate with the colonial administration.<sup>29</sup>

The heavy recruitment of Acholi into the army during the colonial period has led to the stereo-typing of the Acholi as a warrior people which, according to Finnström, 'few scholars have made any serious effort to question ... and academic understandings continue to reinforce'.<sup>30</sup> Latigo contends that the suggestion of the British viewing the Acholi as a warrior people and recruiting them extensively into the army for this reason is an 'unsubstantiated myth created by the British' which was 'based entirely on prejudice and misrepresentation of facts and was used for political reasons'.<sup>31</sup> Nonetheless, '[a]ccount after account recapitulates the view that the Acholi have a militarised ethnic identity',<sup>32</sup> an image which has been reinforced by the GoU in order both to 'promote [Acholi ethnic identity] as a central explanation for the conflict and its violence'<sup>33</sup> and to justify its military rather than political response to the grievances of the Acholi people.

### Cosmology

To assist in the understanding of the applicability and impact of the *Mato Oput* ceremonies today proposed by Acholi Elders to deal with ex-LRA fighters, it will be useful to examine Acholi belief systems and how they 'draw on local cosmologies in times of moral crisis to interpret and navigate the way forward'.<sup>34</sup>

Although the individual practices of Acholi clans may vary, there is a commonality of principle and belief,<sup>35</sup> the central theme of which is belief in the existence of spirits known as *Jogi* (sing. *jok*) which influence and affect everyday life.<sup>36</sup> There are five inter-

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<sup>29</sup> Finnström, S. (2008) p41

<sup>30</sup> *Ibid* p61

<sup>31</sup> Latigo, J.O. (2008) p86

<sup>32</sup> Finnström, S. (2008) p80

<sup>33</sup> *Ibid* p219

<sup>34</sup> Baines, E. (2010) 'Spirits and Social Reconstruction after Mass Violence: Rethinking Transitional Justice' 109 *Africa Affairs* pp409-430 at p411

<sup>35</sup> Baines, E. (2007) p103

<sup>36</sup> For a full and detailed discussion on the history of religions in Acholi, see Behrend, H. (1999) pp100-128

related levels of social and political systems in Acholi society: the home, hamlet, village, domain and Acholiland.<sup>37</sup> At each level of society, the spirits live among the Acholi in their sacred shrines (*abila*) which form the ritual centre, watching over the moral order.<sup>38</sup> For the Acholi, the *jogi* are human-like with needs and desires that have to be satisfied by the living on their behalf.<sup>39</sup> Since these spirits can bring trouble to the clan if they are offended, of fundamental importance to the Acholi is ascertaining the cause of any misfortune and rectifying it.<sup>40</sup> The whole clan assumes collective responsibility for righting the wrong, with Elders conducting traditional rituals at the level required to appease ancestors and ensure the moral order is upheld.<sup>41</sup>

*Jogi* are divided into 'chiefdom' and 'clan *jogi*', which are benevolent spirits that enforce the moral code and punish violations but are responsible for the clan's welfare and 'free *jogi*' which are wandering spirits, unattached to a particular clan or area.<sup>42</sup> Free *jogi* are vengeful and can bring misfortune to those they encounter with unexplained illnesses and afflictions often being attributed to a free *jok*.<sup>43</sup> The Acholi have strict taboos associated with death, killing and the interaction with dead bodies which require an extensive series of funeral rites to be performed to appease the spirit of the dead person.<sup>44</sup> Acholi believe spirits of the person who either died badly or whose corpse was not buried properly or was treated disrespectfully can turn into *cen*, a 'vengeance ghost' who will haunt the location of their killing, the killer or the person who mistreated the body and possibly even their family.<sup>45</sup> Since *cen* gather in places where death occurred and enter passers-by, any person passing a corpse must cover it with leaves of the *olwedo* plant and immediately request the Elders to perform the proper funeral

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<sup>37</sup> Lamony, S. (2007) *Approaching National Reconciliation in Uganda: Perspectives on Applicable Justice Systems* UCICC p6

<sup>38</sup> *Ibid*; See also Behrend, H. (1999) p15

<sup>39</sup> Lonergan, K. (2012) 'Gender and Generation in Acholi Traditional Justice Mechanisms' JRP Field Note XVII November (Gulu, JRP) p2

<sup>40</sup> Baines, E. (2010) p417

<sup>41</sup> Lonergan, K. (2012) p2

<sup>42</sup> *Ibid*

<sup>43</sup> *Ibid*

<sup>44</sup> *Ibid* p3

<sup>45</sup> Baines, E. (2010) p420

rites.<sup>46</sup> If this is not done, the spirits of the dead will seek revenge and torment the person(s) who mistreated the corpse.<sup>47</sup>

Sometimes, a desire for revenge leads the Acholi to act in ways which would deliberately incur the wrath of the spirit world. For example, Baines describes how Acholi buried those murdered by government soldiers (the Ugandan People's Defence Force (UPDF)) next to the army camp instead of in their own homesteads to encourage the spirits to take revenge on the soldiers.<sup>48</sup> Baines also describes how the bones of those killed in an ambush on a road were not buried but were thrown into the bush to enable the spirits to exact revenge on the killers. The Acholi have suffered terrible abuses at the hands of the UPDF and as Baines says, '[i]n the absence of state accountability, justice is delivered through the spirit world.'<sup>49</sup>

The LRA conflict has seriously affected these traditional customs for reasons including abducted persons being forced to kill brutally, civilians fleeing attacks being unable to properly bury their dead and life in internally displaced person (IDP) camps severely restricting the freedom and resources to perform traditional ceremonies. Baines has noted, for example, that formerly-abducted persons (FAPs) who have unsuccessfully re-integrated into their communities often quote possession by *cen* and their inability to perform *moyo kum*, a 'cleansing of the body' ritual to expel *cen* as the reason.<sup>50</sup> Furthermore, she notes the reluctance of some people in IDP camps to return to their villages where massacres have occurred until *moyo piny* rituals to cleanse and remove *cen* from the area in and around their villages have been performed.<sup>51</sup>

As described in this section, Acholi spiritual and cultural moral codes commonly involve acknowledgement of wrongdoing and reconciliation through rituals and spiritual appeasement, according to the level and seriousness of the violation. Whether or not

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<sup>46</sup> Lonergan, K. (2012) p3; see also Finnström, S. (2008) p88

<sup>47</sup> Lonergan, K. (2012) p3; see also Baines, E. (2005) *Roco Wat I Acoli: Restoring Relationships in Acholi-land: Traditional Approaches to Reconciliation and Justice (Roco Wat)* (Gulu: Liu Institute for Global Issues) p12

<sup>48</sup> Baines, E. (2010) p422

<sup>49</sup> *Ibid* p423

<sup>50</sup> *Ibid* p420

<sup>51</sup> *Ibid* p421

perpetrators of crimes against the Acholi and other tribes are dealt with by way of formal trials, for many Acholi there may still be a need at grass-roots level for the traditional rituals and ceremonies which invoke the spirit world, in order to achieve some form of accountability, atonement and social repair in a population devastated by the conflict.

In the next section, the *Mato Oput* ritual and its cultural and spiritual meaning for the Acholi people will be discussed.

### **Mato Oput**

*Mato Oput* ('drinking the bitter roots' to wash away bitterness) is the ceremony traditionally used in cases of inter-clan deliberate or accidental killings.<sup>52</sup> Acholi people believe that life is sacred and the killing of a human being is strictly forbidden.<sup>53</sup> If a killing does occur, Acholi believe the anger of the *jogi* of the victim's clan will be invoked against the offender's clan and this will create a supernatural barrier between the two clans which will not disappear 'until the killing is atoned for and a religious rite of reconciliation has been performed, to cleanse the taint.'<sup>54</sup> *Mato Oput* is described as the final act in the process of reconciliation which involves the establishment of the truth, accountability and acknowledgement of wrongdoing, the payment of compensation for the life lost (*culo kwor*) and the restoration of relationships.<sup>55</sup> Accounts of *Mato Oput* claim that *culo kwor* is an important feature of the process since it symbolises acceptance of the suffering caused by the offender's act and works as a deterrent to prevent a similar offence in the future.<sup>56</sup>

The process is voluntary and until the ceremony takes place, the offender is treated as unclean and is excluded from the homesteads in his community for fear that any *cen*

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<sup>52</sup> *Ibid* p104; see also Anyeko, K., Baines, E., Komakech, E., Ojok, B., Ogora, L.O., Victor, L. (2012) 'The Cooling of Hearts': Community Truth-Telling in Northern Uganda' 13 *HRR* pp107-124 at p111

<sup>53</sup> Latigo, J.O. (2008) p103

<sup>54</sup> *Ibid*

<sup>55</sup> Baines, E. (2007) p104

<sup>56</sup> Lonergan, K. (2012) p6

attached to him will pollute others.<sup>57</sup> Once the offender has freely confessed his wrongdoing to his village Elders, they report the offence to the clan Elders and responsibility for the offence now lies with the offender's whole clan which can have no social interaction with the victim's clan or community. 'Intermarriage, trade and joint parties between the conflicting clans [are] made impossible and the clans [involved] cannot socialise or share food or drink' until a process of reconciliation is completed.<sup>58</sup> This social exclusion is a major factor in persuading the offender's community to accept collective guilt, express remorse and seek reconciliation.<sup>59</sup>

The ultimate goal of *Mato Oput* is the restoration of relations between the clans and following a cooling-off period, a negotiation process begins, which can last from months to decades.<sup>60</sup> An impartial mediator or a reconciliation committee (*kal kwaro*) will conduct negotiations between the two clans for the payment of *culo kwor* and a reconciliation.<sup>61</sup> When the compensation amount is agreed, a contribution is made by every household in the offender's clan on the basis of collective responsibility.<sup>62</sup> Latigo states that after *culo kwor*, the ceremony takes place 'in an uncultivated field which is usually somewhere between the villages or communal settlements of the two clans, away from any footpath or any place commonly frequented by women and children.'<sup>63</sup>

The *Mato Oput* ritual itself is described in a report by Stephen Lamony from which the following has been summarised:<sup>64</sup>

In preparation for the ritual, an elder will dig up roots from the *oput* tree and they will be ground into a powder which is mixed with fruit juice<sup>65</sup> in a new calabash carefully placed on the ground. Each clan will provide a sheep which will be sacrificed

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<sup>57</sup> Latigo, J.O. (2008) p104

<sup>58</sup> Finnström, S. (2008) p224

<sup>59</sup> Baines, E. (2005) p55 explaining that in communal cultures where food, water, land and social relations are shared between families of respective clans and chiefdoms this exclusion is highly significant

<sup>60</sup> Anyeko, K. *et al.* (2012) p111

<sup>61</sup> *Ibid*

<sup>62</sup> Compensation is usually in the form of money or cattle. Cattle for the Acholi are 'the most prestigious form of wealth', see Finnström, S. (2008) p34

<sup>63</sup> Latigo, J.O. (2008) p104

<sup>64</sup> Lamony, S. (2007) p11; For other descriptions of the *Mato Oput* ceremony see e.g. Baines, E. (2005) p57-8, Latigo, J.O. (2008) pp103-5; Baines, E. (2007) p104-5

<sup>65</sup> Sometimes the root is mixed with a local brew called *kwete*

at the site of reconciliation by the elder leading the ceremony and the blood of both will be added to the calabash containing the *oput* and fruit juice mixture to form a 'reconciliation drink'. The close relatives of the victim and the offender gather around the calabash in a gesture signifying the end of hostilities and the beginning of reconciliation. In an act symbolizing the swallowing of all bitterness between the clans, the offender and a close relative of the victim each kneel, their hands folded behind their backs and take three sips of the drink in the calabash without using their hands. Other relatives will be encouraged to drink the reconciliation drink too.

Elders then check the compensation to ensure it is as agreed and when it is declared acceptable, the Elders bless the compensation by smearing the chest of each person present with the entrails of the sacrificed sheep, using words to the effect of "Let these cows produce many and only female offspring. We all make mistakes. May peace and calm now return among us".<sup>66</sup>

The sacrificed sheep are cooked and following the drinking ceremony, the livers of the animals are cut into pieces and the killer feeds pieces to the close relative of the victim who in turn feeds pieces of the liver to the killer. The rest of the sheep is then eaten by both sides to confirm full reconciliation between the clans has been achieved. An elder will beat a royal *bwola* drum and the women will begin to sing ululations which will encourage people from the area to join the reconciled group for dancing and singing. The feasting may continue for a second day and may require further animals to be slaughtered to feed the celebrants.

It is clear from the description of the *Mato Oput* outlined above that the process contains elements of truth and accountability, the payment of compensation and an agreement between the parties for reconciliation. *Mato Oput* is therefore an important justice mechanism for the Acholi but how appropriate it is, in the context of the war between the GoU and the LRA, to deal with the crimes that have been committed

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<sup>66</sup> Before colonial times, the compensation was a girl from the offender's clan both to bind the families together and in order that any child born to that girl would replace the life of the victim but in 1934, the British outlawed this practice and ordered that compensation should instead be ten cows

against civilians will be considered in section three following a discussion of the factors leading to the LRA conflict in the next section.

## **Section Two: The Background and History of Conflict in Northern Uganda**

In this section, the historical background to the ethnic and other divisions that have beset Uganda since colonial times will be outlined to contextualise the complex conflict in Northern Uganda and further afield. In support of the argument for local (or Acholi) justice, the war has been portrayed as an Acholi conflict, peripheral to the rest of Uganda, which the Acholi should be permitted to resolve in their traditional way, using long established justice mechanisms. In this section, the background of the LRA conflict will be examined to see if this interpretation of the war and the call for Acholi traditional justice as the appropriate means of achieving accountability are justified.

### **Colonial Rule**

When Uganda became a British protectorate in 1894, it comprised many diverse nationalities and ethnic groups. To better and profitably manage this diversity, the British exploited pre-existing ethnic tensions thereby undermining any potential co-ordinated resistance.<sup>67</sup> Opting for a policy of 'divide and rule', the British favoured different ethnic groups and regions for their perceived attributes.<sup>68</sup> They imposed, for example, a division of labour which ran along regional lines, with the Nile dividing the country not only geographically but also politically.<sup>69</sup> Those from the south were preferred for agriculture and the civil service and those in the north, particularly the Acholi, for the military.<sup>70</sup>

This resulted in significant political and economic division between north and south Uganda which was deepened by religious divisions fostered by the Catholic and Anglican

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<sup>67</sup> Lomo, Z. and Hovil, L. (2004) p10

<sup>68</sup> Latigo, S. (2008) p89

<sup>69</sup> Mamdani, M. (1988) 'Uganda in Transition: two years of the NRA/NRM' 10 *Third World Quarterly* pp1155-1181 at p1155

<sup>70</sup> Finnström, S. (2008) p60

churches, so that 'by the time of independence in 1962, the organising principles of ethnicity, sub-region, religion and politics could only be extricated from one another with considerable difficulty'.<sup>71</sup>

### Post-Colonial Rule

Following independence in 1962, Milton Obote, a Langi from the north, became Prime Minister. He initiated a strategy of 'politicisation and militarisation of ethnicity' later replicated by successive regimes,<sup>72</sup> recruiting more troops from the north and swiftly increasing numbers from 700 at independence to 9000, over one-third of which were Acholi.<sup>73</sup>

Idi Amin mounted a successful coup against Obote in January 1971 and 'introduce[d] competitive retaliation on an ethnic basis',<sup>74</sup> systematically removing the pro-Obote Acholi and Langi contingent from the army by means of mass executions.<sup>75</sup> Amin replenished his depleted national army by recruiting the urban poor from his own West Nile region (*Kakwa*) as well as Nubian Ugandans and mercenaries from South Sudan.<sup>76</sup> Determined to exterminate all opposition, Amin's forces slaughtered thousands of Acholi political leaders, intellectuals and civilians.<sup>77</sup>

Many who survived Amin's purges fled into exile but in 1979, they returned and assisted by Tanzanian forces, captured Kampala, ousting Amin from power. Obote returned to power in 1980 and again reformed the composition of the national army, (now the Uganda National Liberation Army (UNLA)) to reflect his northern bedrock of support by recruiting heavily from the Acholi and Langi. The new army took violent revenge on the people of the West Nile region for their own sufferings during Amin's regime.<sup>78</sup>

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<sup>71</sup> Dolan, C. (2005) 'Understanding War and Its Continuation: The Case of Northern Uganda' PhD thesis, LSE) p71

<sup>72</sup> Branch, A. (2005) 'Neither Peace nor Justice: Political Violence and the Peasantry in North Uganda 1986-98' 8 *African Studies Quarterly* pp1-31 p9

<sup>73</sup> Branch, A. (2011a) *Displacing Human Rights: War and Intervention in Northern Uganda* (Oxford: OUP) p56

<sup>74</sup> Van Eyck, F. (2003) p17

<sup>75</sup> *Ibid* p16

<sup>76</sup> *Ibid*; see also Mamdani, M. (1988) p1158

<sup>77</sup> Mamdani, M. (1988) p1158

<sup>78</sup> Finnström, S. (2008) p65



During Obote's second period in power, he faced many insurgencies and one rebel group fighting the UNLA was the southern-based National Resistance Army (NRA), led by Yoweri Museveni. The UNLA began to factionalise<sup>79</sup> which resulted in a coup led by Acholi General Toto Okello, who deposed Obote in 1985 and immediately invited all political parties and insurgent groups to join a Military Council, which would become the new government of Uganda. The NRA refused to join so from August to December 1985, Okello and the NRA held peace talks which concluded in a power-sharing agreement.<sup>80</sup> Throughout the peace process, however, Museveni continued his military campaign, winning considerable support from the civilian population of the Luwero triangle and recruiting to the NRA a 'lumpen militariat'.<sup>81</sup> In January 1986, the NRA seized Kampala and Museveni became Uganda's sixth President in seven years. For many northerners, the NRA's annulment of the power-sharing agreement was a betrayal and resentment against Museveni for his 'backstabbing' has persisted.<sup>82</sup>

### **Museveni and the National Movement Government**

The NRA/M victory ended the colonial division of labour where northerners controlled the army and government and southerners dominated in the civil service and trade, by concentrating control of all areas of socio-economic, political and military life in the south. The UNLA retreated north, robbing and plundering as they went, quickly followed by the NRA to whom the Acholi civilians looked for protection. The NRA successfully defeated the retreating UNLA and took control of the major Acholi towns of Gulu and Kitgum. Many former UNLA soldiers then fled to Acholi areas of Sudan, where they were joined by Acholi politicians and others 'originating from the leadership of previous regimes, particularly from within the armed forces'.<sup>83</sup> Here they formed various anti-government groups, the best known of which was the Uganda People's Democratic Army (UPDA).<sup>84</sup>

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<sup>79</sup> Mamdani, M. (1988) p1159

<sup>80</sup> Lomo, Z. and Hovil, L. (2004) p5

<sup>81</sup> *Ibid*; (a lumpen militariat is a class of ill-trained soldiers and officers with no discernible skills and very low discipline, given, for example, to plundering and looting).

<sup>82</sup> *Ibid*

<sup>83</sup> Mamdani, M. (1988) p1169

<sup>84</sup> *Ibid*

Without the UNLA to fight and failing to perceive the lack of support for the UNLA among the Acholi, the NRA/M presumed instead an enemy united in its ethnicity.<sup>85</sup> The NRM government, rather than consolidating their military successes by winning over the 'hearts and minds' of the local population, committed the political error of launching 'a counterinsurgency without an insurgency',<sup>86</sup> their forces perpetrating violent atrocities against the Acholi civilians. The UPDA, as a result, built up considerable Acholi support, especially as it called upon the central government to implement in the north the same promises made to the south, specifically relating to security and ending dictatorship.<sup>87</sup> Determined to destroy this support, the NRA responded by killing and torturing scores of Acholi civilians, burning down their villages and grain stores and killing or stealing their cattle,<sup>88</sup> acts which were seen by the Acholi as a deliberate strategy to impoverish them.<sup>89</sup>

For the Acholi, therefore, the success of the NRA/M was devastating. They resented the loss of political and economic power as a result of Museveni's breaking of the December 1985 power-sharing agreement and they also feared that Museveni's government would marginalise them after their earlier dominance in the Ugandan government and national army.<sup>90</sup> They were suffering brutal NRA reprisals and unfortunately, the UPDA proved incapable of addressing their problems and of protecting them from NRA violence. Furthermore, its manner of replenishing supplies and recruits became increasingly coercive as Acholi support for the rebel force began to dwindle.<sup>91</sup> The political vacuum caused by the successes of the NRA/M and the corresponding decline of the UPDA (which signed a peace agreement with the NRA/M government at Pece Stadium in 1988<sup>92</sup>) was fundamental to the emergence and popularity of social

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<sup>85</sup> Branch, A. (2011a) p63

<sup>86</sup> *Ibid*

<sup>87</sup> Branch, A. (2005) p11

<sup>88</sup> *Ibid*

<sup>89</sup> Finnström, S. (2008) p72

<sup>90</sup> Lomo, Z. and Hovil, L. (2004) p5

<sup>91</sup> Finnström, S. (2008) p70

<sup>92</sup> Latigo, J.O. (2008) p88

movements such as the Holy Spirit Movement (HSM)<sup>93</sup> and ultimately the LRA, that reflected the anti-government feelings of northerners.

### **The Lord's Resistance Army**

Joseph Kony had fought Museveni with the UPDA before he established his new movement, absorbing ex-fighters from the UPDA and the HSM forces.<sup>94</sup> Kony initially focussed his attacks on the NRA but the Acholi were tired of living in a 'rebel versus government' conflict and failed to give Kony the popular support he craved.<sup>95</sup> Claiming to be defending the rights of the Acholi, Kony interpreted this as support for the government and disloyalty to his cause on their behalf and he began to attack Acholi civilians, escalating his atrocities in the belief that he had to cleanse the Acholi of evil.<sup>96</sup> Far from protecting the Acholi the NRA withdrew, rarely engaging the LRA in combat or attempting to do so.<sup>97</sup>

Violence against Acholi civilians by both sides of the conflict continued, each side blaming the Acholi for supporting and collaborating with the other.<sup>98</sup> The LRA retaliatory violence included murder, cutting off limbs, ears, noses and lips<sup>99</sup> and forcible abductions of men, women and children for use as soldiers, sex slaves and porters. The NRA killed and tortured suspected LRA collaborators whilst at the same time, the government attempted to explain its failure to defend the Acholi from LRA atrocities by insisting that the LRA conflict was not a matter for the NRA, it was an Acholi problem for the Acholi to deal with.<sup>100</sup> To further support their viewpoint, the government constantly referred to the LRA rebels as criminals and murderers and perpetuated the stereo-type of Acholi people being violent and warlike. For example, in an interview with HRW, Major General Kazini (UPDF commander and close military associate of

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<sup>93</sup> The HSM emerged in January 1985 and by December 1996 was said to number more than 18,000 soldiers. Led by Alice Lakwena, the military manoeuvres of the HSM as they marched south towards the capital were highly successful against the NRA until their forces were routed by the NRA just 80 miles from Kampala

<sup>94</sup> Finnström, S. (2008) p77

<sup>95</sup> Baines, E. (2005) p13

<sup>96</sup> Branch, A. (2005) p14

<sup>97</sup> *Ibid* p15

<sup>98</sup> Lomo, Z. and Hovil, L. (2004) p9

<sup>99</sup> See Branch, A. (2005) p16-17 for a rebel commander's explanation for these atrocities

<sup>100</sup> *Ibid* p14

Museveni) blamed the Acholi for the violent abuses inflicted upon them by government forces stating that “[i]f anything, it is the local Acholi soldiers causing the problems. It’s the cultural background of the people here; they are very violent. It’s genetic.”<sup>101</sup>

### **‘Protected Villages’**

In September 1996, the GoU mobilised the UPDF (the successor to the NRA) to forcibly move (through a campaign of murder, threats, bombing and burning down of villages) the whole Acholi population into IDP camps which they euphemistically called ‘protected villages’.<sup>102</sup> By 2006, the population in the 251 camps northern Uganda totalled 1.84 million, approximately 90% of the Acholi population.<sup>103</sup> Ostensibly, the camps were established to protect the Acholi from the LRA but according to Dolan, they were ‘primary sites of Social Torture, as evidenced in widespread violation, dread, disorientation, dependency, debilitation and humiliation, all of which are tactics and symptoms typical of torture.’<sup>104</sup>

In the camps, Acholi were virtually unprotected by the UPDF and were far worse off than in their villages where they were largely self-sufficient.<sup>105</sup> The GoU had created what Jan Egeland (UN Under-Secretary for Humanitarian Affairs), after visiting IDP camps in the Kitgum district, declared ‘one of the worst humanitarian crises in the world’.<sup>106</sup> The overcrowding, severe shortages of food, water and medicine and deplorable conditions of hygiene resulted in mortality levels in the camps reaching approximately 1000 people per week, predominantly due to starvation and treatable diseases.<sup>107</sup> The Acholi became totally dependent on food aid to survive<sup>108</sup> because they were not permitted to leave the camps to work on their own land: they were threatened with being arrested

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<sup>101</sup> Finnström, S. (2008) p114 (quoting HRW 1997 p59)

<sup>102</sup> Branch, A. (2005) p19

<sup>103</sup> Shabditia, S. and Odiya, O. (2015) p2

<sup>104</sup> Dolan, C. (2005) p16

<sup>105</sup> Branch, A. (2005) describing how one camp of 50,000 had 45 soldiers and another of 15,000 had 12 soldiers to protect them p20

<sup>106</sup> UN Press Release (2003) ‘Head of UN Humanitarian Affairs Office Visits Northern Uganda, says ‘Deeply Shocked’ by ‘War against Children’ 10 November [Online] Available: <http://www.un.org/press/en/2003/afr750.doc.htm> [Accessed 06.08.16]

<sup>107</sup> Finnström, S. (2008) p12

<sup>108</sup> Baines, E., Stover, E. and Wierda, M. (2006) *War-Affected Children and Youth in Northern Uganda: Toward a Brighter Future: An Assessment Report May 2006* (Chicago: MacArthur Foundation) p10

or shot as suspected rebels if they were found outside the camps.<sup>109</sup> The UPDF routinely subjected camp residents to violent assaults, torture and other mistreatments, often killing indiscriminately.<sup>110</sup> With the UPDF providing little or no protection, the camp residents were sitting targets for the LRA, unable to escape their frequent attacks on the camps looting, stealing supplies and abducting.<sup>111</sup> Indeed, it was estimated that at the height of the conflict, every night around 40,000 children travelled from the camps to the towns where they felt it safer to sleep in shelters, bus stations, schools, hospitals and on the streets than in the camps.<sup>112</sup> Life in the camps was so bad, some abductees were said to have stayed with the LRA in preference to camp life.<sup>113</sup>

### **International, National or Local Conflict?**

It is a mainstream view that the nature of post-Cold War conflicts reflect ‘increasingly intra-state struggles rather than clearly delineated international conflicts.’<sup>114</sup> While this is undoubtedly correct, it is questionable whether the fighting between the GoU and the LRA can accurately be termed an ‘intra-state struggle’ considering the incursions into neighbouring territories by both sides. For example, following the failure of the Juba peace talks between the GoU and the LRA in April 2008, the governments of Uganda, DRC, South Sudan and CAR launched ‘Operation Lightning Thunder’, an attack on LRA bases in the DRC in December 2008. The mission failed to capture senior LRA leaders but resulted in brutal reprisals by the LRA on the civilian populations of the DRC and South Sudan.<sup>115</sup>

The logistic and military equipment support provided to the LRA since the early 1990s by the Sudanese government in return for LRA help in quelling rebel forces in South Sudan, which in their turn received support from Museveni’s government, also gives the

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<sup>109</sup> Branch, A. (2005) p19

<sup>110</sup> See for example, HRW (2005) pp24-36

<sup>111</sup> Branch, A. (2005) pp19, 21; see also Finnström (2008) describing how the soldiers lived in the centre of the camp surrounded by residents: ‘It’s the people protecting the army’ p143

<sup>112</sup> Baines, E. (2007) p95-6, see also Baines, E. *et al.* (2006) p10

<sup>113</sup> Branch, A. (2005) p21

<sup>114</sup> Keller, L.M. (2007-8) ‘Achieving Peace with Justice: The International Criminal Court and Ugandan Alternative Justice Mechanisms’ *Connecticut JIL* p209-279 at p210

<sup>115</sup> Enough Project ‘The LRA in Congo, CAR and South Sudan’ (undated) [Online] Available: <http://www.enoughproject.org/conflicts/lra/congo-car-south-sudan> [Accessed 07.04.17]

conflict an international dimension.<sup>116</sup> It is believed that since April 2012, the LRA has moved to the Darfur region of Sudan where the Sudanese government is rumoured to be giving it safe shelter.<sup>117</sup>

Additionally, the continuation of the war has allowed Museveni to promote himself on the international stage, both as an ally of the US in the region in the 'war on terror' and with donor governments, which uphold Uganda as a 'model of democracy and development'.<sup>118</sup>

If not definitively international, a more accurate description of the war could be what Ramsbotham and Woodhouse term an 'international-social conflict'(ISC), specifically 'neither inter-state nor contained within the resources of domestic conflict management [but] between the two'.<sup>119</sup> They argue that the terms 'internal conflict' and 'civil war' do not 'capture the further twin characteristics of ISCs' which are 'rooted in relations between communal groups [... which ...break] out of the domestic arena and become a crisis for the state', causing 'massive human suffering and invit[ing] international intervention'.<sup>120</sup> This appears to be a 'fit' for the LRA war but is unlikely to be an acceptable definition for the GoU which, in the past, has not acknowledged that the LRA conflict is even a civil war, frequently dismissing it as a minor problem of insecurity in the north, peripheral to the rest of the country.<sup>121</sup>

Describing the LRA as 'nothing but criminals and murderers', 'bandits', 'hyenas', 'thugs' and 'terrorists'<sup>122</sup> and portraying Kony as a mad man whose aim was to rule Uganda in accordance with the Ten Commandments,<sup>123</sup> the GoU for many years refused to countenance peace talks, insisting that the LRA did not have a political manifesto and even imprisoning and charging with treason or suspected terrorism those who argued

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<sup>116</sup> Finnström, S. (2008) p84-5

<sup>117</sup> Enough Project (undated)

<sup>118</sup> Branch, A. (2005) p3

<sup>119</sup> Ramsbotham, O., Woodhouse, T. (1996) *Humanitarian Intervention in Contemporary Conflict* (Cambridge: Polity Press) p87

<sup>120</sup> *Ibid*

<sup>121</sup> Finnström, S. (2008) p119

<sup>122</sup> *Ibid* p96

<sup>123</sup> Baines, E. (2007) p100

to the contrary.<sup>124</sup> In fact, the LRA has published at least three manifestos (in 1996, 1997/8 and 1999) each setting out a number of objectives<sup>125</sup> ranging from the restoration of multi-party politics, nationwide socio-economic balance, the ending of corruption and the reform of parliament to empower it to deal with the critical political and economic issues of the country<sup>126</sup> to the promotion of human rights (HR), national unity and nationwide peace and security.<sup>127</sup>

Despite the LRA's obvious abuse of HR, these manifesto objectives indicate the fundamental socio-economic and political problems faced by the Acholi since Museveni seized power in 1986. For decades, they have been caricatured as backward, primitive and violent, a stereo-type from colonial times which has persisted and has been used by the Museveni government to justify military oppression in ethnic terms. The colonial policy of divide and rule is adjudged partly responsible for the turmoil that has troubled the country since independence, every successive regime leader having applied 'politicised ethnicity as a means by which they can acquire and maintain political power'.<sup>128</sup>

Since 2006, the situation in Acholiland has improved somewhat because there has been a cessation of rebel and military violence.<sup>129</sup> After more than a decade of living in IDP camps, many Acholi have returned to their villages (or have settled in new areas) to try to rebuild their lives.<sup>130</sup> Although the fighting in northern Uganda appears to have ended, however, the absence of war does not mean peace has been achieved.<sup>131</sup> The threat of resumption of the LRA conflict in Acholiland is ever-present<sup>132</sup> and the issue of

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<sup>124</sup> Finnström (2008) p120-1 (referring to reports by Uganda HR Commission 2003 and HRW 2003)

<sup>125</sup> Latigo, J.O. (2008) p91

<sup>126</sup> Finnström, S. (2008) p122; see also Latigo, J.O. (2008) p91-2

<sup>127</sup> Finnström, S. (2008) p123

<sup>128</sup> Latigo, J.O. (2008) p89

<sup>129</sup> Okiror, S. (2016) 'How the LRA still haunts northern Uganda: The appearance of an LRA commander at the ICC is stirring old memories' (Gulu: IRIN) 17 February

<sup>130</sup> Shabdita, S. and Odiya, O. (2015) p14

<sup>131</sup> Okiror, S. (2016)

<sup>132</sup> Finnström, S. (2008) p12; see also Pham, P. and Vinck, P. (2010) *Transitioning to Peace: A Population-Based Survey on Attitudes about Social Reconstruction and Justice in Northern Uganda* (Human Rights Centre: University of California, Berkeley) revealing that only 44% of respondents believe the peace to be permanent with 40% believing it to be only temporary because of the continued existence of the LRA (45%) and fear the LRA may return (45%) p17-8

peace and justice for those affected by the conflict remains just as relevant today as it was ten or even 20 years ago.

### **Section Three: Viewpoints on the Intervention of the ICC in Uganda**

Whether the cessation of violence in northern Uganda can be attributed to the intervention of the ICC is a debatable point. It certainly has been credited with encouraging the LRA leadership to the negotiating table but it was equally responsible for the breakdown of the Juba Peace negotiations when the Prosecutor refused to agree to the withdrawal of arrest warrants for the LRA leadership. For the GoU, the self-referral to the ICC was expedient for several reasons. First, it enabled the government to garner international support for its conflict with the LRA which its forces had been unable to defeat.<sup>133</sup> The failed military operations and the highlighting by the UN of the deplorable conditions suffered by Acholi in the government's IDP camps had tarnished the GoU's reputation and resulted in pressure for a peaceful resolution to the conflict, not least from international donors who funded between 35 and 50 per cent of Uganda's budget.<sup>134</sup>

The self-referral served the GoU by enabling it to improve its image on the international stage by projecting itself as a leader in international criminal justice (ICJ) fighting a criminal organisation. It also deflected attention from the human rights abuses against the Acholi committed by government forces, as the OTP was unlikely to risk antagonising the GoU, upon whose co-operation it relied, by investigating the UPDF.<sup>135</sup> The Prosecutor's decision to hold a joint press conference with Museveni and his subsequent failure to charge any UPDF members certainly fuelled suspicions that the ICC was being manipulated by Museveni in his struggle against the LRA.<sup>136</sup> Another advantage for Museveni was that the referral to the ICC put pressure on Sudan to end its support for the LRA and reports suggested that the government of Sudan (GoS) stopped supplying

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<sup>133</sup> RLP 2004

<sup>134</sup> Nouwen, S.M.H. (2013) *Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan* (Cambridge: CUP) p117

<sup>135</sup> *Ibid* p118

<sup>136</sup> Happold, M. (2007) 'The International Criminal Court and the Lord's Resistance Army' 8 *Melbourne JIL* pp159-184 at p170



the LRA in 2006.<sup>137</sup> As mentioned above, the issue of arrest warrants has often been credited with encouraging the LRA to attend the Juba peace negotiations. Equally, if not more persuasive, however, was the loss of Sudan's support following the implementation of the Comprehensive Peace Agreement between the GoS and the Sudan People's Liberation Army (SPLA).<sup>138</sup> The newly-formed Government of South Sudan (GOSS) denied the LRA territorial sanctuary and encouraged LRA leaders to negotiate with the GoU or face military attack by the SPLA.<sup>139</sup>

Museveni was also persuaded by the GOSS to attend the peace talks, despite his previous reluctance to accept the LRA as an equal negotiating partner. The immediate effect of the intervention of the ICC had been renewed attempts by the UPDF to defeat the LRA which had failed and when he also realised that the ICC arrest warrants had not increased the likelihood of Kony's arrest and that international pressure to improve the humanitarian situation in northern Uganda was increasing, the option to attend mediated talks became more attractive to Museveni. However, as stated in the Introduction to this chapter, the talks ultimately failed when Kony refused to sign the Final Peace Agreement unless the ICC withdrew the arrest warrants whereas, the GoU used the ICC to put pressure on Kony and would only agree to make representations to the UNSC and ICC after Kony had signed.<sup>140</sup>

Turning to those in northern Uganda, news of the ICC's intervention initially received a positive response, as Kony's imminent arrest was anticipated. However, major concerns surfaced when it was realised that the ICC had no enforcement powers of its own and would be relying on the UPDF to effect arrests as the UPDF had demonstrated for many years its inability to apprehend the LRA leadership.<sup>141</sup> The Acholi feared the LRA would mount violent reprisals against citizens in general and against those who it believed to be co-operating with the Court's investigation, in particular.<sup>142</sup> Further concerns

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<sup>137</sup> *Ibid* p180

<sup>138</sup> *Comprehensive Peace Agreement between the Government of the Republic of the Sudan and the Sudan People's Liberation Movement/Sudan People's Liberation Army*, signed 9 January 2005

<sup>139</sup> Nouwen, S. (2013) p130

<sup>140</sup> *Ibid* p140

<sup>141</sup> *Ibid* p142

<sup>142</sup> *Ibid*

centred on the welfare of LRA abductees who, forced to become soldiers had themselves perpetrated crimes against northern Ugandans, as it was feared their lives would be endangered by military attempts to execute the ICC arrest warrants.<sup>143</sup> Widespread Acholi support for the AA had been based on weakening the LRA by encouraging defections and it was believed that that ICC arrest warrants undermined the AA, discouraged defections and thereby prolonged the conflict and the horrors of camp life.<sup>144</sup>

Traditional leaders, supported by religious leaders and community based civil society organisations began to voice their opposition to the intervention of the ICC, basing their opposition on the dangers to achieving peace in the region and challenging the ICC's western notion of justice. They criticised the ICC for its selective justice in that it focussed on the LRA leadership and ignored the abuses perpetrated by government forces and those lower down the command chain.<sup>145</sup> ICC justice, they also argued, ignored the socio-economic causes of the conflict and failed to address the need for political solutions.<sup>146</sup> Furthermore, trials at the ICC would not restore relationships between victims and offenders and between their respective clans but instead, risked exacerbating tensions. Certainly, ICC trials would do nothing to heal the cosmological rifts between offenders and the spirit world. Finally, even punishment by the ICC was criticised as being too soft, leaders believing that a more severe punishment than life in an air-conditioned cell with plenty to eat would be for offenders to live among those to whom they had caused suffering, seeing the effects of their actions.<sup>147</sup>

Support for traditional Acholi justice for ex-LRA fighters, specifically focussed on *Mato Oput*, rather than trials at the ICC. *Mato Oput* had not traditionally been used for killings that occurred in war but rather for inter-clan deliberate or accidental killings.<sup>148</sup> In the next section, local and national efforts for the establishment of *Mato Oput* to deal with issues of accountability and reconciliation will be discussed.

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<sup>143</sup> *Ibid*

<sup>144</sup> *Ibid*

<sup>145</sup> *Ibid* p143

<sup>146</sup> *Ibid* p144

<sup>147</sup> *Ibid*

<sup>148</sup> Baines, E. (2005) p54; see also Baines, E. (2007) p104

#### Section Four: The Establishment and Operation of *Mato Oput*

The professed Acholi preference for *Mato Oput* over formal trials, which has been cited by supporters locally and by some international aid agencies as the appropriate way to address killing and other crimes committed during the LRA conflict, has been facilitated by the GoU in two ways. First, under pressure from the Acholi Religious Leaders Peace Initiative (ARLPI), the government passed the AA in 2000 granting a blanket amnesty to former combatants to encourage their return and reintegration,<sup>149</sup> and ‘borrowing largely from traditional approaches that emphasise ‘forgiveness’.’<sup>150</sup> Second, the GoU signed the AAR with the LRA on 29 June 2007 in Juba. The AAR aimed to strengthen domestic accountability mechanisms by adopting a variety of strategies to facilitate peace, justice and reconciliation:

Traditional justice mechanisms, such as *Culo Kwor*, *Mato Oput*, *Kayo Cuk*, *Ailuc* and *Tonu ci Koka* and others as practiced in the communities affected by the conflict, shall be promoted, with necessary modifications, as the central part of the framework for accountability and reconciliation.<sup>151</sup>

It is difficult to envisage how this provision could be effected, however, given the widespread crimes committed by LRA fighters against different tribes in northern Uganda and across borders, which could potentially necessitate each identified perpetrator undergoing several different traditional justice rituals.<sup>152</sup>

Furthermore, despite *Mato Oput* being heavily promoted as an Acholi traditional form of justice, it is debatable how prevalent the practice actually has been within Acholi society, especially since the outset of the LRA conflict.<sup>153</sup> The war and particularly the forced removals to IDP camps severely eroded Acholi communal life and with it, the

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<sup>149</sup> There has been criticism that the amnesty provisions have not been implemented fairly, especially after many returnees were arrested and charged with treason plus concern about the criminalisation of victims of abduction and the forced recruitment of returned fighters into government forces – see Latigo, J.O. (2008) p96

<sup>150</sup> Latigo, J.O. (2008) p95

<sup>151</sup> 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 Clause 3.1

<sup>152</sup> *Kayo Cuk* is the Langi justice mechanism, *Ailuc* is performed by the Teso and *Tonu ci Koka* by the Madi

<sup>153</sup> Baines, E. (2005) p52 stating *Mato Oput* is no longer widely practiced

foundation upon which the Acholi traditional values and beliefs, cultural knowledge and social institutions were based.<sup>154</sup> The roles of the *Rwodi* and Elders who perform the various traditional rituals and ceremonies, for example, were severely weakened by almost two decades of displacement.<sup>155</sup> No longer living in the centre of their chiefdoms, many *Rwodi* became distanced from their people and suffering extreme poverty in the camps, lost their significant role in cultural ceremonies, conflict resolution and community bonding.<sup>156</sup> As a result, Acholi understanding and knowledge of them and their position in the community greatly diminished, particularly among the young who had been born and raised in the camps.<sup>157</sup>

Likewise, the Elders who survived life in the camps often found themselves isolated from their village neighbours who were scattered and intermingled with other clans in the grossly overcrowded camps.<sup>158</sup> Like the *Rwodi*, Elders felt disrespected, especially by the youth raised in camps who had never experienced the role and duties of village Elders.<sup>159</sup> The traditional means of teaching and reinforcing social and cultural norms before displacement had been extended families sitting around the communal village fire (*wang oo*) in the evenings to talk, tell folktales, sing and dance but this was impossible in the camps due to curfews and fear of rebel attack.<sup>160</sup> Thus, opportunities to learn about and experience traditional ceremonies were very limited, added to which, extreme poverty had made it impossible to assemble all the essential components for specific rituals.<sup>161</sup> High levels of drinking in the camps (even among the Elders themselves)<sup>162</sup> as well as prostitution and crimes such as rape, assault and theft further disrupted social order and harmony which some attributed to the loss of guidance and leadership from the Elders.<sup>163</sup>

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<sup>154</sup> Lomo, Z. and Hovil, L. (2004) p27

<sup>155</sup> Baines, E. (2005) p21

<sup>156</sup> *Ibid*

<sup>157</sup> *Ibid*

<sup>158</sup> *Ibid* p22

<sup>159</sup> *Ibid*

<sup>160</sup> Finnström, S. (2008) p146

<sup>161</sup> Latigo, J.O. (2008) p107

<sup>162</sup> Baines, E. (2005) p22

<sup>163</sup> *Ibid* p22-3

It was to address this cultural and societal turmoil that several conferences known as *Kacoke Madit* (Big Meeting) were held in London,<sup>164</sup> bringing together 'a full cross-section of Acholi'<sup>165</sup> to investigate possible ways of ending the LRA conflict peacefully.<sup>166</sup> After the first conference, anthropologist Dennis Pain was asked to canvass the views of Acholi 'opinion leaders' about peace and reconciliation<sup>167</sup> and to write a report<sup>168</sup> which became 'the first major articulation of a traditional reconciliation agenda for the Acholi.'<sup>169</sup> Pain's report outlined the 'traditional authority structure of the Acholi' and concluded that the conflict had led to the 'collapse of traditional networking and values' where 'the Elders have failed to take on the responsibility which they should have taken'.<sup>170</sup> Unfortunately, by blaming the conflict on the breakdown of traditional authority, Pain endorsed the view that the war was an intra-Acholi problem<sup>171</sup> which could be resolved via a 'community-based approach drawing on Acholi values and institutions'.<sup>172</sup>

In Pain's opinion, 'Acholi traditional resolution of conflict and violence stands among the highest practices anywhere in the world'<sup>173</sup> and he argued that Western law was 'incapable of addressing the situations of human rights abuses and break-down of social order which have arisen in Uganda'.<sup>174</sup> Highlighting *Mato Oput* as 'the ancient rite that allows for reconciliation with compensation rather than revenge',<sup>175</sup> Pain suggested a 'twin-track approach' that all LRA rebels should be given a formal amnesty and undergo a *Mato Oput* ritual.<sup>176</sup> He urged international donors to fund compensation for victims and support the re-invigoration of *Rwodi-moo*, whose influence, he stated, had been eroded by the conflict but whose moral authority remained intact.<sup>177</sup>

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<sup>164</sup> Over 300 Acholi from Uganda and worldwide attended the meeting, including government ministers, church leaders and LRA representatives

<sup>165</sup> Pain, D. (1997) *"The Bending of Spears": producing consensus for peace & development in Northern Uganda* p13

<sup>166</sup> *Ibid*; see also Allen, T. (2007) p4

<sup>167</sup> Allen, T. (2006) p132

<sup>168</sup> Pain's report was commissioned by International Alert, London

<sup>169</sup> Branch, A. (2011a) p155

<sup>170</sup> Pain, D. (1997) p78

<sup>171</sup> Branch, A. (2011a) p156

<sup>172</sup> Allen, T. (2006) p132

<sup>173</sup> Pain, D. (1997) p2

<sup>174</sup> *Ibid* p58-9

<sup>175</sup> Allen, T. (2007) p4

<sup>176</sup> Pain, D. (1997) p60

<sup>177</sup> *Ibid* p83, 86; see also Allen, T. (2007) p4

Research to follow up on Pain's findings began in 1999, funded by the Belgian government and administered by ACORD, a non-governmental organisation (NGO).<sup>178</sup> Unlike Pain, ACORD discovered 'weak and fragmented' traditional structures, Elders unsure how to perform traditional rituals and 'widespread disagreement over who the real traditional leaders actually were'.<sup>179</sup> Assessing Pain's report, Dolan concluded it is 'littered with cultural and political landmines' and 'perpetuates/creates a highly sentimental picture of Acholi culture rather than attempting to assess either the extent to which that picture is accurate or whether the cultural institutions identified are up to the task of bringing peace to northern Uganda'.<sup>180</sup> Nonetheless, the concept of Acholi traditional leaders promoting traditional reconciliation began to garner support from local HR campaigners,<sup>181</sup> the ARPLI and international NGO's working in northern Uganda<sup>182</sup> and there began 'a series of internationally and locally supported efforts to bolster the roles of Chiefs and Elders in conflict resolution'.<sup>183</sup>

One such effort in furtherance of Pain's proposal to revive Acholi cultural institutions was the establishment in 2000 of *Ker Kwaro Acholi* (KKA), comprising traditional Acholi chiefs and Elders, which became recognised as the Acholi legal cultural institution. Baines' report for the Liu Institute, *Roco Wat*, upheld the establishment of KKA as fundamental to the process of 'rejuvenat[ing] traditional culture and restor[ing] relationships'.<sup>184</sup> Mindful that many Elders were unfamiliar with the traditional rituals, it offered to assist by 'collecting and writing down practices, rituals, and ceremonies, which [will] proceed in tandem with the empowerment of KKA as the privileged body that will apply this formalised traditional justice system'.<sup>185</sup> Not leaving the Acholi to assimilate their own traditional practices prompted Branch to comment that 'the

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<sup>178</sup> Agency for Cooperation and Research in Development

<sup>179</sup> Allen, T. (2007) p5

<sup>180</sup> Dolan, C. (2000) 'Inventing traditional leadership? A critical assessment of Denis Pain's 'The Bending of the Spears'' COPE Working Paper no. 31 (London: ACORD) p12

<sup>181</sup> E.g. Barney Afako, head of Human Rights Focus; the RLP of Makerere University in Kampala

<sup>182</sup> Allen, T. (2007) p6

<sup>183</sup> Baines, E. (2005) p4; see also Branch, A. (2011a) p156 referring to projects 'spanning everything from discovering lost chiefs, building a palace for the so-called Acholi paramount chief, providing development funds for redistribution by the Acholi council of chiefs and providing money for reconciliation rituals.'

<sup>184</sup> Baines, E. (2005) p2

<sup>185</sup> Branch, A. (2011a) p164; see also Baines, E. (2005) p26

strangeness of foreign organisations teaching Elders how to be proper Acholi Elders is then compounded by the fact that Elders are then to teach recalcitrant youth and women how to be proper Acholi.<sup>186</sup> Recalling the British colonial practice of ‘indirect rule’ where local forms of adjudication and criminal justice were tolerated in rural areas but which ‘underwent a dramatic transformation’ due to colonial interference,<sup>187</sup> one might fear for the authenticity of such documented local customs and tribal procedures.

Branch’s reference to ‘recalcitrant youth and women’ highlights the attitudes of some of the male Elders in KKA who retained traditional views on appropriate gender and age roles and resented the emergent awareness of their rights among women and the young.<sup>188</sup> Elders criticised the expansion of these rights for preventing them from carrying out their ‘traditional roles’, including ‘disciplining a woman through beatings’.<sup>189</sup> The legitimacy and acceptability of the KKA is weakened by the fact that it is elderly-male dominated and does not represent women and youth.

For some, KKA’s incorporation had more sinister connotations, since by regularising and institutionalising the Acholi leadership, the government had indicated an ‘intention to circumscribe the authority of this body’ and ‘to keep it non-political.’<sup>190</sup> As Latigo comments, the re-emergence of the KKA:

was largely based on the blueprint of the inherited colonial administrative structure without the necessary anchoring in the deep traditional beliefs, culture and norms that had been practised hitherto. Thus both the status and the popular authority of this cultural institution, once considered as ‘providers’ and guides of their people, have been severely weakened.<sup>191</sup>

Efforts were also made to identify the true descendants of the *Rwodi moo* deposed during the colonial period and in 2000, traditional *Rwodi* were formally re-instated in 52 major clans of Acholiland.<sup>192</sup> In an unprecedented move, the *Rwot* of Payira in Gulu

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<sup>186</sup> Branch, A. (2011a) p164

<sup>187</sup> Vogler, R. (2005) *A World View of Criminal Justice* (Aldershot, Ashgate Publishing Ltd) p256

<sup>188</sup> Baines, E. (2005) p32-3

<sup>189</sup> *Ibid* p33

<sup>190</sup> Cline, L.E. (2013) p3

<sup>191</sup> Latigo, J.O. (2008) p103

<sup>192</sup> Baines, E. (2005) p4

district was elected to become 'paramount chief' or cultural head of the Acholi people.<sup>193</sup> For many Acholi, this was 'a violation of traditional customs' as traditionally there had never been a paramount chief and the many *Rwodi* had had a 'collaborative relationship with the Elders of each clan associated with them.'<sup>194</sup>

By mid-2005, dozens of ceremonies, referred to as *Mato Oput*, were being performed, sometimes attended by aid workers and journalists. For example, Barney Afako refers to a group *Mato Oput* ceremony in Pajule in November 2001 which involved 'about 20 recently returned LRA combatants and included many others who had already settled in the community'.<sup>195</sup> The ceremony 'was supported by non-governmental organisations (NGOs), churches, the amnesty commissioners, senior army commanders in the region and several representatives of NGOs attended the function'.<sup>196</sup> Afako states that another ceremony had taken place in Pabbo, Gulu district and others were planned in different parts of Acholi.<sup>197</sup> Latigo confirms the United States Agency for International Development-funded Northern Uganda Peace Initiative, through KKA, supported 54 of these ceremonies between 2004 and 2006.<sup>198</sup>

However, it appears that rather than the *Mato Oput* ceremony, an Acholi cleansing ritual called *Nyono Tong Gweno* ('stepping on the egg') had been adapted for LRA returnees and is being incorrectly referred to as *Mato Oput*. *Nyono Tong Gweno* is traditionally performed before a community's own sacred shrine<sup>199</sup> to welcome back to the homestead those who have been away for an extended period and who may have had experiences which have made them unclean, requiring them to be cleansed before they can re-enter the family homestead.<sup>200</sup> Since 2003, in some big towns and in the presence of the media, communal ceremonies which have been called *Mato Oput*, have been performed by the paramount chief for large numbers of returning fighters living in camps and also for former LRA commanders who have returned and have accepted

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<sup>193</sup> Allen, T. (2006) p133

<sup>194</sup> *Ibid* p149

<sup>195</sup> Afako, B. (2002) 'Reconciliation and justice: 'Mato Oput' and the Amnesty Act' (Accord 11) pp64-67 at p67

<sup>196</sup> *Ibid*

<sup>197</sup> *Ibid*

<sup>198</sup> Latigo, J.O. (2008) p105

<sup>199</sup> Lamony, S. (2007) p13

<sup>200</sup> *Ibid*



amnesty.<sup>201</sup> The purification ceremony has clearly been adapted in this new context as a ceremony to 'forgive' the LRA but it is not *Mato Oput*. To illustrate this point, Allen refers to a conversation he had with 'Brigadier' Sam Kolo just before Kolo went through one such ceremony which he called *Mato Oput*. When pressed by Allen as to whether:

he would really look into the faces of those he had harmed, request reconciliation and pay compensation for what he had done, he just laughed, saying he would not do that, but would do the *Mato Oput* that the paramount chief performed. I asked him if he thought the ceremony was really something serious. He laughed again, saying nothing.<sup>202</sup>

If those undergoing the ritual could be dismissive, then some Acholi themselves appear to be even more so. Lamony comments on the paramount chief rituals: '[t]o the Acholi, all these are just political shows which are empty of all religious and moral contents.'<sup>203</sup> Allen agrees, stating that he has found no widespread enthusiasm for the so-called *Mato Oput* or other ceremonies performed by the paramount chief.<sup>204</sup> One criticism was that the performance of *Mato Oput* and other healing ceremonies should be done at domain and chiefdom level by *Rwodi moo* and not by the paramount chief.<sup>205</sup> Others expressed concern that the ceremony should not be communally performed in the towns but separately at the individual's homestead. Some Elders have argued that the ceremonies provide an avenue for returnees to be forgiven without having to repent or ask for forgiveness<sup>206</sup> and some Acholi are adamant that large public rituals like those in Gulu were 'useless [and could] make things worse by concentrating *cen* in the urban areas.'<sup>207</sup> Furthermore, Madi, Langi and Teso were even more dismissive when asked, pointing out that they had suffered too so why should it be Acholi who did the forgiving?<sup>208</sup>

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<sup>201</sup> Baines, E. (2005) p44

<sup>202</sup> Allen T. (2007) p8; see also Allen, T. (2006) p166

<sup>203</sup> Lamony, S. (2007) p13

<sup>204</sup> Allen, T. (2006) p167; see also Allen, T. (2007) p8 describing how when his team contacted 238 resettled former LRA abductees in 2005, none had performed *Mato Oput* and only 69 had taken part in any kind of reconciliation ceremony

<sup>205</sup> See Allen, T. (2007) p7 relating how the paramount chief admitted that he did not know how to perform the traditional *Mato Oput* ceremony

<sup>206</sup> Baines, E. (2005) p47

<sup>207</sup> Allen, T. (2006) p154-5

<sup>208</sup> *Ibid* p167

*Roco Wat* offers a different viewpoint, however, stating that ‘communal cleansing ceremonies were started within camps and town centres as a means of addressing the impact of the conflict and forced displacement on traditional practices.’<sup>209</sup> One such ceremony held in Amuru involved 800 returnees and *Roco Wat* comments that the ceremony ‘may be the first form of ‘therapy’ for them.’<sup>210</sup> Returnees ‘often felt more accepted following a communal cleansing ceremony and they were better able to communicate and socialise with community members’ and the majority of family and neighbours of the returnees ‘were in favour of communal cleansing ceremonies’.<sup>211</sup> *Roco Wat* states the cleansing ceremonies are also an important communication with remaining rebels and abductees in the bush since they give the message that communities are willing to receive them back and ‘that the traditional leaders are going to be their guide to the justice and reconciliation process.’<sup>212</sup>

As for the ‘real’ *Mato Oput* ritual, Lamony says that ‘despite the extent to which *Mato Oput* has become known inside and outside Uganda, its performance is relatively rare in contemporary Acholi, especially in connection with the reintegration of former LRA combatants.’<sup>213</sup> Allen states that he has not encountered ‘any confirmed instance of *Mato Oput* being performed to re-integrate a former LRA combatant, although this is often claimed to be taking place’.<sup>214</sup> Finnström does describe attending four *Mato Oput* ceremonies performed by Elders during the course of his 1997-2002 fieldwork but none of them in fact involved re-integrating former LRA fighters.<sup>215</sup> Likewise, *Roco Wat* states that ‘researchers were partially able to record 50 cases of *Mato Oput* taking place between 2000 and 2005’ and details one in-depth case study which encompasses ‘the aspects of truth, compensation and ritual [...] considered central elements of the process’ but again that ceremony does not involve ex-LRA.<sup>216</sup> Even the *Mato Oput*

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<sup>209</sup> Baines, E. (2005) p44

<sup>210</sup> *Ibid* p46

<sup>211</sup> *Ibid* p45

<sup>212</sup> *Ibid* p47

<sup>213</sup> Lamony, S. (2007) p11

<sup>214</sup> Allen, T. (2006) p165; see also Baines, E. (2007) p69-70 stating ‘To the best knowledge of the author, *mato oput* between a LRA perpetrator’s clan and a victim’s clan has never occurred.’ (*sic*) p110; Baines, E. (2005) p69 stating ‘To date, no documented cases of *Mato Oput* have taken place with a former LRA commander and/or a former abducted person.’

<sup>215</sup> Finnström, S. (2008) pp224, 231

<sup>216</sup> Baines, E. (2005) pp58-65

ceremonies that do take place can be viewed as unsatisfactory. For example, in 2005, Allen's team attended and filmed a ceremony which they showed to Finnström's Acholi collaborator, Tonny Odiya Labol, who 'complained that it was not a 'real' *Mato Oput* at all [because] the Elders [...] did not even know how to cut the sheep in half in the correct way.'<sup>217</sup> Allen comments that '[f]or Tonny, people are just playing with customs and do not really understand them.'<sup>218</sup>

The scepticism regarding the '*Mato Oput*' ceremonies among the ordinary Acholi can be attributed to many factors, not least the decline in knowledge and understanding of Acholi culture and leadership that occurred during the conflict as previously described. Also, the ceremonies have been promoted by Acholi (male) leaders and perhaps a lack of consultation and involvement among all sections of Acholi society is also responsible for the dissatisfaction and disengagement often expressed.<sup>219</sup> The willingness of the perpetrators to undergo the cleansing ceremonies does not necessarily indicate that all has been forgiven and there certainly has been little evidence of 'following up' the cleansing ceremonies at grass roots level in terms of establishing and endorsing truth and forgiveness.<sup>220</sup>

It has been demonstrated in this section that whilst certain sections of Acholi society, namely traditional and religious leaders and their national and international supporters, have vigorously promoted Acholi justice and specifically *Mato Oput* as the appropriate mechanism for achieving accountability and reconciliation in the LRA conflict, there are fundamental concerns both as to its legitimacy and efficacy.

However, in Chapter 4 it was noted that the fluidity and adaptability of AJMs is one of their potential strengths so the fact that Acholi cleansing ceremonies have been adapted and re-named *Mato Oput* by Acholi leaders to fit the situation of returning LRA fighters and abductees should not of itself make them irrelevant and inappropriate. Traditional culture need not be rigid and unchangeable to maintain its fundamental values. In the

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<sup>217</sup> Allen, T. (2006) p165

<sup>218</sup> *Ibid*

<sup>219</sup> See, for example, Baines, E. (2005) case study p64

<sup>220</sup> *Ibid* p47

next section, *Mato Oput* in its traditional form and in the ‘adapted’ communal cleansing ceremonies will be discussed to establish whether they satisfy the requirements of ICJ.

### **Section Five: Does *Mato Oput* Satisfy the Aims of International Criminal Justice?**

By way of reminder, the aims of ICJ were identified in Chapter 2 and summarised by former UNSG, Kofi Annan, in his 2004 report, as being to bring to justice those responsible for serious violations of HR and humanitarian law, put an end to such violations and prevent their recurrence, secure justice and dignity for victims, establish a past record of events, promote national reconciliation, re-establish the rule of law and contribute to the restoration of peace.<sup>221</sup>

Before analysing *Mato Oput*’s capacity to satisfy these aims of ICJ, it is necessary to deal briefly with the question of whether amnesty and the performance of a *Mato Oput* ceremony complies with Uganda’s obligations under international law or whether the offences for which the LRA leaders have been indicted must be prosecuted. Of the five arrest warrants originally issued by the ICC in 2005, only two remain outstanding: Joseph Kony and Vincent Otti (now believed deceased).<sup>222</sup> Kony faces charges of Crimes against Humanity and War Crimes. Unlike the crime of Genocide (which is *jus cogens*, creating *obligatio erga omnes*) and grave breaches of the Geneva Conventions (which are accepted as customary international law),<sup>223</sup> which both impose a duty to prosecute, the position is less clear for crimes against humanity and non-grave breaches of the Geneva Conventions, since no treaty expressly imposes a duty to prosecute these crimes and there is substantial debate on their status in customary international law.<sup>224</sup> Accordingly, there appears to be nothing to prevent an amnesty and *Mato Oput* being implemented for the indicted LRA leadership. However, if an admissibility challenge is

<sup>221</sup> *The rule of law and transitional justice in conflict and post-conflict societies. Report of the Secretary-General* 23 August 2004 UN Doc. S/2004/616 para. 38

<sup>222</sup> Dominic Ongwen surrendered voluntarily and is currently facing trial at the ICC on 70 charges concerning Crimes against Humanity and War Crimes which commenced on 6<sup>th</sup> December 2016. See *Situation in Uganda* ICC-02/04 Investigation [Online] Available: <https://www.icc-cpi.int/uganda> [Accessed 29.08.16]

<sup>223</sup> Which means the obligation to prosecute extends even to those states that are not parties to the treaties

<sup>224</sup> For a full discussion, see Scharf, M. (1997) ‘The Letter of the Law: The Scope of the International Legal Obligation to Prosecute Human Rights Crimes’ 59 *Law and Contemporary Problems* pp41-61

to be successful, the GoU must persuade the ICC that *Mato Oput* will achieve justice and accountability. To consider this, each of identified goals of ICJ will be considered in turn.

### **Bringing those responsible to justice**

For this section, the issue is whether *Mato Oput* in its traditional form, which focusses on the restoration of relationships through dialogue and inclusiveness to uphold the principles of truth, accountability and compensation, can potentially be endorsed as an appropriate justice mechanism for dealing with ex-LRA leadership and fighters.

For their report entitled *Peace First, Justice Later*, Hovil and Quinn investigated whether Acholi justice mechanisms could meet the procedural and accountability standards of western models of justice by gauging them against both the RSt and the International Covenant on Civil and Political Rights (ICCPR), to which the GoU became a signatory in 1995.<sup>225</sup> They concluded that ‘the conditions listed in Article 14 ICCPR could easily be met’<sup>226</sup> by customary mechanisms. As for Article 17(1)(c) of the RSt which deals with issues of admissibility ‘where a person has already been tried for conduct which is the subject of the complaint’, they found that if an Acholi investigation ‘were to be carried out using agreed-upon and sufficiently prosecutorial traditional means’, the case would be inadmissible to the ICC.<sup>227</sup> Considering that *Mato Oput* requires that the truth be established during the negotiation phase (which takes place prior to the ritual being performed), by means of shuttle diplomacy between the clans (which can take months, if not years, to conclude), perhaps it could be argued that ‘sufficiently prosecutorial means’ have been employed. However, whether such lengthy methods of accountability and negotiation are feasible for numerous ex-LRA fighters and given the scale and gravity of the offences committed is a debatable point.

Indeed, when interviewed for *Roco Wat*, most *Rwodi* were reluctant to adapt *Mato Oput* to ‘address crimes committed during the conflict, and to rebuild social trust and restore

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<sup>225</sup> Hovil, L and Quinn, L. (2005) *Peace First, Justice Later* (Kampala: RLP) pp40-48

<sup>226</sup> *Ibid* p42

<sup>227</sup> *Ibid* p45

relationships' stating 'that it was not possible with current *Mato Oput* procedures.'<sup>228</sup> As previously mentioned, *Mato Oput* has always been used for inter-clan individual accidental or deliberate killings, not for the type of grievous atrocities committed during the LRA conflict. There are questions, therefore, over how it would deal with other crimes such as rape, sexual and gender-based violence, abduction, arson and mass-looting. Nor was *Mato Oput* designed to deal with large scale and trans-border crimes involving thousands of victims from different ethnic groups in three countries. So many have been killed during the war, it is often impossible to know who killed whom, which then makes it impracticable for the perpetrator to confess to a specific crime, ask for forgiveness from the victim's clan and for the perpetrator's clan to pay compensation, all fundamental features of the *Mato Oput* justice process.<sup>229</sup>

Another difficulty is that the Acholi traditional and religious leaders' promotion of *Mato Oput* refers only to the LRA and not also UPDF soldiers, who arguably committed crimes of equal scale and severity against the Acholi and who have seldom, if ever, been held to account.<sup>230</sup> Nor has there been any suggestion of involving Museveni in a *Mato Oput* ceremony to acknowledge and ask forgiveness for the crimes committed by the GoU during the war. In a 2010 survey about peace, justice and social reconstruction in northern Uganda, of 2,498 adult respondents, 84% saw accountability as important and more than two-thirds said the GoU should be among those held responsible for the violence.<sup>231</sup>

### **Putting an end to violations and preventing their recurrence**

The potential for *Mato Oput* to end the commission of crimes and prevent their recurrence certainly could be realised, since to go through a *Mato Oput* ceremony, either real or adapted, the ex-LRA fighter must emerge from the bush which means they

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<sup>228</sup> Baines, E. (2005) p66.

<sup>229</sup> *Roco Wat* also notes that 'the same *Rwodi*, *Mego* and Elders interviewed agreed that the LRA should be forgiven without a confession. This indicates that the same final outcome of *Mato Oput* is desired for the former LRA, but it needs to be accomplished through practical means.' p67-8. However, see IRIN (2010) 'Former LRA combatants struggle for forgiveness' Kampala, 10 November (detailing the unsuccessful attempt of one former-abductee who became an LRA commander to undergo *Mato Oput* but was refused by Elders as he could not identify his victims)

<sup>230</sup> HRW (2005) pp4, 24-37, 41-47

<sup>231</sup> Pham, P. and Vinck, P. (2010) p3

would no longer be involved with the LRA. Moreover, for FAPs, deterrence is a limited factor as they were coerced into joining the LRA and were threatened with death if they tried to escape. However, for other LRA members, it is as difficult to gauge the deterrence potential of *Mato Oput* as it is for criminal trials, where deterrence is one of their fundamental objectives.<sup>232</sup>

Although *Mato Oput* focusses on restorative justice, deterrence can still be achieved, through social pressure exerted on the offender and their clan and through the Acholi spiritual and cultural moral codes which involve acknowledgement of wrongdoing and reconciliation through rituals and spiritual appeasement. Fear of spiritual revenge in the form of *cen* could act as a strong incentive not to offend or to seek forgiveness and reconciliation after an offence has been committed. The requirement of compensation and the ostracising of the offender and their clan until it is paid and *Mato Oput* is performed could also be a powerful tool of societal control and deterrence. Additionally, the fact that the whole clan normally contributes towards the compensation amount can act as a strong deterrent as clearly being required to pay for someone else's crime could adversely affect relations within the clan.

However, these deterrent factors relate to the traditional *Mato Oput* ritual and would not apply in the case of returning LRA who undergo the adapted *Mato Oput* communal cleansing ceremonies. Whilst Latigo believes the '*open nature* of the process applied is itself a deterrent to many who would have contemplated committing similar offences',<sup>233</sup> it is difficult to see how such ceremonies have the potential to end and prevent the commission of future crimes since they appear not to be widely respected by either the perpetrators or the onlookers. It might be argued instead, that the combination of the AA and the performance of the communal cleansing ceremonies by local cultural leaders has encouraged former LRA fighters to return from the bush by offering not only freedom from the risk of prosecution but also the potential for forgiveness and acceptance back into the community.

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<sup>232</sup> For a general discussion on deterrence, see p63 *ante*

<sup>233</sup> Latigo, J.O. (2008) p112 (emphasis in original)

### Securing justice and dignity for victims

In its traditional form, *Mato Oput* could achieve justice and dignity for the families of those killed deliberately or accidentally, by virtue of the negotiations that take place prior to the ritual being performed, the compensation that is paid to acknowledge the loss suffered by the victim's family and the reconciliation ritual itself. However, it has already been discussed above why the traditional form of *Mato Oput* is impracticable for returning LRA fighters and abductees. A further point is that even if the victim and perpetrator were identifiable, the payment of compensation (a fundamental element of the justice and reconciliation process) may be unachievable due to the number of victims to be compensated, the poverty suffered by the perpetrator's clan and the fact that they may have been FAPs and thus are also victims. Although in such situations, it could be possible to adapt *Mato Oput* to hold ceremonies in the locations of the communities affected, where the truth can be told, forgiveness requested and compensation paid through a reparations fund established by the government.

Another serious weakness was noted in *Roco Wat's Mato Oput* case study, which concerns the minor role women played in the mediation process.<sup>234</sup> Nor were women consulted during evidence gathering and 'important factual information and knowledge that was known by the women was not included in the 'truth-finding' period.'<sup>235</sup> As a result, 'some individuals [were] unsatisfied with the entire process.'<sup>236</sup> As *Roco Wat* comments, 'if left up to men, the danger remains that women will not fully enjoy the process and benefits of *Mato Oput*.'<sup>237</sup> The traditional non-involvement of women and girls in the *Mato Oput* decision-making, arbitration or negotiations, also is incompatible with recognising and acknowledging the sexual- and gender-based abuses they suffered during the conflict. Since their demands and expectations from a justice process differ from those of men, it is unlikely that *Mato Oput* can satisfy their interests without significant adjustment.<sup>238</sup> Equally, the youth (who form the majority of the Acholi

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<sup>234</sup> Baines, E. (2005) p64

<sup>235</sup> *Ibid*

<sup>236</sup> *Ibid*

<sup>237</sup> *Ibid* p65, noting that at a second *Mato Oput* ceremony attended at Pabo camp on 3 August 2005, 'few women from either clan were present ...' p66

<sup>238</sup> Baines, E. (2007) p107



population) are often unfamiliar with the ceremonies and yet frequently they are both the main perpetrators and the main victims of the violence on both sides of the conflict.<sup>239</sup>

As for the communal cleansing ceremonies performed in towns to welcome returning LRA abductees, although sometimes called *Mato Oput*, they are not 'real' *Mato Oput* but are adapted from other Acholi rituals. Whilst they may play an important role in implementing the provisions of the AA and the AAR, the ceremonies cannot be accurately described as 'traditional' in the manner of their performance, nor as a 'unique system of Acholi justice' as is claimed by KKA and its adherents but more as a public ceremony of re-integration and 'forgiveness'.<sup>240</sup>

However, the adapted process can be less satisfactory for the families and clans of victims who are involved only as onlookers: there is no period of negotiation, no compensation, no killing of sheep, no drinking of the bitter root.<sup>241</sup> In fact, the payment of compensation has become a sensitive issue, as Baines explains:

[c]ultural leaders and elders are reluctant to request compensation from former LRA perpetrators, believing that if this is done it may deter other LRA combatants from returning home. Worse, it may make the LRA doubt the sincerity of the amnesty law and seek revenge on local leaders for failing to uphold the principle of forgiveness the amnesty appears to offer.<sup>242</sup>

Participants are not required to face their victims, ask for forgiveness or to pay compensation,<sup>243</sup> so whilst the ceremonies were described by one local social counsellor as a 'first step aimed at the relieving pain, agony and traumatic experiences our sons underwent [...] while in captivity',<sup>244</sup> they appear to do nothing to relieve the 'pain, agony and traumatic experiences' of their victims. These realities should not be ignored if victims are to feel a sense of justice being done. A survey, *Forgotten Voices*, conducted

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<sup>239</sup> *Ibid*

<sup>240</sup> Allen, T. (2006) p166

<sup>241</sup> Allen, T. (2007) p7

<sup>242</sup> Baines, E. (2007) p110

<sup>243</sup> Ssenyonjo, M. (2007) 'The International Criminal Court and the Lord's Resistance Army Leaders: Prosecution or Amnesty?' 51 *Netherlands ILR* pp51-80 at p65

<sup>244</sup> Baines, E. (2007) p94

in 2005 found that 65% of respondents supported the amnesty process for LRA returnees but only 4% said the amnesties should be granted unconditionally.<sup>245</sup> The majority wanted some form of acknowledgement and/or retribution from all those granted amnesty.<sup>246</sup>

The 2005 survey reveals that the pressure exerted by Acholi traditional and religious leaders on the ICC to withdraw the arrest warrants in favour of *Mato Oput* did not reflect the views of Acholi people at grassroots level. Over three-quarters of respondents said those responsible for abuses should be held accountable<sup>247</sup> and when asked how the LRA should be dealt with, 66% favoured punishment (trial, imprisonment, killing) whereas only 22% supported forgiveness, reconciliation and reintegration.<sup>248</sup> In 2005, 'immediate concerns' for the respondents were food (34%) and peace (31%) with fewer than 1% mentioning justice.<sup>249</sup> When asked 'What is Justice?', 31% said trials, 18% said reconciliation and 19% said they did not know; only 7% said traditional justice.<sup>250</sup> When asked specifically who best represented their views, only 6% said traditional leaders and the same low percentage thought that traditional leaders could bring justice in Northern Uganda. Likewise, only 10% thought Acholi traditional and religious leaders could bring peace to the region as opposed to the GoU (43%) or the international community (26%).<sup>251</sup> These results show just how divided at that time community leaders and victims were on topics of justice, accountability and reconciliation.<sup>252</sup>

The population survey was repeated in 2007 and the report entitled *When the War Ends*, reveals how the views of victims on issues of peace and justice can soften over time as by then, of the 2,875 interviewees, 52% preferred forgiveness, reconciliation and reintegration for LRA leaders as opposed to 41% who supported trials and/or

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<sup>245</sup> Pham, P. *et al.* (2005) p5

<sup>246</sup> *Ibid* p5

<sup>247</sup> *Ibid* p4

<sup>248</sup> *Ibid* p5

<sup>249</sup> *Ibid* p25

<sup>250</sup> *Ibid* p24

<sup>251</sup> *Ibid* p35

<sup>252</sup> *Ibid* p20 Ethnicity of total 2,585 respondents: Acholi 49%, Langi 24%, Teso 24%, Mixed/Other 3%

punishment including imprisonment or death.<sup>253</sup> Although 70% said it was important to hold those responsible for committing crimes accountable<sup>254</sup> support for amnesty was still strong, with 81% saying it would help to achieve peace<sup>255</sup> and 80% choosing peace with amnesty over peace with trials.<sup>256</sup> The apparent contradiction between the support for both accountability and amnesties can perhaps be explained by the fact that the Juba peace talks were in progress at the time the survey was conducted. The authors of the report surmise that the figures may reflect respondents' fear that trials could hinder the peace process.<sup>257</sup>

Nonetheless, when asked in 2007 how to deal with the abuses committed, only 3% chose traditional justice with the highest number of respondents (28.7%) choosing the ICC and 27.9% preferring Ugandan national courts.<sup>258</sup> Regarding traditional ceremonies, 57% agreed those responsible for abuses should participate in traditional ceremonies, with *Mato Oput* receiving the most support from the Acholi at 48% but understandably, not from the Langi (9%) or Teso (16%). Only 47% felt that the traditional ceremonies were necessary to bring justice to northern Uganda, the majority (66.6%) felt they were necessary to chase away bad spirits to bring peace.

In 2010, after almost four years of the absence of fighting, although respondents recognised the need for social reconstruction and holding perpetrators accountable, the provision of basic needs and services such as food (28%), land access (19%), education (15%), health services (13%), was more of a priority.<sup>259</sup> When given the option of four transitional justice mechanisms, 45% of respondents supported peace with amnesty over peace with a truth seeking mechanism (32%), peace with trials (15%) and peace with traditional ceremonies (8%), revealing still that few respondents chose traditional

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<sup>253</sup> Pham, P., Vinck, P., Stover, E., Moss, A., Wierda, M., and Bailey, R. (2007) *When the War Ends: A Population-Based Survey on Attitudes about Peace, Justice, and Social Reconstruction in Northern Uganda* (HRC, Berkeley/Tulane/ICTJ) p36-7

<sup>254</sup> 50% said LRA leaders should be held accountable, 48% said all the LRA and 55% said the UPDF should be put on trial, see p4

<sup>255</sup> Pham, P. *et al.* (2007) p42

<sup>256</sup> *Ibid* p5, 38

<sup>257</sup> *Ibid* p5 (76% of those who had heard of the ICC (60% of all respondents, an increase from 27% in 2005) said pursuing trials *now* could endanger the Juba peace talks)

<sup>258</sup> *Ibid* p36

<sup>259</sup> Pham, P. and Vinck, P. (2010) p19-20

ceremonies over amnesty, truth-seeking or trials.<sup>260</sup> Nonetheless, 53% viewed traditional ceremonies as useful to deal with ex-LRA as they helped the community reconcile (39%) and forgive the wrongdoer (25%) although 31% said they did not achieve anything.<sup>261</sup>

On the strength of these figures, the argument for *Mato Oput* as a transitional justice mechanism appears overstated by its supporters; not reflective of the demand for justice expressed by many Acholi at grass roots level. As Allen states, the Acholi are not 'a race apart' and they want those responsible for terrible crimes to be held to account.<sup>262</sup> This appears to be borne out in the interviews conducted by HRW where '[v]ery few victims of LRA abuses [...] in the camps expressed any desire for 'forgiveness' – many asked for 'punishment' of the commanders.'<sup>263</sup>

### **Establishing past record of events**

In Chapter 3 the value and importance of a full and comprehensive record of the atrocities suffered by the citizens of a state transitioning from conflict to peace was discussed and in northern Uganda, there is considerable support for a written historical record. In the afore-mentioned 2007 survey, 95% of respondents said a written historical record of what had happened during the war in northern Uganda should be prepared and 89% indicated they were willing to talk openly about their experiences in a court or public hearing.<sup>264</sup> Likewise, in the 2010 population survey, 93% of respondents believed it was important for future generations to remember what had occurred in northern Uganda. The majority suggested that books be written (42%), children be educated (26%) and monuments be erected (13%) to commemorate the victims.<sup>265</sup>

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<sup>260</sup> *Ibid* p3, 41

<sup>261</sup> *Ibid* p3-4

<sup>262</sup> Allen, T. (2006) p181

<sup>263</sup> HRW (2005) p60

<sup>264</sup> *Ibid* pp4, 34

<sup>265</sup> Pham, P. and Vinck, P. (2010) p46

Historically, traditional processes leading to rituals such as *Mato Oput* have not been recorded: the procedure is voluntary and all negotiated settlements are oral. Primarily due to the work of the Liu Institute, many ceremonies and rituals have been documented, relying on the oral testimony of Elders, *Rwodi*, camp residents and documentation from other NGOs.<sup>266</sup> However, this codification of select rituals does not have unqualified support. Allen is concerned that if 'there is external support for doing so, and figures of authority are created to perform them, then they may become formalized into a pseudo-traditional system.'<sup>267</sup>

Whilst the Liu Institute has also recorded some oral testimonies of participants in *Mato Oput* ceremonies performed between 2000-2005<sup>268</sup> and compiled a list of communal cleansing ceremonies performed by the KKA,<sup>269</sup> the records do not amount to a full and accurate history of the conflict. They do provide basic information and are thus helpful to demonstrate the efforts that have been made to perform and adapt ceremonies to a communal level. Interestingly, no accounts of *Mato Oput* being currently performed with ex-LRA or FAPs appear to be available and whether this is because no ceremonies are being performed or that they are not being recorded is not clear.

However, what is clear is that a comprehensive historical record of all abuses suffered by the population in Northern Uganda during the LRA conflict is desired by most Acholi and should be prepared either through the auspices of the GoU or some other institution, such as a truth commission and this must be on a national basis, not a regional or ethnic one.

### **Promoting national reconciliation**

It is difficult to see how *Mato Oput* can promote national reconciliation for three predominant reasons. First, Acholi justice is not national justice and in Uganda,

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<sup>266</sup> Baines, E. (2005) p26

<sup>267</sup> Allen, T. (2008) 'Ritual (Ab)use? Problems with Traditional Justice in Northern Uganda' in Wadell, N. and Clark, P. (eds.) *Courting Conflict? Justice, Peace and the ICC in Africa* (London: Royal African Society) p50

<sup>268</sup> Baines, E. (2005) pp91-94

<sup>269</sup> *Ibid* pp95-97

reconciliation and peace building must be developed as a national programme, not a regional or ethnic one, for reasons already outlined in this chapter. It has, of course, been extremely useful for Museveni to appear to be acceding to the Acholi demands for their traditional justice to deal with the LRA. Not only does it serve to reinforce the GoU's insistence that the war was an Acholi affair, it relieves the government of any responsibility to address the causes of the conflict from a national, socio-economic and political standpoint.<sup>270</sup> Furthermore, support for traditional justice protects the government 'from the full implications of public trials at The Hague [where] competent defence counsel for the accused could raise very embarrassing issues, including government implication in atrocities.'<sup>271</sup>

Second, *Mato Oput* is a ceremony that is culturally specific to the Acholi, although it does have some equivalence to conflict resolution practices of other ethnic groups affected by the LRA conflict.<sup>272</sup> These groups have their own ceremonies of forgiveness and reconciliation, however and it is questionable whether they would accept that justice has been done if ex-LRA are subjected to a justice system that is not their own. If *Mato Oput* becomes the established AJM, these other tribes may resent the fact that their own justice system has been ignored, which could cause inter-tribal tensions.

Third, within the Acholi community, traditional ceremonies have lost their significance and relevance due to the breakdown of traditional Acholi society during displacement and therefore their ability to effect forgiveness and reconciliation may have been severely diminished. Indeed, Acholi communities often display little evidence of the forgiveness which, according to Acholi Elders and Chefs who promote *Mato Oput*, is inherent in the Acholi psyche.<sup>273</sup> For example, in 2005, *Roco Wat* noted worrying signs that forgiveness and reconciliation had not been achieved successfully between community members in camps and returnees, referring to 'stigmatization, resentment,

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<sup>270</sup> It also, of course, relieves the government of the expense of funding a national justice and accountability programme

<sup>271</sup> Allen, T. (2008) p47

<sup>272</sup> *Ibid* p48

<sup>273</sup> See, for example, Baines, E. (2007) describing the efforts of Alice, an ex-LRA fighter, to re-settle into her former community

[and] insecurities in camp settings'.<sup>274</sup> This stigmatisation reveals that while the return of ex-LRA and FAPs may have been accepted, individually they may not have been accepted as members of the community, which perhaps is understandable given the abuses suffered by civilians who now live alongside their former abusers. The outcome, however, is that many returnees try to conceal their identity and do not participate in the communal cleansing ceremony even if they are inclined to do so, for fear of being persecuted by their victim's clan and stigmatised by the community.<sup>275</sup>

*Roco Wat* further noted that '[y]oung mothers and orphaned returnees are a particularly vulnerable category among returnees. Acholi society tends to discriminate against [them]'.<sup>276</sup> While KKA 'acknowledged the difficulties facing returnee mothers, no official policy exists for how culture might facilitate their reintegration, thus the problems they encounter are not supported in a cultural fashion.'<sup>277</sup> In fact, KKA appears to have done very little to address the problem of re-integration of ex-LRA and FAPs in the intervening years despite the worrying escalation of stigmatisation. In April 2015, the JRP conducted an opinion survey on regional reconciliation across seven communities of the Acholi and Lango sub-regions.<sup>278</sup> Their report notes that in 2012, 5% of respondents 'frequently' and 8% 'occasionally' observed stigmatisation in their communities, whereas by 2015, these figures had risen to 12.4% and 52.8% respectively.<sup>279</sup> Again, in 2012, 62% of respondents 'never' witnessed stigmatisation whereas in 2015, this figure fell to 0% meaning that every respondent was aware of widespread 'practices and attitudes of stigmatisation in their community, which seek to dangerously undermine reconciliation efforts.'<sup>280</sup>

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<sup>274</sup> Baines, E. (2005) p73

<sup>275</sup> Baines, E. (2007) p109

<sup>276</sup> *Ibid*

<sup>277</sup> *Ibid*

<sup>278</sup> Shabdita, S. and Odiya, O. (2015)

<sup>279</sup> *Ibid* p18

<sup>280</sup> *Ibid*; see also Thernstrom, M. (2005) 'Charlotte, Grace, Janet and Caroline Come Home' The New York Times Magazine, May 8 at p37 [Online] Available: <http://www.nytimes.com/2005/05/08/magazine/charlotte-grace-janet-and-caroline-come-home.html> [Accessed 04.09.16]

In 2015, the majority of respondents (68%) noted poor relations due to the war within their own community<sup>281</sup> and 75% blamed the war for adversely affecting relations across sub-regions.<sup>282</sup> Within the Acholi, stigmatisation<sup>283</sup> was the most frequently cited cause of conflict (43%) with FAPs, victims of sexual or gender-based violence, children born of war, the families of missing persons and survivors of mass killings being identified as those most severely stigmatised within communities.<sup>284</sup> Regarding FAPs, for whom the *Mato Oput* cleansing ceremonies have been especially targeted, the JRP survey reveals:

Hostile relationships between community members and FAPs amidst a vicious cycle of accusations, bitterness and stigma permeates through most communities in the region. Community members usually ostracise FAPs and blame them for their sufferings during the brutal war[.]<sup>285</sup>

Further and specific research conducted in 2015 by JRP in Gulu town into the plight of children born to LRA-abducted girls over a three-year period reveals that children born to LRA-abducted girls 'exist on the margins of their society, stigmatised and with limited life opportunities'.<sup>286</sup> The main research findings were that these children 'face significant stigma from communities, peers, and even at times from family members, including violent abuse from stepfathers' and 'those whose fathers are top commanders still at-large fear for their safety if their fathers are captured.'<sup>287</sup> For these children, the *Mato Oput* ritual is not appropriate as they have not killed but no ceremony of cleansing and reconciliation has been adapted to acknowledge their situation in the community, so from a transitional justice perspective, the daily tribulations they suffer have been overlooked.

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<sup>281</sup> Shabdita, S. and Odiya, O. (2015) p12 citing 'reintegration challenges and stigmatization faced by formerly-abducted persons (FAPs), clashes between communities and government officials over the latter's failure to adequately represent the victim's demands for justice and reparation, violent community disputes over boundaries and resources, or changing gender relations leading to sexual- and gender-based violence, among several others.'

<sup>282</sup> *Ibid* p13 citing 'fear of revenge and renewed violence, frustrated business opportunities and decline in intermarriages across sub-regions, deep-rooted grievances and collective attribution of responsibility for the war on 'the other' community'

<sup>283</sup> Stigmatisation included finger-pointing, name-calling, ignoring, pointed remarks

<sup>284</sup> *Ibid* p16

<sup>285</sup> *Ibid*

<sup>286</sup> JRP Field Note 23 (2015) *We are all the Same: Experiences of children born into LRA captivity*, 17 December (Gulu: JRP) p1

<sup>287</sup> *Ibid* JRP pvi



Since *Mato Oput* seemingly has been ineffective in promoting widespread reconciliation within the Acholi tribe, it can only be less effective at promoting reconciliation regionally and nationally, where reconciliation is of prime importance but the ritual has no cultural resonance. Across the northern Ugandan sub-regions, the stereotyping of the LRA war as an ethnic conflict waged by Acholi to further Acholi nationalism in the area has deeply affected relationships, with interactions revealing deep-rooted suspicion, grievances and prejudices.<sup>288</sup> In the 2015 JRP survey, 65% of non-Acholi respondents blamed the Acholi 'highly' or 'moderately' for instigating the war and 62% agreed that the war had adversely affected the relationship between Acholi and Lango.<sup>289</sup> Other neighbouring regions also blame the Acholi for the war and suffering experienced, for example, 'eastern regions in the past have been hostile to the Acholi as the LRA high command is largely Acholi.'<sup>290</sup> Indisputably, in South Uganda there has long been the misconception that the war in the north is the fault of Acholi and further afield, South Sudanese attending the Juba peace talks 'asked Acholi leaders what they had 'allowed their children to do,' thereby ascribing responsibility to the group as a whole.'<sup>291</sup>

Clearly there is a great need to address the issue of reconciliation locally, regionally and nationally but *Mato Oput* appears not to be the answer, for in the years since the idea of traditional Acholi justice for ex-LRA fighters first garnered support, little appears to have been achieved by way of forgiveness and reconciliation within the Acholi community itself, let alone between neighbouring tribes and nationally. Traditionally, reconciliation between tribes was achieved by the performance of *Gomo Tong* ('bending of the spear'), a 'profound ritual of reconciliation' which 'evokes, manifests and remakes greater political alliances among peoples in northern Uganda'.<sup>292</sup> The ceremony is a highly sacred act, evoking ancestors and vowing that no more blood will be shed between the tribes.<sup>293</sup> Few recorded practices of *Gomo Tong* exist<sup>294</sup> but there is clearly

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<sup>288</sup> Shabdita, S. and Odiya, O. (2015) p22

<sup>289</sup> *Ibid*

<sup>290</sup> Baines, E. (2007) p107

<sup>291</sup> *Ibid*

<sup>292</sup> Finnström, S. (2008) p43

<sup>293</sup> Baines, E. (2007) p107

<sup>294</sup> *Ibid*; see also Allen, T. (2006) p165 stating that to his knowledge the ceremony has only been performed once in living memory, more than 20 years ago

no point in the ritual being performed to effect reconciliation regionally or nationally whilst there is any risk of the LRA resuming their violence in northern Uganda.

### Re-establishing Rule of Law

It has already been argued above that if *Mato Oput* were accepted as the justice mechanism to deal with the ex-LRA fighters, this would effectively give the GoU impunity for all the crimes committed against the Acholi by government forces during the conflict which ‘reinforces the very forms of injustice that gave rise to the war and that will need to be rectified if the legacy of war is to be overcome.’<sup>295</sup> Furthermore, as Baines asserts, rituals presided over by male lineage-based Acholi authorities are inadequate to deal with other crimes commonly committed during the conflict,<sup>296</sup> such as rape, arson, looting and abduction, which are excluded because *Mato Oput* is a ritual traditionally used for killings.

A further important question is whether the KKA, which was established with the support of the GoU and foreign donors to resurrect and promote Acholi culture and to revive traditional rituals and restore relationships will receive universal support from Acholi society. Quinn’s research has revealed an impression among some Acholi that the GoU ‘has somehow tainted [traditional] processes.’<sup>297</sup> Quinn states that as the KKA has ‘only a tenuous grasp’ on the use of customary practices, the government is now ‘set to attempt to codify and/or formalise [them] without much, if any, input’<sup>298</sup> from the KKA and/or the traditional leaders. This, of course, could seriously impact the manner in which these rituals operate. Additionally, Quinn notes that the government has effectively co-opted the KKA, ‘playing a significant role’ and ‘far from being arms-length regulators [...] has inserted itself into [their] day-to-day workings’,<sup>299</sup> including ‘rely[ing] on [the KKA] to assist in implementing their policies.’<sup>300</sup> Whether Acholi society

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<sup>295</sup> Branch, A. (2014) p625; Branch also argues that Acholi AJMs fail to take account of the international dimensions of the war, including the role of donors in funding Uganda’s militarisation and the role of aid agencies in collaborating with forced displacement

<sup>296</sup> Baines, E. (2007) p114

<sup>297</sup> Quinn, J. (2014) p42

<sup>298</sup> *Ibid* p46

<sup>299</sup> *Ibid* p44

<sup>300</sup> *Ibid* p45

in the long term will accept as legitimate a cultural institution headed by a paramount chief crowned by Museveni and regarded by some as an anathema, led by a council of chiefs supported by foreign aid and a manipulative government remains to be seen.

The reputation and standing of Acholi Chiefs and Elders, already seriously diminished during the conflict and almost two decades of displacement, may not be enhanced either by the *raison d'être* of KKA and its supporters, which is to reinstate the former authority of male Elders and *Rwodi* in order that they could preside over re-constructed traditional societies. In effect, the intention is to re-establish traditional ritual practices that ensure harmony and social order,<sup>301</sup> where traditional leaders would have the 'exclusive role of regulating Acholi society through their access to the spiritual domain.'<sup>302</sup> Once back in their village environment, the revival of the traditional authority of men and Elders 'would take place by imposing discipline at the family and clan levels through warnings, fines, corporal punishment and, if all else fails, expulsion from the clan and curses.'<sup>303</sup>

The re-assertion of 'patriarchal, gerontocratic power within clan and household structures' may not be universally welcomed.<sup>304</sup> Women whose 'economic, social and political authority and status' has risen due to opportunities made possible during displacement and young people who 'sometimes found ambiguous empowerment in the rebel groups and paramilitaries' may be unwilling to defer to older men who 'assert their power under the guise of tradition and [...] dismiss challenges to that power as non-traditional and non-authentic.'<sup>305</sup> Attempts to impose pre-conflict forms of domination and inequality would neither be practical nor fair and could give rise to conflict, since 'although local mechanisms emphasise reconciliation in a way that punitive approaches do not, it could potentially increase violence rather than restore relationships.'<sup>306</sup>

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<sup>301</sup> Branch, A. (2014) p613-4

<sup>302</sup> *Ibid* p622

<sup>303</sup> *Ibid* p623

<sup>304</sup> *Ibid* p617

<sup>305</sup> *Ibid* p622

<sup>306</sup> Baines, E. (2009) 'Complex Political Perpetrators: Reflections on Dominic Ongwen' 47 *JMAS* pp163-191 at p184

### **Contributing to restoration of peace**

The traditional objective of an AJM is primarily to seek assistance from Elders to facilitate, acknowledge and resolve conflicts arising from the violation of a code of behaviour common to all members of the community. *Mato Oput* has been successful in restoring peace following an inter-clan killing, not least because the period of shuttle diplomacy between the respective clans affords a 'cooling-off' period for both sides of the conflict which forestalls vengeful violence. Accountability is achieved through the truth-telling process and payment of compensation acknowledges the wrongdoing and elicits forgiveness. In the final stage of the process, the drinking of the bitter roots ritual re-establishes broken relationships which in turn brings peace and social harmony back to the tribe.

Previous sections in this chapter have demonstrated the deficiencies of *Mato Oput* both in its original form and as adapted to achieve the goals of ICJ within the context of the war between the GoU and the LRA. Without repeating them here, it is argued that whilst *Mato Oput* has some strengths, Uganda needs a national policy framework on peace-building and conflict prevention and *Mato Oput* alone cannot achieve that goal.

### **Conclusion**

In this chapter it has been demonstrated that there are numerous causes of the LRA conflict, some of which stem from deep-rooted ethnic and regional divides which pre-date but were exploited during the colonial period. After independence, these divides were exacerbated by successive regimes to bolster and maintain their own power by means of military violence and repression. It could be argued that the catalyst for the Acholi insurgency was the NRA abuses of the Acholi in the Gulu and Kitgum districts but it was fed and nurtured by historical divisions in Ugandan society that permeated all areas of social, economic and religious life to the extent that the north was stigmatised by Museveni's government as backward, primitive and violent and the south lauded as modern, cultural and forward-looking.

Therefore, far from the conflict being a peripheral matter, a local trouble involving the Acholi for the Acholi to sort out amongst themselves as the Museveni government has insisted, this conflict must be viewed from a wider perspective. It is a national conflict, a violent manifestation of the long-term grievances endured by the Acholi and northerners generally, arising out of their daily-lived experience of neglect, discrimination and mistrust. This calls into question the applicability of a local, or specifically, Acholi, justice system as the appropriate means of dealing with accountability since to do so defines the conflict as an Acholi, not a national problem and absolves the GoU from any responsibility for the insurgency.

By calling for traditional justice in the form of the *Mato Oput* ritual as the means of addressing the gross violations of HR committed by the LRA, it could be suggested that the Acholi Elders and their supporters are ignoring the wider context of this conflict, particularly the abuses committed by the government military forces, the abuses committed outside Acholiland and the conflict's national dimensions, as epitomised by the socio-economic and political divide between the north and the south of Uganda.

In this chapter, *Mato Oput* has been examined in depth to establish if it could satisfy the goals of ICJ. The examination has concluded that although 'real' *Mato Oput* has features of accountability, truth-telling, reparation and rehabilitation, it does not meet other ICJ goals because it is culture-specific and it fails to include abuses perpetrated by government forces. It has also been demonstrated that the communal cleansing ceremonies conducted by traditional leaders in towns and camps for returning ex-LRA and FAPs do not meet the aims of ICJ and cannot accurately be described as a justice mechanism. Although referred to as *Mato Oput* and intended to 'help facilitate reintegration, and stimulate the process towards reconciliation [...] they must be considered as a first step only, and are not sufficient for reconciliation in the community'.<sup>307</sup>

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<sup>307</sup> Baines, E. (2005) p69

In his 2004 report, Kofi Annan called for 'local' solutions to issues of transitional justice and *Mato Oput*'s inclusion in the AAR establishes it as part of the Ugandan strategy of achieving justice and accountability post-conflict, which could potentially require the ICC to decide whether the AJM meets the complementarity principle. This chapter has argued, however, that *Mato Oput* does not achieve either accountability or justice for victims of the LRA conflict and concludes that, as an AJM to deal with ex-LRA combatants, it does not satisfy the aims of ICJ either in Acholiland or nationally. Accordingly, its advocates should not be successful in challenging the ICC under the complementarity provisions of the RSt.

In the next chapter, the South African Truth and Reconciliation Commission (SATRC) will be assessed for its retrospective capacity to satisfy the aims of ICJ in order to consider the parallels between the ICC, *Mato Oput* and the SATRC.

## CHAPTER SIX

### THE TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA AND INTERNATIONAL CRIMINAL JUSTICE

#### Introduction

During the last quarter of the 20<sup>th</sup> Century, many countries transitioning from a period of repressive rule or internal conflict to democratic governance confronted the issue of how to address their recent history and the human rights (HR) abuses perpetrated against their people. It is commonly argued that enabling an emerging nation and its society to move forward in unity, peace and stability necessitates the rebuilding of shattered lives, effective reconciliation between former enemies and some form of acknowledgement of the suffering caused in order to ensure that similar atrocities do not occur in the future.<sup>1</sup> The alternative of not addressing these issues, it is argued, risks unresolved bitterness and desire for revenge erupting into conflict and damaging a fragile democracy.<sup>2</sup> In deciding how to deal with those responsible for HR abuses, the choices facing the new government can vary according to the nature of the transition. For example, if the former regime was defeated, prosecutions may be viable<sup>3</sup> but where political transition has resulted from dialogue and negotiation and the former regime retains a strong presence in the institutions of state, the reality may be that the new democratic government must be more circumspect about prosecuting former leaders and agents of the oppressive regime.<sup>4</sup>

It was this latter situation that faced the African National Congress (ANC) between 1990 and 1993 during its negotiations with the ruling National Party (NP) for the transition from the apartheid regime to democracy in South Africa (SA). For decades, with the

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<sup>1</sup> Asmal, K. (1992) 'Victims, Survivors and Citizens – Human Rights Reparations and Reconciliation' 8 *SAJHR* pp491-511 at pp494-8

<sup>2</sup> *Ibid*

<sup>3</sup> As in the case, for example, of the Nuremberg trials after World War 2

<sup>4</sup> Brahm, E. (2007) 'Uncovering the Truth: Examining Truth Commission Success and Impact' 8 *International Studies Perspectives* pp16-35 at p17; see also Cassese, A. (1998) 'Reflections on International Criminal Justice' 61 *The Mod LR* pp1-10 at p4

support of the minority white population, the NP had fought to protect its white supremacist rule against an increasingly defiant and violent black national liberation movement within SA.<sup>5</sup> The catalyst for the commencement of talks between the NP and the ANC in the late 1980s was the stalemate in which they each found themselves, with neither able to overcome the other.<sup>6</sup> This led to the realisation on both sides that the only possibility of achieving lasting peace was through a negotiated settlement.<sup>7</sup>

The ANC, as the largest party within the SA national liberation movement, led negotiations with the NP during which long process both sides were forced to adapt their demands, particularly over the question of amnesty.<sup>8</sup> From the outset of negotiations, the NP<sup>9</sup> had argued strenuously that to achieve reconciliation, the past should be forgotten and a blanket amnesty given to all leaders and agents of the apartheid regime.<sup>10</sup> This was unacceptable to the ANC which insisted that accountability was a 'pre-requisite for a human rights culture' to be nurtured in the new SA, not only 'for the sake of justice, for stability and the restoration of dignity to victims' but as a 'deterrent to those who might be tempted in the future to engage in gross human rights violations.'<sup>11</sup> On 18<sup>th</sup> November 1992, however, the ANC leadership pragmatically adopted a discussion document entitled 'Strategic Perspectives',<sup>12</sup> which not only committed an elected government to a power-sharing arrangement with the NP for five years and protected the posts of white civil servants but also *recognised the desirability* of a general amnesty from prosecution for politicians, civil servants and security forces

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<sup>5</sup> Theissen, G. (1999) *Common Past, Divided Truth: The Truth and Reconciliation Commission in South African Public Opinion* (Paper presented at the Workshop on 'Legal Institutions and Collective Memories' at the International Institute for the Sociology of Law, Oñati, Spain, 22-24 September) pp21-28

<sup>6</sup> Wilson, R.A. (2001a) *The Politics of Truth and Reconciliation in South Africa: Legitimizing the Post-Apartheid State* (Cambridge: CUP) p5

<sup>7</sup> Bundy, C. (2001) 'The Beast of the Past: History and the TRC' in James, W. and Van de Vijver, L. (eds.) *After the TRC: Reflections on Truth and Reconciliation in South Africa* (Athens: Ohio UP) p11; see also F.W. de Klerk's speech at the opening of Parliament, 2 February 1990 [Online] Available:

<https://www.nelsonmandela.org/omalley/index.php/site/q/03lv02039/04lv02103/05lv02104/06lv02105.htm> [Accessed 09.11.16]

<sup>8</sup> Bundy, C. (2001) p11

<sup>9</sup> Supported by the Inkatha Freedom Party (IFP) led by Chief Buthelezi

<sup>10</sup> Nyatumba, K. (2001) 'Neither Dull nor Tiresome' in James, W. and Van de Vijver, L. (eds.) p88

<sup>11</sup> Borraine, A. (2000a) *A Country Unmasked* (Oxford: OUP) p7

<sup>12</sup> See 'Negotiations: The strategic debate' African Communist Journal Extracts – No 131 – Fourth Quarter 1992 [Online] Available:

<https://www.nelsonmandela.org/omalley/index.php/site/q/03lv02424/04lv02730/05lv03005/06lv03006/07lv03041/08lv03043.htm> [Accessed 09.11.16]



members 'because such individuals have the power to obstruct the transition' (emphasis added).<sup>13</sup>

Nonetheless, the amnesty issue proved extremely difficult to resolve until the ANC and the NP agreed a limited amnesty which Simpson describes as 'a last minute compromise struck so late in the negotiation process that it had to be included in a "post-amble" tacked on to the end of the Constitution – almost as an after-thought'.<sup>14</sup> Indeed, Boraine talks of the extraordinary difficulty the negotiating parties had in agreeing the wording of the amnesty provision and of the time constraints which precluded having the postamble drafted in technical, legal language.<sup>15</sup> It is difficult to see the commitment to the amnesty (limited or otherwise) as 'an after-thought', however, especially given the initial polar positions of the negotiating parties and the importance of the issue to SA's smooth transition to democracy.

Mamdani argues that the negotiated settlement 'began with an attempt to articulate a notion of justice within the broader framework of 'reconciliation'' but ultimately 'de-emphasised justice in the interests of reconciliation and realism, both local and international'.<sup>16</sup> While this may be true, the SA Truth and Reconciliation Commission (SATRC) reflected a compromise which attempted to balance demands for truth and justice with the existing amnesty commitment. It has been suggested, therefore, that the SATRC 'was not merely a legal by-product of the political settlement, but in a more fundamental sense a crucial element of the settlement'.<sup>17</sup>

The question to be considered in this chapter is whether, if a similar situation arose today, a Truth Commission (TC) could be adjudged a viable alternative to formal trials

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<sup>13</sup> Berat, L. (1995) 'Negotiating Change?' in Roht-Arriaza, N. (ed) *Impunity and Human Rights in International Law and Practice* (Oxford: OUP) p273-4

<sup>14</sup> Simpson, G. (1998) 'A Brief Evaluation of South Africa's Truth and Reconciliation Commission: Some lessons for societies in transition'. *The Centre for the Study of Violence and Reconciliation* [Online] Available: <http://www.csvr.org.za/index.php/publications/1724-a-brief-evaluation-of-south-africas-truth-and-reconciliation-commission-some-lessons-for-societies-in-transition.html> [Accessed 09.11.16] (For the wording of the postamble, see Appendix Two)

<sup>15</sup> Boraine, A. (2000a) p39

<sup>16</sup> Mamdani, M. (1996a) 'Reconciliation Without Justice' 46 *Southern African Review of Books* [Online] Available: <http://web.archive.org/web/20010715032454/http://www.uni-ulm.de/~rturrell/antho3html/Mamdani.html> [Accessed 09.01.17] (unnumbered pages)

<sup>17</sup> Bundy, C. (2001) p10

for those guilty of the crimes within the jurisdiction of the International Criminal Court (ICC), thus making the cases inadmissible to the Court. Despite 17 TCs having been established globally between 1974 and 1998,<sup>18</sup> the impact of the ICC on TCs was not given much consideration, either during the statute drafting negotiations or at the Rome Conference. Although there was considerable debate at the Rome Conference on TCs and national amnesties,<sup>19</sup> the difficulties surrounding the issue of alternative justice mechanisms (AJMs) generally, were resolved by the adoption of provisions that reflected 'creative ambiguity'<sup>20</sup> and TCs are nowhere mentioned in the Rome Statute (RSt). Since 1998, a further 23 TCs have been established,<sup>21</sup> during which time the issue of whether they are an acceptable alternative to trials as a means of dealing with international crimes, has been strenuously debated.<sup>22</sup> The two systems are, of course, distinct in that TCs emphasise restorative (truth-seeking) justice with the procedure focusing on victims whereas trials emphasise retributive (criminal) justice, with the defendant and the trial's rules of procedure and evidence being the focus.

The ICC has not yet investigated a situation where a TC has been adopted as the nationally-preferred justice mechanism<sup>23</sup> but given the evident popularity of TCs in transitional societies, it is foreseeable that the Court will be forced to adjudicate on whether a TC satisfies its inadmissibility criteria. An indication of the Prosecutor's view appeared in a 2007 Policy Paper, which endorsed the role of truth-seeking not as alternative but complementary to prosecutions at the ICC, in the 'pursuit of a broader justice.'<sup>24</sup> There has not, therefore, been a focussed discussion on whether a specific TC could successfully challenge the admissibility of a case before the ICC on the grounds that the TC satisfies the same goals in the pursuit of international criminal justice (ICJ) that are required of trials at the ICC.

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<sup>18</sup> Hayner, P.B. (2011) *Unspeakable Truths. Transitional Justice and the Challenge of Truth Commissions* (Abingdon, Routledge) pxi

<sup>19</sup> See pp48-49 *ante*

<sup>20</sup> Scharf, M.P. (1999) 'The Amnesty Exception to the Jurisdiction of the International Criminal Court' 32 *Cornell ILJ* pp507-527 at p522

<sup>21</sup> Hayner, P.B. (2011) ppxi-xii

<sup>22</sup> See, for example, Robinson, D. (2003) 'Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court' 14 *EJIL* pp481-505; Villa-Vicencio, C. (2000b) 'Why Perpetrators should not always be prosecuted: Where the International Criminal Court and Truth Commissions Meet' 49 *Emory Law Journal* pp202-222

<sup>23</sup> Although internationalised trials have operated alongside TCs in, e.g. Sierra Leone, Kenya and East Timor

<sup>24</sup> Policy Paper on the Interests of Justice, *ICC-OTP-2007*, September 2007 p8

To this end, this chapter will examine the SATRC (or TRC) because internationally it is held up as one of the most successful in terms of its size and reach and because it is credited with facilitating a peaceful transition from an abusive regime to a democracy. Assessment of the SATRC and highlighting its strengths and weaknesses from the ICJ viewpoint will also facilitate the formation of a framework for future TCs wishing to challenge admissibility at the ICC. Notwithstanding such a framework, however, the jurisprudence of the ICC in admissibility challenges made to date<sup>25</sup> reveals that the provisions relating to complementarity are interpreted very narrowly by the Judges and that, as it currently stands, even a well-constituted TC would be unlikely to persuade the Court to defer in its favour. For a TC to make a situation inadmissible to the ICC, therefore, would require the Judges to apply the ICJ framework formulated herein and then to adopt a more flexible interpretation of the provisions of Article 17 of the RSt. Given the growing interest in the holistic, contextual nature of transitional justice, if such flexibility is not demonstrated by the ICC, the only alternative would be for the Assembly of State Parties to amend the RSt to allow for AJMs that satisfy the aims of ICJ to trump trials at the ICC.

In the first section of this chapter, the status of apartheid in international criminal law (ICL) will be examined to establish whether there is a duty to prosecute or whether an AJM such as a TC is viable. In the second section, the emergence in ICL of the legal concept of the 'right to truth' will be discussed. The right to truth is a precept fundamental to the creation of a TC, frequently cited by advocates of TCs to support their pressure on governments to establish an effective TC. Section three, to contextualise SA's decision to eschew trials in favour of a TRC, briefly outlines SA's history of repression and resistance under the apartheid regime and the negotiations that brought about its demise. The fourth and fifth sections discuss the establishment, structure and processes of the SATRC, highlighting the nationwide discussion and participation these involved. In the sixth section, the SATRC will be assessed against the aims of ICJ identified in Chapter Three to ascertain whether a TRC can achieve those

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<sup>25</sup> For a full discussion, please see Chapter Seven

aims. If it is demonstrated that the SATRC does satisfy ICJ goals, it will be argued that the ICC should defer to a state wishing to deal with perpetrators of international crimes by way of a TRC based on the SATRC model and declare the case inadmissible.

### **Section One: The Status of Apartheid in International Law**

Although the Act establishing the SATRC did not include the crime of apartheid in its mandate, before beginning the discussion on the SATRC, the 'status' of apartheid in ICL and whether there was a duty to prosecute leaders and agents of an apartheid regime will be established. 'Apartheid' is an Afrikaans word meaning 'separation' and apartheid was enforced in SA by the governing NP from 1948, when the party narrowly won a Parliamentary majority, until it was abandoned in 1990. Under the apartheid system, the rights of the black majority were curtailed and the rule of the white minority was maintained with successive governments enacting national laws to legitimise their repressive policies. In 1948, the year the Universal Declaration of Human Rights (UDHR) was adopted by the UN, the NP was just beginning its policy of legal racial discrimination, segregation and political repression which violated almost every right upheld in the UDHR.

Between 1952 and 1990, the UN General Assembly (UNGA) annually condemned SA's apartheid regime and after 1960, the UN Security Council (UNSC) regularly added its own condemnation. In 1965, international condemnation of apartheid resulted in the International Convention on the Elimination of All Forms of Racial Discrimination<sup>26</sup> which committed its signatories to eliminating racial discrimination and promoting understanding between all races.<sup>27</sup> In 1966, the UNGA declared apartheid a crime against humanity (CAH)<sup>28</sup> and despite some opposition which argued that it was already covered by the 1965 Convention, on 30<sup>th</sup> November 1973, adopted the International

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<sup>26</sup> GA Res 2106 (XX) 21 December 1965 In force 4 January 1969

<sup>27</sup> *Ibid* Article 2

<sup>28</sup> GA Res 2202 A (XXI) 16 December 1966

Convention on the Suppression and Punishment of the Crime of Apartheid.<sup>29</sup> In 1984, the UNSC endorsed the UNGA's determination.<sup>30</sup>

The Apartheid Convention declared apartheid unlawful because it violated Articles 55 and 56 of the UN Charter; it criminalised the system.<sup>31</sup> As Article V of the Apartheid Convention provided that a person charged may be tried 'by a competent tribunal of any State Party [...] or by an international penal tribunal', the creation of a special international court to try individuals for the crime of apartheid was considered in 1980.<sup>32</sup> However, it was decided that as individual states could enact legislation permitting them to prosecute on the basis of universal jurisdiction if the accused was within their jurisdiction, such a court was unnecessary.<sup>33</sup> In 1998, the RSt included the crime of apartheid as a CAH within its jurisdiction.

In fact, no-one has ever been prosecuted for the crime of apartheid, either in SA or elsewhere.<sup>34</sup> Apartheid was ended in SA by negotiations between the government and liberation parties and the agreement provided for the establishment of a TRC rather than prosecutions. As discussed in Chapter Five, no treaty expressly imposes a duty to prosecute CAH and there is substantial debate on their status with regard to customary international law so the existence of a duty to prosecute the crime of apartheid as a CAH is questionable.<sup>35</sup> Certainly, the UN did not 'suggest or even consider the establishment of an *ad hoc* tribunal' to try the leaders and agents of the apartheid regime, despite the many CAH committed during the nation's struggle.<sup>36</sup> Accordingly, SA was able to decide for itself how to proceed and after wide consultation, opted for a TRC with conditional amnesties. At the time, this decision was lauded by the international community and in a similar situation today, it is argued that the state would be under no ICL duty to

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<sup>29</sup> Annexed to GA Res 3668 (XXVIII) In force 18 July 1976

<sup>30</sup> Res 556 (1984) 23 October 1984

<sup>31</sup> Article 1 declares apartheid a CAH and 'inhuman acts resulting from the policies and practices of apartheid and similar policies and practices of racial segregation and discrimination' are international crimes

<sup>32</sup> E/CN.4/1426 (1981)

<sup>33</sup> Articles 4 and 5

<sup>34</sup> Post-apartheid SA has not ratified the Apartheid Convention.

<sup>35</sup> See p158 *ante*

<sup>36</sup> Dugard, J. (1998) 'Reconciliation and Justice: The South African Experience' 8 *Transnational Law and Contemporary Problems* pp277-311 at p278

prosecute apartheid or other CAH, leaving it free in theory to deal with these crimes by way of a TC.

## Section Two: The Right to Truth

The primary aim of a TC is to establish an accurate record of a county's history, clarify uncertain events and to expunge silence and denial from its painful past.<sup>37</sup> While some argue forgetting is best, for others, only learning about what happened and why, can facilitate recovery.<sup>38</sup> This need for information has been acknowledged as 'the right to truth', a term which originates from the efforts of families of the 'disappeared' in Latin America to compel their governments to disclose information about their relatives.<sup>39</sup>

The right to truth is linked to the ICJ aim of securing justice and dignity for victims and has gained prominence as a legal concept in international law over the last three decades, alongside the development of transitional justice. Closely connected to the ascendancy of the international HR movement, the 1980s onwards 'witnessed renewed global enthusiasm for, and confidence in, the idea of truth as the basis of justice and stability.'<sup>40</sup> It is discussed as a separate section within this chapter to illustrate that investigating and making public the truth about past violations has been established as a general state obligation by international courts and re-affirmed in UN policy papers and resolutions and various inter-governmental institutions.<sup>41</sup> It demonstrates, furthermore, that TCs are ideally placed to achieve the ICJ aim of securing justice and dignity for victims.

At regional level, the Inter-American Commission on HR (IACCommHR) and the Inter-American Court of HR (IACtHR) pioneered the development of jurisprudence on the right to truth of the victim, their next-of-kin and indeed, society as a whole.<sup>42</sup> In 1986, the

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<sup>37</sup> Hayner, P. (2011) p20

<sup>38</sup> *Ibid* p2

<sup>39</sup> Groome, D. (2011) 'The Right to Truth in the Fight against Impunity' 29 *Berkeley JIL* pp175-199 at p177

<sup>40</sup> Posel, D. (2008) 'History as Confession: The Case of the South African Truth and Reconciliation Commission' 20 *Public Culture* pp119-141 at p125

<sup>41</sup> Hayner, P. (2011) p23

<sup>42</sup> de Greiff, P. (2013) *Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence*, A/HRC/24/42, 28 August para. 19

Commission declared ‘every society has the inalienable right to know the truth about past events, as well as the motives and circumstances in which aberrant crimes came to be committed in order to prevent repetition of such acts in the future.’<sup>43</sup> In 1988, the IACtHR confirmed a state has a duty to investigate the fate of the disappeared and disclose the information to relatives.<sup>44</sup> Later, in a 2003 case, the IACtHR imposed a more positive obligation on the state, finding that ‘the next of kin of the victims and society as a whole *must* be informed of everything that has happened in connection with the said violations’.<sup>45</sup>

An early example of the right to truth appearing in an international convention is the 1977 First Additional Protocol to the Geneva Conventions which, ‘prompted mainly by the right of the families to know the fate of their relatives’, detailed a state party’s obligations concerning missing and dead persons.<sup>46</sup> In 1991, the UN Commission on Human Rights (UNCHR) Sub-Commission on Prevention of Discrimination and Protection of Minorities requested its Special Rapporteur, Louis Joinet, to undertake a study on the impunity of perpetrators of HR violations. In his final report, Joinet formulated a set of 50 principles,<sup>47</sup> updated by Diane Orentlicher in 2005 at the UNCHR’s request, which were ‘intended as guidelines to assist states in developing effective measures for combating impunity.’<sup>48</sup> Joinet’s principles covered the victims’ right to know, right to justice and right to reparations and established state responsibility and the inherent right of redress for individual victims of grave HR violations. The principles also identified ‘mechanisms, modalities, and procedures for the implementation of existing, legal obligations under international humanitarian law and international HR law.’<sup>49</sup>

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<sup>43</sup> IACCommHR Annual Report, 1985-86, AS Doc. No. OEA/Ser.L/V/II.68, Doc.8 rev. 1 (26 September 1986) p193

<sup>44</sup> *Velásquez Rodríguez vs Honduras*, IACtHR, (Ser. C) No. 4, 29 July 1988

<sup>45</sup> *Myrna Mack Chang v Guatamala*, IACtHR, (Ser. C) No.101, 25 November 2003 (Merits, Reparations and Costs) p128, para.274 (emphasis added)

<sup>46</sup> Protocols Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977, Articles 32-34

<sup>47</sup> Joinet, L. (1997) *The Administration of Justice and the Human Rights of Detainees: Question of the Impunity of Perpetrators of Human Rights Violations (Civil and Political)* E/CN.4/Sub.2/1997/20/Rev.1 2 October p5

<sup>48</sup> Orentlicher, D. (2005) *Report of the independent expert to update the Set of principles to combat impunity*, E/CN.4/2005/102/Add.1, 8 February p5

<sup>49</sup> Sisson, J. (2010) ‘A Conceptual Framework for Dealing with the Past’ 3 *Politorbis Nr. 50: Dealing with the Past* pp11-16

For Joinet, this right applied not only to individual victims and their families but also collectively, 'drawing on history to prevent violations from recurring in the future'.<sup>50</sup> He argued the corollary of this right was the state's duty to remember:

to guard against the perversions of history that go under the names of revisionism or negationism; the knowledge of the oppression it has lived through is part of a people's national heritage and as such must be preserved. These, then, are the main objectives of the right to know as a collective right.<sup>51</sup>

Orentlicher affirmed Joinet's 'right to know the truth'<sup>52</sup> which 'imprescriptible right' applied irrespective of any legal proceedings<sup>53</sup> and obliged states to 'ensure the preservation of, and access to, archives concerning violations of human rights and humanitarian law'.<sup>54</sup> The UNCHR then adopted a resolution<sup>55</sup> recognising 'the importance of respecting and ensuring the right to the truth so as to contribute to ending impunity and to promote and protect human rights'.<sup>56</sup> The resolution requested the Office of the High Commissioner for Human Rights (OHCHR) to prepare a report 'including information on the basis, scope and content of the right under international law'. The 2006 report stated the right to truth was 'recognized in several international treaties and instruments as well as by national, regional and international jurisprudence and numerous resolutions of intergovernmental bodies at the universal and regional levels'.<sup>57</sup>

Since the 1990s, therefore, the UN HR policy body<sup>58</sup> has passed several resolutions reiterating the right to truth and all the reports, resolutions and jurisprudence indicate that the right to truth has become a generally accepted legal concept. Whilst there are many ways in which the state could meet its obligations to provide access to

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<sup>50</sup> Joinet, L. (1997) para.17

<sup>51</sup> *Ibid*

<sup>52</sup> Orentlicher, D. (2005) Principle 2

<sup>53</sup> *Ibid* Principle 4

<sup>54</sup> *Ibid* Principle 5

<sup>55</sup> Right to the truth, Human Rights Resolution, E/CN.4/RES/2005/66, 20 April

<sup>56</sup> *Ibid* para. 1

<sup>57</sup> Study on the right to the truth: Report of the Office of the UN HCHR, UN Doc. E/CN.4/2006/91, 8 February 2006, para. 55

<sup>58</sup> In 2006 the UNCHR was replaced by the UN Human Rights Council



information,<sup>59</sup> for those wishing to persuade their government to establish an effective TC, it is this right and obligation that is most often cited.<sup>60</sup>

In the next section, to contextualise the emergence of the TRC as the preferred means of accountability, the background and history of the apartheid system in SA will be considered to discover how and why HR became a dominant feature of the nation-building project during the peace talks between 1985 and 1994.

### **Section Three: Background and History of Apartheid in South Africa**

Colonial rule in SA, in common with much of the rest of Africa, involved segregation, racial discrimination and repression in the form of dispossession, denial and subordination. Thus, by 1948 when the Afrikaner NP led by Daniel Malan won the whites-only general election and introduced apartheid, racism and oppression were already firmly established across SA's societal, political and legal landscapes, including housing, jobs, education and welfare.<sup>61</sup>

In the 1950s, the ANC<sup>62</sup> organised marches, meetings, boycotts and strikes to protest at the increasingly harsh treatment of the blacks.<sup>63</sup> However, the government 'violently crushed [all] peaceful methods of struggle' leading to the realisation among ANC leadership that non-violent resistance to apartheid would not succeed.<sup>64</sup> In December 1961, the ANC's military wing, *Umkhonto we Sizwe* ('the Spear of the Nation' also 'MK') was formed to organise and co-ordinate an armed struggle.<sup>65</sup> The NP reacted to the unrest in the early 1960s by enacting increasingly oppressive legislation, banning leading anti-apartheid movements, imprisoning their leaders and granting the police and the military comprehensive powers to arrest and detain without trial.<sup>66</sup>

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<sup>59</sup> Hayner, P. (2011) suggesting, for example, de-classification of state documents, exhumations of mass graves, parliamentary enquiries p24

<sup>60</sup> *Ibid*

<sup>61</sup> Bundy, C. (2001) p17

<sup>62</sup> Founded in 1912

<sup>63</sup> Mandela, N. (1996) *Long Walk to Freedom* (Abridged Edition) (London: Little, Brown and Co. Ltd.) p27

<sup>64</sup> *Ibid* p54

<sup>65</sup> *Ibid* p56

<sup>66</sup> Berat, L. (1995) p267

The government's repressive legislation in the mid-1960s effected a decade of outward relative calm in the resistance movement which ended on the morning of 16<sup>th</sup> June 1976 when, without warning, police shot at unarmed Soweto schoolchildren who were peacefully protesting against the imposition of lessons being taught in Afrikaans.<sup>67</sup> After the Soweto Uprising, the need for a united opposition to apartheid began to be realised and in 1983, the United Democratic Front (UDF), a broad-based umbrella organisation, was formed.<sup>68</sup> It incorporated over 600 anti-apartheid groups and had strong links to the ANC.<sup>69</sup> Initially, conceived as a peaceful movement for change, in the mid-1980s, some organisations within the UDF became more militant and anti-government protests 'succeeded in 'making the townships ungovernable' through rent boycotts, school boycotts, demonstrations, strikes and other means.'<sup>70</sup> The perceived threat to the government of then-President P.W. Botha, became so severe that a nationwide state of emergency was declared on 12th June 1986 and the security forces were elevated to a new level of authority within the government.<sup>71</sup> Crimes committed by police and military hit squads, allegedly with the knowledge of the leaders of the apartheid regime, included 'a campaign of assassinations, bombings and torture' of those who were believed to be the regime's opponents.<sup>72</sup>

Thus, by the mid-1980s, there was a general state of emergency in SA, thousands were in prison, detained without trial (including children as young as eight years<sup>73</sup>) and almost every opposition party was banned.<sup>74</sup> Although SA was not a military dictatorship, the military had been given extreme powers to keep the black population under control and troops were everywhere on the streets of the black townships.<sup>75</sup> President P.W. Botha

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<sup>67</sup> Estimates for the number killed range from 176 to 700 with hundreds more injured during the ensuing chaos

<sup>68</sup> Berat, L. (1995) p267

<sup>69</sup> Mandela, N. (1996) p117

<sup>70</sup> Wilson, R. A. (2001b) 'Justice and Legitimacy in the South African Transition' in Barahona de Brito, A., González-Enríquez, C. and Aguilar P. (eds.) *The Politics of Memory: Transitional Justice in Democratizing Societies* (Oxford: OUP) p192

<sup>71</sup> Berat, L. (1995) p267

<sup>72</sup> McGreal, C. (2007) 'Apartheid-era murder of sleeping teenagers returns to haunt De Klerk' *The Guardian* 6 August [Online] Available: <https://www.theguardian.com/world/2007/aug/06/southafrica.topstories3> [Accessed 28.08.17]

<sup>73</sup> It is estimated that approximately 54,000 were detained during the state of emergency between 1985 and 1990. By contrast, an estimated 25,000 were detained between 1963 and 1984.

<sup>74</sup> Boraine, A. (2000a) p24

<sup>75</sup> Berat, L. (1995) p267

was virtually running the country 'from the white citadel of Pretoria' with the support of the SA Defence Force (SADF).<sup>76</sup>

By the end of the 1980s, the armed conflict between the apartheid regime and the anti-apartheid movement had reached stalemate or what Gump describes as 'a state of violent equilibrium'.<sup>77</sup> Neither could overcome the other: the state could not govern without maintaining a state of emergency and the black majority could not overthrow the state by violence.<sup>78</sup> ANC leaders realised that even if they won the battle, there would be little left of the country's infra-structure to carry forward to a new multi-racial society.<sup>79</sup> Meanwhile, the collapse of the Berlin Wall and the breakdown of communist regimes in Eastern Europe, resulted in the NP softening its rigid anti-communist stance, which for so long had been its justification for the repression of the blacks.

Tentative talks between the NP and the black leadership began in 1985 and gathered pace until on 2<sup>nd</sup> February 1990, President F.W. De Klerk announced in Parliament that the ANC, the Pan-African Congress (PAC), the SA Communist Party and other groups were unbanned and political prisoners (including Nelson Mandela) were to be released.<sup>80</sup> In June 1990, De Klerk announced the lifting of the four-year state of emergency and the ANC responded by abandoning the armed struggle.<sup>81</sup> De Klerk's announcements were greeted with great resentment by the Security Forces who felt betrayed by the NP whose repressive policies they had enforced, putting themselves now in danger of being prosecuted for the gross violations of HR they had committed in the name of the state.<sup>82</sup>

Initial euphoria following the release of Mandela<sup>83</sup> soon gave way to frustration as it was realised that blacks still had no vote, the NP remained firmly in political control and the

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<sup>76</sup> Wilson, R. A. (2001b) p194; see also Boraine, A. (2000a) p24

<sup>77</sup> Gump, J. (2014) 'Unveiling the Third Force: Toward Transitional Justice in the USA and South Africa, 1973-1994'

15 *The Journal of South African and American Studies* pp75-100 at p91

<sup>78</sup> Wilson, R.A. (2001a) p5

<sup>79</sup> *Ibid*

<sup>80</sup> Berat, L. (1995) p268

<sup>81</sup> *Ibid*

<sup>82</sup> Van Zyl Slabbert, F. (2000) 'Truth without Reconciliation, Reconciliation without Truth' in James, W. and Van de Vijver, L. (eds) p67

<sup>83</sup> 11<sup>th</sup> February 1990

legislation that upheld the policy of apartheid remained in force.<sup>84</sup> By the end of 1990, SA was on the verge of collapse, plunged into internecine violence within the black community,<sup>85</sup> allegedly with the assistance of complicit security forces, that threatened to destroy the country.<sup>86</sup> Despite the violence that sometimes derailed the 'talks about talks' during 1990 and 1991,<sup>87</sup> progress was made and in September, a National Peace Accord was signed by the government, ANC and IFP. On 20th December 1991, a negotiating forum comprising delegations from 18 political organisations (the Convention for a Democratic SA (CODESA)) assembled at the World Trade Centre outside Johannesburg to begin 'real' talks<sup>88</sup> which the NP intended would produce a settlement favourable to its interests.<sup>89</sup> Wilson suggests that initially, the NP government:

wanted to tinker with apartheid, to create a system of power-sharing that would entrench white 'minority' rights, ensure an NP veto on the introduction of key legislation, and thereby allow whites to cling to their historical political privileges. Their strategy was to use negotiations to destabilise the ANC politically and undermine its bargaining position through violence.<sup>90</sup>

After months of heated debate, a format for the new constitution was agreed by the groups who attended the CODESA talks and it then only required ratification by the NP-led SA Parliament.<sup>91</sup> Interestingly, the Interim Constitution which was to remain in force until a new parliament, to be elected in April 1994, could draft a new one, provided for

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<sup>84</sup> Asmal, K. (1992) p504

<sup>85</sup> Mandela, N. (1996) p140 stating the biggest problem was violence in Natal and in townships around Johannesburg, mostly between the ANC and IFP. Between July 1990 - June 1992, 6229 people were killed, approximately the same number killed during all the 1980s unrest

<sup>86</sup> Berat, L. (1995) p269

<sup>87</sup> For example, on 26 March 1991 police shot dead 12 ANC demonstrators and wounded many more in the Sebokeng township leading to the ANC refusing attend planned talks with the government

<sup>88</sup> Mandela, N. (1996) p141-2

<sup>89</sup> Berat, L. and Shain, Y. (1995) 'Retribution or Truth-Telling in South Africa? Legacies of the Transitional Phase' 20 *Law & Social Inquiry* pp163-189 at p172; see also Asmal, K. (1992) stating 'The NP would like the state to stay as it is, with the formal modifications, freed of overt manifestations of racism.' p504

<sup>90</sup> Wilson, R. A. (2001b) p194; see also Gump, J. (2014) p85 stating SA officials used a 'third force approach' by allying themselves with Zulu traditionalists and exploited the rivalry between the ANC and IFP to undermine the progressive forces of the ANC/UDF. He cites the TRC Report, vol.3 p187: 'Deploying black surrogates to strike back at black insurgents held several advantages in the minds of South African strategists. In addition to helping defeat or at least weaken insurgents, such an approach held great potential value as a propaganda tool. As factional conflict escalated the government could characterize it as "black-on-black" violence, thereby justifying the continuation of white minority rule.'

<sup>91</sup> Dugard, J. (1998) p292

majority rule and protection for minority rights but made no provision for amnesty.<sup>92</sup> During all the months of negotiations, the focus had been the shape of the political system in the new SA and its economic structure because the question of how to deal with the HR abuses committed during the apartheid regime was so divisive and controversial, it had effectively been pushed down the list of priorities.<sup>93</sup> Nor did there appear to be much 'popular or open political party debate on amnesty' outside the talks.<sup>94</sup> Thus, on 17<sup>th</sup> November 1993 when the CODESA talks concluded, the issue of amnesty remained unresolved.<sup>95</sup>

From the outset of talks, the NP (supported by the SADF) had argued strongly for a blanket amnesty. They had tried to link the question of a general amnesty to the freeing of the remaining political prisoners and had also attempted to extend the indemnity granted to ANC exiles to the SADF.<sup>96</sup> Both attempts were rebuffed by the ANC which suspended all discussion on the amnesty question, declaring in a press release on 13<sup>th</sup> August 1992 that 'the discussion of amnesty should be reserved for "an interim government of National Unity" and that such amnesty should only be granted if the people agreed.'<sup>97</sup>

The ANC had resisted the idea of a blanket amnesty as being unacceptable to the victims of gross HR violations committed during the apartheid regime and for the purposes of future deterrence.<sup>98</sup> *Realpolitik* won through, however, when the Police Commissioner and the recently retired head of the National Intelligence Service approached Mandela with the offer that in exchange for amnesty, 'the security forces would 'guarantee stability' during the transition period.'<sup>99</sup> The ANC leadership realised that to prosecute the offenders could lead to more bloodshed and the failure of a peaceful transition to a multi-racial democracy. Thabo Mbeke, when Deputy President of SA, later reflected:

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<sup>92</sup> Sriram, C.L. (2004) *Confronting Past Human Rights Violations: Justice vs Peace in Times of Transition* (Abingdon: Frank Cass) p153

<sup>93</sup> Wilson, R.A. (2001a) p7

<sup>94</sup> *Ibid* p8

<sup>95</sup> *Ibid*

<sup>96</sup> Dugard, J. (1998) p291

<sup>97</sup> Berat, L. (1995) p272

<sup>98</sup> Boraine, A. (2000b) 'Truth and Reconciliation in South Africa: The Third Way' in Rotberg, R. and Thompson, D. (eds.) *Truth v. Justice: The Morality of Truth Commissions* (Oxford: Princeton UP) p143

<sup>99</sup> Berat, L. and Shain, Y. (1995) p182-3 (Citing *S. Africa Rep.*, 10 Dec. 1993 at p3)

‘Within the ANC the cry was to ‘catch the bastards and hang them’ but [h]ad there been a threat of Nuremberg-style trials for the members of the apartheid state security establishment, we would never have undergone a peaceful change’.<sup>100</sup> Pragmatically, trials were unfeasible because the existing justice system, comprising white judges and predominantly white prosecutors, was ill-equipped to undertake the task and would be for many years, given the time it takes to train lawyers under a Common Law system. For Asmal, the limited resources available to prosecute and punish were at risk of being ‘misspent [and] sabotaged’ by supporters of the former regime who still dominated the judicial and policing systems.<sup>101</sup>

Thus, after the conclusion of the CODESA talks, in the period between approval of the Interim Constitution and its adoption by Parliament at the end of 1993, the amnesty issue again came to the fore. Negotiators from the ANC and the NP drafted a postamble to the Constitution entitled ‘National Unity and Reconciliation’ which contained an amnesty clause.<sup>102</sup> The interim Constitution with postamble was ratified by Parliament in December 1993 and the first non-racial elections in SA were held on 27<sup>th</sup> April 1994. The newly-elected ‘Government of National Unity’ was dominated by the ANC and Nelson Mandela became President of SA.

Pressure from churches, the judiciary and HR groups meant the question of how to deal with the HR violations from the apartheid era needed to be addressed promptly by the newly-elected government.<sup>103</sup> The proposal for a SATRC had originally come from the ANC National Executive Committee (NEC) which had met in October 1993 to discuss the findings of an internal inquiry into torture and killing in its military camps in Zambia,

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<sup>100</sup> Boraine, A. (2000a) p13-4

<sup>101</sup> Asmal, K. (2000) ‘International Law and Practice: Dealing With the Past in the South African Experience’ 15 *American University ILR* pp1211-1230 at p1227 referring by example to the prosecution of Magnus Malan, Chief of the SADF from 1976 and Defence Minister (1980-91) plus 21 others, who were all acquitted in 1996. See also Mallinder, L. (2009) ‘Indemnity, Amnesty, Pardon and Prosecution Guidelines in South Africa’ Working Paper No. 2 from *Beyond Legalism: Amnesties, Transition and Conflict Transformation*, Institute of Criminology and Criminal Justice, Queens University, Belfast p53 (blaming the ‘totally untransformed’ Attorney General who failed to investigate thoroughly despite overwhelming evidence); Wilson, R.A. (2001b) ) ‘Justice and Legitimacy in the South African Transition’ in Barahona de Brito, A., González-Enríquez, C. and Aguilar P. (eds.) p203-4; and *The Telegraph* Obituaries 19 July 2011 ‘General Magnus Malan’ stating some blamed the acquittals on an apartheid-era judge presiding over the case, [Online] Available: <http://www.telegraph.co.uk/news/obituaries/8648347/General-Magnus-Malan.html> [Accessed 16.01.17]

<sup>102</sup> Wilson, R.A. (2001a) p8; (see Appendix Two for the wording of the postamble)

<sup>103</sup> Battersby, J. (1994) ‘South Africans Weigh Exposing Apartheid Crimes’ *The Christian Science Monitor* 18 May

Angola, Tanzania and Uganda.<sup>104</sup> At that meeting, Asmal argued that SA needed a TC to look at 'all the violations of human rights on all sides by whatever party'.<sup>105</sup> The NEC agreed that the violations should be seen against a culture of HR violations that had pervaded SA society for decades<sup>106</sup> and called upon the government 'to agree, following discussions with the ANC, to set up without delay, a Commission of Inquiry or Truth Commission into all violations of human rights since 1948'.<sup>107</sup> The approach of the ANC appears to have been a desire both to discover the truth about the crimes committed by the apartheid state as well as to repudiate the system of apartheid.

In the next section, the process of establishing the SATRC will be outlined and the nature of the limited amnesty will be discussed to establish whether the decision to eschew prosecutions in favour of the TRC was widely supported by the victims (who comprised the majority of the SA population), whether dissent was heeded and respected and whether the establishment of the TRC can justifiably be termed the democratically-expressed will of society. These factors have an impact on the ICJ aim of obtaining justice and dignity for victims and it will be argued that, when considering the issue of inadmissibility, as well as assessing the capacity of the TRC to satisfy the aims of ICJ, the ICC must take account of the public support for the proposed AJM and of the political constraints outlined in this section.

#### **Section Four: The Establishment and Process of the SATRC**

On 27<sup>th</sup> May 1994, the new government announced to Parliament its decision to establish a TRC to enable SA to address its past and to deal with the issue of amnesty, to which the government was bound by the postamble to the Interim Constitution. After setting out its proposals for the TRC, the government invited 'individuals, organisations, religious bodies and members of the public to submit their comments and proposals by 30<sup>th</sup> June 1994, before the legislation was finalised'.<sup>108</sup> It had been decided from the

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<sup>104</sup> Berat, L. (1995) p274; see also Boraine, A. (2000a) p11

<sup>105</sup> Mallinder, L. (2009) p45

<sup>106</sup> Boraine, A. (2000a) p11

<sup>107</sup> *Ibid* p12 (citing the ANC 'NEC's Response to the Motsuenyane Commission's Report' August 1993)

<sup>108</sup> *Ibid* p42

outset to involve as much of society as possible in the framing of the legislation that would bring the TRC into effect.<sup>109</sup>

With the assistance of SA non-governmental organisations (NGOs) such as Justice in Transition (JIT), the government made great efforts to ensure there was widespread participation in the preparatory steps for the TRC. It circulated the proposed legislation to leading NGOs throughout SA, many of which organised over 30 seminars and numerous workshops to discuss and promulgate the theory behind the commission.<sup>110</sup> JIT printed 150,000 booklets entitled 'The Truth and Reconciliation Commission' in six languages for distribution throughout SA and produced four radio programmes, also in six languages, which were broadcast on national radio with recordings made available to organisations throughout the country.<sup>111</sup>

The Portfolio Committee on Justice which was tasked with drafting the final Bill, spent many weeks sifting through and publicly debating the many submissions and issues before the draft Bill was ready to be introduced to Parliament. Wilson describes the intervention of victims' families when 'it seemed congressional deputies would balk at 'naming names' in the final report', which they successfully opposed on the grounds they had the right to know the names of the killers of their kin.<sup>112</sup> Another controversial area where civil society influenced the Committee was over the issue of whether amnesty hearings would be open to the public. Initial proposals were that hearings would be *in camera* but NGOs argued this would compromise the purpose and intention of the Commission's work.<sup>113</sup> It was agreed, therefore, that all committees would sit in public although there was discretion to hold some or parts of hearings *in camera* where there was a likelihood of harm or in the interests of justice.<sup>114</sup>

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<sup>109</sup> *Ibid* p47

<sup>110</sup> *Ibid* p50

<sup>111</sup> *Ibid*; See also Orentlicher, D. (2004) *Independent Study on Best Practices, including Recommendations, to Assist States in Strengthening their Domestic Capacity to Combat all Aspect of Impunity* (UNCHR E/CN.4/2004/88) para.11

<sup>112</sup> Wilson, R.A. (2001b) p200-201

<sup>113</sup> Sarkin, J. (2004) *Carrots and Sticks: The TRC and the South African Amnesty Process* (Oxford: Intersentia) p54

<sup>114</sup> Boraine, A. (2001a) p70



The Bill was introduced into Parliament on 17<sup>th</sup> May 1995 whereupon parliament held over 150 hours of hearings,<sup>115</sup> during which over 300 amendments were made to the draft legislation.<sup>116</sup> In the final vote, the Bill received the support of all political parties, save for the IFP which abstained, unconvinced that 'even-handedness would prevail' and the extreme right-wing Freedom Front which voted against because it had argued unsuccessfully for the 6<sup>th</sup> December 1993 cut-off date to be extended to 10<sup>th</sup> May 1994.<sup>117</sup> The Bill was signed into law on 19<sup>th</sup> July and The Promotion of National Unity and Reconciliation Act (PNURA or 'the Act') came into effect on 15<sup>th</sup> December, the same day the names of the appointed commissioners were announced.<sup>118</sup>

The procedure for appointing the commissioners had been equally participative and transparent, as the committee established by President Mandela to draw up a short list from which he would make the appointments publicly invited nominations of suitable persons to serve.<sup>119</sup> The committee received 299 nominations and following public interviews, a final list of 25 names was submitted to Mandela who selected 15 and added Archbishop Desmond Tutu as Commission Chairperson and Alex Boraine as his deputy.<sup>120</sup>

The TRC's objectives were clearly outlined in the PNURA and Hayner describes it as 'the most complex and sophisticated mandate for any truth commission to date, with carefully balanced powers and an extensive investigatory reach.'<sup>121</sup> The main objectives of the TRC were to promote national unity and reconciliation through:

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<sup>115</sup> Orentlicher, D. (2004) para. 11

<sup>116</sup> Mallinder, L. (2009) p53

<sup>117</sup> *Ibid.*

<sup>118</sup> Boraine A. (2000a) p71

<sup>119</sup> Mamdani, M. (2000) 'A Diminished Truth' in James, W. and Van de Vijver, L. (eds.) p58

<sup>120</sup> *Ibid*; see also Boraine, A. (2000a) p72-3

<sup>121</sup> Hayner, P. (2011) p27

- establishing as complete a picture as possible of the nature, causes and extent of the gross violations of HR between 1<sup>st</sup> March 1960<sup>122</sup> and 5<sup>th</sup> December 1993<sup>123</sup>
- facilitating the granting of amnesties to persons making full disclosure of all relevant facts relating to acts associated with a political objective
- establishing and making known the fate/whereabouts of victims
- taking measures aimed at granting reparations, rehabilitating and restoring human and civil dignity to victims and
- compiling a report providing as comprehensive an account as possible of the activities and findings of the TRC and containing recommendations of measures to prevent future violations of HR<sup>124</sup>

‘Gross violation of HR’ was defined in the Act as ‘killing, abduction, torture or severe ill-treatment of any person’ which limited the investigation to acts which were already crimes under the apartheid state. The restriction to *gross* HR violations meant that the ‘everyday, mundane bureaucratic enforcement’<sup>125</sup> of the abusive but ‘legal’ practices of apartheid, which affected every member of the black community, such as detention without trial, pass laws, racial segregation of public amenities and forced removals of millions of blacks from their homes, were excluded from the investigation. Excluding evidence of these injustices may have been expedient to avoid overwhelming the TRC with work but the TRC was accused of distorting the ‘truth’ of HR violations in SA by concentrating on offences that were already crimes under SA criminal law rather than the injustices suffered under the apartheid regime.<sup>126</sup> The decision also ignored all the UN Resolutions passed annually between 1952 and 1990 condemning the apartheid regime and the 1973 Apartheid Convention (to which SA is not a party) which internationalised apartheid as a CAH.

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<sup>122</sup> This date covers the banning of political organisations, severe oppression of any resistance to apartheid and the Sharpeville massacre on 21 March 1960

<sup>123</sup> Later changed to 10<sup>th</sup> May 1994 (Mandela’s inauguration date) to accommodate the demands of right-wing parties and the PAC, whose supporters had committed violent acts immediately prior to the April 1994 election

<sup>124</sup> The full text of the PNURA is available at <http://www.justice.gov.za/legislation/acts/1995-034.pdf> [Accessed 19.01.17]

<sup>125</sup> Wilson, R.A. (2001a) p34

<sup>126</sup> Mamdani, M. (1996a) (unnumbered pages)

Dugard suggests two explanations for the decision: first, ‘the desire to avoid the suggestion of ‘victor’s justice’’ by addressing crimes committed on both sides of the struggle and second, to demonstrate a commitment to legality and the rule of law by avoiding the invalidation of apartheid laws retrospectively.<sup>127</sup> He bases the latter explanation on the argument that ‘the apartheid order was a legal order’, so most of the injustices were committed in the name of the law, notwithstanding they breached international HR norms and international criminal law.<sup>128</sup> This latter argument is controversial, however, given that crimes committed by the Nazi regime were ‘legal’ but nonetheless were tried as CAH at Nuremberg.

PNURA decreed that the granting of amnesties was to be facilitated by an Amnesty Committee (AC), which was established after the main commission, independently of it and without the same transparent process.<sup>129</sup> The amnesty legislation faced some dissent, due to its ‘opaque origins and the understandable desire for retribution’ which made it ‘the most controversial legislation of post-apartheid SA.’<sup>130</sup> In a challenge made to the Constitutional Court, the Azanian People’s Organization (AZAPO) and the relatives of some of the most well-known victims of apartheid<sup>131</sup> sought to set aside the provision for amnesty in PNURA on the ground that it was inconsistent with s22 of the Interim Constitution which provided that everyone should have the right to have justiciable disputes settled by a court of law. Furthermore, the applicants argued ‘the State was obliged by international law to prosecute those responsible for gross human rights violations and that the provisions of s20(7) which authorized amnesty for such offences constituted a breach of international law.’<sup>132</sup>

In his ‘beautifully scripted’ judgment, Mahomed DP held that the postamble to the Constitution trumped s22, thus the s20(7) PNURA authorisation of criminal and civil

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<sup>127</sup> Dugard, J. (1997a) ‘Retrospective Justice: International Law and the South African Model’ in McAdams, A.J. (ed) *Transitional Justice and the Rule of Law in New Democracies* (London: University of Notre Dame Press) p279

<sup>128</sup> *Ibid* p270-1

<sup>129</sup> Mamdani, M. (2000) p58

<sup>130</sup> Dugard, J. (1997b) ‘Is the Truth and Reconciliation Process Compatible with International Law? An Unanswered Question: *Azapo v President of the Republic of South Africa* 1996’ (4) SA 562 (CC) 13 SAJHR pp258-268 at p260

<sup>131</sup> Steven Biko, Griffiths and Victoria Mxenge and Dr and Mrs Fabian Ribeiro

<sup>132</sup> Dugard, J. (1997b) p261

amnesty was constitutional.<sup>133</sup> Agreeing with this finding,<sup>134</sup> Dugard notes this was the first time the Constitutional Court had been asked to interpret the Constitution such that the setting aside of a statute enacted by a democratically elected Parliament would result.<sup>135</sup> Asmal comments '[d]issent, however much in the minority, should always be taken seriously particularly when it is expressed by victims against so traumatic a choice.'<sup>136</sup> However, he cautions dissent should not 'prevent new democracies from deciding democratically how they wish to deal with their shameful pasts.'<sup>137</sup>

Unfortunately, the judgment did not address either the applicant's claim that SA had a duty under customary international law to prosecute the gross HR violations of the previous regime or the compatibility of the postamble amnesty with both conventional and customary international law.<sup>138</sup> To reiterate an earlier observation, as SA was not a party to relevant treaties (e.g. the Apartheid and Torture Conventions) at the time violations were committed, treaty law obligations did not arise. Clearly, gross HR violations committed during the apartheid era, which were also crimes under SA law (e.g. murder, rape, torture, assault, disappearances) are CAH but as Dugard suggests, any enquiry 'would probably have revealed state practice is too unsettled to support a rule obliging states to prosecute' such crimes in customary international law and accordingly there was no legal impediment to the granting of amnesty in circumstances such as prevailed in SA at that time.<sup>139</sup>

In this section, the public consultation and participation in the process of establishing the TRC has been outlined to demonstrate that the SATRC was not merely a 'top-down' appointment but a commission established by a democratically-elected Parliament which encouraged the full involvement of civil society. This is a positive factor which should also influence any determination by the ICC when considering a challenge to admissibility based on a TC. In the next section, the structure and working processes of

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<sup>133</sup> *Ibid*

<sup>134</sup> *Ibid* p267

<sup>135</sup> *Ibid* p261

<sup>136</sup> Asmal, K. (2000) p1224

<sup>137</sup> *Ibid*; Subsequently, Steve Biko's killers were denied amnesty as they claimed his death was accidental

<sup>138</sup> Dugard, J. (1997b) p267

<sup>139</sup> *Ibid*

the SATRC will be outlined to indicate how the PNURA which established the SATRC was put into effect.

### Section Five: The Structure and Process of the SATRC

The PNURA established a TRC comprising three committees: the Human Rights Violations Committee (HRVC), the AC and the Reparations and Rehabilitation Committee (R&RC).<sup>140</sup> Two principal differences between the committees were that the HRVC and R&RC focussed on victims; the AC on perpetrators and the ACs decisions were binding on the TRC and the government whereas the decisions of the other two committees were recommendations only.<sup>141</sup> This latter difference had the unfortunate effect of giving preferential treatment to perpetrators who could be granted amnesty as soon as a decision was made whereas victims had to wait for parliament to decide whether to accept the committees' recommendations.<sup>142</sup>

The TRC commenced work in December 1995 with a staff of approximately 300.<sup>143</sup> It was supported by an Investigative Unit which collaborated with the Research Department, conducting enquiries to establish the identity of victims and perpetrators,<sup>144</sup> and a sophisticated witness-protection programme.<sup>145</sup> The TRC had four large offices nationwide and a budget of US\$18 million for its first two and a half years, making it larger than any previous TC in terms of size and reach.<sup>146</sup> PNURA gave the TRC power to *subpoena* witnesses, search premises and seize evidence.<sup>147</sup> Unfortunately, often it chose not to use these powers, even in the face of deliberate delay or obstruction from key individuals<sup>148</sup> or institutions, which sometimes led to

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<sup>140</sup> Ntsebeza, D. (2000) 'The Struggle for human rights: from the UN Declaration of Human Rights to the present' in Villa-Vicencio C. and Verwoerd, W. (eds) *Looking Back Reaching Forward: Reflections on the Truth and Reconciliation Commission of South Africa* (London: Zed Books) p6

<sup>141</sup> Mamdani, M. (2000) p58

<sup>142</sup> Mallinder, L. (2009) p62 stating there was considerable tension between the AC and the Commission due to the ACs relative autonomy, the difference in their work, the failure to share data and the difference in approaches to holding public meetings pp58-63

<sup>143</sup> Hayner, P. (2011) p28

<sup>144</sup> Ntsebeza, D. (2000) p6

<sup>145</sup> Hayner, P. (2011) p28

<sup>146</sup> *Ibid*

<sup>147</sup> *Ibid*

<sup>148</sup> The TRC subpoenaed P.W. Botha but he refused to appear. Charges were brought and following trial, he was convicted, fined \$2000 and sentenced to 12 months' imprisonment, suspended for five years on condition he did not

criticism that the TRC held 'the mission of reconciliation above that of finding the truth.'<sup>149</sup>

Each of the three committees had its designated area of responsibility. The HRVC was responsible for investigating gross violations of HR: it could initiate enquiries, gather information, determine facts and record allegations and complaints. The SATRC took 21,298 statements concerning almost 38,000 gross violations of HR,<sup>150</sup> more statements than any previous TC.<sup>151</sup> Trained statement-takers worked from one of the four offices, or in public buildings such as halls or churches within communities throughout SA or in people's homes. Clearly, time constraints prevented all statement-givers from giving evidence in public hearings so 2000 were selected as 'an appropriately representative sample of the whole – but only symbolically, not statistically.'<sup>152</sup> Posel states this was achieved in two ways: those appearing in the hearings 'had to instantiate the demography of the rainbow nation in an appropriate mix of race, gender and political affiliation and the violations of which they spoke had to be rendered as exemplars of wider patterns of abuse.'<sup>153</sup>

The AC considered applications for amnesty and SA was the only state to link the granting of amnesties with a TC.<sup>154</sup> There were three conditions before an amnesty could be granted: the abuses had to have been committed in or outside SA between 1<sup>st</sup> March 1960 and 10<sup>th</sup> May 1994; the motive had to be political (not personal, malice or spite) and the perpetrator had to make full and frank admissions, including the chain of command.<sup>155</sup> However, the applicant did not have to express remorse.<sup>156</sup> When granted amnesty, perpetrators were exempted from criminal prosecutions and civil suits for

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contravene the Act again. On appeal, the conviction was overturned on a technicality. See Boraine, A. (2000a) pp200-220

<sup>149</sup> Hayner, P. (2011) p28

<sup>150</sup> Posel, D. (1999) *The TRC Report: What Kind of History? What Kind of Truth? A preliminary exploration* pp1-30 at p15 [Online] Available:

[http://www.academia.edu/1012474/The\\_TRC\\_Report\\_What\\_kind\\_of\\_history\\_What\\_kind\\_of\\_Truth](http://www.academia.edu/1012474/The_TRC_Report_What_kind_of_history_What_kind_of_Truth) [Accessed 25.06.17]

<sup>151</sup> Wilson, R. A. (2001b) p207

<sup>152</sup> Posel, D. (2008) p138

<sup>153</sup> *Ibid*

<sup>154</sup> Boraine, A. (2000a) p269; see also Wilson, R.A. (2001a) p23

<sup>155</sup> Hayner, P. (2011) p29

<sup>156</sup> *Ibid*

damages, however, if amnesty was refused the perpetrator then was at risk of criminal and/or civil proceedings.<sup>157</sup> In a situation which caused some strain between the Commission and the offices of the Attorney General,<sup>158</sup> perpetrators often waited until they were targeted for prosecution by the special investigations teams (formed in 1994 to examine prominent cases of political violence) before immediately applying to the TRC for amnesty.<sup>159</sup>

Of the 7116 applications for amnesty received by the AC, 4500 were refused after administrative review mainly due to lack of political motive.<sup>160</sup> Those requesting amnesty for gross HR violations (as opposed to other forms of politically motivated crimes e.g. criminal damage) had to appear at a public hearing to answer questions from the AC and the victims, their families or their legal representatives.<sup>161</sup> Sarkin has analysed the statistics and notes '[p]ublic hearings were heard on 2548 incidents, which took place on 1888 days at 267 venues around the country, using 1538 interpreters who interpreted for 11,680 hours [which] translates into 1973 hearings.'<sup>162</sup> Of those appearing before public hearings, 1167 people were granted amnesty and 806 were refused because they did not satisfy the above-mentioned conditions,<sup>163</sup> although 145 of those refused were granted partial amnesty.<sup>164</sup> It has been estimated that for HR violations where a public hearing was required, amnesty was granted in 84.3% of cases.<sup>165</sup>

The R&RC reviewed cases referred to it by the HRC and AC for reparations and rehabilitation to victims. It had no money of its own to disburse and could only make recommendations to the Government regarding the payment of reparations to victims, medical expenses and memorialization.<sup>166</sup> It also made recommendations regarding the

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<sup>157</sup> Wilson, R.A. (2001b) p209

<sup>158</sup> Hayner, P. (2011) p100

<sup>159</sup> Wilson, R.A. (2001a) p23-4 describing the suspension and later abandonment of a criminal investigation into five security policemen concerning 27 cases of murder, attempted murder and damage to property after they all applied for and were granted amnesty, which 'undermined the efforts of the criminal prosecution service.'

<sup>160</sup> Sarkin, J. (2004) p111

<sup>161</sup> Hayner, P. (2011) p29

<sup>162</sup> Sarkin, J. (2004) p108

<sup>163</sup> Mallinder, L. (2009) p73

<sup>164</sup> Sarkin, J. (2004) p108

<sup>165</sup> Mallinder, L. (2009) p74

<sup>166</sup> Wilson, R.A. (2001b) p208

prevention of future abuses and the steps necessary to create a culture of respect for HR in SA, including institutional, administrative and legislative initiatives to achieve this aim.<sup>167</sup> In its final report of 1998, the TRC recommended that approximately 22,000 victims should receive a grant of approximately US\$2800-3500 per annum for six years. Unfortunately, however the reparations issue was very low down the list of priorities for the new government which did not act on the recommendation until January 2000 when President Mbeki announced it would offer victims only token compensation of several hundred US dollars per person in total.<sup>168</sup>

The HRVC held its first hearing on 16<sup>th</sup> April 1996 in East London, Eastern Cape.<sup>169</sup> Throughout 1996 and early 1997, it held fifty hearings in Town Halls, hospitals, churches and other public buildings all over the country.<sup>170</sup> Following a decision taken during the Act's drafting stage, all meetings were open to the public and the media coverage of the hearings was intense. To ensure all citizens could follow the proceedings, there were daily newspaper, television and radio news reports and four hours of daily live coverage broadcast on the radio plus a 'Truth Commission Special Report' on television every Sunday, which became the most-watched news programme in SA.<sup>171</sup>

As well as general hearings, the commission held special hearings focussing on key social institutions<sup>172</sup> and individuals<sup>173</sup> and their response to or participation in abusive practices.<sup>174</sup> Other special hearings dealt with issues such as the use of chemical and biological weapons against opponents of the apartheid government, compulsory military service, political party policies and how youth and women were affected by the violence.<sup>175</sup> Wilson states that these 'event hearings' were the TRC's attempt to 'transcend some of the limitations of its narrow human rights mandate' which excluded

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<sup>167</sup> Llewellyn, J.J. and Howse, R. (1999) 'Institutions for Restorative Justice: The South African Truth and Reconciliation Commission' 49 *University of Toronto LJ* pp355-388 at p368

<sup>168</sup> Wilson, R.A. (2001a) p22

<sup>169</sup> Boraine, A. (2001a) p98

<sup>170</sup> Wilson, R. A. (2001b) p206

<sup>171</sup> Hayner, P. (2011) p28

<sup>172</sup> Legal, health, media, prisons, armed forces, business and the faith community

<sup>173</sup> The most well-known hearing involved Winnie Madikizela-Mandela

<sup>174</sup> Hayner, P. (2011) p28

<sup>175</sup> *Ibid*



investigation of crimes that were legal under apartheid and address the social context: 'the normal, everyday, banal and mundane violent reality of apartheid.'<sup>176</sup>

The special hearings for women demonstrate the flexibility of the SATRC process. It had become clear after the first few weeks of hearings in 1996 that of 204 witnesses, 60% were women and 75% of them talked about abuses suffered by men, with only 17% giving evidence about abuses suffered by women.<sup>177</sup> Despite encouragement, therefore, women were giving 'scant account of their own suffering or experiences of violence, least of all of sexual violation.'<sup>178</sup> The TRC was thus portraying women as grieving wives and mothers, not as sufferers of numerous abuses themselves.<sup>179</sup> Active pressure from women's organisations to 'create an empowering and non-victimising environment for women to describe their experiences'<sup>180</sup> led the TRC, in an unprecedented move, to examine gender issues by organising workshops on gender and instituting women-only hearings chaired by female commissioners to hear from women who wanted an all-female forum.<sup>181</sup>

An early problem faced by the TRC related to the naming of perpetrators by those giving evidence. The Commission was challenged in Court on its failure to give advance notice to those expected to be named.<sup>182</sup> Although the TRC argued that no findings were being made at the public hearings, the Appeal Court ruled that in the interests of due process, prior notice must be given so that those named could 'submit representations to the Commission within a specified time with regard to the matter under consideration or to give evidence at a hearing of the Commission' in accordance with s30 PNURA.<sup>183</sup> This ruling also had a direct impact on the publication of the Commission's final report: the considerable administrative work and notice required limited how many were named in

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<sup>176</sup> Wilson, R.A. (2001b) p207

<sup>177</sup> Kashyap, R. (2009) 'Narrative and truth: a feminist critique of the South African Truth and Reconciliation Commission' 12 *Contemporary Justice Review* pp449-467 at p459

<sup>178</sup> Ross, F. (2010) 'An Acknowledged Failure: Women, Voice, Violence, and the South African Truth and Reconciliation Commission' in Shaw, R. and Waldorf, L., with Hazan, P. (eds.) *Localizing Transitional Justice: Interventions and Priorities After Mass Violence* (Stanford: SUP) p73

<sup>179</sup> Kashyap, R. (2009) p459

<sup>180</sup> *Ibid* p457

<sup>181</sup> *Ibid* p450

<sup>182</sup> Ntsebeza, D. (2000) p8

<sup>183</sup> Borraine, A. (2000a) pp111-114

the Commission's final report, with one commissioner estimating approximately 600 names were removed.<sup>184</sup>

The TRC submitted its five-volume Report to President Mandela on 29<sup>th</sup> October 1998.<sup>185</sup> The days before its final release were filled with controversy as, in accordance with required procedures, the Commission sent more than 400 notices to individuals, institutions and organisations that were adversely mentioned in the report giving them 21 days to reply in writing if they wished to take issue with the TRC findings.<sup>186</sup> De Klerk immediately sought to prevent his name being published in the Report, arguing in a two-thousand-page complaint that the Commission had acted in bad faith.<sup>187</sup> The ANC tried to stop publication of the Report altogether due to its dissatisfaction with the TRC's findings on its past actions.<sup>188</sup> Fortunately, the Court found against the ANC just hours before the report's release. Several months after release, the Report was considered in Parliament and Thabo Mbeki, Deputy President of SA and President of the ANC, stated that the ANC had 'serious reservations' about the TRC's process and report since 'the net effect of [its] findings is to delegitimise or criminalise a significant part of the struggle of our people for liberation.'<sup>189</sup> After days of debate, there was no government commitment to implement the TRC's many recommendations.

The AC held public hearings until December 2000 and was not officially dissolved until 31<sup>st</sup> May 2001. Its final two-volume report was submitted to the government in 2003, publication having been delayed by a legal action brought by the IFP and Chief Buthelezi over disagreements with the Commission's findings. The AC also presented a list of 300 names to the National Prosecuting Authority for investigation and prosecution.<sup>190</sup> In 2015, after years of inaction, the former national director of public prosecutions, Vusi

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<sup>184</sup> Hayner, P. (2011) p136

<sup>185</sup> Excluding the AC's report

<sup>186</sup> Boraine, A. (2000a) p302

<sup>187</sup> Hayner, P. (2011) p137 The Commission wanted to name De Klerk for having information about several bombings, after the fact and failing to report them. The issue was resolved in Court and De Klerk was named in an addendum report.

<sup>188</sup> *Ibid* p31

<sup>189</sup> *Ibid*

<sup>190</sup> See AFP (2016) 'Long battle for truth in S. Africa for apartheid victim's family' 4 March [Online] Available: <http://www.dailymail.co.uk/wires/afp/article-3476166/Long-battle-truth-S-Africa-apartheid-victims-family.html> [Accessed 30.04.17]

Pikoli, stated that “political interference’ was the reason that investigations in cases recommended for prosecution by the commission were ‘effectively barred or delayed’.<sup>191</sup> Controversially, just two months after the release of the final two volumes, President Mbeki had used his constitutional powers to pardon 33 convicted prisoners (predominantly ANC and PAC members) who had been refused amnesty by the AC.<sup>192</sup> The government also tried to introduce an expanded amnesty programme but was prevented by legal action taken by victims and civil society.<sup>193</sup>

In this section, the establishment of the SATRC has been discussed and it has been seen the SATRC had many commendable features which could be emulated by future TCs intending to challenge the ICC. For example, the SATRC was well-financed and resourced and was highly accessible to the public in terms of victims giving statements, public hearings taking place across the country and extensive media coverage. Further, the process was flexible and adaptable enabling changes to be made as required. However, the SATRC’s failure often to use its substantial powers to obtain evidence which was viewed by some as prioritising reconciliation over truth. The discrepancy between AC decisions taking effect immediately and being binding on the government whereas decisions of the HRVC and R&RC were recommendations only also caused widespread frustration. However, it is suggested that the government’s failure to implement R&RC recommendations, particularly regarding reparations caused the greatest dissatisfaction among victims and this, plus its failure to follow-up with prosecutions of those who did not apply or were refused amnesty, should be avoided by any future TC model intending to show the ICC that it will uphold the ICJ aim of justice for victims.

In the next section, in order to consider whether a TC modelled on the SATRC would make prosecutions at the ICC inadmissible, the performance of the SATRC in satisfying the ICJ requirements discussed in Chapter Three will be discussed.

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<sup>191</sup> Boshomane, P. (2016) ‘20 years after the TRC hearing South Africa’s pain persists’ *Sunday Times Opinion and Analysis*, 10 April [Online] Available: <http://www.timeslive.co.za/sundaytimes/opinion/2016/04/10/20-years-after-the-TRC-hearings-South-Africas-pain-persists> [Accessed 15.04.17]

<sup>192</sup> Hayner, P.B. (2011) p31

<sup>193</sup> *Ibid*

## **Section Six: Does the SATRC satisfy the Requirements of ICJ?**

In this section, following assessment of the SATRC, it will be suggested that if it can be demonstrated that the SATRC does satisfy these aims, this will give weight to the argument that the ICC should declare a case inadmissible when a State intends to deal with past offending by means of a TC rather than prosecutions.

### **Bringing those responsible to Justice**

Assessment of the SATRC's retributive capacity clearly indicates that by not having the power to punish perpetrators of gross HR violations and by granting amnesties, it could justifiably be accused of denying justice by preventing victims from seeking justice through civil or criminal courts. To counter this accusation, it could be argued that given the transitional context in which the SATRC was established, insisting that the grant of amnesty be subject to strict rules was the best justice that could be achieved in the prevailing circumstances. Furthermore, if justice is perceived as restorative rather than retributive, then a TC has advantages that outweigh trials at the ICC.

Restorative justice has been defined in the Chapter One but in the words of the SATRC report:

[It] seeks to redefine crime: it shifts the primary focus of crime from the breaking of laws or offences against a faceless state to a perception of crime as violations against human beings [...]. [It] encourages victims, offenders and the community to be directly involved in resolving conflicts. Rather than providing an alternative to the goals of the established justice system, restorative justice seeks to recover certain neglected dimensions that make for a more complete understanding of justice.<sup>194</sup>

Justice at the SATRC sought to prioritise the needs of victims and the question is whether the SATRC lived up to its own rhetoric. For some victims and witnesses, the TRC setting, with its emphasis on healing and belief in the restorative power of truth-telling, could

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<sup>194</sup> TRC Report Chapter 5, para. 80

have been a welcome alternative to courts which had infamously upheld the injustices of the apartheid regime.<sup>195</sup> PNURA gave all citizens the right to give statements to the TRC<sup>196</sup> and having someone listen to and acknowledge their pain may have been cathartic for many of the thousands who did so.<sup>197</sup> Minow states that telling one's story and being heard without interruption or scepticism is 'nowhere more vital than for survivors of trauma'<sup>198</sup> although it has been suggested that this view is based on a 'Eurocentric discourse about 'post-traumatic stress''<sup>199</sup> and does not take into account '[a]ll cultural traditions have their own systems of psychological thought and practice.'<sup>200</sup>

Despite its best intentions, however, the SATRC may not have fulfilled its restorative justice aims. Many perpetrators who could have applied to the TRC for amnesty for their crimes failed to do so, possibly in the belief that it was unlikely they would be prosecuted in any event.<sup>201</sup> As Ash states, '[w]ithout that stick, the carrot of amnesty is useless.'<sup>202</sup> The TRC's report notes that no application was received from any member of the former national intelligence service, for example.<sup>203</sup> The PNURA terms of reference provided the potential for including high-ranking intellectual authors of atrocities, as they included 'an attempt, conspiracy, incitement, instigation, command or procurement to commit an act.'<sup>204</sup> Yet many of those in high office failed to co-operate with the Commission, which the report referred to as 'one of the most shameful aspects of the process'<sup>205</sup> and the Indemnity Acts of 1990 and 1992 granted indemnity to thousands who might otherwise have been impelled to apply for amnesty. Several political parties and institutions did not support the amnesty process and some urged

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<sup>195</sup> Minow, M. (2000) 'The Hope for Healing: What Can Truth Commissions Do?' in Rotberg, R. and Thompson, D. (eds.) p243

<sup>196</sup> Bundy, C. (2000) p14

<sup>197</sup> Doak, J. (2011) 'The Therapeutic Dimension of Transitional Justice: Emotional Repair and Victim Satisfaction in International Trials and Truth Commissions' 11/*CLR* pp263-298 at p273

<sup>198</sup> Minow, M. (1998) *Between Vengeance and Forgiveness* (Boston: Beacon Press) p58

<sup>199</sup> Summerfield, D. (1999) 'A critique of seven assumptions behind psychological trauma programmes in war-affected areas' 48 *Social Science and Medicine* pp1449-1462 at p1461

<sup>200</sup> *Ibid* p1459

<sup>201</sup> Wilson, R.A. (2001b) p210

<sup>202</sup> Ash, T.G. (1997) 'True Confessions' *The New York Review of Books* (July) p5

<sup>203</sup> Hayner, P.B. (2011) p101

<sup>204</sup> Wilson, R.A. (2000) 'Reconciliation and Revenge in Post-Apartheid South Africa: Rethinking Legal Pluralism and Human Rights' 41 *Current Anthropology* pp75-98 at p79

<sup>205</sup> Hayner, P.B. (2011) p101

their supporters not to apply, for example, applications from IFP and SADF were particularly low.<sup>206</sup>

For those perpetrators who did successfully apply, although amnesty allowed them to escape prosecution, the requirement of full and frank admissions required them to confirm important truths about the past and a great deal of new information was learned from their hearings.<sup>207</sup> Unfortunately, there were often doubts about the 'fullness and frankness' of their evidence<sup>208</sup> but victims or their lawyers were at least able to cross-examine and challenge 'rationalizations and [...] reformulations of events, which contributed to the contesting of impunity'.<sup>209</sup>

The concept of justice for victims was undoubtedly stretched when unrepentant perpetrators were granted amnesty without expressing remorse and in some cases, quoted 'ideological justifications for their acts with little self-reflection and analysis'.<sup>210</sup> Theissen argues that public acceptance of the TRC would have increased and its decisions would have been compatible with international law if the AC could have taken into account genuine remorse, not as a pre-condition for amnesty but as criteria for what he suggests should be 'graded' amnesty decisions, for example, the AC's imposition of non-criminal sanctions or a reduced or suspended sentence.<sup>211</sup> Theissen also suggests that amnesty should not have resulted in perpetrators being protected from civil claims for compensation, especially given the time taken by the government to decide on its reparations programme.<sup>212</sup> These proposals could be incorporated into any future TC model.

The TRC's approach to justice was to minimise prosecution by advocating restorative justice as the 'morally superior choice'.<sup>213</sup> Whether victims understood and accepted this view of justice or whether they would have preferred retributive justice is unclear

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<sup>206</sup> Wilson, R.A. (2001b) p210

<sup>207</sup> *Ibid*

<sup>208</sup> Hayner, P.B. (2011) p100

<sup>209</sup> Wilson, R. A. (2001b) p210

<sup>210</sup> *Ibid* p211

<sup>211</sup> Theissen, G. (1999) p51

<sup>212</sup> *Ibid*

<sup>213</sup> Chapman, A.R. and van der Merwe, H. (2008) p26

although Theissen's review of public opinion surveys undertaken in SA between 1994 and 2000 reveals that '[m]ost South Africans accepted the sacrifice of punishment for the truth.'<sup>214</sup> A study of those who testified at hearings revealed that 20% 'mentioned justice'<sup>215</sup> by which they appeared to mean retributive justice.<sup>216</sup> This group apparently fell mainly within white and 'higher status' survivors e.g. higher level of education and basic needs satisfied.<sup>217</sup> However, findings cannot be generalised because survivors' perceptions of justice were influenced by numerous factors such as the extent of discrimination, deprivation of economic opportunity and the reality and treatment experienced during apartheid.<sup>218</sup>

In Chapter Three, the ineffectiveness of criminal trials to deal with widespread, systematic abuses of HR was discussed and it was pointed out that trials focus on individual rather than collective culpability and can take events out of social context. An International Commission of Inquiry, reporting on the situation in Darfur but making a point which has wider relevance, stated:

[A] TRC could play an important role in ensuring justice and accountability. Criminal courts, by themselves, may not be suited to reveal the broadest spectrum of crimes that took place during a period of repression, in part because they may convict only on proof beyond reasonable doubt. In situations of mass crime [...] a relatively limited number of prosecutions, no matter how successful, may not completely satisfy victims' expectations of acknowledgment of their suffering. What is important [...] is a full disclosure of the whole range of criminality.<sup>219</sup>

Despite its limited mandate, the SATRC sought to achieve justice for victims and their families by identifying the wider implications of apartheid, including collective responsibility for its implementation. It sought to identify patterns of abuses, institutional failings that allowed crimes to occur.<sup>220</sup> The special hearings highlighted a

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<sup>214</sup> Theissen, G. (1999) p51

<sup>215</sup> Chapman, A.R. and van der Merwe, H. (2008) p28

<sup>216</sup> *Ibid* p29

<sup>217</sup> *Ibid*

<sup>218</sup> See Theissen, G. (1999) pp12-30

<sup>219</sup> Report of the International Commission of Inquiry on Darfur to the UNSG, Geneva, 25 January 2005, p156, para.

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<sup>220</sup> Brahm, E. (2007) p21

range of criminality that may not have become apparent in individual criminal trials, in particular, identifying those elements of society who gained from 'corrupting the system, who were able to turn links to public power to private advantage'.<sup>221</sup> The special hearing on the business community, for example, enabled the TRC to report that 'a vast body of evidence points to a central role for business interests in the elaboration, adoption, implementation and modifications of apartheid policies throughout its dismal history'.<sup>222</sup> This finding motivated victims and their lawyers to look to businesses (including multinational corporations) as an additional source of reparations, a welcome move given the government's delay in dealing with the issue.<sup>223</sup>

The extensive media coverage of the TRC proceedings arguably reached a far greater section of society than would a series of lengthy criminal trials, thereby educating the public regarding events and identities and contributing to the attainment of justice and dignity for victims through dissemination and acknowledgment.<sup>224</sup>

However, it is clear from the surveys that have been conducted in SA that the drawing of conclusions on whether the SATRC achieved justice for victims is constrained by lack of detailed information about deponents<sup>225</sup> which prompts the question: why did the SATRC itself not question the victims on this issue?

### **Putting an end to violations and preventing their recurrence**

The abuses suffered by the black majority in SA stemmed from a political regime enforced and supported by the white minority who believed in the rightness of the apartheid system for SA.<sup>226</sup> The negotiated political agreement ended apartheid and the abuses associated with it, so the SATRC was not tasked with putting an end to violations. Central to the SATRC's mission was replacing the deep-seated culture of racism with a respect for HR and thereby to prevent future violations.<sup>227</sup> It sought to

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<sup>221</sup> Mamdani, M. (2000) p60

<sup>222</sup> TRC Report, Vol.4 Chapter 2, p21

<sup>223</sup> Sarkin, J. (2004) p102-3

<sup>224</sup> Brahm, E. (2007) p22

<sup>225</sup> *Ibid* p68-9

<sup>226</sup> Theissen, G. (1999) p21

<sup>227</sup> Boraine, A. (2000a) p49



achieve these aims by exposing the details of widespread abuses and identifying who perpetrated them. To this end, the decision to hold public hearings and allow media coverage was crucial as it ensured that the details uncovered reached a broad spectrum of society, potentially leading to pressure for change and the evolution of social norms.<sup>228</sup> For de Gruchy:

the painful dissecting of apartheid during the hearings of the TRC ... has given us vivid intimations of the kind of society we should strive for: a society that cares ... about the truth, ... about justice, ... about victims, ... about the healing of its wounds and the flourishing of human life.<sup>229</sup>

In Chapter Three, it was suggested that the deterrent nature of international criminal trials is questionable given the motivation of the perpetrators where overriding interests such as avoiding defeat, territorial control and survival can outweigh the threat of prosecution regardless of its certainty.<sup>230</sup> These factors did not apply in SA as apartheid ended by negotiation but the manner in which the SATRC was established, its functionality and independence did enhance its credibility and many perpetrators were reluctant to be identified precisely because evidence of their criminality could result in them being discredited, publicly censored and deprived of power; a potential future deterrent factor.<sup>231</sup> Furthermore, it was argued in Chapter Three that 'offenders commit more atrocities in weak states because they have more *opportunities* to do so and not because they have a greater *inclination* to commit such atrocities'.<sup>232</sup> By examining apartheid institutions, publicising the past abuses and suggesting reforms, by identifying and discrediting the perpetrators of those abuses and by assisting to educate and inculcate a respect for HR into these institutions and society at large, the SATRC sought to reduce the risk of their recurrence.

Proponents of restorative justice argue that a transformation of society such as that envisaged by the TRC can only be achieved when all stakeholders (victims, perpetrators

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<sup>228</sup> Brahm, E. (2007) p22

<sup>229</sup> de Gruchy, J. (2000) 'The TRC and the Building of a Moral Culture' in James, W. and Van de Vijver, L. (eds.) p167

<sup>230</sup> See p67 *ante*

<sup>231</sup> Brahm, S. (2007) p21; see also Wilson, R.A. (2001a) p165

<sup>232</sup> Ku, J. and Nzelibe, J. (2006) 'Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities' 84 *Wash ULR* pp777-833 at p780 (emphasis in original)

and beneficiaries) come together to confront the past and identify means for future peaceful cohabitation.<sup>233</sup> This is an area where TCs arguably can better criminal trials in the fulfilment of ICJ aims. As de Greiff notes in his report:

the wide-ranging analysis undertaken by TCs seems to invite similarly wide-ranging transformation proposals in the name of prevention. Thus TCs have proposed the transformation of various institutions including the judiciary, security forces, education, media, civil registries, electoral systems and land tenure patterns.<sup>234</sup>

The R&RC was tasked with recommending measures to prevent future violations of HR and with suggesting steps necessary to create a culture of respect for HR in SA. The final TRC report contained over 40 pages of such recommendations<sup>235</sup> including ‘legal, administrative and institutional measures designed to prevent the recurrences of human rights abuses’<sup>236</sup> and suggested that ‘services developed as a result of [this] policy should be responsive to the religious and cultural beliefs and practices of the community in which the services are provided’.<sup>237</sup>

Thus, although the SATRC was unable to deter by punishing the perpetrators of gross HR violations, it did effectively highlight the pervasive disregard for the HR of the black community in SA and contributed to instilling a culture of respect for HR in SA.

### **Securing Justice and Dignity for victims**

Central to the healing mission of the SATRC was a commitment to a ‘victim-centred’ approach, giving victims and witnesses space to tell their stories in their own words and language, in order ‘to restore the[ir] human and civil dignity.’<sup>238</sup> HRVC hearings were designed to ‘engender an atmosphere that would be welcoming, friendly and affirming’ for victims and witnesses<sup>239</sup> and ‘many found the public hearing process psychologically

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<sup>233</sup> Llewellyn, J.J. and Howse, R. (1999) p380

<sup>234</sup> de Greiff, P. (2013) para.41

<sup>235</sup> Sarkin, J. (2004) p99

<sup>236</sup> TRC Report, Vol.5, Chapter 5, para.32

<sup>237</sup> *Ibid* para. 49

<sup>238</sup> De Lange, J. (2000) ‘The historical context, legal origins and philosophical foundation of the South African Truth and Reconciliation Commission’ in Villa-Vicencio C. and Verwoerd, W. (eds) p27

<sup>239</sup> Tutu, D. (1999) *No Future without Forgiveness* (London: Rider) p88

beneficial.’<sup>240</sup> The Commission prevented witnesses being ‘traumatised and upset by insensitive cross-examination’ by refusing demands of those named as perpetrators to be allowed to cross-examine.<sup>241</sup> As a result, many victims reported that HRVC hearings offered them the opportunity to ‘re-validate’ themselves, ‘affirming the sense “you are right, you were damaged, and it was wrong”’ which satisfied their conception of justice.<sup>242</sup>

Unfortunately, however, some found testifying before the SATRC did not so much heal as re-victimise them.<sup>243</sup> When questioned after their appearance, some described having insufficient time to tell their story, others that their views and needs were not properly taken into account.<sup>244</sup> For others, reliving the memories caused them to be re-traumatised which resulted in ill-health.<sup>245</sup> However, the SATRC ‘went further than any other TC at that time in incorporating psychological support into its operational structures’, by hiring four mental health professionals, training statement-takers how to respond to signs of trauma and hiring ‘briefers’ to give constant support to those testifying at public hearings.<sup>246</sup>

It is difficult to imagine that testifying before a formal criminal court would be less traumatic than before a TRC especially since trials require victims to undergo the ordeal of potentially hostile cross-examination. Furthermore, victims are witnesses for the prosecution, rarely permitted to narrate their story, instead obliged to give yes or no answers to questions designed to establish the guilt or innocence of the accused.<sup>247</sup> Worse, acquittals can exacerbate the trauma suffered by victims, compounding the sense of low self-worth, of not being believed. Minow argues that the ‘failure to address damage to individual dignity and to the very idea that members of targeted groups are persons with dignity ensures that the consequences of mass violation will persist and

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<sup>240</sup> Hayner, P. (2011) p148

<sup>241</sup> Tutu, D. (1999) p88

<sup>242</sup> Minow, M. (1998) p60

<sup>243</sup> Doak, J. (2011) p284

<sup>244</sup> *Ibid*

<sup>245</sup> Hayner, P. (2011) p155; The Trauma Centre for Victims of Violence and Torture in Cape Town estimated that of the hundreds they worked with, 50-60% of those who testified suffered difficulties afterwards or expressed regret for having taken part.

<sup>246</sup> *Ibid* p156

<sup>247</sup> Doak, J. (2011) p272

may give rise to new rounds of revenge.’<sup>248</sup> For Minow, TCs offer more potential than prosecutions ‘[i]f the goals of repairing human dignity, healing individuals and mending societies after the trauma of mass atrocity are central’.<sup>249</sup>

De Greiff agrees the contribution of TCs to the restoration of dignity and justice for victims has proved to be significant in many of the countries where they have been implemented.<sup>250</sup> In his report, he notes that:

Giving a “voice” to and empowering victims [...] to tell their stories [...] thereby giving them a place in the public sphere for the very first time [...] is part of the process of affirming the status of victims, often members of socially marginalised groups, as equal rights holders.<sup>251</sup>

Another factor when considering justice and dignity for victims is the role of the beneficiaries of apartheid and their collective responsibility. The extensive media coverage of the TRC proceedings obliged whites to acknowledge the truth of the widespread horrors of the system they had reinforced and supported for decades. They could not ignore or justify apartheid’s crimes which was fundamentally important to the dignity of victims, to the potential for reconciliation and to the creation of a culture of respect for HR and democracy. As Neier states, ‘[b]y knowing what happened, a nation is able to debate honestly why and how dreadful crimes came to be committed [...] and to identify the victims, and recall how they were tortured and killed, ‘is a way of acknowledging their worth and dignity.’<sup>252</sup>

Whilst the offer of amnesty to perpetrators of the apartheid crimes committed in SA could be seen to deny victims of dignity and justice, it could be argued that unsuccessful prosecutions can be far more traumatic for them and as far as the ICJ principle of the

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<sup>248</sup> Minow, M. (2000) p236

<sup>249</sup> *Ibid*

<sup>250</sup> de Greiff, P. (2013) para. 23

<sup>251</sup> *Ibid* para. 24

<sup>252</sup> Neier, A. (1990) ‘What should be done about the Guilty?’ 37 *NY Rev Books* February Issue (unnumbered pages)

right to truth is concerned, the amnesty process allowed victims greater access to information than, for example, the failed prosecutions of Malan and his cohorts.<sup>253</sup>

One important element of securing justice and dignity for victims is the payment of reparations, the aim of which is 'to empower individuals and communities to take control of their own lives.'<sup>254</sup> Reparations include not only monetary payments to victims but health and social services, memorials and other acts of symbolic commemoration. The ICC can order a convicted person to pay compensation and make other reparation to victims<sup>255</sup> and a Trust Fund has been established for cases where the offender has insufficient resources.<sup>256</sup> Given the number of victims involved in ICC crimes, the Court may prioritise collective (not individual) reparations e.g. the building of victim centres or symbolic measures<sup>257</sup> which, though welcome, would not alleviate individual victims' financial difficulties.

In contrast, the SATRC's report contained detailed and comprehensive recommendations for a reparations programme specifically geared to the needs and aspirations of the whole victim community. In advance of its publication, the Commission met the government to discuss its proposals and obtain the government's commitment to implement them.<sup>258</sup> Having done so, the Commission publicised advance information about their recommendations.

Unfortunately, this action backfired on the TRC when victims were left angry and frustrated by the government's delay in implementing the reparation proposals, especially when they saw how swiftly successful applications for amnesty were granted.<sup>259</sup> Five years after the TRC's first report, the government implemented a significantly more modest reparations programme, blaming a depressed economy and other pressing social needs on its token offer of several hundred dollars per person

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<sup>253</sup> Wilson, R.A. (2001b) p210

<sup>254</sup> Minow, M. (1998) p92-3

<sup>255</sup> Rome Statute, Article 75

<sup>256</sup> *Ibid* Article 79

<sup>257</sup> ICC Reparation/Compensation stage [Online] Available: <https://www.icc-cpi.int/Pages/ReparationCompensation.aspx> [Accessed 15.04.17]

<sup>258</sup> Hayner, P. (2011) p176

<sup>259</sup> Tutu, D. (1999) p58

rather than the \$21,000 recommended by the TRC and no additional recommended services.<sup>260</sup> Sarkin states that the issue of reparations was crucial as ‘for many victims the reparations aspect of the TRC’s work was fundamental’ so the government’s stance led not only to dissatisfaction with the amount to be paid but with the entire TRC process.<sup>261</sup> Clearly the intention of the SATRC was creditable but it was let down by the failure of the government to implement the recommendations, a factor to be addressed by any government wishing to persuade the ICC to defer prosecutions in favour of a TC.

Finally, as discussed earlier in this chapter, the SATRC’s mandate has been criticised for its limitation to gross HR violations rather than all the routine degradations and humiliations suffered by the black community under the apartheid regime. Posel states that ‘the apartheid system itself was not the subject of the TRC’s investigations; rather, it was the ‘background’, the ‘political landscape’ on which the picture of gross human rights violations was to be painted.’<sup>262</sup> Mamdani heavily criticised the TRC for not addressing the issue of justice for the black majority ‘who understandably expect to gain from reconciliation and healing’ arguing:

Victims of apartheid are now narrowly defined as those militants victimised as they struggled against apartheid, not those whose lives were mutilated in the day-to-day web of regulation that was apartheid. We arrive at a world in which reparations are for militants, those who suffered jail or exile, but not for those who suffered only forced labour and broken homes.<sup>263</sup>

This criticism can be countered to some extent by recalling the nine institutional and special hearings held by the TRC which heard evidence on the maintenance and environment in which HR violations could thrive. This is a feature that could be built into a generic model for future TCs. Every black South African knew about the everyday injustices they had suffered under apartheid so perhaps they did not need the TRC to specifically identify these abuses, rather they needed a change in the culture to one of respect for their HR, to which the SATRC did contribute.

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<sup>260</sup> Minow, M. (1998) p93; see also Wilson, R.A. (2001a) p22; Hayner, P. (2011) p177

<sup>261</sup> Sarkin, J. (2004) p103-4; see also Hayner, P. (2011) p177

<sup>262</sup> Posel, D. (1999) p9

<sup>263</sup> Mamdani, M. (1996a) (unnumbered pages)

### Establishing a past record of events

The SATRC was given an exceptionally demanding brief which required it to establish:

as complete a picture as possible of the nature, causes and extent of the gross human rights violations ... including the antecedents, circumstances, factors and context of such violations, as well as the victims and the motives and perspectives of the persons responsible for the commission of the violations.<sup>264</sup>

At the outset, the TRC invited all South Africans wishing to do so to make a statement to the Commission thereby providing the potential for 'an infinitely detailed, comprehensive and multi-vocal account of past traumas.'<sup>265</sup> Accordingly, expectations of the SATRC's report were high: this was the opportunity for the Commission to compile a full and detailed account of the conflict as well as:

to clarify exactly who had been responsible for past traumas, how and why these had been inflicted, and to dispel any lingering doubts about who had or had not been an informer, which for many communities was a particularly divisive and sensitive issue.<sup>266</sup>

Unfortunately, however, the report has been subject to considerable criticism. Bundy argues that the SATRC, 'charged with writing an official history', failed to get to grips with its brief and presented 'a structurally fragmented historical account, in which the contradictory pulls of the TRC's mandate exact a toll both epistemological and methodological.'<sup>267</sup> For Wilson, the report is 'a multi-layered document drawing upon many different types of material, from the quantitative sociological analysis of findings to the testimonies of victims at hearings.'<sup>268</sup> He considers it has no central narrative or overarching truth and that by grouping cases together under themes (detention, deaths in custody, banishment, for example), it presented fragmented and de-contextualised accounts of historical incidents.<sup>269</sup>

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<sup>264</sup> TRC Report, Vol 1, Chapter 4, para. 31(a)

<sup>265</sup> Bundy (2000) p14

<sup>266</sup> Posel, D. (1999) p7

<sup>267</sup> Bundy, C. (2000) p13

<sup>268</sup> Wilson, R.A. (2001a) p52

<sup>269</sup> *Ibid* p53

To this criticism can be added that of Mamdani who, because the TRC 'ignor[ed] everything that was distinctive about apartheid and its machinery of violence'<sup>270</sup> derides the TRC's 'diminished truth' as having been 'established through narrow lenses, crafted to reflect the experience of a tiny minority' of victims and perpetrators.<sup>271</sup> Mamdani does, however, acknowledge the TRC for discrediting the apartheid regime in the eyes of its beneficiaries although he is concerned that by leaving the majority of victims out of its version of history, the TRC may have unwittingly fomented resentment between them and the white community.<sup>272</sup>

Posel considers there is a primary narrative and overriding structure, however, arguing the report reads 'less as a history, more a moral narrative about the fact of a moral wrongdoing across the political spectrum, spawned by the overriding evil of the apartheid system'.<sup>273</sup> The difficulty for the TRC was that expectations for a comprehensive, detailed narrative of individual and community histories conflicted with its goals of nation-building and of creating a shared national history which required merely a sample of the truth; just enough to demonstrate past violations and achieve the desired consensus.<sup>274</sup> Accordingly, the historical exercise became primarily to narrate the moral truth about wrongdoing, conflict and injustice by selecting a relatively small number of cases to exemplify collective 'truths'.<sup>275</sup>

Another difficulty was the TRC's mandate to reveal truths in the interests of 'reconciliation' conflicted with the awareness that rather than forgiveness and reconciliation, revelation could provoke further discord.<sup>276</sup> The requirement to document the whole truth was tempered, therefore, by the realisation that a detailed account of the violent past could endanger the fragile new state's peaceful future.<sup>277</sup>

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<sup>270</sup> Mamdani, M. (2000) p60

<sup>271</sup> *Ibid* p59

<sup>272</sup> *Ibid* p61

<sup>273</sup> Posel, D. (1999) p3

<sup>274</sup> *Ibid* p7

<sup>275</sup> *Ibid* p8

<sup>276</sup> *Ibid*

<sup>277</sup> *Ibid*



Notwithstanding the criticisms, the five-volume report produced by the SATRC was more comprehensive and detailed than any historical record that could have been produced by an ICC trial. The potential for trials at the ICC to provide a comprehensive record of past events was discussed in Chapter Three and it will be recalled that the lens is narrow, focussed on the offender's actions and *mens rea* in the particular incident. Minow asserts that the aspiration of producing a meaningful record of the past is better met by TCs than prosecutions because TCs 'widen the lenses, sifting varieties of evidentiary materials and drafting syntheses of factual material that usually does not accompany a trial.'<sup>278</sup> A TRC can focus its enquiries on the 'role of entire sectors of society ...in enabling and failing to prevent mass violence.'<sup>279</sup> Furthermore, the 'sheer narrative project of a TC makes it more likely than trials to yield accounts of [the] entire regime'.<sup>280</sup>

For Villa-Vicencio, the TRC was not tasked with writing an 'official history' but rather a 'comment from its perspective on a given period of history. And even then, the voice or perspective of the Commission was rarely a single, homogenous one.'<sup>281</sup> Far more than being an historical comment, therefore, the TRC's report was a nation-building chronicle of moral wrong-doing prepared with the intent of constructing a new moral unity and as such, it can be argued that it did fulfil the ICJ aim of establishing a past record of events.

### **Promoting national reconciliation**

One rationale for TCs is that by revealing and officially acknowledging the truth about past injustices, cycles of resentment and mistrust can end, general social reintegration is fostered and reconciliation is facilitated.<sup>282</sup> Chapter Three discussed research which identified 'no direct link between criminal trials [...] and reconciliation' because 'survivors rarely, if ever, connected retributive justice with reconciliation' which they

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<sup>278</sup> Minow, M. (2000) p238

<sup>279</sup> *Ibid*

<sup>280</sup> *Ibid*

<sup>281</sup> Villa-Vicencio, C. (2000a) 'On the Limitations of Academic History: The Quest for Truth Demands Both More and Less' in James, W. and Van de Vijver, L. (eds.) p22

<sup>282</sup> de Greiff, P. (2013) para.24

viewed as ‘mostly a personal matter to be settled between individuals’.<sup>283</sup> With its emphasis on restorative justice, this section will explore whether the SATRC achieved more.

The PNURA gave the SATRC its overarching goal of promoting national unity and reconciliation and the Act’s silence on the precise meaning of this aspect of its mandate allowed the commission considerable interpretative flexibility. Unfortunately, the TRC’s approach to this aspect of its mandate displayed some fundamental shortcomings, due *inter alia* to its failure to develop a clear definition or understanding of the meaning of reconciliation within the context of its work.<sup>284</sup> In late 1996, an official view of ‘reconciliation’ had been formulated by the TRC’s Research Unit Director, Charles Villavicencio, who argued that instead of promoting reconciliation at individual level (that is, between victim and perpetrator or between social groups), the TRC should enhance reconciliation at the level of the SA nation, viewing the nation as having ‘a single psyche, a collective conscience, which is the repository of a collective memory.’<sup>285</sup> A lack of internal agreement, however, resulted in Commissioners adopting divergent and sometimes conflicting approaches to reconciliation.<sup>286</sup> Contrary to its official mandate, the TRC emphasised interpersonal reconciliation rather than national reconciliation<sup>287</sup> to the extent that during the early HRVC hearings, Commissioners ‘made the mistake of almost demanding’ that people forgive and reconcile before realising it had no right to make such a demand.<sup>288</sup>

The SATRC was presented, therefore, as a means to reconcile the broken nation with signs and pamphlets at public meetings proclaiming ‘Truth, The Road to Reconciliation’.<sup>289</sup> Even the AC was influenced by the comprehensive theme of reconciliation, often basing its decisions on what would achieve that goal.<sup>290</sup> Although

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<sup>283</sup> Stover, E. and Weinstein, H.M. (2004) ‘Conclusion: a common objective, a universe of alternatives’ in Stover, E. and Weinstein, H.M. (eds.) *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity*, (Cambridge: CUP) p323

<sup>284</sup> Chapman, A.R. and van de Merwe, H. (2008) pp46-48

<sup>285</sup> Wilson, R.A. (2001a) p107

<sup>286</sup> Chapman, A.R. and van de Merwe, H. (2008) pp46-48

<sup>287</sup> *Ibid* p47

<sup>288</sup> Boraine, A. (2001b) p76

<sup>289</sup> Hayner, P. (2011) p183

<sup>290</sup> *Ibid* p184

some hearings witnessed moving examples of forgiveness and reconciliation at individual and community level, particularly where perpetrators showed real remorse,<sup>291</sup> after the TRC concluded its work, the general feeling was it had failed to achieve widespread reconciliation, national or inter-personal. Indeed, long before it delivered its final report, the TRC acknowledged that this aim had been unrealistic and amended it to the 'promotion' of reconciliation, in keeping with the title of the PNURA.<sup>292</sup>

Van Zyl Slabbert says the TRC 'was doomed from the start to fight an uphill battle as an instrument of national reconciliation' because the 'indescribable cruelty, torture, pain, confusion and senseless suffering experienced by victims was never, other than in highly exceptional instances, answered with confession and accountability.'<sup>293</sup> He argues 'the willingness to forgive on the one hand, without confession on the other, makes national reconciliation almost impossible.'<sup>294</sup> This criticism equally applies to criminal trials but unlike trials, the SATRC at least obliged perpetrators who applied for amnesty to admit their crimes. The TRC also caused the whole nation to examine its past and to recognise the legitimacy of their opponents' claims to HR abuses which arguably is a pre-requisite of reconciliation.<sup>295</sup>

A random survey on the TRC conducted by MarkData in June/July 1997 found that of 2240 people, 40% thought the TRC would bring SA closer together, 17% expected it to make people more willing to forgive, 27% said it would create hostility and 23% that it would make no difference.<sup>296</sup> The researchers state these findings suggested 'fairly widespread scepticism' about the effectiveness of the TRC's attempts to assist South Africans in coming to terms with the past.<sup>297</sup> Theissen's 1999 research revealed

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<sup>291</sup> *Ibid* p185; see also Tutu, D. (1999) pp112-120;

<sup>292</sup> Hayner, P. (2011) p184

<sup>293</sup> Van Zyl Slabbert, F. (2000) p65

<sup>294</sup> *Ibid* p68

<sup>295</sup> Gibson, J.L. (2006a) 'The Contributions of Truth to Reconciliation: Lessons from South Africa' 50 *The Journal of Conflict Resolution* pp409-432 at p414

<sup>296</sup> South African Press Association (1998) 'Only Half of People Feel TRC is Fair and Unbiased: Survey' Pretoria March 5 [Online] Available: <http://www.justice.gov.za/trc/media%5C1998%5C9803/s980305d.htm> [Accessed 01.02.17]

<sup>297</sup> *Ibid*

‘consistent racial divisions in relation to key questions about the past, about the TRC, and about the way South Africans view the need to address the legacy of apartheid.’<sup>298</sup>

However, a representative survey of 3700 ‘ordinary South Africans’ conducted by Gibson in 2001 led him to conclude that the TRC ‘contributed to at least some forms of reconciliation among at least some groups’ and that ‘there is no evidence whatsoever that the “truth” proclaimed by the SATRC damaged reconciliation, as so many feared.’<sup>299</sup> Gibson suggests that the truth process facilitated reconciliation because it apportioned blame to all sides in the struggle over apartheid.<sup>300</sup> The ‘most certain conclusion of this research is that truth did not *undermine* reconciliation’ and ‘relatively certain is [...] that those subscribing to the TRC’s truth are more likely to be reconciled.’<sup>301</sup> From this, Gibson deduces that getting people to accept the TRC’s version of the truth is the key issue for societal transformation.<sup>302</sup>

Including the word ‘reconciliation’ in the TC’s title possibly created unrealistic expectations that reconciliation would be achieved solely by the Commission’s work.<sup>303</sup> Healing, national unity and reconciliation depend on a state’s political, social and economic future and are processes achieved by the whole community, possibly over decades.<sup>304</sup> SA has experienced over 20 years of democracy, transitioning from apartheid with remarkably little bloodshed, a crucial factor being the TRC, which provided a framework within which steps for societal change could be taken. A comprehensive evaluation of the SATRC’s contribution towards reconciliation would require assessment of a far wider range of activities and sources,<sup>305</sup> however, a fundamental requirement for any future TC should be that it is framed to provide the opportunity for national debate in pursuit of the goal of promoting national reconciliation.<sup>306</sup>

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<sup>298</sup> Theissen, G. (1999) pp46-50

<sup>299</sup> Gibson, J.L. (2006b) ‘Overcoming Apartheid: Can Truth Reconcile a Divided Nation?’ *The Annals of the American Academy of Political and Social Science* pp82-110 at pp82, 85

<sup>300</sup> Gibson, J.L. (2006a) p411

<sup>301</sup> *Ibid* p414

<sup>302</sup> *Ibid* p418

<sup>303</sup> de Grieff, P. (2013) para. 47

<sup>304</sup> Boraine, A. (2000a) p345

<sup>305</sup> Chapman, A.R. and van de Merwe, H. (2008) p64

<sup>306</sup> *Ibid* p65

## Re-establishing the Rule of Law

One primary argument in support of criminal trials is they encourage respect for the rule of law, essential for a state transitioning from conflict to democracy. However, in SA the system of apartheid was lawful and the state had the institutional means to enforce it. SA experienced a breakdown of law and order in the late 1980s and before the 1994 election, due to the unwillingness of political parties<sup>307</sup> and certain elements of society to accept the outcome of the negotiations. After the election, however, the incidence of such extreme violence greatly decreased and there was relative calm.

Clearly, during the apartheid era the legal order did not uphold international standards and the black community hated all the repressive institutions that upheld the apartheid state. Referring to the ANC government's need to suppress township 'vigilantes' and lynch mobs, Wilson states 'the SATRC was part of a general and long-term orientation within state institutions which asserted the state's ability to rein in and control the informal adjudicative and policing structures in civil society.'<sup>308</sup> Acknowledging that 'any form of amnesty' was not unjustifiable and perhaps even 'politically indispensable at the time', he then argues that:

drawing upon international HR to reinforce trials [...] would not only have the advantage of fortifying the rule of law and indirectly addressing wider criminalisation in society but would have linked HR to popular understandings of justice and accorded HR-orientated institutions much greater legitimacy in the process.<sup>309</sup>

However, although the legal system was functional, the predominance of white judges and prosecutors, who remained in place after the 1994 election, meant that it was ill-equipped for this task, as the trial of Magnus Malan had demonstrated.

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<sup>307</sup> The IFP threatened to boycott the election and many feared a bloodbath because of the enmity between the IFP and ANC but finally Chief Buthelezi agreed to participate

<sup>308</sup> Wilson, R.A. (2001a) p21

<sup>309</sup> *Ibid* p27

Most South Africans believed that the TRC fulfilled its aim of uncovering past atrocities.<sup>310</sup> The white community could not deny the truth of the horrors of apartheid because the confessions of the perpetrators of gross HR violations against the blacks were extensively reported in the media.<sup>311</sup> It is unlikely that an ICC trial would have been as effective in this regard, since a finding of guilt can still provide space for denial.

The SATRC contributed to the aim of establishing respect for the law by proposing the reforms necessary for the recognition of victims as right-holders, for fostering civic trust and for preventing future HR violations.<sup>312</sup> Only when the need for reform had been accepted and put into effect in the institutions of state that enforced and upheld the law could respect for the rule of law permeate through the whole of society.

### **Contributing to the restoration of peace**

SA's transition from authoritarianism to democracy was different from many states because although it had suffered extreme political violence, apartheid ended by negotiation. However, had a TRC not been agreed as the acceptable means of addressing the HR violations committed under apartheid, peace talks may have failed and the risk of prolonged violence in SA would have heightened. Once apartheid ended and the country had a democratically-elected president, the need for politically motivated violence ended. It would be fair, therefore, to credit some of the success of the transition to the establishment and operation of the TRC. Further, the reforms proposed by SATRC contributed to fostering social integration and the official acknowledgment of abuses assisted curtailment of resentment and mistrust.

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<sup>310</sup> Theissen, G. (1999) p45

<sup>311</sup> *Ibid* p51

<sup>312</sup> The TRC recommended, for example, that SA's society and political system should be reformed to include faith communities, businesses, the judiciary, prisons, armed forces, health sector, media and educational institutions in a reconciliation process; that prosecutions should be considered in cases where amnesty was not sought or was denied, if sufficient evidence existed and that its work should be preserved by archiving its documents

## Conclusion

In this chapter, the SATRC has been appraised to ascertain whether it satisfied the same ICJ goals established for the ICC. The aim is to find a generic model TC based on the SATRC, which would persuade the ICC to declare a case inadmissible. It is obvious that no one system of justice is perfect and in the case of a country transitioning from conflict or authoritarian rule, justice may require more than prosecutions and punishment. In political transitions, justice is defined by the nature of the injustices suffered in that State, so it is always contextual, a factor which the ICC must acknowledge. SA experienced decades of oppression and violent HR abuses which left its society deeply polarised, resentful and distrustful. Justice had to include a nationwide acknowledgement of the illegitimacy of apartheid which necessitated not only victims and perpetrators but also the beneficiaries of the apartheid regime being involved in the process. Justice required the de-criminalisation of those who resisted apartheid and the establishment of equality of rights and before the law. SA society needed to experience reconstruction and reconciliation if it was to enjoy the peace, unity and well-being of all its citizens as called for in its Constitution.

There are features of the SATRC that should be improved, lessons to be learned for future TCs, some of which were beyond the control of the Commission. The failure to deal properly with the issue of reparations, for example, was a serious mistake of the government, leading to antipathy towards the TRC, as for many 'the main motive in coming forward was simply the hope of material compensation'.<sup>313</sup> Additionally, the criteria for selecting the 2000 witnesses who gave evidence at the public hearings from the over 21000 who gave statements was never publicised, leading to '*a hierarchy of victimhood experience*' and criticism of the TRC for 'insensitivity towards the fact that exclusion could compound injuries and experience of marginalization'.<sup>314</sup> Clearly the SATRC could not hear from everyone who provided a statement but giving details of the reasons for witness selection could have prevented these negative responses.

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<sup>313</sup> Ash, T.G. (1997) p3

<sup>314</sup> Kashyap, R. (2009) p456 (emphasis in original)

The impact of testifying differed between witnesses, with some benefitting from the acknowledgment and support the TRC gave them and others having a negative or detrimental experience. Whether testifying at an ICC trial would be less traumatic for the latter group is unlikely but certainly future TCs should offer improved support (including follow-up contact) for witnesses, to ensure their physical and psychological well-being. Another area for improvement is the SATRC's limited gender sensitivity, acknowledged in its report, which Kashyap states is 'particularly significant as it reiterates the TRC's commitment to gender issues and its influences in SA politics.'<sup>315</sup> To its credit, the SATRC did respond to calls for the hearings to be gender conscious but of course, this initial oversight should be avoided by future TCs.

The situation of offenders waiting until they were the subject of a police investigation before applying for amnesty also should be avoided in any future TC proposal, possibly by imposing a condition that once a criminal investigation has commenced, the opportunity to apply for amnesty is withdrawn, a condition which could have the primary effect of encouraging early applications for amnesty. Clearly, the political will to follow through with prosecutions of those who did not apply or were refused amnesty was lacking in South Africa and this is also something that would have to be addressed by a future TC model.

Sarkin has identified numerous deficiencies in the amnesty process which would need to be addressed by any generic TC model. These included the superficial nature and minimal number of investigations undertaken to test the veracity of evidence;<sup>316</sup> grave inequalities between respective groups regarding access to legal representation;<sup>317</sup> an inconsistent approach<sup>318</sup> and insufficient efforts to ensure victim participation.<sup>319</sup> He also assesses the extent and types of inconsistencies arising from the TRC's assessment,

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<sup>315</sup> *Ibid* pp456, 462 (pointing out that the SATRC's acknowledgment resulted in subsequent TCs incorporating the gender component e.g. Ghana, Peru, Timor-Leste)

<sup>316</sup> Chapman, A.R. and van der Merwe, H. (eds.) (2008) *Truth and Reconciliation in South Africa: Did the TRC Deliver?* (Philadelphia: UoPP) p95

<sup>317</sup> *Ibid* p96-7

<sup>318</sup> *Ibid* p98

<sup>319</sup> *Ibid* p99



methodology and application of amnesty provisions relating to full disclosure, political objective and 'proportionality'.<sup>320</sup> He concludes that amnesty hearings achieved accountability through the democratic legislative process and criteria for granting amnesty but with research suggesting that applicants tailored their evidence specifically to fit the criteria for amnesty and within this context, to achieve their political objectives, whether this culpability was meaningful is debatable.<sup>321</sup>

Notwithstanding these issues, the establishment of the SATRC demonstrated a willingness to explore an alternative way of addressing the inequities of the past which was rooted in restorative rather than retributive justice and this was contemporaneously lauded by the international community. Whether today there would be an international call for prosecutions is interesting to speculate. Clearly it is very disappointing that many perpetrators of gross violations of HR did not apply for amnesty and that SA did not proceed with prosecutions against them subsequently. A future TC would have to address these issues, to satisfy the ICC's demands for accountability and justice. Whether the existence of the ICC and threat of international prosecution would encourage more amnesty applications is a pertinent question. It certainly might discourage leaders from wilfully obstructing and/or failing to co-operate with the TC as occurred in SA.

Any ICC assessment of a TC would necessitate a thorough examination of the situation which led to the atrocities being committed because TCs do not work in every context. For example, research conducted in Ghana, Sierra Leone and Liberia reveals that '[t]ruth Commissions face greater challenges carrying out their mandates in post-conflict as opposed to post-authoritarian societies' where the state has perpetuated abuses against its citizens.<sup>322</sup> In post-conflict societies, weak institutions combined with huge numbers of victims and perpetrators can overwhelm a TC<sup>323</sup> whereas SA possessed

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<sup>320</sup> *Ibid* pp102-114

<sup>321</sup> *Ibid* pp134,137-138

<sup>322</sup> Sirleaf, M.V.S. (2013-14) 'The Truth about Truth Commissions: Why they do not function optimally in Post-Conflict Societies' 35 *Cardozo LR* pp2263-2348 at p2263

<sup>323</sup> *Ibid* p2268

strong institutions to support the TRC.<sup>324</sup> Also, the need for truth held great significance because 'deception [was] so central to the abuses.'<sup>325</sup> In post-conflict contexts, abuses normally have been committed openly so truth holds less significance.<sup>326</sup> Thus, the ICC should acknowledge that transitional context can determine the transitional justice mechanism chosen by the state to deal with its past.

Accordingly, the ICC's assessment should acknowledge national support, particularly from victims, for a state's proposal that a TC address past HR violations. It should ensure that the national consensus was achieved following widespread consultation and participation and that dissent has been respected. It should ascertain that the TRC is well-resourced and its commissioners democratically appointed as this contributes to moral authority of its leadership. Once the ICC has satisfied itself on these fundamental concerns, it should examine the capacity of the TC to attain the goals of ICJ outlined in this thesis by examining the TC's mandate and investigating its capacity for attaining those goals.

In his graduation address (Honorary Doctor of Laws) to Witwatersrand University on 1<sup>st</sup> September 1998 when talking of the proposed ICC and the SATRC, Kofi Annan stated:

The purpose of the clause in the Statute [which allows the Court to intervene where the State is 'unwilling or unable' to exercise jurisdiction] is to ensure that mass-murderers and other arch-criminals cannot shelter behind a State run by themselves or their cronies or take advantage of a general breakdown of law and order. No one should imagine that it would apply to a case like SA's, where the regime and the conflict that caused the crimes have come to an end and the victims have inherited power.

It is inconceivable that, in such a case, the Court would seek to substitute its judgment for that of a whole nation that is seeking the best way to put a traumatic past behind it and build a better future.<sup>327</sup>

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<sup>324</sup> *Ibid*

<sup>325</sup> Hayner, P. (2002) *Unspeakable Truths: Facing the Challenge of Truth Commissions* (London: Routledge) p27 (citing Aryeh Neier)

<sup>326</sup> Sirleaf, M.V.S. (2013-14) p2269

<sup>327</sup> See Villa-Vicencio, C. (2000b) 'Why Perpetrators should not always be prosecuted: Where the International Criminal Court and Truth Commissions Meet' 49 *Emory Law Journal* pp202-222 at p222

This chapter has attempted to show that in some contexts, ICJ can be achieved other than by trials at the ICC and in such situations, it *should* be inconceivable that the ICC would intervene. It has been argued that situations like SA require flexibility of interpretation of the RSt and ICC judges should be prepared to accede to a state's genuine intention to uphold ICJ goals by alternative means.

In the next chapter, the accuracy of Kofi Annan's statement at Witwatersrand University is examined. The procedure for a state challenge to the involvement of the ICC is discussed and the jurisprudence of the court is scrutinised to establish the criteria used by ICC judges to determine the admissibility of a case and whether this criteria reflects the ICJ aims discussed in this thesis.

## CHAPTER SEVEN

### THE CHALLENGING REGIME AT THE INTERNATIONAL CRIMINAL COURT

#### Introduction

The preceding three chapters have discussed the ability of alternative justice mechanisms (AJMs) to satisfy the requirements of international criminal justice (ICJ), in support of the central argument that if a state has selected an AJM which can fulfil the same ICJ goals that are attributed to trials at the International Criminal Court (ICC), the Court should defer prosecutions. The outstanding questions now arising from this enquiry are: if a state challenges the admissibility of a case based on an AJM, will the Court assess the AJM's potential to attain ICJ goals that are attributed to criminal prosecutions and following such an assessment, if the AJM is found to be capable of satisfying the same goals, will the ICC will defer prosecutions in favour of that AJM?

In this chapter, to answer these questions, the ICC's regime from a situation first coming to the Prosecutor's attention to the commencement of a trial will be examined, to establish the procedural steps required and obstacles facing a state wishing to challenge the intervention of the ICC. The Rome Statute of the ICC 1998 (RSt) and the ICC's Rules of Procedure and Evidence 2002 (RPE) will be scrutinised as part of this process. The jurisprudence of the Court will be examined to discover the factors ICC judges have applied to date when considering admissibility challenges and to gauge the likelihood of a challenge to the admissibility of a case before the ICC based on an AJM being successful.

It is argued that in these days of substantial African disenchantment with the ICC, it is more important than ever that the Court should demonstrate flexibility in its interpretation of its mandate, especially as it was anticipated by the delegates at the Rome Conference in 1998 that 'creative ambiguity' would give space for it to do so in

the case of AJMs.<sup>1</sup> Article 17(1)(a), states that the Court shall determine that a case is inadmissible where:

The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution

Stahn suggest this provision ‘appears to allow some flexibility for deference in the case of parallel and ongoing investigations in a domestic forum.’<sup>2</sup> Other commentators have suggested that the ICC should defer, for example, to TC initiatives ‘where such initiatives are legitimate and necessary mechanisms for a transition from repression or violence to a stable democracy.’<sup>3</sup> This chapter will investigate whether there is any evidence that the ICC would give effect to this suggestion.

### **The Jurisdiction of the ICC**

Before considering admissibility, the ICC must establish that it has jurisdiction to deal with the alleged crimes and their perpetrators since if jurisdiction does not exist, the question of admissibility does not arise. The ICC’s jurisdiction over the crimes of genocide, crimes against humanity and war crimes<sup>4</sup> came into effect when the RSt entered into force on 1<sup>st</sup> July 2002,<sup>5</sup> does not apply retrospectively<sup>6</sup> and no statute of limitations applies to its jurisdiction.<sup>7</sup> Ratification of the RSt confirms a state’s acceptance of the Court’s jurisdiction,<sup>8</sup> which extends to nationals of State Party’s (SP) to the RSt<sup>9</sup> or of states that have accepted the ICC’s jurisdiction<sup>10</sup> and to persons who

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<sup>1</sup> See p48-49 *ante*

<sup>2</sup> Stahn, C. (2005) ‘Complementarity, Amnesties and Alternative Forms of Justice: Some Interpretative Guidelines for the International Criminal Court’ 3 *JICJ* pp695-720 at p710

<sup>3</sup> Robinson, D. (2003) ‘Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court’ 14 *EJIL* pp481-505 at p482

<sup>4</sup> Rome Statute of the International Criminal Court 1998, Article 5 (defined in Articles 6, 7 and 8 respectively)

<sup>5</sup> Article 11(1)

<sup>6</sup> Article 24

<sup>7</sup> Article 29

<sup>8</sup> Article 12(1)

<sup>9</sup> Article 12(2)(b)

<sup>10</sup> In accordance with Article 12(3)

have committed crimes on the territory of an SP,<sup>11</sup> provided in all cases the offender is over 18 at the time of the alleged crime<sup>12</sup> and regardless of any official capacity held.<sup>13</sup>

### The Admissibility of Cases before the ICC

Once the Court has established it has the required jurisdiction, it must examine whether the case is admissible. Article 17 of the RSt deals with issues of admissibility and the reverse wording of the article makes it clear that all cases are admissible to the ICC unless the exceptions outlined in paragraphs (a) to (d) apply. One exception to admissibility is the legal principle *ne bis in idem*,<sup>14</sup> which states the same person shall not be tried twice for the same crime, either in the same court or another court, whether convicted or acquitted, provided the earlier proceedings were genuine.<sup>15</sup>

A second exception to admissibility is that the crime is not of sufficient gravity to justify prosecution by the ICC.<sup>16</sup> The issue of gravity has led to some ICC judicial debate and disagreement. In *Lubanga*, Pre-Trial Chamber 1 (PTC1) declared that because all crimes within the jurisdiction of the ICC are serious *per se*, when determining admissibility, their gravity should be assessed separately using three questions to establish whether the gravity threshold is satisfied:<sup>17</sup>

1. Is the conduct which is the object of a case systematic or large scale (due consideration should also be given to the social alarm caused to the international community by the relevant type of conduct)?
2. Considering the position of the relevant person in the State entity, organisation or armed group to which he belongs, can it be considered

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<sup>11</sup> Article 12((2)(a) 'Territory' includes a vessel or aircraft registered to an SP

<sup>12</sup> Article 26

<sup>13</sup> Article 27 (Nor do immunities or special procedural rules attaching to the official capacity of a person bar the Court from exercising its jurisdiction over that person)

<sup>14</sup> Articles 17(1)(c) and 20(1)-(3).

<sup>15</sup> Article 20(3)(a)-(b)

<sup>16</sup> Article 17(1)(d)

<sup>17</sup> *The Prosecutor v. Thomas Lubanga Dyilo (Lubanga)* ICC-01/04-01/06, Decision on the Prosecutor's Application for a warrant of arrest, Article 58 10 February 2006 (Arrest warrant decision)

that such a person falls within the category of most senior leaders of the situation under investigation?

3. Does the relevant person fall within the category of most senior leaders suspected of being most responsible, considering (i) the role played by the relevant person through acts or omissions when the State entities, organisations or armed groups to which he belongs commit systematic or large-scale crimes within the jurisdiction of the Court and (ii) the role played by such state entities, organisations or armed groups in the overall commission of crimes within the jurisdiction of the Court in the relevant situation?<sup>18</sup>

The Appeal Chamber (ACh), however, held this three-pronged test was incorrect as the ‘distinction between the jurisdictional requirements for war crimes and crimes against humanity’ was blurred by the requirement that conduct be either systematic or large scale<sup>19</sup> and that ‘social alarm’ depends on ‘subjective and contingent reactions to crimes rather than upon their objective gravity’ which ‘is not a consideration that is necessarily appropriate for the determination of the admissibility of a case’.<sup>20</sup> The ACh also disapproved of PTC1’s focus on the most senior perpetrators as potentially having the greatest deterrent effect,<sup>21</sup> arguing that the fact that any perpetrator could be brought before the Court would have the greatest deterrent effect.<sup>22</sup>

PTC1 subsequently took the ACh’s comments to be *obiter dicta*,<sup>23</sup> leaving the factors to be considered when assessing gravity in connection with the admissibility of a case rather unclear. Reference to the *travaux préparatoires* provides some guidance since during International Law Commission discussions in 1994, it was suggested that the Court could have the power to stay a prosecution if ‘the acts alleged were not of

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<sup>18</sup> *Ibid* para. 63

<sup>19</sup> *Situation in the Democratic Republic of Congo (DRC)* ICC-01/04 Judgment on the Prosecutor’s Appeal Against the Decision of PTC1 Entitled ‘Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58’ 13 July 2006, para. 70 (*DRC* Arrest warrant judgment)

<sup>20</sup> *Ibid* para. 72

<sup>21</sup> *Lubanga* Arrest warrant decision paras. 54-55

<sup>22</sup> *DRC* Arrest warrant judgment para. 73

<sup>23</sup> *Situation in Darfur, Sudan* ICC-02/05-01/09 Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir 4 March 2009 (*Bashir*) para. 48, fn51

sufficient gravity to warrant trial at international level. Failing such power, the Court might be swamped by peripheral complaints involving minor offenders, possibly in situations where the major offenders were going free.<sup>24</sup> This would suggest that PTC1's interpretation of the gravity provision is correct, although deGuzman states PTC1's 'exceptionally high gravity threshold risked detracting from the Court's ability to fulfil its most important objectives'.<sup>25</sup> However, given that all crimes within the jurisdiction of the ICC are serious, the question arises why the additional gravity requirement was included as an exclusion to admissibility by the drafters of the RSt if it were not intended to be a separate assessment?

This appears to be PTC1's view since, ignoring the ACh's *obiter dictum*, it held in the *Abu Garda* case that the "sufficient gravity" threshold [...] 'is in addition to the [Statute] drafters' careful selection of crimes included in articles 6 to 8 of the Statute'.<sup>26</sup> Hence, PTC1 continued, "the fact that a case addresses one of the most serious crimes for the international community as a whole is not sufficient for it to be admissible before the Court".<sup>27</sup> PTC1 also commented that when assessing the gravity of a case, "the issues of the nature, manner and impact of the [alleged] attack are critical".<sup>28</sup> Further:

the gravity of a given case should not be assessed only from a quantitative perspective, i.e. by considering the number of victims; rather the qualitative dimension of the crime should also be taken into consideration when assessing the gravity of a given case.<sup>29</sup>

The qualitative factors to be taken into consideration appear in RPE 145(1)(c)<sup>30</sup> and assist the Court in determining sentence. PTC1 viewed them as useful guidelines when

<sup>24</sup> YBILC 1994, vol 1 UN Doc. A/CN.4/SR.2330 Summary record of the 2330<sup>th</sup> meeting, para. 9

<sup>25</sup> deGuzman, M.M. (2008) 'Gravity and the Legitimacy of ICC' *Fordham ILJ* pp1400-1465 at p1428

<sup>26</sup> *The Prosecutor v. Bahar Idriss Abu Garda (Abu Garda)* ICC-02/05-02/09 Decision on the Confirmation of Charges 8 February 2010 (Decision on Charges) para. 30 (quoting *Lubanga* Arrest warrant decision para. 41)

<sup>27</sup> *Ibid*

<sup>28</sup> *Ibid* para. 31

<sup>29</sup> *Ibid*

<sup>30</sup> PTCs have consistently held that factors listed in RPE 145(1)(c) may assist in evaluating gravity, see e.g. *The Prosecutor v. Charles Blé Goudé* ICC-02/11-02/11 Decision on the Defence challenge to the admissibility of the case against Charles Blé Goudé for insufficient gravity 12 November 2014, para. 12; *Situation in the Republic of Côte d'Ivoire* ICC/02/11 Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire 3 October 2011, para. 204



evaluating the gravity threshold required by Article 17(1)(d)<sup>31</sup> as they refer, *inter alia*, to ‘the extent of the damage caused, in particular the harm caused to the victims and their families, the nature of the unlawful behaviour and the means employed to execute the crime’. In proceedings relating to the situation in Kenya,<sup>32</sup> PTC2 added ‘[r]egarding the qualitative dimension, it is not the number of victims that matter but rather the existence of some aggravating or qualitative factors attached to the commission of crimes, which makes it grave.’<sup>33</sup> PTC2 also relied on the aggravating circumstance to be taken into account on determining sentence listed in RPE 145(2)(b)(iv) which specifies the crime being committed with particular cruelty or there being multiple victims. The Chamber went on to list the factors to be considered as:

1. The scale of the alleged crimes (including assessment of geographical and temporal intensity)
2. The nature of the unlawful behavior or of the crimes allegedly committed
3. The employed means for the execution of the crimes (i.e. the manner of their commission)
4. The impact of the crimes and the harm caused to victims and their families<sup>34</sup>

The jurisprudence of the PTCs therefore sets the bar quite high for gravity, which could assist the state relying on the principle of complementarity to retain jurisdiction in preference for an AJM. Although the PTCs seem all to agree, there is unresolved disagreement between the PTCs and the ACh regarding the test to be applied and this uncertainty perhaps could be used to the state’s advantage in a challenge. The state potentially could argue that despite the alleged crimes coming within the jurisdiction of the ICC, their gravity does not fulfil the Court’s strict criteria and therefore the case is inadmissible and can be dealt with nationally by means of an AJM.

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<sup>31</sup> *Abu Garda* Decision on Charges para. 32

<sup>32</sup> *Situation in the Republic of Kenya* ICC-01/09 Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya 31 March 2010, para. 62 (*Kenya* Investigation Authority)

<sup>33</sup> *Ibid.* In making this comment, PTC2 noted the observations of Schabas, W.A. (2009) ‘Prosecutorial Discretion and Gravity’ in Stahn, C. and Sluiter, G. (eds.) *The Emerging Practice of the International Criminal Court* (Leiden, Boston: Martinus Nijhoff Publishers) pp245-6

<sup>34</sup> *Kenya* Investigation Authority para. 62

Notwithstanding these two exceptions to the admissibility of a case to the ICC, by far the most significant provisions for a state wishing to retain jurisdiction for the purpose of an AJM are those contained in Article 17(1)(a) which, by way of reminder, provides that where a case ‘is being investigated or prosecuted by a State which has jurisdiction over it’ the case is inadmissible to the ICC and 17(1)(b) which provides that a case is also inadmissible if it has been investigated by the State with jurisdiction and ‘the State has decided not to prosecute the person concerned’.

Article 17 confirms, therefore, that the Court’s function is complementary to that of national jurisdictions, which means it is a state with jurisdiction and not the ICC that has the first and overriding right and responsibility to investigate and prosecute a case and this right can only be overridden by the ICC if the state is inactive or if the Court determines that the state is not exercising its right with the genuine purpose of bringing the accused to justice. The Article 17 exception to the supremacy of national jurisdictions therefore states a case is inadmissible to the ICC *unless* ‘the State is unwilling or unable *genuinely* to carry out the investigation or prosecution’.<sup>35</sup> Likewise, if a state has investigated the case and has decided not to prosecute, the case is inadmissible to the ICC *unless* that decision resulted from ‘an unwillingness or inability of the State *genuinely* to prosecute’.<sup>36</sup>

The RSt provides guidance on what constitutes ‘unwillingness’ and ‘inability’ to investigate or prosecute ‘genuinely’. Unwillingness is demonstrated by proceedings<sup>37</sup> undertaken in order to shield the offender from criminal responsibility, or taking an inordinate length of time to bring proceedings (thereby indicating a lack of intention to bring the offender to justice) and/or conducting proceedings which are not independent and impartial or in a manner which is deemed inconsistent with bringing the offender to justice.<sup>38</sup> Inability is demonstrated by a ‘total or substantial collapse or unavailability’

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<sup>35</sup> Article 17(1)(a) (emphasis added)

<sup>36</sup> Article 17(1)(b) (emphasis added)

<sup>37</sup> The term ‘proceedings’ covers both investigations and prosecutions, see ‘Decisions taken by the PrepCom at its session held from 4-15 August 1997’ UN Doc. A/AC.249/1997/L.8/Rev.1 fn25

<sup>38</sup> Article 17(2)(a)-(c)

of the national judicial system which prevents the state obtaining the accused or evidence and testimony or being otherwise unable to conduct the proceedings.<sup>39</sup>

Crucially for a state wishing to mount a challenge, the ICC is the sole arbiter of jurisdictional and admissibility issues and the Court 'shall satisfy itself that it has jurisdiction in any case brought before it' and 'may, on its own motion, determine the admissibility of a case'.<sup>40</sup> This suggests that the Court may 'use its own autonomous criteria and standards to assess' whether an AJM satisfies the requirements of ICJ and is compatible with the RSt, which could result in the Court deciding that the state's AJM is irrelevant in its decision-making process.<sup>41</sup> The issue becomes particularly pertinent given that the wording of Article 17 refers to investigations and prosecution since even if the term 'investigation' were satisfied by the state's AJM, the Court may insist on a narrow interpretation of the word 'prosecution' and refuse the challenge.

A further difficulty arises because even if the ICC accepts a state has investigated by means of e.g. a Truth and Reconciliation Commission (TRC), it would be difficult for the state to argue that *after* it has investigated, a decision has been made not to prosecute, as is required by Article 17(1)(b). Even if it is accepted by the Court that this decision was made genuinely as part of the state's national policy for an AJM, the decision not to prosecute would have been taken by the state at the time it decided to proceed by way of an AJM rather than criminal prosecutions. One possible way around this difficulty could be for the state to show that individual perpetrators are given amnesty conditional upon their full and frank admissions to the AJM and that the question of prosecution or amnesty is decided after evidence has been given, with domestic prosecution a certainty if there is reasonable doubt about the veracity of the perpetrator's evidence.

In reaching their decision on admissibility, the ICC judges may be influenced by the argument that although amnesties are not prohibited *per se*, for the crimes within the Court's jurisdiction, they are incompatible with ICJ.<sup>42</sup> Of course, the Court would not

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<sup>39</sup> Article 17(3)

<sup>40</sup> Article 19(1)

<sup>41</sup> Stahn, C. (2005) p700

<sup>42</sup> *Ibid* p701

accept any attempt by a state to avoid its duty to prosecute genocide and grave breaches of the Geneva Conventions by means of an AJM but there has been a shift from an international endorsement of blanket amnesties to a rejection of them for serious international crimes.<sup>43</sup> Furthermore, the RSt's Preamble recalls that 'it is the *duty* of every state to exercise its criminal jurisdiction over those responsible for international crimes'<sup>44</sup> which undoubtedly would have some bearing on the Court's decision on whether to defer in favour of an AJM. However, the fact that an amnesty is conditional and must be warranted by the giving of full and frank admissions should be a positive factor in the Courts assessment.

The RSt is drafted in a manner which enables the issue of admissibility to be considered at different stages of the proceedings i.e. from preliminary examination where there is a general 'situation' under consideration, to the 'case' stage where individuals have been identified for prosecution.<sup>45</sup> In this section, it has been seen that there are several factors arising from both treaty (including the RSt itself) and customary international law which the ICC will have to consider when asked to adjudicate on whether to defer prosecutions in favour of an AJM before it begins consideration of the AJM and its capacity to satisfy the requirements of ICJ.

In the next two sections, the process leading to the ICC commencing an investigation into a situation is outlined and the steps the state needs to take to challenge the Court will be examined, from which it will be noted that these vary according to the stage the proceedings have reached at the ICC.

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<sup>43</sup> For example, upon the signing of the Lomé Peace Agreement which provided for blanket amnesties, the United Nations (UN) Special Representative added a reservation stating that the UN did not recognise the application of amnesty to genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law. Seventh Report of the Secretary-General on the UN Observer Mission in Sierra Leone, UN Doc. S/1999/836 30 para. 7

<sup>44</sup> Paragraph 6 (emphasis added)

<sup>45</sup> Articles 53, 18 and 19

### State Challenges to Admissibility Pre-Investigation Stage

There are three mechanisms by which the jurisdiction of the ICC may be activated. First, a situation can be referred to the Prosecutor by a SP,<sup>46</sup> second the UN Security Council (UNSC) can refer a situation acting under Chapter VII of the UN Charter<sup>47</sup> and third, the Prosecutor can initiate an investigation *proprio motu* (on her own initiative)<sup>48</sup> based on information received from other sources.<sup>49</sup>

None of these three trigger mechanisms automatically activates an investigation, however, since when a situation comes to the Prosecutor's attention, she must first conduct a preliminary examination to assess its seriousness<sup>50</sup> and then persuade the PTC that there is a 'reasonable basis to proceed with an investigation'.<sup>51</sup> For the PTC, this is a evidential test rather than of the appropriateness of bringing a case and the focus is whether the Prosecutor should be permitted to investigate a situation, not 'if one or more specific individuals should be liable to criminal responsibility and punishment'.<sup>52</sup>

After completion of the preliminary examination, the procedural steps differ according to the particular trigger mechanism used. Clearly, if the Prosecutor has determined that there is no reasonable basis to proceed because, for example, a state has issued conditional amnesties in combination with a TRC, which she considers has satisfied the 'investigation' element of Article 17 and diminished the necessity for ICC prosecutions, the ICC intervention stops. The PTC can review the Prosecutors decision at the request of the state making the referral under Article 14 or the UNSC making the referral under Article 13 but cannot oblige the Prosecutor to change her decision, only request her to

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<sup>46</sup> Articles 13(a) and 14

<sup>47</sup> Article 13(b)

<sup>48</sup> Articles 13(c) and 15

<sup>49</sup> E.g. individuals, Human Rights organisations and non-governmental organisations

<sup>50</sup> Article 15(2)

<sup>51</sup> Article 15(4) To assist the Prosecutor and the Court, Article 53(1)(a)-(c) details factors to be considered

<sup>52</sup> Bergsmo, M. & Pejić, J. (2008) 'Prosecutor' in Triffterer, O. (ed.) *Commentary on the Rome Statute of the International Criminal Court – Observers' Notes, Article by Article* (Oxford: Hart Publishing) p589

reconsider.<sup>53</sup> If, however, the Prosecutor's decision is based on it not being in the interests of justice to proceed with an investigation,<sup>54</sup> for example, because the Prosecutor has been persuaded by the state that the context of its transition justifies restorative rather than retributive justice, the PTC can review her decision on its own initiative and can oblige the Prosecutor to initiate an investigation.<sup>55</sup>

If the Prosecutor decides that the preliminary examination does reveal a reasonable basis to proceed with an investigation, she does not need to inform the PTC unless she initially acted *proprio motu*, in which case, she must obtain the authority of the PTC before commencing the investigation.<sup>56</sup> The PTC must agree that there is a reasonable basis to proceed with an investigation and that the case '*appears* to fall within the jurisdiction of the Court'<sup>57</sup> before it grants authorisation, which is 'without prejudice to subsequent determinations [...] with regard to the jurisdiction and admissibility of a case.'<sup>58</sup> The court has full discretion in determining whether or not this 'appearance' exists and will exercise its discretion by examining the supporting material<sup>59</sup> provided by the Prosecutor with the application.<sup>60</sup> Should the application be refused, the Prosecutor can renew it if new facts or evidence subsequently come to light.<sup>61</sup>

Before commencing her investigation, Article 18(1) requires the Prosecutor to notify all SPs as well as those states who would normally have jurisdiction over the crimes concerned (i.e. a non-SP) of her intention to commence an investigation proper. This notification may provide only limited information (to protect persons and evidence or prevent people absconding) but it must be sufficient to enable a state to identify whether it can respond by informing the Court that it is itself investigating the matters of which it has received notification from the Prosecutor, or has already done so.

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<sup>53</sup> Article 53(3)(a)

<sup>54</sup> Articles 53(1)(c)

<sup>55</sup> Article 53(3)(b)

<sup>56</sup> Article 15(3)

<sup>57</sup> Article 15(4) (Emphasis added)

<sup>58</sup> *Ibid*

<sup>59</sup> Supporting material includes 'materials from governmental sources, international organisations, NGOs and the media'. See Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of the Côte d'Ivoire 3 October 2011 ICC-02/11-14 para.18

<sup>60</sup> Article 15(4) The Court will also take account of representations made by victims (Article 15(3)) who have been informed by the Prosecutor of the intention to seek authorisation from the PTC pursuant to RPE 50(1)

<sup>61</sup> Article 15(5)

Article 18's early notification provision is extremely useful for the state wishing to rely on the principle of complementarity to deal with offenders itself by means of an AJM since there is no requirement in the RSt that the investigation conducted by the state be a criminal investigation<sup>62</sup> and at this early stage, since no specific crime or offender has been identified by the Prosecutor, the response of the state to the notification can be equally general. Therefore, a state wishing to rely on, for example, a TRC could argue that this AJM equates to an investigation into the crimes within the Court's jurisdiction.

From the date of receiving the Prosecutor's notification, the state has one month to inform the Court that it is investigating or has investigated those matters detailed in the notification and is requesting the Prosecutor to defer her investigation.<sup>63</sup> The response must be in writing and provide information regarding the state's investigation.<sup>64</sup> The state can, in the meantime, request further information from the Prosecutor to assist in preparing its response but this will not extend the one-month time-limit so the Prosecutor is required to deal with any such request 'on an expedited basis'.<sup>65</sup> The Prosecutor also is entitled to request further information from the state relating to its investigation, if necessary.<sup>66</sup> At this stage, however it is the investigation being conducted by the state that is under review, not the outcome of the investigation.

When the Prosecutor receives information from the state that it is investigating and requests the ICC to defer, it seems (although it is not explicit in the RSt) that her investigation must cease immediately in deference to the national proceedings, that is, the case becomes inadmissible to the ICC. There is, however, provision for the Prosecutor to apply to the PTC for authorization to commence an investigation notwithstanding the state's request to defer,<sup>67</sup> for example, where the Prosecutor believes the state is not making the deferral request for genuine reasons but instead is attempting to obstruct international justice. If the Prosecutor does decide to make such

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<sup>62</sup> Stahn, C. (2005) p697

<sup>63</sup> Article 18(2)

<sup>64</sup> RPE 53

<sup>65</sup> RPE 52(2)

<sup>66</sup> *Ibid*

<sup>67</sup> Article 18(2)

an application, the state is informed and is provided with a summary of the basis of the application<sup>68</sup> so that it may submit observations to the PTC for consideration.<sup>69</sup>

Additionally, pending a ruling by the PTC following such an application, or indeed at any time when an investigation has been deferred, the Prosecutor may ‘on an exceptional basis, seek authority from the PTC to pursue necessary investigative steps’ relating to the preservation or obtaining of evidence where there is a ‘significant risk that such evidence may not be subsequently available’.<sup>70</sup> The hearing by the PTC of this application for authority is held *ex parte* and *in camera* and the PTC’s ruling has to be expedited.<sup>71</sup> This provision clearly overrides the jurisdictional primacy of the state, which has no right to attend or make representations.

Even when the Prosecutor has acceded to the state’s request for deferral of the Court’s investigation, the state may still be requested ‘periodically’ to provide the Prosecutor with information of the progress of its investigation and any ‘subsequent prosecutions’, information which must be provided ‘without undue delay’.<sup>72</sup> Furthermore, the decision to defer can be reviewed after six months from the date of deferral or at any time if there has been a significant change of circumstances relating to the state’s willingness or ability to carry out its investigation genuinely.<sup>73</sup> These provisions give the ICC a continuing right to monitor the state’s investigation and to step in if the Court considers the state is not acting genuinely. It also demonstrates that the assessment of complementarity is an on-going process, kept under review by the ICC and with an emphasis on the outcome being prosecutions rather than AJMs.

### **State Challenges to Admissibility Post-Investigation Stage**

Whereas Article 18 enables a state to request the deferral of an investigation into a situation by the Prosecutor before an investigation proper is commenced (and therefore

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<sup>68</sup> RPE 54(2)

<sup>69</sup> RPE 55(2)

<sup>70</sup> Article 18(6)

<sup>71</sup> RPE 57

<sup>72</sup> Article 18(5)

<sup>73</sup> Article 18(3)



before crimes and offenders have been identified), Article 19 provides the opportunity for the State to challenge jurisdiction and admissibility after the Prosecutor's investigation, where a 'case' has been identified against specific suspect(s) for specific conduct. To reflect the on-going nature of the principle of complementarity, even if a State has unsuccessfully challenged the Court's intervention under Article 18, it is entitled to make a further challenge under Article 19 on grounds of 'additional significant facts or significant change of circumstances'.<sup>74</sup>

A challenge under Article 19 must be made at the 'earliest opportunity'<sup>75</sup> and only once, prior to or at the commencement of the trial unless, in exceptional circumstances, the Court grants leave for a subsequent and/or later challenge.<sup>76</sup> Challenges to admissibility made at the commencement of the trial (or later if permitted) may only be based on the principle *ne bis in idem* since it is only after confirmation of the charges that this issue can be properly considered.<sup>77</sup> The burden of proof regarding inadmissibility lies with the State making the challenge since it will have all the information as to why the case should be deemed inadmissible to the Court.<sup>78</sup>

Prior to the commencement of the trial, therefore, a state wishing to rely on an AJM could, for example, argue that its chosen method of accountability attains the goals of

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<sup>74</sup> Article 18(7)

<sup>75</sup> Article 19(5)

<sup>76</sup> Article 19(4) For the purposes of Article 19(4), Trial Chamber (TCh) 2 has stated that the trial commences "as soon as the Chamber is constituted", see *The Prosecutor v Germain Katanga and Matthieu Ngudjolo Chui (Katanga)* Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute) ICC-01/04-01/07-1213-tENG 16 June 2009, para. 49; whereas TCh1 in *Lubanga*, decided that "[...] the true opening of the trial [is] when opening statements, if any, are made prior to the calling of witnesses", see Decision on the status before the TCh of the evidence heard by the PTC and the decisions of the PTC in trial proceedings and the manner in which evidence shall be submitted, ICC-01/04-01/06-1084 13 December 2007, para. 39. See also *Lubanga* Reasons for Oral Decision lifting the stay of proceedings, holding that "the 'commencement' of the trial was not when the Chamber was constituted ... or when the charges were confirmed ... but on the date fixed for trial ... when the proceedings by way of opening statements and the introduction of evidence commence." ICC-01/04-01/06-1644 23 January 2009, para. 36. TCh1's interpretation was favoured by PTC3 in *The Prosecutor v Jean-Pierre Bemba Gombo* Decision on the Admissibility and Abuse of Process Challenges, ICC-01/05-01/08-802 24 June 2010, para. 210. The ACh in its Judgment on the Appeal of Mr Germain Katanga against the Oral Decision of TCh2 of 12 June 2009 on the Admissibility of the Case, ICC-01/04-01/07-1497 25 September 2009 declined to pronounce on whether TCh2 was correct in its interpretation of the term 'commencement of trial' stating, however, that this decision did not 'necessarily mean that it agrees with the TCh's interpretation', para. 38

<sup>77</sup> Schabas, W.A. (2010) *The International Criminal Court. A Commentary on the Rome Statute* (Oxford: OUP) p369

<sup>78</sup> *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Judgment on the appeal of the Republic of Kenya against the decision of PTCII of 30 May 2011 entitled "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute" ICC-01/09-02/11-274, 30 August 2011, para.61

ICJ and provide detailed information of how this would be achieved. Later challenges would require the state to show that the person accused by the Court had been dealt with by the state's AJM and therefore the principle *ne bis in idem* applies and further, would have to satisfy the Court of the genuineness of the AJM process and that it provided both accountability and justice for victims. Prior to confirmation of the charges, the decision whether the AJM satisfies Article 17 rests with the PTC, after confirmation, with the Trial Chamber (TCh)<sup>79</sup> and decisions may be appealed to the ACh in accordance with Article 82.<sup>80</sup>

The Chamber receiving the state challenge has discretion on how and when to deal with it, although there must not be undue delay and the challenge must be dealt with before any other proceedings are heard.<sup>81</sup> Details of the challenge must be provided to the Prosecutor and the accused<sup>82</sup> both of whom may submit written observations within a time-limit imposed by the Chamber.<sup>83</sup> The Prosecutor can only request a review of a decision that a case is inadmissible if new facts arise which negate the basis of that decision<sup>84</sup> in which case, the state whose challenge to admissibility resulted in the decision must be notified of the review request and must be given time to make representations.<sup>85</sup>

When a challenge is submitted by a state under Article 19, the Prosecutor must suspend the investigation until 'such time as the Court makes a determination in accordance with Article 17'.<sup>86</sup> Pending the Court's determination of the state's challenge, the Prosecutor may seek the Court's authority to take investigative and other additional steps deemed necessary<sup>87</sup> 'to preserve the Court's jurisdiction or its ability to render a fair decision'<sup>88</sup>

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<sup>79</sup> Article 19(6)

<sup>80</sup> *Ibid*

<sup>81</sup> RPE 58(2)

<sup>82</sup> The wording of RPE 58(2) suggests only an accused who has been surrendered to the Court or has appeared voluntarily already i.e. there is no requirement to notify an accused who has been detained by a national authority but is awaiting transfer to the Court or a person who is intending to voluntarily surrender themselves at some point in the future

<sup>83</sup> RPE 58(3)

<sup>84</sup> Article 19(10)

<sup>85</sup> RPE 62(2)

<sup>86</sup> Article 19(7)

<sup>87</sup> Article 19(8)

<sup>88</sup> Hall, C.K. (2008) 'Challenges to the jurisdiction of the Court or the admissibility of a case' in Triffterer, O. (ed) p662

as is also permitted under Article 18(6) but without there needing to be an ‘exceptional basis’ for the application.

The preceding two sections have outlined the formal requirements with which a state and the Prosecutor must comply when challenges to the admissibility of a case before the ICC are made and it has been noted these differ depending on the stage the proceedings have reached at the ICC and that having deferred to the state, the Prosecutor has the right to keep the state’s progress under review and to step in if there is doubt about the genuineness of the state’s investigation. This demonstrates the on-going nature of complementarity.

In the next section, the jurisprudence of the Court in admissibility challenges that have been made to date will be examined to ascertain the factors the judges consider when deciding admissibility issues.

### **Challenging Admissibility in Practice**

Several admissibility challenges to the Court have been made to the ICC,<sup>89</sup> the decisions of which have contributed to the understanding of complementarity and which, in turn, have significantly restricted the potential for success of any challenge mounted by a state ultimately desiring to deal with offenders who have committed crimes within the jurisdiction of the ICC by means of AJMs. Before considering these challenges, the first point to establish is whether a case would be admissible if the state issued blanket amnesties and did nothing to investigate or prosecute offenders. Alternatively, if the state did investigate abuses but not to prosecute offenders but instead as part of an AJM and conditional amnesty programme, could this lead to the Court arguing that the State was inactive, thus making the case admissible to the ICC?

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<sup>89</sup> By Kenya in relation to the cases against William Samoei Ruto, Henry Kiprono Kosgey, Joshua Arap Sang, Frances Kirimi Muthaura, Hussein Ali and Uhuru Kenyatta; Côte d’Ivoire relating to the case against Simone Gbagbo and Charles Blé Goudé and Libya relating to the case against Saif Al-Islam Gaddafi and Abdullah Al-Senussi

The ICC has ruled that the inactivity of a state having jurisdiction does not prevent a case being admissible to the Court.<sup>90</sup> This may seem obvious, given the wording of Article 17(1)(a) which states “the Court shall determine that a case is inadmissible where: (a) The case *is being investigated or prosecuted by a State* which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution”<sup>91</sup> but the point has led to considerable academic debate, with some commentators contending if a state is inactive for reasons other than that they are ‘unwilling’ or ‘unable’, then the case should be inadmissible.<sup>92</sup> Arsanjani and Reisman, for example, argue that it was the intention of the drafters of the RSt that ‘the ICC [...] would decide to take up the cases, on the basis of its assessment of the *unwillingness* or *inability* of the state in which the crimes had occurred to undertake to prosecute them.’<sup>93</sup> Likewise, Sheng writes ‘a case is *inadmissible unless* the elements of unwilling or unable are present’<sup>94</sup> and Schabas contends that ‘the legal difficulty with proceeding on the basis that a case is admissible when simply no State is actively prosecuting or has actively prosecuted the matter is that the text of article 17 does not appear to allow this.’<sup>95</sup>

This was not, however, the interpretation of Article 17 put forward in the Informal expert paper prepared at the request of the Office of the Prosecutor (OTP) in 2003. The experts advised that although it was common to concentrate on the ‘unwilling or unable’ aspects of Article 17, the wording provided for three contingencies: inactivity, unwillingness and inability, the most straightforward of these being where no State has initiated any investigation. In this case, the experts stated, none of the alternatives of Article 17(1)(a)-(c) are satisfied and there is no impediment to admissibility.<sup>96</sup>

<sup>90</sup> *Lubanga*, Arrest Warrant decision paras. 29, 40

<sup>91</sup> Emphasis added

<sup>92</sup> Schabas, W.A. (2010) p341; see also Schabas, W.A. (2008) ‘Prosecutorial Discretion v. Judicial Activism at the International Criminal Court’ 6 *JICJ* pp731-761 at p757

<sup>93</sup> Arsanjani, M.H. and Reisman, W.M. (2005) ‘The Law-in-Action of the International Criminal Court’ 99 *AJIL* pp385-401 at p387 (emphasis in original)

<sup>94</sup> Sheng, A.Y. (2006) ‘Analyzing the International Criminal Court Complementarity Principle Through a Federal Courts Lens’ *bepress Legal Series Working Paper* 1249 [Online] Available:

<http://law.bepress.com/expresso/eps/1249> [Accessed: 22.04.17] p5 (emphasis in original)

<sup>95</sup> Schabas, W.A. (2010) p341

<sup>96</sup> Informal Expert Paper, *The Principle of Complementarity in Practice* 2003, ICC-01/04-01/07-1008-AnxA paras.17-18

This interpretation was followed in *Lubanga*, by PTC1 which stated that the concept of unwillingness or inability is only considered by the Court if national proceedings exist because otherwise, the genuineness of those proceedings cannot be scrutinised.<sup>97</sup> Since *Lubanga*, the ACh has confirmed a two-stage test, where it has first to be established whether the State is actually investigating or prosecuting the case, or has already done so and only if such proceedings exist, is the question of unwillingness and inability examined.<sup>98</sup> Thus, contrary to the opinions of some academics and in a decision which, according to Schabas, 'defies common sense'<sup>99</sup> case law states that the inactivity of a State means that the case is admissible to the ICC.<sup>100</sup>

The concern with this two-stage test is that it emanated from *Lubanga*, a case which arose from a self-referral made by the DRC where the defendant was in custody awaiting trial before the domestic court on charges more serious than the child soldier offences for which he was brought before the ICC.<sup>101</sup> Since it could not be argued that the DRC was unwilling or unable to investigate and/or prosecute this defendant, the ICC side-stepped the issue by finding that the DRC had been inactive regarding child soldier offences and therefore the case was admissible before the ICC without the need for an analysis of unwillingness or inability.

It is argued, therefore, that the interpretation of Article 17(1)(a) was a matter of pragmatism, developed out of the Court's need to start work on the first and only situations before the Court, all of which had been self-referrals.<sup>102</sup> The problem arises

<sup>97</sup> *Lubanga*, Arrest warrant decision para. 32

<sup>98</sup> *Katanga*, Judgment on the Appeal 25 September 2009 para. 78; See also *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang* Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute' 30 August 2011, ICC-01/09-01/11-307 (OA) (*Ruto*) para. 41; *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali* Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute' 30 August 2011, ICC-01/09-02/11-274 (OA) (*Muthaura*) para. 40

<sup>99</sup> Schabas, W.A. (2010) p341

<sup>100</sup> "Interpretation *a contrario* of article 17, paras. 1 (a) to (c) of the Statute" appears as footnote 19 after the words 'in relation to that case' in *Lubanga*, Arrest warrant decision

<sup>101</sup> *Lubanga*, Arrest warrant decision para. 39. Lubanga was under State arrest for genocide and war crimes including murder, illegal detention and torture but not the conscription or use of child soldiers.

<sup>102</sup> ICC Press Release, *President of Uganda refers situation concerning the Lord's Resistance Army (LRA) to the ICC*, ICC-CPI-200440129-44, 29 January 2004; ICC Press Release, *Prosecutor receives referral of the situation in the Democratic Republic of Congo*, ICC-OTP-20040419-50, 19 April 2004; ICC Press Release, *Prosecutor receives referral concerning Central African Republic*, ICC-OTP-20050107-86, 7 January 2007

when the same test is applied to a state opposed to the intervention of the ICC on the basis that a domestic investigation prior to national prosecutions or potentially to an AJM is being undertaken. This situation is completely different from self-referrals and some commentators argue that the challenging state should be evaluated on its willingness and ability to deal with the offenders and not on the judge-made criteria concerning the existence of national proceedings.<sup>103</sup>

The ACh's most recent decision following a State's admissibility challenge relates to Côte d'Ivoire's challenge in the case against Simone Gbagbo.<sup>104</sup> The background to the case is that Côte d'Ivoire had been notified by the Court of the arrest warrant for Mrs Gbagbo on 19<sup>th</sup> March 2012 and had been requested to arrest and surrender her to the Court.<sup>105</sup> Côte d'Ivoire lodged an admissibility challenge with PTC1 on 30<sup>th</sup> September 2013,<sup>106</sup> submitting that on 6<sup>th</sup> February 2012 domestic proceedings had been instituted against Mrs Gbagbo based on allegations similar to those in the case before the Court.<sup>107</sup> Côte d'Ivoire also confirmed that it was willing and able to try Mrs Gbagbo for those offences.<sup>108</sup> On 11<sup>th</sup> December 2014, PTC1 rejected Côte d'Ivoire's challenge, concluding that Côte d'Ivoire was not taking 'tangible, concrete and progressive steps' aimed at ascertaining whether Mrs Gbagbo was criminally responsible for the same conduct alleged in the case before the ICC.<sup>109</sup> Recalling the jurisprudence of the ACh in a challenge to admissibility brought by Libya,<sup>110</sup> PTC1 commented:

[E]ven when the alleged domestic proceedings are still at an early stage of investigation, [the State] must be able to show the contours or parameters

<sup>103</sup> Hansen, T.O. (2012) 'A Critical Review of the ICC's recent practice concerning Admissibility Challenges and Complementarity' 13 *Melbourne JIL* p217-235 at p222

<sup>104</sup> *The Prosecutor v. Simone Gbagbo* Judgment on the appeal of Côte d'Ivoire against the decision of Pre-Trial Chamber 1 of 11 December 2014 entitled "Decision on Côte d'Ivoire's challenge to the admissibility of the case against Simone Gbagbo" (*Simone Gbagbo*) ICC-02/11-01/12 OA 27 May 2015 (Admissibility Judgment)

<sup>105</sup> 'Demande d'arrestation et de remise de Simone Gbagbo' ICC-02/11-01/12-6

<sup>106</sup> 'Requête de la République de Côte d'Ivoire sur la recevabilité de l'Affaire Le Procureur c. Simone Gbagbo, et demande de sursis à exécution en vertu des articles 17, 19 et 95 du Statut de Rome' 30 September 2013, ICC-02/11-01/12-11-Conf and annexes

<sup>107</sup> *Ibid* paras. 23-38

<sup>108</sup> *Ibid* paras. 39-56

<sup>109</sup> 'Decision on Côte d'Ivoire's challenge to the admissibility of the case against Simone Gbagbo' ICC-02/11-01/12-47-Red 11 December 2014, para. 65

<sup>110</sup> *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi* ICC 01/11-01/11-547-Red Judgment on the appeal of Libya against the decision of Pre-Trial Chamber 1 of 31 May 2013 entitled "Decision on the admissibility of the case against Saif Al-Islam Gaddafi" 21 May 2014 paras. 83-4

of that investigation in order to determine the subject matter of the national investigation.<sup>111</sup>

On 17<sup>th</sup> December 2014, Côte d'Ivoire filed its appeal against PTC1's decision<sup>112</sup> and on 27<sup>th</sup> May 2015, the ACh unanimously dismissed the appeal, confirming that 'the presumption in favour of domestic jurisdictions only applies where it has been shown that there are (or have been) investigations and/or prosecutions at the national level.'<sup>113</sup>

In rejecting Côte d'Ivoire's appeal, the ACh re-confirmed the two-step analysis requirement of Article 17(1)(a) and further, that the expression 'the case is being investigated' requires the 'taking of steps' directed at ascertaining whether the person is responsible for the alleged conduct, for instance 'by interviewing witnesses or suspects, collecting documentary evidence, or carrying out forensic analyses'.<sup>114</sup> This requirement had been established in *Ruto*, when the ACh explained 'For assessing whether the State is indeed investigating, the genuineness of the investigation is not at issue, what is at issue is whether there are investigative steps.'<sup>115</sup>

The RSt offers no assistance on what constitutes 'investigative steps' although, acknowledging the vagueness of information provided by the Prosecutor to a state at the preliminary examination stage, RPE 52(1) provides that 'subject to the limitations provided for in article 18', the notification submitted by the State shall contain 'information about the acts that may constitute crimes referred to in article 5, relevant for the purposes of article 18, paragraph 2'. However, PTC2, in its decision to authorise the Prosecutor to open an investigation into the post-election violence in Kenya in 2007-8, demonstrated that the Court is more demanding at the Article 18 stage than the RPE appear to require:

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<sup>111</sup> *Simone Gbagbo* Judgement on Admissibility Appeal para. 76

<sup>112</sup> 'Appeal of the Republic of Côte d'Ivoire against PTC1's Decision on Côte d'Ivoire challenge to the admissibility of the case against Simone Gbagbo' 17 December 2014 ICC-02/11-01/12-48-tENG (OA)

<sup>113</sup> *Ibid* para. 2

<sup>114</sup> *Simone Gbagbo* Admissibility Judgment para. 28; *Ruto* Admissibility Judgment para. 41; *Muthaura* Admissibility Judgment para. 40

<sup>115</sup> *Ruto* Admissibility Judgment para. 41

Admissibility at the situation phase should be assessed against certain criteria defining a 'potential case' such as: (i) the groups of persons involved that are likely to be the focus of an investigation for the purpose of shaping the future case(s); and (ii) the crimes within the jurisdiction of the Court allegedly committed during the incidents that are likely to be the focus of an investigation for the purpose of shaping the future case(s).<sup>116</sup>

The Court requires the information provided by a state to be even more precise in a challenge at the Article 19 'case' stage, as by now, a suspect has been identified for specific conduct. PTC1 in *Lubanga* defined the concept of 'case' as including 'specific incidents during which one or more crimes within the jurisdiction of the Court seems to have been committed by one or more identified suspects'.<sup>117</sup> The ACh has also clarified that it is the challenging state which 'bears the burden of proof to show that the case is inadmissible'.<sup>118</sup> by demonstrating that it is conducting 'a genuine investigation or prosecution'.<sup>119</sup> The 'mere preparedness to take such steps or the investigation of *other* suspects is not sufficient'.<sup>120</sup> Nor is it sufficient merely to assert that investigations are ongoing, the ACh stressed,<sup>121</sup> the state must provide 'evidence of a sufficient degree of specificity and probative value' to demonstrate that the state is indeed investigating the case.<sup>122</sup> This means, the ACh clarified, the state must demonstrate a conflict of jurisdiction i.e. show the *same case* is being investigated by both the Court and the state.<sup>123</sup>

In *Lubanga*, PTC1 held that 'same case' requires the state to show that its national proceedings 'encompass both the person and the conduct which is the subject of the case before the Court'.<sup>124</sup> The ACh tempered this requirement slightly by ruling that the national investigation must cover the same individual and *substantially* the same

<sup>116</sup> *Kenya Authorisation of Investigation* para. 50

<sup>117</sup> *Lubanga Arrest warrant decision* para. 31

<sup>118</sup> *Simone Gbagbo Admissibility Judgment* para. 29; *Ruto Admissibility Judgment* para. 62; *Muthaura Admissibility Judgment* para. 61; *Al-Senussi Admissibility Judgment* para. 166

<sup>119</sup> *Simone Gbagbo Admissibility Judgment* para. 29; *Al-Senussi Admissibility Judgment* para. 166

<sup>120</sup> *Ibid* (*Simone Gbagbo* para. 41; *Al-Senussi* para. 40) (emphasis in original)

<sup>121</sup> *Simone Gbagbo Admissibility Judgment* para. 41; *Ruto Admissibility Judgment* para. 62; *Muthaura Admissibility Judgment* para. 61

<sup>122</sup> *Ibid*

<sup>123</sup> *Ruto Admissibility Judgment* para. 37; *Muthaura Admissibility Judgment* para. 36) (emphasis added)

<sup>124</sup> *Lubanga Arrest warrant decision* para. 31; see also *The Prosecutor v. Mathieu Ngudjolo Chui* ICC-01/04-01/07-262 Decision on the evidence and information provided by the Prosecutor for the issuance of a warrant of arrest for Mathieu Ngudjolo Chui 6 July 2007, para. 21



conduct as alleged in the proceedings before the Court.<sup>125</sup> It refused to accept Kenya's submission that 'it cannot be right that in all the circumstances in every Situation and in every case that may come before the ICC, the persons being investigated by the Prosecutor must be exactly the same as those being investigated by the State if the State is to retain jurisdiction.'<sup>126</sup>

Nor will the ACh accept a state's assertion that investigations into the crimes committed were ongoing at the time the admissibility challenge was lodged at the ICC and are continuing, together with promises of reports to be provided to the Court as the investigations progress.<sup>127</sup> Furthermore, the Court will not allow a state to amend an admissibility challenge or to submit additional supporting evidence just because the state made the challenge prematurely.<sup>128</sup> The ACh noted that despite PTC2 having a broad discretion regarding the procedure to be followed 'for the proper conduct of proceedings'<sup>129</sup> which could have allowed for the filing of additional evidence, 'it was not obliged to do so and nor could Kenya expect to be allowed to present additional evidence'.<sup>130</sup>

The argument (submitted by both Kenya and Libya in support of their challenges) that since Article 19(5) requires the state to 'make a challenge at the earliest opportunity', the state (especially a state in transition which is the process of implementing steps to stabilise the country) may not be able fully to disclose its investigative progress at the time of filing its admissibility challenge, was also rejected by the Court:

[A]dmissibility proceedings should not be used as a mechanism or process through which a State may gradually inform the Court, over time and as its investigation progresses, as to the steps it is taking to investigate a case. Admissibility proceedings should rather only be triggered when a State is ready and able, in its view, to fully demonstrate a conflict of jurisdiction on the basis that the requirements set out in article 17 are met.<sup>131</sup>

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<sup>125</sup> *Ruto* Admissibility Judgment para. 40; *Muthaura* Admissibility Judgment para. 39 (emphasis added)

<sup>126</sup> *Ibid* (*Ruto* para. 42; *Muthaura* para. 39)

<sup>127</sup> *Ruto* Admissibility Judgment para. 62

<sup>128</sup> *Ibid* para. 146; see also *Gaddafi* Admissibility Judgment paras. 164-7

<sup>129</sup> RPE 58(2)

<sup>130</sup> *Ruto* Admissibility Judgment para. 98; *Muthaura* Admissibility Judgment para. 96

<sup>131</sup> *Gaddafi* Admissibility Judgment para. 164; see also *Simone Gbagbo* Admissibility Judgment para. 35

It is perhaps not surprising, given the rulings on admissibility challenges, that the attitude of the Court to states seeking to assert their judicial primacy has been described as obstructive to the point of hostile. In *Katanga*, the Defence contended that the ICC's interpretation of complementarity:

[N]egates the concerns raised by States at the Rome Conference, defeats the principle's objects and purpose and turns it on its head; the current regime – as developed by the Court's early practice ... is *de iure* one of complementarity but *de facto* is nothing less than primacy of the ICC over national courts.<sup>132</sup>

In this section, it has been seen that ICC judges, far from demonstrating flexibility in their interpretation of the RSt relating to admissibility, have been prescriptive. At the preliminary examination stage, they have demanded evidence of 'tangible, concrete, progressive steps' taken by states to investigate the situation before the ICC and at the case stage, information detailing the 'specificity and probative value' of the state's investigation must be provided to confirm to the Court's satisfaction that precisely the same person is being investigated for substantially the same conduct. Furthermore, by refusing to allow the amendment of an admissibility challenge or the submission of additional supporting material, the judges' decisions also appear to undermine the ongoing nature of the assessment of admissibility.

In the next section, the question of whether these judicial demands make a challenge to the ICC based on an AJM untenable will be addressed.

### **Unchallengeable Admissibility in Practice?**

The examination of the ICC's jurisprudence in the preceding section reveals that it has deviated from the RSt's fundamental principle that national jurisdictions have primacy over the investigation and prosecution of the crimes within the Court's jurisdiction. Since the demands made of states challenging admissibility are so exacting and its

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<sup>132</sup> Motion Challenging Admissibility of the Case by the Defence of Germain Katanga, pursuant to Article 19(2)(a) of the Statute 11 March 2009, para. 19

decisions so robust when national prosecutions are a state's intention, how much more difficult would it be for a state intending to proceed by way of an AJM to persuade the Court to defer in its favour? The Court's same person and (substantially) same conduct requirement and the very narrow definition of a 'case' makes it onerous for the state to show it is acting in relation to that same matter and easier for the ICC to assert admissibility.<sup>133</sup> Additionally, the Court's refusal to permit amendments or the filing of additional documentation to support a challenge presents huge obstacles for states wishing to retain jurisdiction, especially a transitioning state which is seeking to uphold the requirements of ICJ by means other than prosecutions.

The judges' inflexibility, it is argued, is contrary to the intention of the drafters of the RSt that the assessment of admissibility should be an on-going process, dependent on the investigative and prosecutorial steps taken by the state, which may change over time. As the ACh in *Katanga* stated, 'a case that was originally admissible may be rendered inadmissible by a change of circumstances in the concerned states and *vice versa*.'<sup>134</sup> Yet there is little, if any, evidence of the Court accepting admissibility as an on-going assessment in practice.

In 1997, following much deliberation, consensus was achieved by the PrepCom that the Court 'would not take jurisdiction unless the State with criminal jurisdiction over the offence was unable or unwilling to carry out the investigation or prosecution'<sup>135</sup> This consensus was replicated at the Rome Conference and without complementarity, 'there would have been no agreement' leading to the adoption of the RSt.<sup>136</sup> It is argued that the jurisprudence of the court to date does not honour the spirit of this consensus: the requirement for co-operation between State and Court working in unison to attain the aims of ICJ identified earlier in this thesis.

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<sup>133</sup> Robinson, D. (2010) 'The Mysterious Mysteriousness of Complementarity' *CLF* pp67-102 at p101

<sup>134</sup> *Katanga* Admissibility Judgment para. 56

<sup>135</sup> Williams, S.A./Schabas, W.A. 'Issues of Admissibility' in Triffterer, O. (ed) p610

<sup>136</sup> *Ibid* p613

This is certainly the view of Judge Anita Ušacka, who presented dissenting opinions in both the Kenyan and Libyan admissibility appeals.<sup>137</sup> Judge Ušacka is of the opinion that the ‘same person/(substantially) same conduct’ test disregards the principle of complementarity expressed in paragraph 10 of the Preamble and Article 1 of the ICCSt and is contrary to the language of the *chapeau* of Article 17(1).<sup>138</sup> She agrees that the test was developed in cases that had been self-referred, therefore admissibility was not challenged and the state was not required to demonstrate what investigatory or prosecution steps it had taken regarding the suspect and the conduct.<sup>139</sup> When the same test is then applied to compare a case before the ICC with a state’s domestic proceedings, she argues ‘the Court will come to wrong and even absurd results, potentially undermining the principle of complementarity and threatening the integrity of the Court’.<sup>140</sup>

It is Judge Ušacka’s view that, having regard to the principle of complementarity, Article 17(1)(a) does not require the State to ‘focus on largely or precisely the same acts or omissions that form the basis for the alleged crimes or on largely or precisely the same acts or omissions of the person(s) under investigation or prosecution to whom the crimes are allegedly attributed.’<sup>141</sup> She continues ‘[e]stablishing such a rigid requirement would oblige domestic authorities to “copy” the case before the Court’<sup>142</sup> which would lead not to the state and Court complementing each other but rather to competition and the ‘jurisdictional conflict’ as PTC1 termed it in *Lubanga* admissibility decision.

The approach taken by the ICC, Judge Ušacka argued in her dissenting opinion in *Gaddafi*, has the effect of intruding on the sovereignty of states and the discretion afforded to national prosecutorial authorities.<sup>143</sup> Further, it shows no regard for ‘the many differences in legal frameworks and in the practice of criminal justice between domestic

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<sup>137</sup> Libya Dissenting Opinion ICC-01/11-01/11-547-Anx2 21 May 2014; Kenya Dissenting Opinion ICC-01/09-01/11 OA 20 September 2011

<sup>138</sup> *Ibid* (Libya Dissenting Opinion) para. 47

<sup>139</sup> *Ibid* para. 48

<sup>140</sup> *Ibid*

<sup>141</sup> *Ibid* para. 51

<sup>142</sup> *Ibid* para. 52

<sup>143</sup> *Ibid* para. 53

jurisdictions and the Court but also between the various domestic jurisdictions'.<sup>144</sup> She expressed concern about the ramifications of the approach, arguing that it could preclude a state from focusing its investigations on a wider scope of activities, or conversely, encourage the state to focus on only the narrower case selected by the Prosecutor.<sup>145</sup> Finally, she argued that it raises concerns about timing as the proceedings before the Court might have progressed further than the domestic proceedings or *vice versa*.<sup>146</sup>

Clearly, the Court's assertive use of its judicial power risks antagonising states upon which it relies for co-operation, especially in the absence of its own enforcement methods, as has already been seen from the discontent expressed by the African Union and the moves of some African states to withdraw from the treaty. The Court must demonstrate a more conciliatory approach towards complementarity in an endeavour to find the appropriate balance between respecting the sovereignty of states and ensuring an effective Court. The Defence in *Katanga*, quoting Kleffner,<sup>147</sup> argued that a better test would give states 'a margin of appreciation in selecting crimes'<sup>148</sup> and proposed a combination of a 'comparative gravity-test'<sup>149</sup> and 'comprehensive conduct-test'<sup>150</sup> which could be applied alternatively or jointly.<sup>151</sup> It also advocated a duty on the Prosecutor to consult and assist national authorities, a duty which 'lies at the heart of 'effective complementarity''<sup>152</sup> and which the Defence alleged was conspicuously lacking in the DRC case.<sup>153</sup>

Judge Ušacka argued that complementarity should be assessed using multiple criteria referenced to each specific case; that there should be a broad test of 'conduct' not necessarily requiring the same acts attributed to that suspect.<sup>154</sup> Further, she considers

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<sup>144</sup> *Ibid* para. 54

<sup>145</sup> *Ibid* para. 55

<sup>146</sup> *Ibid* para. 56

<sup>147</sup> Kleffner, J.K. (2008) *Complementarity in the Rome Statute and National Criminal Jurisdictions* (Oxford: OUP)

<sup>148</sup> *Katanga* Motion Challenging Admissibility para. 40

<sup>149</sup> *Ibid* para. 46

<sup>150</sup> *Ibid* para. 47

<sup>151</sup> *Ibid* para. 45

<sup>152</sup> *Ibid* para. 48

<sup>153</sup> *Ibid* para. 49

<sup>154</sup> Libya Dissenting Opinion para. 58

that the evidence rules in challenges should be relaxed so as not to require ‘probative value’ and ‘specificity’ as this imposes too high a standard e.g. from a State in transition<sup>155</sup> and that the ‘clearly expressed genuine will’<sup>156</sup> of a State to investigate and prosecute should be given far more weight, particularly when combined with the ‘active co-operation’ the State should receive from the Court.<sup>157</sup>

The attitude of the ICC seems to be at odds with the desire to encourage and assist States to investigate and prosecute international crimes when they express willingness and ability to do so. Given that current Court practice appears hostile to state action rather than one of co-operation and promotion of state proceedings, how much more unlikely is it that the Court would declare a case inadmissible when the intention of that State is to deal with offenders by means of an AJM? Indeed, the *raison d’être* of the ICC is to ensure perpetrators of atrocious crimes face trial before either a domestic or international court and if the Court can decide against a state that declares itself willing and able to bring offenders to trial, it is perhaps inconceivable that it will defer in favour of a state intending to deal with offenders by means of an AJM.

## Conclusion

The decisions of the ICC have established a legal framework for determining admissibility challenges and it is clear from the nature of those decisions that a state cannot rely on the principle that it is the sovereign right of every state to exercise its criminal jurisdiction when it is faced with the ICC calling it to account. It is notable even from the wording of the RSt, given that the State has primary jurisdiction, that the State is placed in the position of having to ‘request’ the Prosecutor to defer at the Article 18 stage,<sup>158</sup> rather than entitling it to demand the Prosecutor defers to its jurisdiction and although the Prosecutor must defer to the State upon receipt of the required information, that deferral is subject to regular review of the State’s activities and the

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<sup>155</sup> *Ibid* para. 62

<sup>156</sup> *Ibid* para. 59

<sup>157</sup> *Ibid* para. 65

<sup>158</sup> Article 18(2)

State must satisfy the Prosecutor that its proceedings are *bona fides* and effective.<sup>159</sup> Again, for Article 19 challenges, it is for the State to prove that the case is inadmissible to the Court and not for the Prosecutor to prove that it is admissible. When coupled with the judiciary of the Court being the sole arbiter of challenges to its jurisdiction, this gives the appearance that rather than respect for state sovereignty, complementarity is weighted in favour of the Court and international justice<sup>160</sup> and certainly this leaves little room for AJMs.

The Court has shown that it will act decisively even when its intervention is opposed by a State that declares itself willing and able to conduct criminal proceedings, so how much more robust would the Court be when faced with a challenge based on a transitioning state's intention to rely on AJMs rather than trials? Once the ICC becomes seised of a case, current jurisprudence shows that a state wishing to assert its judicial primacy is required to provide concrete, tangible proof of the steps it is taking to investigate the same suspects for the same criminal conduct as the ICC. Promises and assurances are insufficient: to satisfy the Court, states are required to provide adequate evidence of degree of specificity and probative value. The RSt does not define the standard of proof for the purposes of a determination on the admissibility of a case, so these requirements are judge-made and serve to demonstrate how confident and assertive the judges have become in their determination to fulfil the Court's mandate. Is this, as Hansen contends 'judicial activism [...] where judges of the ICC increasingly grant themselves powers that were not clearly envisaged by the drafters of the Rome Statute'<sup>161</sup> and which could undermine its key principles'?

Certainly, it all seems very distanced from the PrepCom discussions and the negotiations at the Rome Conference when delegates were keen to protect their right to deal with the crimes and offenders within their jurisdictions themselves and complementarity was the sweetener to win their support for the ICC. In hindsight, it seems the South Africans were right to insist during the lengthy debates concerning the attitude the Court should

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<sup>159</sup> Article 18(3)

<sup>160</sup> Hansen, T.O. (2012) p234

<sup>161</sup> *Ibid*; see also Schabas, W.A. (2009) p757

take to AJMs that the RSt should include specific provisions for AJMs such as TRCs otherwise an omission might open the door to international prosecution.<sup>162</sup>

It has been argued in earlier chapters that transitioning states may be unwilling to commit offenders to trial for fear that doing so could disrupt a fragile peaceful transition to democracy, as occurred in Latin American states and South Africa. Instead they may favour AJMs such as TRCs or ceremonies such as *Mato Oput*, which in turn could involve amnesties and reparations. How the Court addresses AJMs in the light of the complementarity principle is yet to be seen but given their global rise in popularity and acceptance and their perceived importance for the achievement of peace and reconciliation, it is without doubt a challenge to be faced by the Court in the future. It will require a complete re-assessment by the Court of its retributive justice paradigm if AJMs are going to be accommodated within the sphere of international justice. Without the intervention of the ASP which could agree to re-draft specific provisions of the RSt that are perceived to be problematic insofar as their interpretation by the ICC judges is concerned, such a paradigmatic shift appears unlikely.

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<sup>162</sup> Williams, S./Schabas, W.A. (2010) p617



## CHAPTER EIGHT

### CONCLUSION

The intention of this thesis has not been to question the role of the International Criminal Court (ICC) as a protector of individual human rights and punisher of those who violate them. It has, however, sought to discuss a new perspective of international criminal justice (ICJ) so that a more adaptable, contextually-sensitive approach for states transitioning from conflict or authoritarian rule to peace and democracy can be achieved. The research has been undertaken at a time when the ICC has faced substantial challenges in the form of lack of support from the United Nations Security Council, non-co-operation from States Parties and criticism of its selectivity of cases to prosecute, particularly from the continent of Africa, which has been threatening a mass withdrawal from the Rome Statute in protest.<sup>1</sup> This thesis has suggested that to facilitate co-operation and support from States Parties in the global search for ICJ, the ICC should adopt a more flexible interpretation of the complementarity principle, particularly concerning alternative justice mechanisms (AJMs). However, before it can do that, to comply with its mandate, the ICC would have to satisfy itself that an AJM proposed by a State wishing to avoid national or international criminal prosecutions, is capable of attaining ICJ goals. This thesis has attempted to establish a framework by which such an assessment could be undertaken.

To enable a comparative analysis of different accountability mechanisms, Chapter Three identified the numerous justice goals attributed to criminal trials at the ICC by reference both to domestic retributive justice theories and to the aims of transitional justice which, as a discrete field of scholarship, has grown in influence over the last three decades. A comparative study of the potential of the ICC, *Mato Oput* and the SATRC to attain these goals was conducted in Chapters Three, Five and Six and it was suggested that a shift in thinking about the whole ICJ process could be achieved without forfeiting ICJ aims. This research is significant because it is the first time that a comparative study

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<sup>1</sup> See p1-2 and p68 *ante*

has been undertaken of *Mato Oput* and the SATRC *vis-à-vis* the ICC in terms of the goals of ICJ and also because it seeks to broaden the concept of justice within a framework and structure that is relevant to criminal prosecutions at the ICC.

The fundamental problem with AJMs and one which puts them into direct conflict with western notions of justice is that they fail to punish the perpetrators of heinous international crimes. For proponents of retributive justice, this fact alone makes the predominantly restorative justice focus of AJMs unsuitable for dealing with the perpetrators of human rights abuses.<sup>2</sup> The primacy of retributive justice can be seen in the Preamble to the Rome Statute (RSt), which explicitly states that it is the duty of every state 'to exercise its criminal jurisdiction over those responsible for international crimes'<sup>3</sup> and if they prove 'unwilling or unable'<sup>4</sup> to do so genuinely, the International Criminal Court (ICC) will intervene to ensure 'an end to impunity for the perpetrators'<sup>5</sup> of 'crimes of concern to the international community as a whole'.<sup>6</sup> Retributivists insist criminal prosecutions are essential to protect the rights of every human being, even if this means overriding state sovereignty.<sup>7</sup>

The focus on the universal rights of the individual and the obligations of the international community to protect them finds its roots in Kantian philosophy of the Enlightenment era but today raises questions regarding the appropriateness of applying one format for justice in a world marked by cultural and societal diversity, issues which lie at the heart of this thesis.<sup>8</sup> Chapter Three discussed the currency of the Kantian deontological retributive approach to international criminal law<sup>9</sup> and it is argued here that the ICC is essentially a Kantian project,<sup>10</sup> ideologically grounded in cosmopolitanism and its

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<sup>2</sup> See e.g. Orentlicher, D.F. (1990-1991) 'Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime' 100 *Yale LJ* pp2537-2615 at pp2541-2544, 2604-2606, 2615

<sup>3</sup> Rome Statute of the International Criminal Court 1998, Preamble, para. 6

<sup>4</sup> RSt, Article 17(1)(a)

<sup>5</sup> RSt, Preamble, para. 5

<sup>6</sup> *Ibid* para. 4

<sup>7</sup> Leonard, E. K. (2005) 'Discovering the New Face of Sovereignty: Complementarity and the International Criminal Court' 27 *New Political Science* pp87-104 at p104

<sup>8</sup> See Betts, A. (2005) 'Should Approaches to Post-Conflict Justice and Reconciliation be Determined Globally, Nationally or Locally?' 17 *EJ Dev Research* pp735-752 for a summary of the debates

<sup>9</sup> See page 58 *ante*

<sup>10</sup> Kant calls for an international legal system to bring international criminals and aggressors to trial, see Pojman, L.P. (2005) 'Kant's Perpetual Peace and Cosmopolitanism' 36 *Journal of Social Philosophy* pp62-71 at p69

premise that an individual has 'citizenship of the world'<sup>11</sup> and is the 'essential unit of moral agency'.<sup>12</sup> Kant's view of cosmopolitanism and world citizenship 'involves a utopian anticipation of world peace to be attained as a consequence of increased communication among human beings',<sup>13</sup> through which communication, 'a violation of rights in one place is felt throughout the world'.<sup>14</sup> Primarily, therefore, Kant's cosmopolitan citizenship grants rights simply by virtue of being human.<sup>15</sup> For Kant, a just world is:

one in which cosmopolitan principles of justice are realistically institutionalised, and this will be a world in which boundaries are not absent, but also one in which there are further institutional structures which support international justice between states and cosmopolitan justice for people when they interact across borders.<sup>16</sup>

In these terms both the ICC and the United Nations (UN) itself can be described as cosmopolitan institutions. The 1948 Universal Declaration of Human Rights (UDHR) evidences the evolution of this global civil society, transitioning it 'from international to cosmopolitan norms of justice'.<sup>17</sup> Since 1948, the UN has continued to promote human rights (HR)<sup>18</sup> grounded in Kant's philosophy of global citizenship.<sup>19</sup> However, the arguments for universality based on the homogeneity of human beings have not found 'universal' approval. Tibi, for example, comments, '[e]xisting civilisations and cultures differ substantially in their norms, values and outlooks as related to their respective world views'.<sup>20</sup> And as early as 1948, the American Anthropological Association (AAA) rejected the UN's advocacy of the universality of international HR norms,<sup>21</sup> arguing the

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<sup>11</sup> Benhabib, S. (2012) 'Cosmopolitanism after Kant: Claiming rights across borders in a new century' in Tunstall, K. E. (ed) *Self-Evident Truths? Human Rights and the Enlightenment* (The Oxford Amnesty Lectures (London: Bloomsbury Publishing) p78

<sup>12</sup> Allen, T. and Macdonald, A. (2013) *Post Conflict Traditional Justice: A Critical Overview* (London: JSRP) p1

<sup>13</sup> Benhabib, S. (2012) p81

<sup>14</sup> *Ibid*; the RSt Preamble declares the State Parties are '[m]indful that during this century, millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of the world', para. 2

<sup>15</sup> Benhabib, S. (2012) p82

<sup>16</sup> O'Neill, O. (2000) 'Bounded and cosmopolitan justice' 26 *Review of International Studies* pp45-60 at p59

<sup>17</sup> Benhabib, S. (2012) p83 stating whereas 'norms of international law emerge through treaty obligations to which states and their representatives are signatories, cosmopolitan norms accrue to individuals considered as moral and legal persons in a world-wide society.'

<sup>18</sup> See Chapter Two *ante*

<sup>19</sup> Messer, E. (1993) 'Anthropology and Human Rights' 22 *Annual Review of Anthropology* pp221-249 at p222

<sup>20</sup> Tibi, B. (1994) 'Islamic Law/Shari'a, Human Rights, Universal Morality and International Relations' 16 *HRQ* pp277-299 at p280

<sup>21</sup> Executive Board, AAA. (1947) 'Statement on Human Rights' 49 *American Anthropologist* pp539-543; in 1999, the AAA developed a Declaration on HR that it believed had universal relevance [Online] Available: <http://humanrights.americananthro.org/1999-statement-on-human-rights/> [Accessed 30.08.17]

UDHR failed to encompass rights that were truly culturally, ideologically and politically universal.<sup>22</sup>

Thus the UN, the HR movement and the ICC are each seen by many non-Western states as extensions of the Western rationalist project which, through promulgating universality, ignore the diversity of mankind and the culturally contingent nature of law.<sup>23</sup> Allen and MacDonald comment that:

Today, despite a more moderate relativist position that tells us there are overlapping values from which we might be able to identify a common core of human rights principles, there does remain concern that human rights law [...] will continue to struggle for meaning and relevance in non-western cultures, which, it is claimed, have different concepts of personhood and the self.<sup>24</sup>

In Africa, for example, vigorous debate has focussed on whether human rights are individual or collective and whether socio-economic rights have priority over the individual civil-political freedoms which are emphasised in the West.<sup>25</sup> The African (Banjul) Charter on Human and Peoples' Rights produced by African political leaders<sup>26</sup> reflects African assertions that in their societies, 'peoples' not individuals, have rights and individual freedoms may have to be sacrificed to support subsistence and development rights, at least in the short term.<sup>27</sup> Messer asserts that this demonstrates that African concepts of 'personhood' are more likely to be based on an acceptance that 'the human is a social being and only human by virtue of his or her social roles, fulfilment of appropriate rights and duties and relationship as an individual to the social unit'.<sup>28</sup> This, again, calls into question the cross-cultural applicability and appropriateness of a uniquely Western concept of human rights and the juridical means of their protection.<sup>29</sup>

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<sup>22</sup> Fox, D.J. (1998) 'Women's Human Rights in Africa: Beyond the Debate over the Universality or Relativity of Human Rights' 2 *African Rights Quarterly* pp3-16 at p9

<sup>23</sup> Allen, T. and MacDonald, A. (2013) p1

<sup>24</sup> *Ibid*

<sup>25</sup> Messer, E. (1993) p227

<sup>26</sup> Adopted 27 June 1981, in force 21 October 1986

<sup>27</sup> See Articles 27-29

<sup>28</sup> Messer, E. (1993) p228

<sup>29</sup> The difficulty with this view is that some narratives of cultural relativity mask an intention to maintain patriarchy and elite domination and are simply an excuse for gross violations of individuals' rights, as was seen, for example, in Soviet Russia and Nazi Germany. It is difficult for an advocate of human rights, therefore, to accept that an individual in Europe has less right to protection than an individual in Africa

For Matua, the 'arrogant and biased rhetoric of the human rights movement prevents it from gaining cross-cultural legitimacy'<sup>30</sup> and the right of one culture to 'define and impose on others what it deems good for humanity' will only serve to abrogate the very rights it is seeking to promulgate.<sup>31</sup> However, these opinions do seem to be at odds with, for example, SA's desire to build a nation which embodies respect for individual HR and perhaps even with the views expressed by participants in the Ugandan surveys who supported retributive trials.

So if views that the ICC represents a Western justice construction designed to protect culturally inappropriate human rights persist across non-Western societies, one might question why so many have ratified the RSt. It was suggested in Chapter Two that the acceptance of Western justice norms and standards by non-Western states could be attributed both to the export of Western justice mechanisms during the colonial period and to the 'Europeanisation' of the educated elites in those former colonial societies. Matua suggests that states' ratification could mean they 'are bowing to a false international consensus because in some sense their statehood and belonging to the 'international community' is dependent on paying homage to international law, to human rights'.<sup>32</sup> Perhaps ratification satisfies the desires of states' political leaders to be regarded as equals in the international community, by virtue of their state upholding the same norms and standards of justice and respect for human rights and humanitarian law as the rest of the 'civilised' world.

Notwithstanding some vociferously articulated concerns about the ICC's cultural insensitivity, its supporters maintain that the Court upholds norms and values which *are* universal, irrespective of cultural diversity. Moreover, they argue that it is the failure of states to protect the HR of their citizens which establishes the Court's moral authority to intervene to obtain justice for the individual, even against the interest of the state.<sup>33</sup>

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<sup>30</sup> Matua, M. (2001) 'Savages, Victims, and Saviours: The Metaphor of Human Rights' 42 *Harvard ILJ* pp201-245 at p206

<sup>31</sup> *Ibid* p219

<sup>32</sup> *Ibid* p236

<sup>33</sup> Fouladvand, S. (2012) *Complementarity and Cultural Sensitivity: Decision-Making by the ICC Prosecutor in Relation to the Situations in the Darfur region of the Sudan and the Democratic Republic of the Congo (DRC)* PhD thesis, Sussex Law School, University of Sussex p18

Interestingly, despite the interventionist model of the ICC, Kant 'did not 'sanction intervention', which would be a violation of the rights of an independent nation.'<sup>34</sup> In any event, it has been argued that these two concepts, universality and relativism, are not necessarily opposed. Fox argues 'international HR norms should become part of the legal culture of any given society, [although] to do so, they must strike responsive chords in the general human public consciousness.'<sup>35</sup>

This universalism *versus* relativism dichotomy epitomises the problematic issue that criminal prosecutions are the only justice systems which have been conditioned by Post-Enlightenment ideas about HR and there is a clear conflict between the ICC as a Kantian concept of justice and 'traditional' variants which still flourish in many areas of the world. Whatever our views about the effectiveness of community-based models of justice, the problem which must be addressed is that it now seems impossible (and many would argue, illegitimate) to envisage justice without some form of rights-based methodology. It will be recalled from Chapter Four, for example, that Kofi Annan stated in his 2004 Report to the UN Security Council:

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*.<sup>36</sup>

There is a tension between this insistence on conformity with international standards and the desire to localise and contextualise post-conflict justice.<sup>37</sup> Given that universal norms have been formulated from a Western-centric viewpoint, it is perhaps unrealistic (and unfair) to assess AJMs to these standards.<sup>38</sup> Certainly, there are concerns that Western-inspired tampering with traditional processes to ensure they conform to

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<sup>34</sup> *Ibid* p26

<sup>35</sup> Fox, D.J. (1998) p4

<sup>36</sup> 'The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies' UN Doc. S/2004/616, 23 August 2004, para. 36 (emphasis added)

<sup>37</sup> Baines, E. (2010) 'Spirits and Social Reconstruction after Mass Violence: Rethinking Transitional Justice' 109 *Africa Affairs* pp409-430 at p415 (Citing Shaw, R. 'One Size does not fit all – but how to choose? Re-visiting common myths and assumptions' (paper presented at the IJTJ Board Conference, 'Challenging the Assumptions in Transitional Justice: the Role of IJTJ', Cape Town, South Africa, 28-30 May 2008)

<sup>38</sup> *Ibid* p414

international standards will effectively eradicate the very qualities that make them distinctive as local and culturally relevant.<sup>39</sup> In Chapter Five, for example, the establishment of *Ker Kwaro Acholi* with the assistance of international and central governmental agencies and the adaptation of the traditional *Mato Oput* ritual appears not to have inspired the respect of much of the Acholi community. The failure to secure justice and dignity for victims was one reason that Chapter Five concluded the adapted *Mato Oput* ceremony does not satisfy the goals of ICJ.

Supporters of restorative justice and specifically of AJMs argue that adherence to a blueprint for international criminal justice (ICJ) demonstrates disregard for non-Western cultural and historical tradition<sup>40</sup> and this thesis has argued that respect should be accorded to demands for justice mechanisms that function at local rather than international level. This will require the ICC to be far more flexible in its interactions with State Parties and their affected communities and to adopt a more nuanced approach in the quest for meaningful justice for victims.

Similarly, if the ICC is to be persuaded to declare a case inadmissible, there will have to be an acceptance by proponents of AJMs that accommodations should be made to eradicate 'persistent ethnic, religious, generational and gender hierarchies and divisions that complicate and limit the effectiveness of traditional practice from a transitional justice perspective.'<sup>41</sup> Chapter Four's general discussion of AJMs and their domination by elderly males highlighted the hierarchical character of African social accountability and the routine suppression of certain groups, particularly women and youth.<sup>42</sup> Reconstructing 'patriarchal, gerontocratic',<sup>43</sup> pre-conflict structures devastated by violence and its aftermath without reform will merely re-instate traditional hierarchies, to the detriment of women and youth. However, the fact that the original *Mato Oput* ceremony has been adapted to enable it to be used for returning combatants testifies

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<sup>39</sup> Allen, T. and MacDonald, A. (2013) p19

<sup>40</sup> *Ibid* pp3-5; see also Baines, E. (2010) p412-413; Branch, A. (2007) 'Uganda's Civil War and the Politics of ICC Intervention' 21 *Ethics and International Affairs* pp179-198 at p191-192; Branch, A. (2004) 'International Justice, Local Injustice: The International Criminal Court in Northern Uganda' 51 *Dissent* pp22-26 at p25-26

<sup>41</sup> Allen, T. and MacDonald, A. (2013) p13

<sup>42</sup> *Ibid*

<sup>43</sup> Branch, A. (2014) 'The Violence of Peace: Ethnojustice in Northern Uganda' 45 *Development and Change* pp608-30 at p617

to its flexibility. Reforms to end male gerontocracy and enable women and youth to be included in the processes of conflict resolution would ensure the eradication of gender and age discrimination. Clearly, communal ceremonies may still be necessary to cater for large numbers of returnees but they could perhaps involve victims in more positive roles than simply spectating and they could require from the returnees a voluntary acknowledgement of wrong-doing and some form of reparation in the form of, for example, community service.

Regarding the need for national reconciliation in Uganda, it was noted in Chapter Five that although *Mato Oput* is culturally specific to the Acholi, it does have some equivalence to conflict resolution practices of other groups affected by the Lord's Resistance Army violence.<sup>44</sup> This suggests that the various ethnic groups in Uganda could devise an acceptable ceremony based on their communal traditional values to be performed nationwide at the local level, involving all members of the community, including the government, the army and other state institutions.

Something similar occurred in Sierra Leone (SL) after the end of the civil war in 1999, when despite a restorative tradition existing within the various ethnic groups of SL,<sup>45</sup> the Lomé Peace Agreement made the 'regrettable' decision not to rely on traditional 'established cultural practices' but provided for establishment of a Truth and Reconciliation Commission (TRC) largely modelled on the South African TRC (SATRC).<sup>46</sup> Unfortunately, the SLTRC was criticised not only for failing to reach remote areas but also for being 'too Western, too 'official' and fail[ing] to elicit apologies from perpetrators'.<sup>47</sup> These failings led to the development of *Fambul Tok* in 2008.<sup>48</sup> Nationwide consultations over 15 months involving 'victims, ex-combatants, women, youth, religious leaders, elders, cultural leaders and local officials' in all districts assessed 'people's readiness for reconciliation' and revealed that 'local cultural traditions,

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<sup>44</sup> Allen, T. (2008) 'Ritual (Ab)use? Problems with Traditional Justice in Northern Uganda' in Wadell, N. and Clark, P. (eds.) *Courting Conflict? Justice, Peace and the ICC in Africa* (London: Royal African Society) pp47-54 at p48

<sup>45</sup> Graybill, L.S. (2010) *Traditional Practices and Reconciliation in SL: The Effectiveness of Fambul Tok* (ACCORD: Conflict Trends) pp41-47 at p43

<sup>46</sup> *Ibid* p42

<sup>47</sup> *Ibid* p44

<sup>48</sup> Krio for 'family talk', drew upon tradition of discussing and resolving issues within the family circle



dormant since the war, could be reawakened for social healing.<sup>49</sup> *Fambul Tok* was designed to address conflict at a local level and to encourage each person to contribute towards peace.<sup>50</sup> Its voluntary process departed from tradition by including women and youth in the reconciliation committees which arranged the rituals and the members of which all received training in human rights and conflict resolution.<sup>51</sup> It is suggested that this grass-roots collaborative effort to establish a nationally-acceptable means of achieving accountability and reconciliation could be successfully replicated in Uganda. Such an AJM could potentially resolve the issues which make *Mato Oput* unsuitable as a national mechanism for achieving justice and accountability and which render it incapable of attaining the aims of ICJ for the purposes of a challenge at the ICC based on the principle of complementarity.

Turning to the capacity of the SATRC to attain the goals of ICJ identified in this thesis, it was argued in Chapter Six that despite its identified shortcomings, there was much about the SATRC that has great potential to satisfy the aims of ICJ and far more effectively than trials at the ICC. It was suggested that the manner of the SATRC's establishment, which involved nationwide consultation and participation in the drafting of the Act which established it and in the selection of its commissioners, made the TRC especially effective as a nationally-approved means of accountability. The fact that it was well-structured, well-resourced and held nationwide public meetings which were extensively covered in the media all served to reinforce its efficacy as an AJM. For a TC, its 'carefully balanced powers'<sup>52</sup> and 'extensive investigatory reach'<sup>53</sup> were unprecedented at the time (albeit they were under-utilised) and its flexibility enabled it to adapt its processes as issues, such as gender-focus, arose. To improve the range of accountability still further, it is suggested that future generic TC models should incorporate institutional and special hearings into their process from the outset, to enable the identification of the extent of culpability not readily-apparent in criminal trials, such as beneficiaries, those who profited from the system (e.g. business and

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<sup>49</sup> Graybill, L.S. (2010) p44

<sup>50</sup> *Ibid* p45

<sup>51</sup> *Ibid*

<sup>52</sup> Hayner, P. (2011) *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions* (London: Routledge) p27

<sup>53</sup> *Ibid*

industry) and those who upheld the system (e.g. judges, lawyers and the medical profession).

Like any ground-breaking institution, however, the SATRC made mistakes which were identified and discussed in Chapter Six and which a transitioning state wishing to rely on this form of AJM must address if the ICC is to be persuaded to defer in its favour. Concerning the important issue of amnesties, for example, to forestall the inconsistencies of approach that occurred in South Africa over the assessment of provisions relating to disclosure, political objective and proportionality, the TC should establish in advance an agreed framework by which these areas can be assessed. It must also rectify the problem of perpetrators waiting until they are targeted for prosecution before applying for amnesty, perhaps by imposing a time limit for amnesty applications and by ensuring that those who fail to apply remain at real risk of future criminal prosecution. This is important because a study conducted in 2010 concluded that TCs alone 'tend to have a negative impact on HR' whereas, when used together with trials and amnesties, TCs 'can help provide a 'justice balance' that contributes to HR improvements.'<sup>54</sup>

The TC should also allow sufficient time and personnel for full and proper investigations of facts relating to amnesty applications, to ensure the veracity of admissions made, before amnesty is granted. It should provide for equal legal representation to improve victim participation in the amnesty process and ideally, it should co-ordinate decisions regarding amnesty with decisions regarding reparations to avoid the perception that perpetrators receive better treatment than victims. As suggested by Theissen, it could, perhaps, consider 'graded' amnesties and not preclude future civil claims<sup>55</sup> but primarily, reparations must be prioritised so as not to undermine the effectiveness of the TRC process in the opinion of victims.

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<sup>54</sup> Olsen, T.D., Payne, L.A., Reiter, A.G. and Wiebelhaus-Brahm, E. (2010) 'When Truth Commissions Improve Human Rights' 4 *IJTJ* pp457-476 at p458

<sup>55</sup> Theissen, G. (1999) *Common Past, Divided Truth: The Truth and Reconciliation Commission in South African Public Opinion* (Paper presented at the Workshop on 'Legal Institutions and Collective Memories' at the International Institute for the Sociology of Law, Oñati, Spain, 22-24 September) p51

In addition to these issues regarding amnesty, the TC should ensure that there is individual communication with participants in the TC process, from providing reasons for decisions on why statement-makers will not be invited to give evidence, to follow-up checks on those who do appear advising of outcomes and to confirm their well-being. Further, if the term 'reconciliation' is included in its title, the government should encourage a public debate regarding the nature of the reconciliation the TC will attempt to facilitate i.e. national or individual.

Additionally, the function of the TC report should be established and publicised in advance, to control expectations. The SATRC's report was criticised for not providing a detailed narrative of individual and community histories but as noted in Chapter Six, the Commission was aware that to do so conflicted with its nation- building/shared history goals and could ultimately be divisive. Thus, it opted to provide a sample of truth, sufficient to establish consensus and exemplify collective truths although, of course, all TRC documents have been preserved for subsequent historical analysis.

Having acknowledged in Chapter Six that an AJM can successfully attain ICJ goals, Chapter Seven investigated the likelihood of ICC judges utilising the RSt's 'creative ambiguity'<sup>56</sup> to allow an AJM to fulfil its complementarity criteria. In the absence of an existing challenge based on a proposed AJM, decisions in previous admissibility applications reveal the interpretation of complementarity and provide guidance on the factors judges consider when making their decisions. Disappointingly, it was noted that previous admissibility decisions do not bode well for a state wishing to persuade the ICC to allow it to forgo criminal trials in favour of an AJM.

The Rome Conference was generally unfavourable towards the concept of judges' creativity, however, the constructive ambiguity of the RSt has allowed judges to display a degree of activism.<sup>57</sup> This is demonstrated by decisions which all tend to increase judicial control over prosecutorial policy beyond that which appears to be the intention

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<sup>56</sup> Scharf, M.P. (1999) 'The Amnesty Exception to the Jurisdiction of the International Criminal Court' 32 *Cornell ILJ* pp507-527 at p522

<sup>57</sup> Zappalà, S. (2009) 'Judicial Activism v. Judicial Restraint in International Criminal Justice' in Cassese, A. (Ed-in-chief) *The Oxford Companion to International Criminal Justice* (Oxford: OUP) p221

of the drafters of the RSt.<sup>58</sup> Thus, even if the Prosecutor is prepared to exercise her powers in the interests of justice in the state's favour, the judges may seek to overturn this decision.<sup>59</sup> Zappalà argues that the judges' activist attitude may be the only way to prompt states to exercise their jurisdiction to avoid the intervention of the ICC,<sup>60</sup> although how this translates into addressing the role of AJMs is uncertain.

Clearly, if the ICC has jurisdiction and is seeking to intervene, the state intending to rely on an AJM would have to address such issues as the investigation process to satisfy the Court that this includes, at the very minimum, interviewing witnesses and suspects and collecting evidence to identify those responsible. Forensic investigation in the form of identifying graves and bodies would be additional evidence of a thorough investigation. It is suggested that these steps could be incorporated into an AJM process relatively easily. A more difficult problem, however, could be satisfying the same person/substantially same conduct requirement stipulated by the ICC judges but this is an area where potentially, an AJM can improve upon the capabilities of criminal trials.

It was noted in Chapter Three that criminal prosecutions are selective and focus on the culpability of individuals which, it was argued, is incompatible with the nature of the international crimes. In contrast, AJMs employ a wider lens and can focus on collective responsibility as well as individual. The state intending to rely on an AJM therefore should be able to demonstrate to the ICC that its accountability reach far exceeds that of the Court. Furthermore, as Judge Ušacka pointed out in her dissenting judgment in the Libya admissibility challenge, Article 17(1)(a) does not require the State to 'focus on largely or precisely the same acts or omissions that form the basis for the alleged crimes or on largely or precisely the same acts or omissions of the person(s) under investigation or prosecution to whom the crimes are allegedly attributed.'<sup>61</sup> For the ICC to insist otherwise risks negating the whole principle of the state and Court complementing each other and instils instead a sense of antagonism and conflict between the Court and the very states from which it is seeking co-operation in the fight to end impunity.

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<sup>58</sup> *Ibid*

<sup>59</sup> Rome Statute, Article 53

<sup>60</sup> *Ibid* p222

<sup>61</sup> Libya Dissenting Opinion ICC-01/11-01/11-547-Anx2 21 May 2014para.51

More empirical research needs to be undertaken (perhaps in the form of 'before and after' surveys of individuals and communities affected by the crimes perpetrated by defendants who have appeared before the ICC to date) to ascertain how effectively the ICC achieves ICJ goals. It really is not sufficient to say what trials at the ICC are expected to achieve in terms of ICJ, we need to know what they *do* achieve in order to be able to properly assess their efficacy as a transitional justice mechanism. Likewise, although study in the field of transitional justice has grown over the last three decades, empirical studies should be undertaken to establish the long-term success of AJMs in improving lives, healing divisions, fostering social reconstruction and promoting peace.

Similar empirical research is required to establish how other AJMs that states may regard as preferential to criminal prosecutions in the context of their own transitions from conflict or tyrannical rule, can achieve ICJ goals. The thesis has proposed a framework by which the ICC can assess an AJM for the purposes of its complementarity provisions. Further research is necessary to fully develop and analyse this framework to enable its use by both the ICC in its appraisal of an AJM for the purposes of complementarity and by states when establishing an AJM which is intended to negate the requirement for criminal prosecutions.

This thesis has aimed to provide a thorough analysis of three forms of justice procedure in the light of the ICJ principles that were established in Chapter Three and as a result, has reached some potentially radical conclusions about the viability of AJMs and what needs to be done to make them operational in this context. Its findings have wider implications for the architecture of ICJ and justice practice more generally than simply an acceptance of the impossibilities created by cultural relativity. It has argued that justice for victims is often more than the retributive justice offered by criminal trials, thus it must be recognised that in some transitional contexts, prosecutions at the ICC may not be the best option. Therefore, when deciding on the mechanism of accountability, the social and political realities of a specific situation must be taken into account. The thesis has suggested that even if prosecutions at the ICC are justified and practicable, an AJM potentially could be more effective in achieving many of the ICJ

objectives outlined in Chapter Three. It is proposed that if, at the preliminary examination stage, the ICC, in tandem with relevant national stakeholders, were to prioritise the ICJ goals applicable to that particular situation, the response given to the needs of the local community could be tailored to meet ICJ objectives.

The former prosecutor stated that ‘there is a difference between the concepts of the interests of justice and the interests of peace and [...] the latter falls within the mandate of institutions other than the Office of the Prosecutor’.<sup>62</sup> It is argued, however, that in many contexts the two are intertwined and it requires a reformulation of the justice paradigm to reflect this. As a means of healing the wounds of the past and coping with the future, justice and even truth-telling ‘without socio-economic empowerment is ephemeral; a mere short term palliative that does not address substantive and long-term needs in the post-conflict dispensation.’<sup>63</sup> It has been suggested that transitional justice (TJ) may lose its relevance if it does not better connect with the trend towards social movements that underlie conflicts (e.g. the Arab Spring), which again makes it essential that links between TJ and development frameworks (rather than focussing only on human rights violations) be established. The reformulation proposed by this thesis therefore would entail viewing the ICC as part of a package of transitional measures which could include, for example, increasing access to education and health care, the provision of employment opportunities, improving infrastructure and access to services, as well as facilitating accountability measures, including AJMs.

Finally, it has been argued that reparations in themselves are seldom transformative, that whenever they are tied to TJ, it is always unsatisfactory as they never achieve the aim of restoration.<sup>64</sup> In which case, this must be worked into the consideration of TJ

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<sup>62</sup> OTP Policy Paper on the Interests of Justice, September 2007 p1

<sup>63</sup> Sesay, A. (2007) *Does one size fit all? The Sierra Leone Truth and Reconciliation Commission Revisited* (Uppsala: Nordiska Afrikainstitutet) p46

<sup>64</sup> Wierda, M. (2017) ‘Transitional Justice and Human Rights’ Presentation given at a Seminar on *Transitional Justice, Social Justice, and Human Rights* held at Utrecht University, 8<sup>th</sup> June; see also Wlaschutz, C. (2014) ‘Paul Gready, The era of transitional justice: the aftermath of the truth and reconciliation commission in South Africa and beyond’ 2 *Restorative Justice* pp245-248 at p246 stating ‘Despite their often material connotations, they are usually looked upon as pay-offs by the political elite to satisfy international pressure with symbolic payments. At best, they may serve as a ‘costly signal’ for further systemic changes.’

measures and other ways of transforming lives must be implemented. To do this, the victims themselves must be consulted and involved in identifying their needs.

David Crane, former Prosecutor at the Special Court for Sierra Leone commented in 2005, “Our perspectives are off kilter ... we consider our justice as the only justice ... we don’t create mechanisms by which we can consider the cultural and customary approaches to justice within the region”.<sup>65</sup> This thesis has proposed the creation of such a mechanism and has argued that it will require a complete re-assessment by the ICC of its retributive justice paradigm if AJMs are to be accommodated within the sphere of ICJ. If justice is viewed as a multi-dimensional concept encompassing judicial and non-judicial, retributive and non-retributive elements, then AJMs which focus on the restoration of relationships through dialogue and inclusiveness, to uphold principles of truth, accountability and compensation, potentially can be endorsed by the ICC as appropriate justice mechanisms in the future.

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<sup>65</sup> Kelsall, T. (2009) *Culture under Cross-Examination: International Justice and the Special Court for Sierra Leone* (Cambridge: CUP) p11 quoting a speech made by David Crane during which he posed the rhetorical question whether the justice ‘we seek to impose’ is not merely ‘[w]hite man’s justice’.

## **APPENDIX**



## APPENDIX ONE

### Methodology

According to Salter and Mason, '[m]any interdisciplinarians perceive doctrinalists to be intellectually rigid, inflexible, and inward looking; many doctrinalists regard [socio-legal] interdisciplinary research as amateurish dabbling with theories and methods the researchers do not fully understand.'<sup>1</sup> With some trepidation, therefore, it is owned that the two legal research methods used in this thesis are doctrinal and socio-legal.

Historically, all legal research was doctrinal and the ability to conduct doctrinal research was considered a core skill for lawyers as the two-part process entails first identifying and locating the sources of the law and then the rigorous analysis and creative synthesis of its content. The term 'doctrinal' is derived from the Latin '*doctrina*' meaning instruction, knowledge or learning.<sup>2</sup> It also is linked to the doctrine of precedent in that 'legal rules take on the quality of being doctrinal because they are not just casual or convenient norms, but because they are meant to be rules which apply consistently and which evolve organically and slowly.'<sup>3</sup> Doctrine has been defined as a 'synthesis of rules, principles, norms, interpretive guidelines and values which explains, makes coherent or justifies a segment of the law as part of a larger system of law.'<sup>4</sup>

Doctrinal research regards the legal system as autonomous (or at least as relatively autonomous) in that it assumes it can legitimately be described by reference to its own sources.<sup>5</sup> It focusses on primary sources, that is, statutes and court judgments and is

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<sup>1</sup> Salter, M. & Mason, J. (2007) *Writing Law Dissertations: An Introduction and Guide to the Conduct of Legal Research* (Edinburgh: Pearson Education Ltd) p35

<sup>2</sup> Hutchinson, T. (2013) 'Doctrinal Research: Researching the Jury' in Watkins, D. and Burton, M. (eds.) *Research Methods in Law* (Abingdon: Routledge) p9

<sup>3</sup> *Ibid*

<sup>4</sup> *Ibid*

<sup>5</sup> McCrudden, C. (2006) 'Legal research and the social sciences' *LQR* pp632-650 at p635

supported by secondary sources, such as law journal articles, to assimilate what is known and not known about the law. Doctrinal research, therefore, is not concerned with how the law affects the outside world, its context; in its purist form, it is an internal, self-sustaining inquiry, narrowly confined to the law itself. Hutchinson ruefully notes that the doctrinal researcher's 'underlying views are often not articulated'<sup>6</sup> thus the theoretical stance often lies unstated but she does acknowledge Westerman's argument that 'the legal system functions as a theoretical framework that selects facts and highlights them as legally relevant ones'.<sup>7</sup>

Doctrinal legal (or 'black letter') research uses 'reason, logic and argument'<sup>8</sup> as it seeks to clarify and analyse what the law is and how it applies, which for this thesis was essential to fully comprehend the function and processes of the ICC in its capacity as the standard-bearer of international criminal justice,<sup>9</sup> against which alternative justice mechanisms could be assessed. This involved not only examining the sources of the law itself: the Rome Statute and the Rules of Procedure and Evidence but also the records of the drafters of the statute, (including *inter alia*) the International Law Association, the Preparatory Committee and the Preparatory Commission. Also examined in detail were judicial decisions of the ICC (including dissenting judgements) to ascertain whether the jurisprudence of the Court reflects the intentions of the drafters so far as issues of admissibility are concerned or whether the judges are going beyond the original intentions of the drafters to the extent that they could be accused of being reactionary.

In further considering this question, existing literature on the topic was located and critically analysed for, as Richard Posner observed, 'the messy work product of the judges and legislators requires a good deal of tidying up, analysis, restatement and critique.'<sup>10</sup> The secondary literature and commentary was sourced from (*inter alia*) textbooks, journal articles, law reform commission reports, online information and blogs

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<sup>6</sup> Hutchinson, T. (2013) p15

<sup>7</sup> Westerman, P. (2011) 'Open or Autonomous? The Debate on Legal Methodology as a Reflection of the Debate on Law' in Van Hoeke, M. (ed) *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Oxford: Hart Publishing) p91

<sup>8</sup> McCrudden, C. (2006) p633

<sup>9</sup> Darcy, S., Powderly, J. (eds) (2010) *Judicial Creativity at the International Criminal Tribunals* (Oxford: OUP) p2

<sup>10</sup> Posner, R.A. (2007) 'In Memoriam: Bernard D. Meltzer (1914-2007)' 74 *University of Chicago LR* pp435-438 at p437

and newspaper reports. Accordingly, using the doctrinal method of research for this thesis provided the foundation of knowledge about the ICC's processes and jurisprudence and thus its capacity to satisfy the aims of ICJ, upon which the analysis of AJMs to achieve the same aims could be constructed.

In their support, Richard Posner states that doctrinal researchers are essential for the vitality of the legal system and because doctrinal analysis cannot be left to judges, it is of greater social value than much esoteric interdisciplinary legal scholarship.<sup>11</sup> Likewise, Hutchinson argues that the doctrinal method:

still forms the basis for most if not all legal research projects. Valid research is built on solid foundations, so before embarking on any theoretical critique of the law or empirical study about the law in action, the researcher must verify the authority and status of legal doctrine being examined.<sup>12</sup>

However, the doctrinal research method has been criticised as being 'mere scholarship [...] less compelling or respected than the research methods used by those in the sciences or social sciences.'<sup>13</sup> Richard Cotterell, for example, has argued that true legal scholarship also entails a sociological understanding of the law, that is, law must be studied in its practice, from a standpoint outside the legal system, using scientific or social science methodologies.<sup>14</sup> Eric Posner has gone further than merely calling for an interdisciplinary approach and has proclaimed 'doctrinal legal research is dead'.<sup>15</sup>

Socio-legal studies highlight the 'limitations of doctrinal research as being too narrow in its scope and application of understanding law'<sup>16</sup> and certainly, the doctrinal approach did not enable the underlying theme of this thesis to be addressed, namely, does the ICC's 'one-size-fits-all' approach to ICJ suit every situation where the crimes within its jurisdiction have been perpetrated worldwide or are there situations where an AJM

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<sup>11</sup> Posner, R. (2008-9) 'The State of Legal Scholarship Today: A Comment on Schlag' 97 *The Georgetown L J* pp845-55 at p854

<sup>12</sup> Hutchinson, T. (2013) p7

<sup>13</sup> *Ibid*

<sup>14</sup> Cotterell, R. (1998) 'Why Must Legal Ideas be Interpreted Sociologically?' 25 *Journal of Law and Society* pp171-192

<sup>15</sup> Cited in Van Gestel, R. and Micklitz, H-W. (2011) 'Revitalizing Doctrinal Legal Research in Europe: What About Methodology?' *European University Institute Working Papers Law* 2011/05 p1

<sup>16</sup> McConville, M. and Chui, W.H. (2007) 'Introduction and Overview' in McConville, M. and Chui, W.H. (eds.) *Research Methods for Law* (Edinburgh: Edinburgh UP) p5

would be a better fit? Studying statutes and court judgments cannot shed light on this area of inquiry whereas socio-legal research with its 'rich toolbox of methods' held more possibilities.<sup>17</sup> The law and society movement emerged in the late 1960s and 1970s as belief in law's autonomy declined, as did confidence in the ability of lawyers alone to put right the major problems of the legal system.<sup>18</sup> Contemporaneously, disciplines complementary to law which used scientific (meaning, in this context, the generation of knowledge by empirical investigation) and other exact methods of research were rising in prestige and authority and they highlighted the gap between 'law in books' and 'law in action'.<sup>19</sup>

Also referred to as 'law in context', socio-legal research is an 'external method' which examines not the law itself but the societies in which that law is being or will be applied. This inquiry can reveal, for example, that the law itself is problematic because it contributes to or even causes social problems and that other solutions may be more beneficial,<sup>20</sup> an issue which is especially pertinent in the peace versus justice debate. The law in context approach gives an additional dimension to legal studies, broadening legal discourse in terms of its theoretical and conceptual framework. It rejects the assumption that law is autonomous, that legal research is a separate skill and argues that law should be examined using the same tools and methodologies used to study any other political, social or economic practice. It employs a wide range of social science methods, including quantitative and qualitative research.

It is this variety of different approaches that leads to a lack of consensus as to what precisely constitutes socio-legal research although for Cownie and Bradney, it is an "*approach* to the study of law and legal processes' which 'covers the theoretical and empirical analysis of law as a social phenomenon'.'<sup>21</sup> Not all socio-legal research is empirical, although according to Epstein and King's very broad definition:

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<sup>17</sup> Morrill, C., Hagan, J., Harcourt, B.E. and Meares, T. (2005) 'Seeing Crime and Punishment Through a Sociological Lens: Contributions, Practices, and the Future' *University of Chicago Legal Forum* pp289-323 at p299

<sup>18</sup> Posner, R.A. (1987) 'The Decline of Law as an Autonomous Discipline: 1962-1987' 100 *HLR* pp761-80 at p769

<sup>19</sup> McCrudden, C. (2006) p637

<sup>20</sup> McConville, M. and Chui, W.H. (2007) p1

<sup>21</sup> Cownie, F. and Bradney, A. (2013) 'Socio-legal studies: A challenge to the doctrinal approach' in Watkins, D. and Burton, M. (eds.) p35 (emphasis in original)

What makes research empirical is that it is based on observations of the world - in other words, *data*, which is just a term for facts about the world. These facts may be historical or contemporary, or based on legislation or case law, the results of interviews or surveys, or the outcomes of secondary archival research or primary data collection. Data can be precise or vague, relatively certain or very uncertain, directly observed or indirect proxies, and they can be anthropological, interpretive, sociological, economic, legal, political, biological, physical or natural. As long as the facts have something to do with the world, they are data and as long as research involves data that is observed or desired, it is empirical.<sup>22</sup>

Hutchinson and Duncan consider there are even empirical aspects to doctrinal research, as 'legislation and judgments may be seen as social phenomena' but they then qualify this view, stating that 'these are different because they are legitimated by sovereignty of the source (parliament or court) rather than because they are the 'naturally occurring' observable phenomena usually used in empirical work.'<sup>23</sup> Relying on this qualification, therefore, the doctrinal element of this thesis is non-empirical because it does not rely on evidence-based methods whereas the assessment of the AJs and evaluation of their capacity to satisfy the requirements of ICJ is empirical because it does.

No interviews or surveys were undertaken specifically for this thesis as it was unfortunately not possible, for a variety of personal reasons, to travel to Uganda or South Africa during the period of the research and it was decided not to conduct, for example, interviews via Skype because of the very limited knowledge of and access to the people who would need to be canvassed. Elite interviews would have been relatively straightforward to arrange but the views obtained would not be those that matter for the purposes of this research. The best results would have been achieved by spending time in northern Uganda and South Africa, to establish contacts and trust and then to conduct face-to-face interviews and surveys with members of different tribes living in northern Ugandan rural communities and with different ethnic communities living in South Africa. Fortunately, there already exists a wealth of excellent and detailed

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<sup>22</sup> Epstein, L and King, G. (2002) 'The Rules of Inference' 69 *Uni of Chicago LR* pp1-133 at p2-3

<sup>23</sup> Hutchinson, T. and Duncan, N. (2012) 'Defining and Describing What We Do: Doctrinal Legal Research' 17 *Deakin LR* pp83-119 at p114

population surveys, interviews and empirical data undertaken in northern Uganda and in South Africa by well-respected academics and NGO institutions and access to this via the internet and its inclusion in the chapters on *Mato Oput* and the SATRC added strength and depth to the arguments formulated in these chapters.

It is argued that the study of ICJ must involve multidisciplinary and interdisciplinary research methods to fully understand and be sensitive to the many different contexts in which it is called into play. An internal study of the ICL and its practice and a declaration that it will apply in every other situation that arises globally, that 'one-size-fits-all' to use that well-worn phrase, will not suffice. ICL must be not be studied in isolation from its context and its practice must be flexible and culturally sensitive. McCrudden says that today's legal research embraces a pluralism of methodological approaches 'which have moderated important elements of legal research dominated by both internal and external approaches, creating opportunities for closer working across these boundaries'.<sup>24</sup> The inter-disciplinary approach has facilitated research for this thesis in its enquiry whether the ICC is the best option in all instances of transitional justice. Rubin argues that the apparently irreconcilable approaches in legal research are 'being significantly eroded' by developments in each to the extent that what is emerging are approaches 'that combine both the internal and the external approaches, pinpointing what is distinctive about law as a social construction as well as examining its inter-relationship with other social phenomena.' It is intended that adopting an inter-disciplinary approach for this thesis should not be regarded as a weakness but rather as demonstrating 'a mature openness to other disciplines that demonstrates a welcome self-confidence'.<sup>25</sup>

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<sup>24</sup> McCrudden, C. (2006) p642

<sup>25</sup> *Ibid* p645

## APPENDIX TWO

The postamble to the Interim Constitution of South Africa reads:

This Constitution provides a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex.

The pursuit of national unity, the well-being of all South African citizens and peace require reconciliation between the people of South Africa and the reconstruction of society.

The adoption of this Constitution lays the secure foundation for the people of South Africa to transcend the divisions and strife of the past, which generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and the legacy of hatred, fear, guilt and revenge.

These can now be addressed on the basis that there is a need for understanding but not vengeance, a need for reparation but not for retaliation, a need for ubuntu<sup>1</sup> but not victimization.

In order to advance such reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past. To this end, Parliament under this Constitution shall adopt a law determining a firm cut-off date, which shall be a date after 8 October 1990 and before 6 December 1993, and providing for the mechanisms, criteria

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<sup>1</sup> This African word has no direct translation into English. Akin to 'tolerance' or 'reconciliation', It is more a conception that 'a person is only a person through other people'.

and procedures, including tribunals, if any, through which such amnesty shall be dealt with at any time after the law is passed.

With this Constitution and these commitments we, the people of South Africa, open a new chapter in the history of our country.



**APPENDIX THREE**

List of UN Member States which submitted written statements on the draft statute for an international criminal court of the International Law Commission in 1994:

Algeria  
Australia  
Austria  
Belarus  
Chile  
Cuba  
Cyprus  
Czech Republic  
Denmark  
Finland  
Germany  
Hungary  
Iceland  
Japan  
Kuwait  
Malta  
Mexico  
New Zealand  
Norway  
Panama  
Romania  
Slovenia  
Spain  
Sri Lanka  
Sweden  
Tunisia  
United Kingdom  
United States  
Yugoslavia  
Switzerland

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