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**Situating the Place for Traditional Justice Mechanisms in  
International Criminal Justice: *A Critical Analysis of the  
implications of the Juba Peace Agreement on Reconciliation and  
Accountability***

**By**

**DANIEL RONALD RUHWEZA**

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Mansell**

*A Thesis submitted in partial fulfilment of the requirement for the Award of the  
Doctor of Philosophy in Law (International Criminal Law) at University of Kent at  
Canterbury*

**April 2016**

# DECLARATION

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# DEDICATION

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Writing a book is an adventure. To begin with, it is a toy and an amusement; then it becomes a mistress, and then it becomes a master, and then a tyrant. The last phase is that just as you are about to be reconciled to your servitude, you kill the monster, and fling him out to the public. (*Sir Winston Leonard Spencer Churchill (1874-1965)*)

This work is dedicated to the memory of my father James Sylvester Rwabigumire Mutabaazi who passed on in spring 2010 while I was millions of miles away in Canterbury Kent England. It is unfortunate that he never saw the completion of this project. May his passion for education continue *ad infinitum*.

To my dearest mother Jemimah Malyamu *nee* Nyangoma (Kaaka Amooti) you have selflessly struggled through thick and thin to ensure that I and my siblings have a better life. You have been the wind beneath my wings. May the Lord God reward you a trillion-fold. Thank you for pushing me through this last weary mile.

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In a special way, this work is dedicated to my fellow Ugandans who have suffered or been affected by the decades of civil strife in Northern Uganda, as well as its aftermath. Your pain and hurt is immeasurable. I will never be able to imagine what you have gone through. To those who have dedicated their time, lives and resources in making your lives better, may this piece of research be a humble reminder that you are not alone in this struggle.

Last, but certainly not the least, to **Ruhanga Owekitinisa - Omukama Wange**. May you increase, as I decrease. Amen

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# ACRONYMS

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<b>AAR</b>	Agreement on Accountability and Reconciliation
<b>AG</b>	Attorney General
<b>AI</b>	Amnesty International
<b>AU</b>	African Union
<b>CCFU</b>	Cross Cultural Foundation of Uganda
<b>CICC</b>	Coalition for the International Criminal Court
<b>CLP</b>	Critical Legal Pluralism
<b>DPP</b>	Director of Public Prosecutions
<b>GoU</b>	Government of Uganda
<b>HRW</b>	Human Rights Watch
<b>ICC</b>	International Criminal Court
<b>ICD</b>	International Crimes Division of the High Court Uganda
<b>IDP</b>	Internally Displaced People
<b>ICTR</b>	International Criminal Tribunal for Rwanda
<b>ICTY</b>	The International Tribunal for Former Yugoslavia
<b>LRA/M</b>	Lord's Resistance Army/Movement
<b>NRA/M</b>	National Resistance Army/Movement
<b>NUPI</b>	Northern Uganda Peace Initiative
<b>OECD</b>	Organization for Economic and Cultural Development
<b>PTC 1</b>	Pre Trial Chamber 1
<b>TLP</b>	Traditional Legal Pluralism
<b>UPDF</b>	Uganda People's Defence Forces
<b>USAID</b>	U.S. Agency for International Development
<b>FGM</b>	Female Genital Mutilation

<b>ICL</b>	International Criminal Law
<b>TJM</b>	Traditional Justice Mechanisms
<b>OTP</b>	Office Of the Prosecutor (of the International Criminal Court)
<b>TLP</b>	Traditional Legal Pluralism
<b>NTJF</b>	National Transitional Justice Framework Policy
<b>FPA</b>	Final Peace Agreement

# LIST OF LEGISLATION

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- I. The Constitution of the Republic of Uganda, 1995
- II. The Evidence Act Cap. 6 Laws of Uganda
- III. The Geneva Conventions Act (Ch 363)
- IV. The Magistrates Courts Act Cap. 16 Laws of Uganda
- V. The Penal Code Act, Cap. 120 Laws of Uganda
- VI. The Amnesty Act 2000, Chapter 294, Laws of Uganda
- VII. The Rome Statute of the International Criminal Court, Adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 17 July 1998, UN Doc. A/CONF.183/9.
- VIII. The Statute International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, established in accordance with UNSC Res 827 (adopted on 25 May 1993)
- IX. The Statute The International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan citizens responsible for genocide and other violations committed in the territory of neighbouring States , between 1 January 1994 and 31 December 1994, established in accordance with UNSC Res 955 (adopted on 8 November 1994)
- X. The USA-LRA Disarmament and Northern Uganda Recovery Act 2009
- XI. The High Court (International Crimes Division) Practice Directions (“ICD Practice Directions”), Legal Notice No. 10 of 2011, Legal Notices Supplement, Uganda Gazette, No. 38, vol. CIV, May 31, 2011.

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Lubanga (ICC-01/04-01/06-8), Decision on the Prosecutor's Application for a Warrant of Arrest, 10 February 2006

Situation in the Central African Republic, Prosecution's Report Pursuant to Pre-Trial Chamber III's 30 November 2006 Decision Requesting Information on the Status of the Preliminary Examination of the Situation in the Central African Republic, ICC-01/05-7 (15-12-2006)

Situation in the Democratic Republic of Congo ICC-01/04-01/06-32-Anx A1, 21 March 2004

The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, ICC-01/04-01/07-1497 at 78 (25-09-2009).

The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, 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 at 74 (15-07-2009)

The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen, Judgment on the Appeal of the Defence against the "Decision on the admissibility of the case under article 19 (1) of the Statute" of 10 March 2009, ICC-02/04-01/05-408 (16-09-2009)

The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen, Decision initiating proceedings under article 19, requesting observations and appointing counsel for the Defence, ICC-02/04-01/05-320, (21-10-2008)

The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen, Report by the Registrar on the Execution of the "Request for Further Information from the Republic of Uganda on the Status of Execution of the Warrants of Arrest", ICC-02/04-1/05-305-Anx2 (10-07-2008)

The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo, Raska Lukwiya and Dominic Ongwen, Decision to Terminate the proceedings against Raska Lukwiya, ICC-02/04-01/05-248 (11-07-2007).

The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen, Warrant of Arrest for Dominic Ongwen, ICC-02/04-01/05-57 (13-10-2005)

The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen, Warrant of Arrest for Vincent Otti, ICC-02/04-01/05-54, (13-10-2005).

The Prosecutor v. Thomas Lubanga Dyilo, Judgment pursuant to Article 74 of the Statute, ICC-01/04-01/06-2842, (14-03-2012)

The Prosecution v. Thomas Lubanga Dyilo, Decision on the Practices of Witness Familiarization and Witness Proofing, ICC-01/04-01/06-679 (08-11-2006)

Thomas Kwoyelo *alias* Latoni v. Uganda, Constitutional Petition No.036/11 Ruling of the Constitutional Court of Uganda, 21 September 2011

Uganda v. Kwoyelo Thomas, High Court of Uganda (War Crimes Division), Case No.02/10, Indictment, August 31, 2010.

## ABSTRACT

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On the 29<sup>th</sup> of June 2007, the representatives of the Government of Uganda (GoU) and the representatives of the Lord's Resistance Army/Movement rebels (LRA/M) signed an Agreement on Reconciliation and Accountability (AAR). The AAR provided for the use of both International Criminal Law (ICL) and Traditional Justice Mechanisms (TJMs) as part of the framework on accountability and reconciliation due to the conflict in Northern Uganda. Since warrants of arrest had already been issued against the top leaders of the LRA/M prior to the signing of this AAR, a rift arose between those who supported the ICC and those who supported the AAR. The former group argued that the AAR was promoting impunity while the latter group viewed the AAR as a vehicle for a sustainable post conflict transition. This project argues that a critical legal pluralist interpretive framework (CLP) for implementing Agenda Item III of the Juba peace accord is more responsive to the complexities of Uganda's history and politics than the interpretive frameworks of mainstream international criminal law (ICL) or traditional legal pluralism (TLP). In adopting a CLP interpretive framework, critics of the AAR will be able to see that the AAR is not promoting impunity.

# CHAPTER ONE: INTRODUCTION

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## 1.0 INTRODUCTION

This research argues that one of the reasons it has been difficult to achieve a sustainable transition in the case of Northern Uganda is because the international criminal law framework for implementing the Juba Peace Accord is insufficiently responsive to the complexities of the Northern Uganda conflict, Ugandan history, society and politics. This means that there is a disconnect between what the international criminal law framework is prescribing as a response to post conflict violence in Uganda and the way in which the people of Uganda are actually navigating justice. This does not mean that all people disagree with the promises of international criminal law. Rather, it means that there are diverse judicial and non-judicial needs, which the international criminal law framework is unable to meet. Such needs are better addressed by alternative interventions, which ought to be given opportunity to operate in the same time and space as international criminal law.

The research further argues that a critical legal pluralist interpretation of the Juba Agenda Item III's Agreement on Accountability and Reconciliation, affords Uganda a more holistic and effective foundation for a sustainable transition/ post-conflict reconstruction than does the dominant interpretive framework of mainstream international criminal law or the alternative offered by traditional legal pluralism. It is this critical legal pluralist interpretation, which makes it possible for us to view the alternatives interventions to the conflict in northern Uganda as being necessary in addressing the diverse judicial and non-judicial needs in Northern Uganda.

Additionally, through a systematic case study of Juba Agenda Item III's Agreement on Accountability and Reconciliation (AAR), this thesis demonstrates that a critical legal pluralist (CLP) interpretive framework for implementing Juba Agenda Item III is more responsive to the complexities of Ugandan history, society and politics than are the interpretive frameworks of mainstream international criminal law and legal pluralism. Thus, it provides a more compelling interpretive framework for sustainable implementation of the Juba Peace Accord and transition to a post-conflict settlement in Uganda.

## 1.1 SIGNIFICANCE

This thesis proposes a middle ground to the impasse that has been created by the two main conflicting views on how to respond to post violence situations: –those who argue for peace as opposed to those who advocate for justice (and specifically trial justice) as a first response to post conflict violence.<sup>1</sup> It is argued that any sustainable post conflict intervention should be cognizant of the way in which the affected people understand and navigate justice. This is arguably best understood by using a critical legal pluralist (CLP) interpretive framework, which reveals that at the centre of any post conflict intervention, is the individual citizen subject. It is this citizen subject who uses both peaceful and judicial means to address the multitude of post conflict needs that he or she faces. In doing so, the CLP interpretive framework reveals that different interventions available to the citizen subject are not hermeneutically closed to each other but there is a mishmash of interconnectedness between them. However, some of the interventions might (and indeed do) operate completely independently of the individual/citizen subject. These interventions do not need his or her participation in order to be legitimate and/or viable. In such cases, the citizen subject may choose to borrow, acquiesce or even completely ignore their existence. This means that there is no need to sequence or privilege the options available to the citizen subject since he or she uses these interventions in the same time and space- as and when he so chooses. Kihika notes that -

Quite often TJ limits the experiences of survivors of conflict and human rights abuses to that of victimhood. The field conveniently neglects aspects of their resistance and agency. Victims are perceived as passive individuals who play no active role in resisting their oppression. Yet most survivors and victims are not simply silent victims but active agents and resisters during armed conflict. Take an example of what we commonly refer to as child or girl mothers, a label I find problematic because it infantilizes the women, the dominant narrative about their experiences has been one of sexual violence, helplessness and abuse, yet most of them made remarkable attempts to protect themselves during situations of severe violence, some played active role of combatants. On return from captivity the TJ discourse has tried to fit them into neat boxes that they do not fit in. TJ practitioners have taken it upon themselves to limit their experience to a single story of victimhood.<sup>2</sup>

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<sup>1</sup> See Carsten Stahn, 'Beyond the Retributive v. Restorative Divide', FICHL Policy Brief Series No. 36 (2015) available at [https://www.fichl.org/fileadmin/fichl/documents/FICHL\\_Policy\\_Brief\\_Series/150521\\_PBS\\_No.\\_36\\_2015\\_Stahn.pdf](https://www.fichl.org/fileadmin/fichl/documents/FICHL_Policy_Brief_Series/150521_PBS_No._36_2015_Stahn.pdf) accessed April 13 2016.

<sup>2</sup> Kasande Sarah Kihika, 'Uganda: Shifting the Discourse From Victimhood to Reconstruction' available at <http://allafrica.com/stories/201412041627.html> accessed January 31 2016.

Kihika therefore argues that the citizen subject in the form of the mother of girl is an active participant in resisting both the oppression of the conflict as well as that of the TJ interveners. It however needs a critical legal pluralist interpretive framework to recognize this lest it is covered up in the 'neat boxes of victimhood' that Kihika mentions. Therefore, In order for post conflict interventions like ICL to remain relevant and effective, they, ought to adopt a CLP interpretive framework so as to make a finding that what Uganda is implementing under the AAR is not a promotion of impunity but rather a fulfillment of its international obligation to address the situation in its territory.<sup>3</sup> This practically means adopting a purposive interpretation of the concept of complementarity in Rome Statute. The CLP interpretive framework could then be adopted by international criminal law practitioners in other similarly complex situations in and outside Africa with the result that makes the international criminal law more locally acceptable, legitimate and effective. This is because it would resonate with how people understand the concept of justice as one that includes a myriad of both criminal and non-criminal interventions to post conflict violence as far as it addresses both the punitive and non-punitive justice demands of the victims and perpetrators alike. This is especially crucial at this time when the relations between the ICC and the African Union (AU) are very sour and leaders like President Museveni are calling for a severance of ties and cooperation with the ICC.<sup>4</sup>

## 1.2 PEACE VERSUS JUSTICE DEBATE

This study seeks to make a contribution to the literature on the peace versus justice debate, especially with regard to the use of TJMs as recommended in the Juba Agenda Item III.<sup>5</sup> This literature is located in the broad transitional justice discourse which is aimed at confronting the legacies of past human rights abuses and atrocities in order to build a stable, peaceful and democratic future.<sup>6</sup> Transitional justice has been defined as the "conception of justice associated with periods of political change, characterized by legal responses to

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3 For a deeper discussion, see Raymond, Kwun Sun Lau, 'Protection First, Justice Later? Stopping Mass Atrocities In Northern Uganda.' Presentation to the Inaugural ISA Asia-Pacific Regional Section Conference 2011 'Regions, States and Peoples in a World of Many Worlds', 29-30 September 2011, The University of Queensland, Brisbane, Australia., <<http://www.uq.edu.au/isaasiapacific/content/raylau.pdf>> accessed October 3, 2013., See also Human Rights Watch, 'Uprooted and Forgotten: Impunity and Human Rights Abuses in Northern Uganda' <<http://www.hrw.org/reports/2005/uganda0905/uganda0905.pdf>> accessed January 31 2014.

4 See Assembly of the African Union, *Decision on the Implementation of the Decisions of the International Criminal Court*. Addis Ababa: African Union, Doc. EX.CL/639(XVIII), 2011, para. 6. See also Daglous Makumbe 'African Response to the International Criminal Court. Implications For International Legal Justice' IOSR Journal Of Humanities And Social Science (IOSR-JHSS) Volume 20, Issue 8, Ver. IV (Aug 2015), PP 16-23 <<http://iosrjournals.org/iosr-jhss/papers/Vol20-issue8/Version-4/C020841623.pdf>> accessed January 31 2016

5 See generally Janine Natalya Clark, 'Peace, Justice and the International Criminal Court: Limitations and Possibilities' *Journal of International Criminal Justice* 9 (2011), 521 -545.

6 See <<http://www.asf.be/wp-content/uploads/2012/10/Transitional-Justice-Overview.pdf>> accessed Jan 31 2016

confront the wrongdoings of repressive predecessor regimes.”<sup>7</sup> Mindzie argues that “TJ was from its outset a process in which newly established civilian governments or transitional governments, often with the help of the international community, sought to (re)build or strengthen democracy and the rule of law within the state.”<sup>8</sup> The main objectives of TJ are generally to seek accountability for past violations of human rights and humanitarian law, preventing the conflict from reigniting and establishing justice measures that reach into the future of the country.<sup>9</sup> According to Kihika, these mechanisms take the form of truth commissions, trials, indigenous justice mechanisms, and reparations schemes.<sup>10</sup> TJ mechanisms ‘mainly provide post conflict societies with a holistic sense of justice, establish civic trust, reconcile people and communities, and prevent impunity and future abuses.’<sup>11</sup> For Boraine, a holistic interpretation of transitional justice would be based on five key pillars, including accountability, truth recovery, reparations, institutional reform and reconciliation.<sup>12</sup>

For Makau Mutua, TJ mechanisms are “the midwife for a democratic, rule of law state” because of the key role they play in establishing foundations for sound constitutionalism, peace building, and reconciliation in post-conflict societies.<sup>13</sup> Kihika further argues that ‘justice as envisaged under the various transitional justice mechanisms connotes fairness and accountability for actions. It means that the rights of individuals must be protected and the crimes of wrongdoers punished by processes that are fair and accountable and that protect the interest of the victim, the accused, and society at large.’<sup>14</sup>

Transitional justice offers an opportunity for States to deploy a broad range of judicial and non-judicial mechanisms to address the historical injustices, repair the harm suffered by

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7 Ruti Teitel, “Transitional Justice Genealogy,” *Harvard Human Rights Journal* 16 (2003), p. 69.

8 Mindzie, M A (2009) ‘Transitional Justice, Democratisation and the rule of law’ in Sriram, C L & S Pillay (eds.) *Peace versus Justice - Dilemma of Transitional Justice in Africa*, University of KwaZulu-Natal Press at 114 cited in Lisbeth C. Dolberg & Anna W. Meesenburg “Traditional’ justice? The role of traditional authority in traditional justice mechanisms in post-conflict Sierra Leone Master thesis in International Development Studies, Roskilde University, Denmark, autumn 2012

9 Id.

10 See Kihika Sarah Kasande ‘Centering Women’s Rights in Transitional Justice Processes in Northern Uganda: FIDA-Uganda’s Experience’ Paper delivered at the African Transitional Justice Research Network Workshop “Advocating Justice: Civil Society and Transitional Justice in Africa” 30–31 August 2010, Johannesburg, South Africa 10 <[http://www.transitionaljustice.org.za/docs/2010workshop/3\\_Kasande.pdf](http://www.transitionaljustice.org.za/docs/2010workshop/3_Kasande.pdf) >

11 Ruti Teitel, “Transitional Justice Genealogy,” *Harvard Human Rights Journal* 16 (2003), p. 69.

12 Boraine, Alexander 2006. *Transitional Justice. A Holistic Interpretation*, in: *Journal of International Affairs* 60, 1, 17-27 at 19-25.

13 Makau Mutua, “Transitional justice in sexual and gender-based violence,” in *Unfinished Business: Transitional justice and women’s rights in Africa*, ACCORD Occasional Paper No. 1 (2008) cited in Kihika Sarah Kasande 2010.

14 Sir Emyr Jones Parry, “Justice and Rule of Law: Conflict prevention, Post conflict support and peace building” (Address to the International Security and Global issues research group and the Davies Memorial Institute Seminar, 2004), p. 4. Cited in Kihika, supra at page 3.

victims and institute reforms that will guarantee the non-recurrence of conflict and violations.<sup>15</sup> TJ is premised on a broader conceptualisation of justice aimed at addressing the legal, social and economic injustices experienced by victims. However, it is generally agreed that there is no one-size-fits-all solution.<sup>16</sup>

Dolberg & Meeseburg argue that TJ has undergone two phases: - the first phase “focused on cases involving transitions from military dictatorship, or discriminatory or authoritarian regimes, to democratically elected civilian governments.”<sup>17</sup> It is this phase that had to deal with mainly the conflict between peace and justice as States grappled with having to bring perpetrators of repressive regimes to justice while facing the risk of ‘destabilising an already fragile transition.’<sup>18</sup> The compromise was therefore to use truth commissions where trials were viewed as being destabilising the peace achieved.<sup>19</sup> The next phase of TJ which came as a result of ‘the Balkan and Rwanda conflicts in the 90’s marked a new phase, or according to Lutz, a second generation, that involved “transitions from armed conflict to uneasy peace”<sup>20</sup> For Dolberg & Meeseburg, the debate about peace versus justice has now moved on with an acknowledgment that the two are ‘integrated parts of the process in post-conflict societies.’<sup>21</sup> The new debate is now about ‘how best to ‘break the cycle of violence’ ... with an ever growing focus on reconciliation as a prime basis for securing a peaceful future.’<sup>22</sup> Martina Fischer states that ‘today it covers the establishment of tribunals, truth commissions, lustration of state administrations, settlement on reparations, and also political and societal initiatives devoted to fact-finding, reconciliation and cultures of remembrance.’<sup>23</sup> It is in this new brand of TJ that one is able to view both the criminal and

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15 Sriram, C L (2009) ‘Transitional Justice and Peace building’ in Sriram, C L & S Pillay (eds.) *Peace versus Justice - Dilemma of Transitional Justice in Africa*, University of KwaZulu-Natal Press., Sooka, Y L (2009) ‘The politics of Transitional Justice’ in Sriram, C L & S Pillay (eds.) *Peace versus Justice - Dilemma of Transitional Justice in Africa*, University of KwaZulu-Natal Press., Lutz, E (2006) ‘Transitional Justice: Lessons learned and the road ahead’ in Rothj-Arriaza, N & J Mariezcurrena (eds.), *Transitional Justice in the Twenty-First Century: Beyond Truth versus Justice*, Cambridge University Press., UNSG (2004) ‘Report of the Secretary General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies’, S/2004/616 [revised]: <<http://www.unhcr.org/4506bc494.html>> cited in Lisbeth C. Dolberg & Anna W. Meeseburg 2012

16 Ibid.

17 Lutz, E (2006) ‘Transitional Justice: Lessons learned and the road ahead’ in Rothj-Arriaza, N & J Mariezcurrena (eds.), *Transitional Justice in the Twenty-First Century: Beyond Truth versus Justice*, Cambridge University Press at 326

18 Roth-Arriaza, N (2006) ‘The new landscape of transitional justice’ in Roth-Arriaza, N & J Mariezcurrena (eds.) *Transitional Justice in the Twenty-First Century: Beyond Truth versus Justice*, Cambridge University Press at 3

19 Quinn, J R (2009) ‘Introduction’ in Quinn, J. R. (ed.) *Reconciliation(s): Transitional Justice in Postconflict Societies*, McGill-Queen's University Press

20 Lutz, E (2006) *ibid.*

21 Park, A (2010) ‘Community-based restorative transitional justice in Sierra Leone’ in *Contemporary Justice Review: Issues in Criminal, Social, and Restorative Justice* Vol. 13:1, Routledge cited in Lisbeth C. Dolberg & Anna W. Meeseburg 2012 at 38.

22 *ibid*

23 Martina Fischer ‘Transitional Justice and Reconciliation: Theory and Practice’ in ‘Advancing Conflict Transformation: The Berghof Handbook II’ B. Austin, M.Fischer, H.J. Giessmann, (eds.) Barbara Budrich Publishers, Opladen/

non-criminal interventions where both ICL and traditional justice mechanisms fall. It can therefore be asserted that the current understanding of TJ presupposes that neither ICL nor TJMs is in itself adequate to address the varying judicial and non-judicial needs of a post conflict society.<sup>24</sup>

In spite of the above, one of the main criticisms of the field of TJ is it still prioritises and focuses on criminal justice processes at the expense of other judicial mechanisms. Legal scholars continue to dominate and shape the field.<sup>25</sup> There have been calls for a multi-disciplinary approach to advance the goals of TJ.<sup>26</sup> TJ has also predominantly focused on violations of civil and political rights. However, violations of Economic, Social and Cultural Rights have largely been absent from the TJ discourse.<sup>27</sup> These have mostly been regarded as impacts and consequences of the violation of civil and political rights.<sup>28</sup> This one size fits all approach to TJ, has to an extent, limited its ability to benefit from local home grown solutions. In other contexts, TJ practitioners have also been criticised for tending to replicate mechanisms and processes implemented in other contexts under the guise of best practices, with very limited regard to the unique social, economic and political demands of a particular context. As a result, some of the measures are less suited and are of minimal impact.<sup>29</sup> For example, research from Rwanda shows that truth telling might not be appropriate in all circumstances as it might reopen old wounds or even new wounds that might not be easily healed through reconciliation processes.<sup>30</sup> Additionally, the indictment of the top leadership of the LRA in the case of Uganda, without any indictment of the leadership of the UPDF was met with a lot of criticism from the local population.<sup>31</sup> In the

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Framington Hills, pp. 406 -430 available at <[http://www.berghof-foundation.org/fileadmin/redaction/Publications/Handbook/Articles/fischer\\_tj\\_and\\_rec\\_handbook.pdf](http://www.berghof-foundation.org/fileadmin/redaction/Publications/Handbook/Articles/fischer_tj_and_rec_handbook.pdf)> accessed at April 14, 2016.

24 See Julija Bogoeva 'Prosecuting War Criminals as the Basis for Reconciliation Policy,' FICHL Policy Brief Series No. 42 (2015).

25 For example, Jalloh argues that 'the ICC, by prosecuting architects of serious international crimes in Africa's numerous conflicts, could contribute significantly to the continent's fledgling peace and security architecture which aims to prevent, manage and resolve conflicts and to anticipate and avert crimes against humanity.' See Charles Cherner Jalloh, 'Regionalizing International Criminal Law?' *International Criminal Law Review* 9 (2009) 445-499.

26 See Martina Fischer supra.

27 Mindzie, M A (2009) 'Transitional Justice, Democratisation and the rule of law' in Sriram, C L & S Pillay (eds.) *Peace versus Justice - Dilemma of Transitional Justice in Africa*, University of KwaZulu-Natal Press at 114 cited in Lisbeth C. Dolberg & Anna W. Meeseburg "Traditional' justice? The role of traditional authority in traditional justice mechanisms in post-conflict Sierra Leone Master thesis in International Development Studies, Roskilde University, Denmark, autumn 2012

28 Ibid.

29 MacGinty, Roger (2008) 'Indigenous Peace-Making versus the Liberal Peace', *Cooperation and Conflict*, June 2008 43:2, pp. 139-163.

30 See generally, Phil Clark, 'The Gacaca Courts, Post Genocide Justice and Reconciliation in Rwanda: Justice Without Lawyers, CUP 2010 at 190.

31 See Finnström S, *Living with Bad Surroundings: War and Existential Uncertainty in Acholiland in Northern Uganda* (Uppsala: Acta Universitatis Upsaliensis, Uppsala Studies in Cultural Anthropology No. 35, 2003), 64 -66. The OTP argued that 'We selected our first case based on gravity. Between July 2002 and June 2004, the . . . LRA . . . was

same vein, the criticism, by some NGOs and international bodies, of amnesty for perpetrators of crime in the northern Uganda conflict, failed to engage with the fact that it was largely proposed by those directly affected by the conflict - either as victims or survivors.<sup>32</sup> This can be better understood in the text of the judgement by Lord Denning in the *Nyali Ltd V. Attorney General* [1956] 1 QB 1 where he held –

Just as with an English oak, so with the English common law. You cannot transplant it to the African continent and expect it to retain the touch character which it has in England.’

As such, emphasis on mainly retributive justice in certain contexts like Uganda does not suffice especially in light of the questions surrounding victim-perpetrators, diversity in ontology, culture and tradition.

This thesis therefore contends that all the various objectives of TJ should be accorded time and space to operate. In so doing, the post conflict community will enjoy holistic intervention which covers its judicial and non-judicial needs. For the avoidance of doubt, , the thesis contends that international criminal law, traditional justice mechanisms, as well as any other TJ intervention are all part and parcel of what is termed here as holistic intervention. The thesis also departs from some earlier writings on TJ which emphasised the reconciliatory aspects traditional justice as against the punitive nature of ICL, by asserting that both have criminal justice aspects that ought to work in tandem with each other.<sup>33</sup>

While TJMs have both criminal and non-criminal aspects of justice, international criminal law – as represented by the ICC – is mainly about criminal justice. It may however be argued that the recent creation of the Trust Fund for Victims is a departure from ICL’s mainly criminal emphasis. It should however be emphasised that ICL- especially the ICC- is not to blame for this. This is because, the use of the alternative methods of accountability (AMAs) was not expressly provided for in the Rome Statute. During the deliberations at Rome on the formation of the ICC, the states parties failed to agree on the use of these

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allegedly responsible for at least 2200 killings and 3200 abductions in over 850 attacks. It was clear that we must start with the LRA.’ See ICC-OTP, ‘Statement by the Chief Prosecutor on the Uganda Arrest Warrants’, The Hague, 14 Oct. 2005. See also ‘Statement by Luis Moreno-Ocampo, Prosecutor of the International Criminal Court, Fourth Session of the Assembly of States Parties’, 28 Nov. – 3 Dec. 2005, The Hague, 28 Nov. 2005, attached to ICC-02/04-01/05-67, 2 Dec. 2005, at 2 Nouwen and Werner,(2010), 951.

32 See Acholi Religious Leaders Peace Initiative and Acholi Paramount Chief Elect, ‘Suggestions by the Acholi Religious and Cultural Leaders in Response to the Request by the International Criminal Court.’ Statement, Gulu, and 12 November 2004. Reproduced in Tim Allen, *Trial Justice: The International Criminal Court and Lord’s Resistance Army* (2006) 86–7, 75.

33 Barney Afako (2002), ‘Reconciliation and justice: ‘Mato oput’ and the Amnesty Act’(2002), available at <<http://www.c-r.org/our-work/accord/northern-uganda/reconciliation-justice.php>> accessed 10 April 2011

AMAs. South Africa had expressed concern that interventions by a State in the form of non-criminal proceedings like truth and reconciliation commissions would be viewed as evidence of a State's unwillingness to prosecute.<sup>34</sup> While the South African proposal was not adopted at the Rome Conference, Stahn argues that such non-prosecutorial efforts could have the effect of convincing the OTP/ICC to concentrate its energies elsewhere.<sup>35</sup> In essence, it would mean that such interventions would have passed the standard of the 'States willingness to prosecute' and thereby make the situation inadmissible before the ICC. This position is only possible because the OTP/ICC abides by the rules of statutory interpretation and has taken a literal interpretation of the concept of complementarity under the Rome Statute.<sup>36</sup>

This study suggests that in order for the ICC to remain effective, it ought to adopt a purposive interpretation of the concept of complementarity. In so doing, the ICC would have adopted a proactive approach to complementarity.<sup>37</sup> A purposive interpretation would make it possible for the ICC to view that where non-prosecutorial interventions – as suggested in Juba- are made, it is possible to make a finding that the state of Uganda meets the criterion provided in Article 17 of the Rome Statute of being *willing, able* and *actively* addressing the situation under its jurisdiction. Broadly interpreted, proactive complementarity would arguably mean that the OTP would consider South Africa and Stahn's proposal to consider non-prosecutorial interventions as indicative of a State's willingness to 'investigate and prosecute' a situation under its jurisdiction.

For the case of Uganda, a series of meetings were held between the former Prosecutor and traditional and religious leaders.<sup>38</sup> These were aimed at trying to resolve the impasse between the advocates for peace and the advocates for trial justice. The result of these meetings was an announcement by Ocampo that the ICC was mainly 'bringing a justice component to a comprehensive effort to achieve justice and reconciliation and bring an end

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34 William.A. Schabas, *An Introduction to the International Criminal Court* (4th edn.) Cambridge University Press 2011)191,198.

35 Carsten Stahn, 'Complementarity, Amnesties and Alternative Forms of Justice: Some Interpretative Guidelines for the International Criminal Court', [2005] 3 *Journal of International Criminal Justice* 695.

36 Section 53 of the Rome Statute uses the word 'shall' which clearly indicates that the Prosecutor has no discretion. See also Burke-White refers to such primary legal obligation to prosecute international crimes as proactive complementarity. See Burke-White, 'Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice' (2008) 49 *Harvard International Law Journal* 54.

37 Luis Moreno-Ocampo, 'Building a Future on Peace and Justice,' Address at the International Conference in Nuremberg (June 24–25, 2007), <<http://www.peace-justice-conference.info/download/speech%20moreno.pdf>> accessed September 10, 2013.

38 Luis Moreno-Ocampo, Chief Prosecutor of the ICC, 'Statement by Luis Moreno-Ocampo, Prosecutor of the International Criminal Court' (Statement, Fourth Session of the Assembly of States Parties, 28 November 2005 – 3 December 2005) 2 <[http://www.icc-cpi.int/library/organs/otp/speeches/LMO\\_20051128\\_English.pdf](http://www.icc-cpi.int/library/organs/otp/speeches/LMO_20051128_English.pdf)> accessed 18 May 2012.

to violence in northern Uganda'.<sup>39</sup> This view, it is contended, could only have been arrived at after the OTP interfaced with the people for whom justice was sought to be done. By acknowledging both the retributive and reconciliatory aspects of justice, the OTP went a long way in advancing the case for a holistic intervention. This view is supported by authors like Kieran who calls for an interdisciplinary approach to the conflict in Northern Uganda, as well as Honing who argues that 'peace and justice are mutually reinforcing and need to be reached in a holistic fashion, through comprehensive measures at the local, national and international levels.'<sup>40</sup>

The OTP has since given mixed signals on this position: at the beginning of his term of office, the former Chief Prosecutor, Mr. Ocampo, acknowledged the significance of these non-judicial interventions and even suggested that such non-judicial interventions would be relevant in considering his decision on whether a State was genuinely willing to investigate a situation under its jurisdiction.<sup>41</sup> At that time, Ocampo had promised that the ICC would support but not compete with states in fulfilling their primary mandate of fighting international crimes.<sup>42</sup> Unfortunately, by the end of his term of office, the former Prosecutor had reneged on his word and had adopted a literal interpretation of the Rome Statute's concept of complementarity. He viewed interventions like Alternative Justice Mechanisms (AJMs) as a means to avoid accountability and indicative of a State's unwillingness to prosecute a situation under its jurisdiction.<sup>43</sup> Authors like Cassese also do not conceive of AJMs as indicative of a State's 'genuineness to prosecute.'<sup>44</sup> As such, the impasse between the advocates of peace and those of justice remains.

In a move which can be viewed as breaking away from the aforementioned impasse, the parties at Juba, after prolonged negotiations which were coupled with lobbying from various interest groups, made provision for a *multi-dimensional* approach to address the judicial needs of the people of Northern Uganda. It was in this light that the Agreement on Accountability and Reconciliation (AAR) provided that both trial justice as well as TJMs – with '*necessary modifications*'- would be included as part of the post conflict interventions.<sup>45</sup>

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39 Luis Moreno-Ocampo, 2005 *ibid*.

40 Patrick Hönig, *supra*.

41 UN Doc. S/PV.5459, at 3. See UN Doc. S/PV. 5321, at 3 in Schabas (2012)199.

42 Luis Moreno-Ocampo, *Prosecutor of the ICC, Statement of the Prosecutor to the Diplomatic Corps (Feb. 12, 2004)*, <<http://www.iccnw.org/documents/OTPStatementDiploBriefing12Feb04.pdf>> accessed October 3, 2013.

43 *Ibid*.

44 See Cassese 2003, Schabas 2012.

45 Article 4 Agreement on Accountability and Reconciliation  
<[http://www.beyondjuba.org/BJP1/peace\\_agreements/Agreement\\_on\\_Accountability\\_And\\_Reconciliation.pdf](http://www.beyondjuba.org/BJP1/peace_agreements/Agreement_on_Accountability_And_Reconciliation.pdf)>  
accessed April 2012

We should hasten to note however, that some of those who advocated the use of TJMs made rather essentialist arguments praising the inherently forgiving nature of TJMs while championing for them as the preferred choice for the victims of the crimes committed in the conflict.<sup>46</sup> This was not entirely correct since others victims and survivors continue to support the case for retributive justice. Some authors like Clark support the modification of these TJMs as long as they are able to meet the needs of the local people.<sup>47</sup> Human Rights Watch has also voiced its support for the use of TJMs on condition that they meet the international standards of justice.<sup>48</sup>

The GoU has since proceeded to implement the AAR as part of its National Transitional Justice Framework (NTJF) policy which will also include provisions for reparations, prosecutions, truth telling and traditional justice.<sup>49</sup> It can be argued that the AAR conforms to the principle of complementarity in as far as it provides for a multifaceted approach to resolution of the conflict. The AAR sought to use both criminal and non-criminal interventions to address the situation in Northern Uganda specifically and Uganda generally. To date, the GoU has created International Crimes Division of the High Court while at the same time funded the creation of the National Transitional Justice Framework (NTJF) policy with the support of donors under the Justice Law and Order Sector (JLOS). Nonetheless, the AAR has continued to be criticized by the OTP/ICC and international criminal practitioners.<sup>50</sup> The criticism is levied mainly at the proposed use of TJMs in post conflict reconstruction. The OTP/ICC opposes the use of TJMs on the grounds that they promote impunity for crimes when they hinder the arrest of the indicted leaders of the LRA/M.<sup>51</sup> Allen additionally criticizes the use of TJMs arguing that they are avenues through which male elders and church officials seek to reclaim their lost legitimacy after

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46 Barney Afako 'Reconciliation and justice: 'Mato oput' and the Amnesty Act' (2002), <<http://www.c-r.org/our-work/accord/northern-uganda/reconciliation-justice.php>> accessed 10 April 2011. These views were vehemently opposed by Cecily Rose who notes that when conflict was still ongoing, there was no possibility of using TJMs like mato put or gomo tong. Cecily also argued that the mutuality requirement for reconciliation could not work when the LRA was still in rebellion. Cecily Rose, 'Looking Beyond Amnesty and Traditional Justice and Reconciliation Mechanisms in Northern Uganda: A Proposal for Truth telling and Reparations' (2008) 28 BTWLJ 345, 368 -370.

47 Phil Clark, 'Hybridity, Holism and 'Traditional. Justice': The Case of the Gacaca Courts in Post-Genocide Rwanda (2007) 39 (4)George Washington International Law Review, 765-837.

48 Human Rights Watch, ' Benchmarks for Assessing possible national alternatives to IC Cases against LRA leaders: A Human Rights Watch Memorandum, May 2007

49 See paragraph 19 of the Annex states: 'Traditional justice shall form a central part of the alternative justice and reconciliation framework identified in the Principal Agreement.'

50 See generally *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen, Report by the Registrar on the Execution of the 'Request for Further Information from the Republic of Uganda on the Status of Execution of the Warrants of Arrest'*, ICC-02/04-1/05-305-Anx2 (10-07-2008). See also *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen, Decision initiating proceedings under article 19, requesting observations and appointing counsel for the Defence*, ICC-02/04-01/05- 320, (21-10-2008).

51 See also *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen, Submission of Observations on the admissibility of the Case under article 19(1) of the Statute*, ICC-02/04-01/05-350, (18-11-2008).

violent conflict.<sup>52</sup> He notes that these officials are supported by ‘certain foreign humanitarian organizations who invoke African traditions to claim cultural authenticity.’<sup>53</sup> Allen is also concerned that the clamour for TJMs silences the voices of those who want to see the LRA punished. He additionally reports that during his research in Northern Uganda, he ‘did not find widespread enthusiasm for (TJMs like) *mato oput* ceremonies’<sup>54</sup> but instead found that ‘people of northern Uganda required the same kind of conventional legal mechanisms as everyone else living in the modern states.’

Further still Allen states that there was neither ‘an Acholi traditional justice system’ nor was there a general rejection of international justice.<sup>55</sup> Instead, he found that many of his ‘informers were ‘eager to embrace international principles of human rights—(regardless of their contradictions and imperfections).’<sup>56</sup> On the other hand, Branch argues that these criticisms do not make TJMs any less relevant, but only shows that both TJMs and ICL ‘suffer from the same flaw: each claims incontestable legitimacy for its own ideal of justice—one by invoking a universal language of human rights and crimes against humanity, the other by invoking the particular language of custom—and attempts to impose that ideal upon all Acholi.’<sup>57</sup> Branch also notes that just like TJMs, the ICC is not ‘conventional’ and acts against the practices of the modern state especially in so far as it challenges state sovereignty.<sup>58</sup> Although law is relevant, Kieran argues that ‘its significance is often greatly exaggerated, which leads to clashes with the kind of ‘justice’ that is actually ‘embedded’ in communities that have been directly affected by violence and conflict.’<sup>59</sup>

This research therefore concentrates on investigating the way in which a critical legal pluralist framework enables ICL to view these TJMs as contributing to the attainment of sustainable post conflict reconstruction and not merely promoting impunity. The thesis argues that the critical legal pluralist interpretive framework provides a middle ground which acknowledges these flaws in both TJMs and ICL. As such, it is possible to acknowledge how the influences of both the modern state and the local inform the various

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52 Tim Allen, War and Justice in Northern Uganda (draft) (London: Crisis States Research Centre, February 2005), 58–59; <<http://www.isn.ethz.ch/Digital-Library/Publications/Detail/?ots783=0c54e3b3-1e9c-be1e-2c24-a6a8c7060233&lng=en&id=56421>> accessed November 2, 2011.

53 *ibid.*

54 Allen, War and Justice in Northern Uganda, p. 66.

55 *Ibid.*

56 *Ibid* at 83.

57 *Ibid.*

58 *Ibid.*

59 Kieran Mcevoy and Lorna Mcgregor (eds). *Transitional Justice From Below: Grassroots Activism And The Struggle For Change*, (Oxford, UK, and Portland, Or: Hart Publishing, 2008)29.

justice possibilities in the affected society – sometimes clashing, sometimes cooperating, sometimes assisting and/or influencing each other. A purposive interpretation of Article 53 of the Rome Statute would show that genuine non-prosecutorial interventions which are similar to the South Africa Truth and Reconciliation Commission (SATRC) ought to make a case inadmissible before the ICC. Kalenge argues that while lesser perpetrators may be subjected to TJMs, the principle of universal jurisdiction will ensure that regardless of whatever TJMs the top leadership of the LRA undergo, they will always be considered ‘international fugitives.’<sup>60</sup> Kalenge suggests that in order to make the case inadmissible before the ICC, a combination of a truth and reconciliation commission as well as domestic prosecutions should be carried out so as to show that Uganda is genuine about ending the conflict and punishing wrongdoers.<sup>61</sup> It is to this discussion that the thesis seeks to make a contribution by showing through a systematic case study of the AAR that, CLP’s interpretive framework for implementing the AAR is more responsive to the complexities of Ugandan society, history and politics than the frameworks provided by mainstream international criminal law and legal pluralism.

There have been various commentaries on the situation in Uganda: Authors like Branch have criticised the ICC for exacerbating instead of stopping the LRA rebellion.<sup>62</sup> Kasaijja has also argued that the Joseph Kony did not sign the Final Peace Agreement (FPA) because of the ICC arrest warrants.<sup>63</sup> In their view, the result of this failure to sign the FPA, has been more suffering as the rebels have spread their mayhem to the surroundings countries of CAR, DRC and South Sudan.<sup>64</sup> It might be argued that the presence of the arrests warrants forced the rebels back to the negotiating table which resulted into the AAR. Nonetheless, Kasaijja notes that if the GoU had lobbied the UNSC to ‘exercise its powers under Article 16 and suspend the warrants for 12 months,’<sup>65</sup> it is possible that Kony would have signed the FPA and the hostilities would have ceased.

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60 Brian, Kalenge, ‘Reconcile peace process with international law’ *The New Vision*, (Tuesday, 16th September, 2008) <<http://www.newvision.co.ug/D/8/459/649883>> accessed March 24, 2014.

61 *ibid*.

62 Statement by Luis Moreno-Ocampo, Prosecutor of the International Criminal Court, Statement by the Chief Prosecutor on the Uganda Arrest Warrants, The Hague, 14 October 2005, <<http://www.haguejusticeportal.net/Docs/Press%20releases/Statement%20by%20the%20Chief%20Prosecutor%20on%20the%20Uganda%20Arrest%20Warrants.pdf>> accessed April 5, 2014.

63 Kasaijja Phillip Apuli, ‘The ICC’s Possible Deferral of the LRA Case to Uganda,’ 2008 (8) JICJ 804.

64 UNHCR, ‘New LRA attacks trigger more displacements in Southern Sudan, Briefing Notes, 21 August 2009 available at <<http://www.unhcr.org/4a8e974e9.html>> accessed April 5, 2016.

65 See Annalisa Ciampi, ‘The Proceedings against President Al Bashir and the Prospects of their Suspension under Article 16 ICC Statute,’ *Journal of International Criminal Justice* vol. 6, 2008, p. 886.

Similarly, Sun Lau criticises the approach taken by the international community with regards to the responsibility to protect the victims of the LRA rebellion. Lau wonders why ‘the international community simply presumes that upholding justice by making the LRA leadership (perpetrators) accountable generates or equates to providing protection for northern Ugandan (civilians).’<sup>66</sup> He additionally questions why the ‘international community’s response to northern Uganda works on the assumption that achieving long-term humanitarian outcomes of ending impunity and mass atrocity prevention should take precedence over short-term humanitarian outcomes of saving lives and stopping mass killing.’<sup>67</sup>

While the intervention of the ICC did arguably satisfy the global audience, Lau notes that the ‘attitudes and opinions of those most affected by the LRA violence, who are supposedly the primary audiences, have never been unanimous.’<sup>68</sup> As evidence, he refers to the 2007 population-based survey ‘When the War Ends’, in which respondents identified a range of issues that they sought to have addressed. The report noted that only 3% of the respondents were interested in justice while the rest were interested in health care (45%), peace (44%), education for the children (31%) and livelihood concerns (including food, 43%; land, 37%; money, 35%).’<sup>69</sup>

Arguably, the aforementioned survey, as well as other reports, informed the way the AAR was framed to address ‘the serious crimes, human rights violations and adverse socio-economic and political impacts of the conflict, (as well as) the need to honour the suffering of victims by promoting lasting peace with justice.’<sup>70</sup> It can also be argued that these alternatives are crucial in situations where there is a lack of confidence in ‘formal justice, which (is) viewed as purely retributive and unable to advance economic recovery.’<sup>71</sup> Additionally, formal justice would be rejected on the grounds that ‘imprisoning thousands of productive people (in particular young males who often constitute a high

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66 Raymond Kwun Sun Lau, 2011, *ibid.*

67 *Ibid.*

68 Raymond Kwun Sun Lau, 2011, *supra.*

69 Phuong Pham & Patrick Vinck., Human Rights Center, University of California, Berkeley School of Law, December 2010, ‘When the War Ends: Peace, Justice, and Social Reconstruction in Northern Uganda’, 3, 22..

70 Preamble 2, Agreement on Accountability and Reconciliation between the Government of the Republic of Uganda and the Lord’s Resistance Army/Movement, June 29, 2007 (Juba, Sudan), <[http://www.usip.org/pubs/usipeace\\_briefings/2008/accountability\\_reconciliation.pdf](http://www.usip.org/pubs/usipeace_briefings/2008/accountability_reconciliation.pdf)> accessed 9 April 2011.

71 Reports from interviews of survivors showed that more were concerned about economic development, reparations and compensation (97%) as opposed to accountability (84%). See Phuong Pham and Patrick Vinck, ‘*Transitioning to Peace: A Population based Survey on Attitudes about Social reconstruction and Justice in Northern Uganda*,’ December 2010 Human Rights Centre, University of California, Berkeley School of Law.

See Peace Building Initiative - Traditional & Informal Justice & Peace building Processes - International Association for Humanitarian Policy and Conflict Research <<http://www.peacebuildinginitiative.org/indexc7b8.html?pageId=1876>> accessed January 5, 2014.

proportion of suspects) may adversely affect the immediate needs of economic recovery.<sup>72</sup> The International Crisis Group (ICG) also notes that there is a need to address the economic and political marginalisation of the Northern region of Uganda, as well as putting an end to the GoU's military operations against the LRA which have to date only caused reprisals by the LRA upon people in surrounding countries like the DRC and CAR.<sup>73</sup>

Branch criticises the former Prosecutor for referring to the LRA as criminals and dismissing the fact that they could have a political agenda. He argues that Ocampo did not consider the fact that victims suffered atrocities from both the GoU as well as the LRA.<sup>74</sup> Additionally, he notes that Ocampo ignored genuine concerns about the political and economic marginalisation of the people of northern Uganda which were caused by the country's colonial past.<sup>75</sup> Branch further argues that when Ocampo referred to the Acholi people as victims, he fell into the trap of assuming that the intervention of the ICC was the answer. The effect was that Ocampo depoliticized the Acholi by ignoring their ability to foster their own 'justice project that would bring a more just, social and political order.'<sup>76</sup>

Arsanjani and Reisman criticise the ICC's acceptance of the Ugandan self-referral on grounds that the referral would take the ICC 'to areas where the drafters had not wished to tread.'<sup>77</sup> Branch criticises the Uganda referral as ill-advised because the limited temporal jurisdiction of the ICC made it incapable of handling a conflict that commenced in 1986 before the ICC was created. Branch and Zeidy note that the ICC has failed to show how Uganda's referral was in compliance with the concept of complementarity.<sup>78</sup> This is because at the time of the referral, Uganda had (and continues to have) a functioning judiciary which indicated that it was able to try the LRA rebel leaders.<sup>79</sup>

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72 Ibid

73 International Crisis Group: *A Regional Strategy beyond Killing Kony*. Africa Report No. 157 Nairobi, Brussels 2010.

74 Sverker Finnström (2008)

75 Adam Branch, 'Neither Peace nor Justice: Political Violence and the Peasantry in Northern Uganda, 1986–1998,' *African Studies Quarterly* 8, no. 2 (Spring 2005); and Sverker Finnström, *Living with Bad Surroundings: War and Existential Uncertainty in Acholiland, Northern Uganda* (Uppsala, Sweden: Uppsala University Press, 2003).

76 Ibid.

77 Mahnoush H. Arsanjani and W. Michael Reisman, 'The Law-in-Action of the International Criminal Court,' *American Journal of International Law* 99, no. 2 (2005), 397; <[http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=2044&context=fss\\_papers](http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=2044&context=fss_papers)> accessed April 6, 2014.

78 Rome Statute of the International Criminal Court, Preamble, paras. 4 and 6. El Zeidy, 'The Principle of Complementarity,' p. 899. In Adam Branch, 'Uganda's Civil War and the Politics of ICC Intervention' p. 187 <<http://grad.sdsu.edu/~abbranch/Publications/Ethics%20and%20International%20Affairs%2021.2,%20Summer%202007--Branch.pdf>> accessed April 6, 2014.

79 William Burke-White and Scott Kaplan, 'Shaping the Contours of Domestic Justice: the ICC and an Admissibility Challenge in the Ugandan Situation,' *JICJ* (2009) (7) 257-279 at 259). Kasaija Phillip Apuuli, 2008 (8) *JICJ* 805. Adam Branch, *ibid*.

As such, Branch views the Ugandan self-referral as a political calculation by the ICC as a soft landing in that it would establish its legitimacy in light of the resistance from the USA. At the time when the prosecutor solicited the referral from Uganda, the USA was signing Article 98 agreements with countries in a bid to protect its servicemen from being prosecuted by the Court. Branch argues that the former prosecutor calculated that the USA would not undermine a case involving an ally of the USA (Uganda) which was seeking redress against the LRA which was an ally of the Sudan. In so doing, Branch argues that the ICC sacrificed its mandate of pursuing justice at the altar of expediency.<sup>80</sup>

However, other authors believe that the referral of the LRA to the ICC was a step in the right direction in so far as it brought the leaderships of the LRA to the negotiating table.<sup>81</sup>

The above review shows that the GoU undoubtedly benefited the most from the referral. Not only did the referral remove pressure from the GoU to end the conflict single-handedly, it put pressure on the Government of Sudan to stop supporting the LRA.<sup>82</sup> The referral also gave Uganda the necessary support to further militarise the conflict when it was granted permission to enter the Eastern Congo, in pursuit of the rebels, with the technical support of USA soldiers.<sup>83</sup> The analysis also shows that the debate between global justice and TJMs has overshadowed other options of justice which include prioritising the establishment of a social and political order that is able to address the injustices that cause almost all the violent conflicts today.<sup>84</sup>

A purposive reading of the AAR may show an attempt to resolve the impasse between the advocates for peace and the advocates for justice. Nonetheless, since the basic rules of interpretation<sup>85</sup> make it inevitable that ICL, as represented by the ICC, takes a literal

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<sup>80</sup> Ibid.

<sup>81</sup> Julia Crawford, 'Transitional Justice in Uganda- In Brief,' 31 May 2015 available at <<http://www.justiceinfo.net/en/live-feed/409-transitional-justice-in-uganda-%E2%80%93-in-brief.html>> accessed April 2, 2016. See also Mark Kersten 'Why the ICC Won't Prosecute Museveni' Justice In Conflict Blog: On the Challenges of pursuing justice available at <https://justiceinconflict.org/2015/03/19/why-the-icc-wont-prosecute-museveni/> accessed April 2, 2016.

<sup>82</sup> See Situation in the Great Lakes Region, SC Res 1653, UN SCOR, 5359th mtg, UN Doc S/RES/1653 (27 January 2006); Reports of the Secretary-General on the Sudan, SC Res 1663, UN SCOR, 5396th mtg, UN Doc S/RES/1663 (24 March 2006). In Matthew Happold, 'The International Criminal Court and The Lord's Resistance Army the ICC and the Lord's Resistance Army, Melbourne Journal of International Law [Vol 8] <<http://celrl.law.unimelb.edu.au/files/dmfile/download5a9c1.pdf>> accessed November 2, 2011.

<sup>83</sup> 'Museveni wants to hunt LRA in Congo' New Vision (Kampala) June 19, 2006 <<http://www.newvision.co.ug/D/8/13/504856>> accessed November 2, 2011.

<sup>84</sup> Adam Branch, *supra*.

<sup>85</sup> See Article 21 of the Rome Statute, and the Elements of Crimes and the Rules of Procedure and Evidence U.N. Doc. PCNICC/2000/1/Add. 1(2000). Judge van den Wyngaert has held that its only when there is a 'lacuna in the Statute, Rules of Procedure and Evidence or Elements of Crimes,' that reference may be made to customary international law. She further stated in order to determine whether such lacuna exists, 'the Court must first apply the applicable rules of interpretation, as provided for by the Statute and the Vienna Convention on the Law of Treaties.' See Prosecutor v. Mathieu Ngudjolo Chui, Case No. ICC-01/04-02/12-4, Concurring Opinion of Judge Christine Van

interpretation of the Rome Statute, the ICC can only view the provisions of the AAR as promoting impunity. Consequently, the requirement to punish *jus cogens* and *erga omnes* crimes in international law makes it difficult for ICL to consider non-prosecutorial interventions like TJMs as being indicative of a state's *willingness* to investigate a situation in its territory as required by the Rome Statute. This privileging of ICL to address post conflict situations would mean that certain crimes – however serious they might seem– would not be admissible before the court either due to the principle *ratione temporis* and/or the gravity of crimes allegedly committed. Arguably, the proponents of ICL did not envisage such a situation. Neither did they envisage a situation where a state views its non-prosecutorial interventions – especially TJMs– as constitutive of the national proceedings that have the effect of making such a case inadmissible before the ICC.

It is argued here that the ICC should adopt the CLP interpretive framework which will lead it to make a finding that by enforcing the provisions of the AAR, Uganda is not promoting impunity but seeking to achieve a sustainable post conflict settlement. It is further argued that if the ICC chooses to apply the CLP interpretive framework to situations similar to Northern Uganda, it will not be saturated with several situations requiring it to assume jurisdiction. Rather, the ICC would be involved in supporting states to carry out their primary function of addressing situations under their jurisdiction. Failure to do so would mean that the OTP/ICC will remain on a collision course with many States especially in Africa where conflicts are caused and sustained by various factors at the same time and space– be they social, economic, political, religious, environmental, global, or by outside interference etc. This collision between the OTP/ICC and these states will be due to the fact that the former's interpretation of what constitutes genuine proceedings will be at

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den Wyngaert, (Dec. 18, 2012), at 10. <<http://www.icc-cpi.int/iccdocs/doc/doc1529537.pdf>> accessed December 2, 2014.. See also Article 26, 31, 32, 33 of the Vienna Convention on the Law of Treaties, 1969.

Article 31 states -

1. *A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.*
2. *The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
  - (a) Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
  - (b) Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.*
3. *There shall be taken into account, together with the context:
  - (a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
  - (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
  - (c) Any relevant rules of international law applicable in the relations between the parties.*
4. *A special meaning shall be given to a term if it is established that the parties so intended.*

variance with what the latter are doing or proposing to do. As the case in Uganda has shown, whereas the Court will easily make a finding that cases like the LRA rebellion are admissible before it, the Court will not be able to prosecute any of the cases without the support of the very States it faults for not matching up to its standards.<sup>86</sup> This is not what the drafters of the Rome Statute intended.

### **1.3 RESEARCH OBJECTIVES**

This research study specifically seeks to analyse the foundations of post-conflict reconstruction which would be afforded by the interpretive frameworks of mainstream international criminal law, traditional legal pluralism and CLP using the case study of Agenda Item III of the Juba peace process. Crucially, it specifically seeks to investigate the ways in which OTP/ICC relates to other normative orders like TJMs and how those ways hinder or champion the fight against international crimes. It further seeks to situate the place of TJMs within international criminal law. The research is also interested in studying the nature of TJMs and how they operate during and after post conflict situations. It is equally interested in discovering the reasons as to why the parties at the Juba peace process included the use of TJMs as part of the AAR. The research further seeks to critically analyse the concept of complementarity and how it operates. The study also seeks to explore how a CLP interpretive framework would enable the OTP/ICC to have a more effective foundation for the view that the GoU is not promoting impunity when it implements the provisions of the AAR.

### **1.4 RESEARCH QUESTIONS**

In carrying out this research, the central question investigated was why the international criminal law framework for implementing the AAR was insufficiently responsive to the complexities of the Northern Uganda conflict. The research also sought to investigate why the alternative offered by traditional legal pluralism was equally insufficient to afford Uganda an effective foundation for sustainable implementation of the AAR and transition to a post-conflict settlement in Uganda. The research also investigated why the interpretive framework afforded by critical legal pluralism for implementing Juba Agenda item III was

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<sup>86</sup> There are some countries like Malawi which have taken a stand quite different from the rest of the AU. See African Union pulls summit from Malawi in row over Sudan's president,' Associated Press June 8 2012, <<http://www.theguardian.com/world/2012/jun/08/African-union-malawi-summit-sudan>> accessed April 4, 2014.

more responsive to the complexities of Ugandan history, society and politics. Other sub-questions investigated were what is meant by the concept of complementarity, how did its proponents intend it to be practiced, and how is it actually practiced by the OTP/ICC. Additionally the research sought to know what TJMs were, how they operate and why they were included as a central part of the AAR. The research further queried why the GoU resorted to a peace process even though arrest warrants had been issued against the top leadership of the LRA/M.

## **1.5 METHODOLOGY**

At the beginning of this project, preliminary interviews of specific policy makers, key informants, researchers, implementers and practitioners of transitional justice (TJ) were carried out in April 2011 and September 2011. These interviews, which were carried out in compliance with University of Kent's ethical research standards, were aimed at assisting the researcher to have a proper understanding of how those who were either working in the conflict area or those who were affected by the conflict, understood the judicial needs of the victims and survivors of the conflict, as well as to have an appreciation of what was being done to done by these various state and non-state actors in the wider transitional justice process. Additionally, a meta-analysis/review of the vast number of empirical surveys that had already been conducted in this area inspired the researcher to think about the gap in the literature differently. The summation of the meta-analysis of the said surveys is attached hereto as Annexure Tables A and B. The researcher realised that there was a need for a more theoretical model to understand the processes at play better and to ask more critical questions regarding the way in which justice for those who had been affected by the conflict should be done. The researcher discovered that while a lot of empirical research had been done regarding the judicial preferences of the victims and survivors, there was hardly any theoretical engagement concerning why they had those preferences or how transitional justice interveners should either think through the their proposed interventions. It is on this basis that the researcher chose to engage in a theoretical rather than empirical study. One which could easily be applied to other situations as and when the need arose.

The ensuing research was mainly qualitative, involving library research and literature reviews of various legal and non-legal materials such as court cases, text books, history books, newspapers, population surveys, as well as working papers from various NGOs like Refugee Law Project (RLP), African Youth Initiative Network (AYINET), International

Centre for Transitional Justice (ICTJ), among others.<sup>87</sup> Qualitative research was preferred for understanding the world from the perspective of those studied and for examining and articulating processes.<sup>88</sup> It allowed for investigation of multiple meanings and interpretations of social phenomenon.<sup>89</sup> Interpretations are based on an ever changing social reality.<sup>90</sup> Since the emphasis of the research is about the way parties arrived at the specific provisions of the AAR as well as the concept of complementarity in the Rome Statute, this qualitative approach to research is necessary because it centres on the framing of 'words, talk, and texts as meaningful representations of concepts.'<sup>91</sup> The qualitative research method examines the process through which meaning is assigned and assumes that the researcher and his study are 'interactively intertwined in such a way that discoveries are created mutually within the context of the situation that moulds the investigation.'<sup>92</sup>

The research uses the traditional legal pluralism theoretical framework especially when analysing the history of Uganda before and after colonialism just as the early pluralists did.<sup>93</sup> The main purpose of these early pluralists at that time was to identify and describe the various legal orders that existed in any social field.<sup>94</sup> In the case of Ugandan social field, these legal orders include the national/state laws, international humanitarian law, the Rome Statute and alternative justice mechanisms like TJMs.<sup>95</sup> Traditional legal pluralism (TLP) contests the view propounded by legal centralists that law should be uniform for all, and exclusive of all other normative orders.<sup>96</sup> Similarly, TLP can be used to challenge those who argue for a monistic view of ICL, by identifying the existence of other interventions which form part of a variety of possible interventions after violent conflict. TLP envisages that state law is not monistic but an amalgamation of various laws which provides for both

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87 See From the Editors: For the Lack of A Boilerplate: Tips on Writing Up (And Reviewing) Qualitative Research', *Academy of Management Journal* 2009, Vol. 52, No. 5, 856–862.

88 Ibid.

89 See generally Sarah Khasalamwa –Mwandha 'Spaces of Recovery: An exploration of the Complexities of Post-War/disaster Recovery in Uganda and Sri Lanka' (Doctoral Thesis, Norwegian University of Science and Technology 2012).

90 J. E. M Sale, L. Brazil K. Lohfeld (eds), '*Revisiting the Quantitative-Qualitative Debate: Implications for Mixed Methods Research*' in Denzin N. K. and Lincoln, Y. S. 'Handbook of Qualitative Research' (2002) Quality and Quantity, 36. See also Guba E. G., Lincoln, Y. S. 'Competing paradigms in qualitative research' in Denzin N. K. Y Lincoln Y. S, (eds) Handbook of qualitative Research, Thousands Oaks, Sage, (1994) in María Lázaro and Esperanza Marcos 'An Approach to the Integration of Qualitative and Quantitative Research Methods in Software Engineering Research' Kybele Research Group, Rey Juan Carlos University, Madrid, Spain PHISE'06 at 757

91 R.Gephardt, 'What Is Qualitative Research and Why Is It Important?' (2004) 7 AMJ 454 at 455.

92 Ibid.

93 Emmanuel Melissaris, (2004) Tamanaha (2008), Santos, (1995).

94 MB, Hooker, *Legal Pluralism: An Introduction to Colonial and Neo-Colonial Laws*, (Oxford: Clarendon Press 1975) 6.

95 Emmanuel Melissaris, (2004) supra., Tamanaha (2008), supra., Santos, (1995) supra.

96 Griffiths 1986 at 3.

retributive and non-retributive punishments<sup>97</sup> on the one hand, and non-judicial interventions on the other. Examples include truth commissions, military courts, reparations, amnesties, among others. Additionally, the state law is involved in a dynamic process of amendment and reform from both within and without. Similarly, it can be argued that ICL is neither monistic nor static.<sup>98</sup> It is a collection of different practices from both the common law and civil law jurisdictions in the western world but has continued to be amended to include ideas of restorative justice in the form of victim participation and the Trust Fund for Victims.<sup>99</sup> Like tradition, ICL is dynamic as evidenced from the jurisprudence from the international criminal tribunals like the ICTR and ICTY which have *inter alia* defined genocide<sup>100</sup> and rape as a crime of war.<sup>101</sup>

While it is acknowledged that this argument bears similarities with say, theories on transitional justice (TJ) from below, the traditional legal pluralism literature takes the extra step of viewing the state law as both plural and dynamic.<sup>102</sup> Secondly, while transitional justice from below literature proposes a ‘down-up’ approach to transitional justice as opposed to a ‘top –down’ approach, critical legal pluralism CLP argues for a mixing of both approaches to TJ on the basis that no legal system is hermeneutically closed to the other.<sup>103</sup> These TJMs are not only plural, but like the state law, they are dynamic and intertwining with each other in multitudinous ways.

A *critical* view of TLP argues that there is legal porosity/inter-legality in each social field and there is no hierarchy of laws.<sup>104</sup> It envisions these normative orders being in a dynamic movement of supporting, complementing, ignoring or frustrating each other. In analysing

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97 These include fines, compensation, caution, apology, restitution and others See Sec. 180 and Part XVII Magistrates Courts Act Cap. 16, Laws of Uganda. See also Sec. 172 which states that ‘A magistrate’s court may pass any lawful sentence combining any of the sentences which it is authorised by law to pass.’

98 Clifford Geertz 1983. ‘*Local Knowledge: Fact and Law in Comparative Perspective*’, in *Local Knowledge*. New York: Basic Books., See also Chiba, M. *Asian Indigenous Law: An Interaction with Received Law*, (KPI: London and New York. 1986) 6.

99 Trust Fund for Victims (the first of its kind) See Establishment of a Fund for the Benefit of Victims of Crimes Within the Jurisdiction of the Court, and of the Families of Such Victims, ASP/1/Res.6; Procedure for the Nomination and Election of Members of the Board of Directors of the Trust Fund for the Benefit of Victims, ASP/1/Res.7. The Court also has a Victims and Witnesses Unit and the Office of the Public Counsel for Victims. The phrase ‘benefit of Victims’ has been interpreted to consist of reparations and material support. See Regulations of the Trust Fund for Victims, ASP/4/Res.3, Regulation 50 (a) (i).

100 See ‘International Criminal Tribunal for Rwanda – The prosecutor versus Jean-Paul Akayesu: Judgement’ ICTR-96-4-T), TC, 2 September 1998, 500-5-1, <<http://www.unictt.org/Portals/0/Case/English/Akayesu/judgement/akay001.pdf>> accessed April 4, 2014.

101 See ICTY ‘Home > Outreach > Crimes of Sexual Violence > Landmark Cases,’ <<http://www.icty.org/sid/10314>> accessed April 4, 2014.

102 See generally Kieran Mcevoy and Lorna Mcgregor (eds). *Transitional Justice From Below: Grassroots Activism And The Struggle For Change*, (Oxford, UK, And Portland, Or: Hart Publishing, 2008)

103 Macdonald, R., & McMorrow, T. (2007). Wedding a Critical Legal Pluralism to the Laws of Close Personal Adult Relationships. *EJLS*, 1, 1 <<http://www.ejls.eu/1/15UK.pdf>> accessed on November 26, 2009.

104 Jennifer Corrin, ‘*Moving Beyond the Hierarchical Approach to Legal Pluralism in the South Pacific*, (2009) The Journal of Legal Pluralism and Unofficial Law, (41) (59)29-48.

whether a state is adhering to the principle of complementarity, this is the framework that critical legal pluralism (CLP) proposes. In the centre of it all, is the citizen subject is not a mere subject as legal positivists would argue but an active participant in the creation, amendment and contestation of the law.<sup>105</sup> It is this citizen who ideally conceives, appreciates, resists and reforms the laws.<sup>106</sup> This is not to negate the fact that there might be other laws or legal regimes, which, in spite of the citizen subject, will continue exists and influence the citizen subject using other means like international treaties, soft law, trade and usage, etc. It is therefore important to note that when responding to conflict, these normative orders need not be sequenced but rather, they are used by the citizen subject either severally or collectively to address diverse needs.

### 1.5.1 The Critical Legal Pluralist Conception of the Law

At the core of the CLP interpretive framework is its conception of law which it envisions as ‘an on-going co-existence of many legal orders in a long time and space context in a dynamic process involving innovation from the point of view of the recipients.’<sup>107</sup> This suggests that all the laws and legal orders are interlinked, work together, and supplement each other and so on. Kleinhans & McDonald refer to it as a ‘normative heterogeneity’ that not only exists between regimes that ‘inhabit the same intellectual space,’ but also within the individual regimes themselves.<sup>108</sup> Idowu and Oke note that there is ‘a lot of fluidity (taking place within these legal orders) like between water waves or clouds.’<sup>109</sup> These normative orders are neither neatly defined nor monolithic.<sup>110</sup> They continuously borrow and lend to each other in a continuous process. For example, the human rights regime, ICL, as well as international laws generally have influenced the way laws are passed, amended and reformed in Uganda. They have also already influenced the way in which the TJMs will be practised in future. For example, Section 3.3 of the AAR provides that:

With respect to any proceedings under this Agreement, the right of the individual to a fair hearing and due process, as guaranteed by the Constitution, shall at all times be protected. In particular, in the determination of civil rights and obligations or any

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105 B. De Sousa Santos, ‘Three Metaphors for a New Conception of Law: The Frontier, the Baroque, and the South’(1995) 29 (59) *Law and Society Rev.* at 573.

106 MacIntyre (1984), 220.

107 Idowu, W. & Oke, M. ‘Multiculturalism, Legal Pluralism and the Separability Thesis: A Postmodern Critique of ‘An African Case for Legal Positivism’, 2008(2) *Law, Social Justice & Global Development Journal (LGD)*. <[http://www.go.warwick.ac.uk/elj/lgd/2008\\_2/williamandoke](http://www.go.warwick.ac.uk/elj/lgd/2008_2/williamandoke)>.

108 Kleinhans, Martha-Marie and Macdonald, Roderick A. ‘*What Is a Critical Legal Pluralism*’, *ibid*, 25.

109 Idowu, W. & Oke, M. 2008.

110 See Emmanuel Melissaris 2004 at 60.

criminal charge, a person shall be entitled to a fair, speedy and public hearing before an independent and impartial court or tribunal established by law. (Emphasis mine)

On a similar note, section 3.4. of the AAR also states that:

In the conduct of accountability and reconciliation processes, measures shall be taken to ensure the safety and privacy of witnesses. Witnesses shall be protected from intimidation or persecution on account of their testimony. Child witnesses and victims of sexual crimes shall be given particular protection during proceedings. (Emphasis mine)<sup>111</sup>

Even within the individual normative orders we find a lot of fluidity: TJMs in Acholi like *Mato Oput* ceremony are interlinked with similar ceremonies of other tribes in Northern Uganda as well as the across the borders of the country. *Gomo tong* (breaking of spears) is a practice that is not exclusive to only the Acholi or Langi.<sup>112</sup> Even the *akiriket* councils of elders who are tasked with adjudicating inter and intra tribal disputes found in both the Akarimojong and Iteso tribes.<sup>113</sup> Any tribe can use a judicial mechanism that serves the same purpose as another tribe. As seen with the Gacaca court system in Rwanda, it is also possible to make additions to a TJM so as to fit a specific purpose.

In light of the fact that CLP views laws as having the same footing as other normative orders some critical pluralists have even criticised the way in which law is privileged over these other normative orders.<sup>114</sup> Tamanaha argues that the 'processes of human interaction are infinitely more varied than those suggested by a myth of law that gives priority to legislatively announced claims of right and judicial adjudication of these rights.'<sup>115</sup> Others have argued that the 'authoritative language of law' in contemporary discourse is merely promoted by 'faculties of law, legal professions, judges, politicians and political commentators.'<sup>116</sup> In essence, they form opinions on the law based on their day to day

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111 In order to achieve the above, the GoU is in the process of drafting a National Transitional Justice Policy which will provide the necessary framework through which these provisions will be implemented.

112 See further Atkinson R.R., A History of the Western Acholi of Uganda, d. 1675 -1900: A Study in the Utilization And Analysis Of Oral Data. (PhD Dissertation. North-Western University, Evanston, Ill.1978) 523-524; Anywar, R., 'The Life of Rwot Ibrahim Awich', *Uganda Journal* 12 (1):1948)75-76) quoted in Finnstrom (2008:43).

113 See Knighton. B., '*Historical Ethnography and the Collapse of Karamojong Culture: Premature Reports of Trends*' in the African Studies Seminar, St. Antony's College, University of Oxford, 13 June 2002 <[http://www.eldis.org/fulltext/knighton\\_karamoja.pdf](http://www.eldis.org/fulltext/knighton_karamoja.pdf) > accessed 27 April 2011. See also Bruno Novelli, *Karimojong Traditional Religion* (Kampala: Comboni Missionaries, 1999), 169-172, 333-340 quoted in Quinn and Hovil 2005) 24. See also Jones, B., *Beyond the State in Rural Uganda* (Edinburgh: Edinburgh University Press, 2009).

114 Kleinmans and Macdonald. 'What is Critical Legal Pluralism?' (1997)12 *Canada J.L& Soc.* 25 at 32

115 id

116 Sometimes, these professionals will incorporate aspects of these non-State normative orders into State law 'by means of devices such as delegation or referential incorporation 'without acknowledging their contribution. See similar

experiences and perceptions to create this language and myth of legal monism while at the same time excluding or ignoring the existence of non-state normative orders from the realm of the law.<sup>117</sup> It can be argued in their defence, that these professionals are justified, like any other individual subjects, to conjure their own sense of justice. Their only error is to privilege the law over other normative orders. This means that the perception of justice by these normative orders is valid and should not be discounted merely because they have different symbolic systems of what constitutes law.<sup>118</sup> It is unwise to privilege one symbol or system over the others like the colonial project chose to do. It is for this reason that CLP seeks to appreciate how these 'other' laws 'conceive' of justice instead of merely 'translating those very concepts into an entrenched vocabulary.'<sup>119</sup> Instead of dismissing or trivializing these 'other' laws, CLP calls for a deeper appreciation of the 'plurality of unofficial legal orders competing with each other and with State Law.'<sup>120</sup>

CLP also recognises that there is plurality both within and without State law. State law 'typically comprises (of) multiple bodies of law, with multiple institutional reflections and multiple sources of legitimacy'.<sup>121</sup> Plurality in state law is both internal and external. Internally, State law 'has formal divisions of normative jurisdiction such as one finds in unitary systems which incorporate local custom and commercial practice as part of the official regime but also where diverse administrative agencies compete with each other and with different judicial bodies to regulate conduct.'<sup>122</sup> In the case of Uganda, this can be evidenced by the existence of various legal regimes like the Amnesty Law, the ICC Act, the Penal Code, the TJMs and others. The external plurality of the State law is also present in what 'some jurists conveniently label as conflict of law.'<sup>123</sup> Examples of this in Uganda include the situation in the AAR in which the parties agreed to comply with the requirements of complementarity under the Rome Statute which was in conflict with the existing Amnesty laws as well as the provisions for TJMs. In practice, this would require adopting a purposive interpretation of the concept of complementarity. A purposive

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arguments in modern constitutionalism and cultural diversity in J. Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge: Cambridge University Press, 1995) at 58.

117 Fitzpatrick P *The Mythology of Modern Law* (London and New York: Routledge), 1992. J. Tully, 1995 at 58.

118 Alasdair MacIntyre 1988. Merry likens these different symbols to maps which have different scales, forms of projection, and symbolization. See Merry 1988 at 874.

119 Alasdair MacIntyre 1988.

120 Kleinhans and Macdonald 1997 at 31

121 Kleinhans and Macdonald, 'What is Critical Legal Pluralism?' (1997)<sup>12</sup> *Canada J.L& Soc.* 25 at 32

122 H.W Arthurs, *Without the Law: Administrative Justice ad Legal Pluralism in 19th Century England* (Toronto: University of Toronto Press, 1985) in Kleinhans and Macdonald. 'What is Critical Legal Pluralism?' (1997)<sup>12</sup> *Canada J.L& Soc.* 25 at 31

123 See L. Bilmayer, *Conflict of Laws: Foundations and Future Directions* (Boston: Little, Brown, 1991) Kleinhans and Macdonald. 'What is Critical Legal Pluralism?' (1997)<sup>12</sup> *Canada J.L& Soc.* 25 at 31

interpretation would make it possible for the ICC/OTP to have an understanding of the various post conflict goals and needs of the country and the reasons as to why at any post conflict interventions (or national proceedings) ought to be able to speak to a specific or all of these needs.

In using a CLP interpretive framework, it is also possible to have clear understanding of how these multiple legal orders engage with each other and with the state law as they compete to 'define the form, substance and finalities of the law.'<sup>124</sup> CLP goes beyond 'merely identifying specific sources of legal rules or properly defined areas within which to have these specific legal regimes,'<sup>125</sup> to recognizing their multiple forms of ordering.<sup>126</sup> It is possible to conceive these normative orders as being intertwined with each other, sometimes conflicting and sometimes complementing each other in ceaseless continuity. These normative orders sometimes support, sometimes ignore or frustrate one another and are not subsumed in one system.<sup>127</sup> This situation has also been referred to as a *pervasive pluralism* in law.<sup>128</sup> For CLP, legal pluralism – properly so called- should posit law as 'the result of enormously complex unpredictable patterns including competition, interaction, negotiation, and isolationism.'<sup>129</sup> Currently, the NTJP seeks to implement all the possible post conflict interventions to achieve sustainable transition from violence to stability. This is as a result of the AAR which agreed to adhere to the dictates of international criminal law by passing, proposing and amending relevant legislation (the ICC Act No. 11 of 2010,<sup>130</sup> Witness

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124 R.MacDonald, , & T. McMorow, (2007). Wedding a Critical Legal Pluralism to the Laws of Close Personal Adult Relationships. *European Journal of Legal Studies*, 1, 1.

125 Kleinahns, Martha-Marie and Macdonald, Roderick A. 'What Is a Critical Legal Pluralism', *ibid*, 25.

126 *Ibid*.

127 Griffiths, 'What is legal pluralism?', 1986:39 in 'The legal pluralist approach' <[http://epress.anu.edu.au/kastom/mobile\\_devices/ch02s03.html](http://epress.anu.edu.au/kastom/mobile_devices/ch02s03.html)> accessed February 22, 2013.

128 Some have challenged this image of pervasive pluralism on either ideological or methodological grounds. The ideologists argue that legal pluralism undermines respect for the Rule of Law. They state that 'without a systematic, integrated, unitary set of legal prescriptions, normative conflict is inevitable and official actions cannot be subjected to the censure of controlling constitutional and jurisdictional norms.' See J.P.B. Josselin de Jong, 'Customary Law: A Confusing Fiction' in A.D. Renteln & A. Dundes, *Folk Law: Essays in the Theory and Practice of lex non scripta* (New York: Garland, 1994) at 11 in Kleinahns and Macdonald. 'What is Critical Legal Pluralism?' (1997)12 *Canada J.L& Soc.* 25 at 32. Those who object on methodological grounds argue that legal pluralism 'lacks a criterion for distinguishing non-State law from anything else that has a normative dimension e.g social practice, economic forces, religion, etc - this is revealed in the inadequacy of attempts by legal pluralists to find a term for 'non-state law.' B. Z. Tamanaha, 'The Folly of the 'Social Scientific' Conception of Legal Pluralism' (1993) 20 *Journal of Law and Society* 192 in Kleinahns and Macdonald. 'What is Critical Legal Pluralism?' (1997)12 *Canada J.L& Soc.* 25 at 32. However this criticism assumes the priority of State law as the governing standard and merely confirms the political role of definitions as creative of ideological power structures. See F. Fitzpatrick, 'Law, Plurality and Underdevelopment' in D.Sugarman, ed., *Legality, Ideology and the State* (London: Academic, 1983) 159 at 175 :'Law, as state law, serves to produce some homogeneity in support of the ruling group.' in Kleinahns and Macdonald. 'What is Critical Legal Pluralism?' (1997)12 *Canada J.L& Soc.* 25 at 32.

129 Kleinahns and Macdonald also challenge the fact that 'traditional legal pluralism' also deals with identifiable 'real sites of law'. See Kleinahns and MacDonald 1997 at 39.

130 It became law on the 25th May 2010 and commenced on the 25th June 2010.

Protection Bill<sup>131</sup> and the Amnesty Act<sup>132</sup> respectively), while at the same time proposing to use non prosecutorial interventions like TJMs, truth and reconciliation as well as compensation. In the same breath, amnesties continue to be granted to reporters yet at the same time, constitutionality of the Amnesty Act is being challenged before the Supreme Court of Uganda.<sup>133</sup>

In essence, CLP conceives of the law 'as an exercise in hermeneutics.'<sup>134</sup> Writing about language translation, Gadamer, argues that 'every language can be learned so perfectly that using it no longer (needs) translating from or into one's native tongue, but thinking in the foreign language.'<sup>135</sup> This means that in order to appreciate the 'otherness' of other normative regimes, there must be a *genuine* engagement with how their 'otherness' operate. This understanding should however not be merely an exercise in looking for similarities about a preconceived idea of say justice and punishment. Rather, it should instead be an attempt to separate our own preconceived views from what we seek to understand.<sup>136</sup> This is because it is impossible to claim that understanding has occurred 'when we try to intercept what someone wants to say to us by claiming we already know it.'<sup>137</sup> Gadamer suggests that having an understanding of the otherness of the other language, needs mastering the language before one can understand it.<sup>138</sup> A 'conversation' would then ensue as a process of 'coming to an understanding in which each person/ entity/ judicial mechanism opens up to the other, truly accepts his point of view as valid and transposes himself into the other to such an extent that he understands not the particular individual, but what he says.'<sup>139</sup> In reference to the AAR, this would require discovering how these different alternative justice mechanisms -especially TJMs- process, understand and

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131 This Bill has been before the Ugandan Parliament since 2012. The Law Reform Commission is still soliciting views on some of the provisions of this Bill. The author was honoured to represent the School of Law Makerere University at a workshop to discuss this Bill last year.

132 The mandate of the Amnesty Act has been extended until May 2015 and the grant is unconditional. See Yasiin Mugerwa, 'Lawmakers agree to extend Amnesty Act,' Daily Monitor, May 16 2013 <<http://www.monitor.co.ug/News/National/Lawmakers-agree-to-extend-Amnesty-Act/-/688334/1854016/-/24j4chz/-/index.html>> accessed October 31, 2013.

133 According to Principal State Attorney Ms. Patricia Mutesi, the Amnesty Act contravenes the Constitution of Uganda when it interferes with the independence of the Directorate of Public Prosecutions. See LRA's Kwoyelo Trial: State Attorney Challenges Amnesty Act, 20th March 2014 <[http://www.judicature.co.ug/data/incourt/72/LRA's\\_Kwoyelo\\_Trial:\\_State\\_Attorney\\_Challenges\\_Amnesty\\_Act.html](http://www.judicature.co.ug/data/incourt/72/LRA's_Kwoyelo_Trial:_State_Attorney_Challenges_Amnesty_Act.html)> accessed October 31, 2014.

134 See Hans-Georg Gadamer, 'Truth and Method Second Revised Edition Trans. Revised by Joel Weinsheimer and Donald G. Marshall Continuum London NY 2004 at 385.

135 Ibid.

136 Ibid.

137 Ibid.

138 Ibid.

139 id at 387

implement justice. Similarly, in order to have a 'conversation' on how the normative orders like the TJMs operate, it is important that critics of TJMs make a genuine effort to understand them without preconceived ideas. It would mean that the OTP/ICC would have to set aside its literal interpretation of the concept of complementarity when trying to understand the nature, goals and contribution of TJMs to a sustainable post conflict transition. It would mean that TLP would have to do away with its tendency to create properly defined spaces where these TJMs should operate.

Critical pluralists further seeks to understand 'how each legal regime is at the same time a social field within which other regimes are interwoven, and a part of a larger field in which it is interwoven with other regimes.'<sup>140</sup> While these normative orders might be independent, they are also 'interdependent...whereby... one aspect, such as law, kinship or the belief system cannot be extracted from the entire socio-cosmic system without taking it out of context.'<sup>141</sup> By way of example, a man of the Kakwa tribe living in Northern Uganda cannot separate his religious beliefs from his customs. His dress code is informed by his Islamic religious beliefs which also affect his perception of justice. Although he lives in Uganda, he speaks the *Kiswahili* language in addition to his native language and the official English language. All these normative orders affect his perception of the law. This means that in the event that conflict arises and needs to be resolved, any intervention that is independent of the above web of normative orders will not either not be sustainable or will out rightly be rejected by the people for whom it is targeted.

In order to appreciate the plurality and interconnectedness of the various multiple normative orders which are operating in the same time and space, it is important to highlight the 'constructive, creative capacities of legal subjects.'<sup>142</sup> These legal subjects (referred to as 'citizen subjects'<sup>143</sup> or 'individual subjects'<sup>144</sup>) play a crucial role in creating,

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140 Kleinmans & Macdonald, (1997) 25

141 Tanja Hohe and Rod Nixon, 'Reconciling Justice 'Traditional' Law and State Judiciary in East Timor' Final Report, Prepared for the United States Institute of Peace, January 2003 at 12 <<http://www.gsdr.org/docs/open/DS33.pdf>> accessed October 31, 2013.

142 Emmanuel Melissaris, 'The More the Merrier? A New Take on Legal Pluralism' *Social Legal Studies* 2004; (13) (1) at 58. Tamanaha B Z, 2008 'Understanding Legal Pluralism: Past to Present, Local to Global' *Sydney Law Review* [Vol 30: 375 -411 <http://www.jus.uio.no/smr/english/research/areas/diversity/Docs/understanding-legal-pluralism-past-to-present-local-to-global.pdf> accessed October 31, 2013.

Santos, Boaventura de Sousa (1995) 'Toward a New Common Sense: Law, Science and Politics in the Paradigmatic Transition. London: Routledge at 473. See also Santos, Boaventura de Sousa (1987) '*Law. A Map of Misreading. Toward a Postmodern Conception of Law*'. *Journal of Law and Society*, 14: (3) pp. 279-302 at 297 -298.

143 The citizen subject of the law is a merger between three categories of people identified by Mamdani as having existed during colonialism: the citizen who was the creation of the colonial state and accorded rights of free association, free publicity and eventually political representation. This citizen was mainly the settler, the *colon* and a handful of select indigenous people. Mamdani identifies the subject as the 'predominantly rural populace' who were subjected to tradition and Native authority. Mamdani also identifies another group of urban based natives who were 'middle- and working-class persons who were neither rights-bearing citizens, nor subject to the 'lash of customary law'. In most

contesting, and amending, and interweaving the law.<sup>145</sup> As noted earlier, this individual subject can be found anywhere.<sup>146</sup> He or she is the person who Stromseth identifies as having a multitude of ways in which he ‘perceives justice since he is part and parcel of the interwoven network of normative orders operating in the same time and space.’<sup>147</sup> There are two areas in which the citizen subject is most active: the first is in understanding/perceiving justice while the second is in generating normativity.<sup>148</sup> A subject’s perception of justice plays an important role in how such a subject, will respect the institutions which he or she perceives as providing meaningful justice.<sup>149</sup> This knowledge is informed by both the cultural setting in which the subject is domiciled as well as by the internal and external influences with which the subject interacts in his or her day to day affairs. In so doing there is no distinction between normative orders because these normative orders cannot exist outside the creative capacity of the subject.<sup>150</sup> It is this knowledge of the individual subject that partly explains the diverse responses to what is

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countries, these categories of people were to a large extent eradicated by the post colonial governments leaving a new category that adhered to the dictates of tradition and enjoying the rights that accrue from being a citizen. See Mahmood Mamdani 1996 *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* Fountain Publishers Kampala at 19. See also See Martin Murray ‘Review: Configuring the Trajectory of African Political History *Canadian Journal of African Studies / Revue Canadienne des Études Africaines*, Vol. 34, No. 2. (2000), pp. 376-386. <http://links.jstor.org/sici?sici=0008-3968%282000%2934%3A2%3C376%3ACTTOAP%3E2.0.CO%3B2-%23> accessed March 28, 2014.

- 144 Kleinmans & Macdonald., ‘What is Critical Legal Pluralism?’ (1997)12 *Canada J.L& Soc.* 25 at 38.
- 145 G. Bachelard, *La Poétique de l’espace* (Paris: Presses Universitaires de France, 1958) C. 10. in Kleinmans & Macdonald., ‘What is Critical Legal Pluralism?’ (1997)12 *Canada J.L& Soc.* 25 at 38. See also G. Bachelard, *La Poétique de l’espace* (Paris: Presses Universitaires de France, 1958) C. 10. in Kleinmans & Macdonald., ‘What is Critical Legal Pluralism?’ (1997) 12 *Canada J.L& Soc.* 25 at 38. Kleinmans and MacDonald 1997:40; See also Nakitto Saidat, ‘The International Criminal Court, National Courts, Truth Commissions and Peace Negotiations; Complimentary or Alternatives to the Restoration of Peace in Northern Uganda.’ <http://ssrn.com/abstract=1400048> at 14; See also Kleinmans and MacDonald 1997:40; See also Nakitto Saidat, ‘The International Criminal Court, National Courts, Truth Commissions and Peace Negotiations; Complimentary or Alternatives to the Restoration of Peace in Northern Uganda.’ <http://ssrn.com/abstract=1400048> at 14
- 146 Mamdani argues that colonial sub-saharan African countries were ‘bifurcated’ states - states divided distinctly into the ‘civilised’, white urban space with modern rules, development, infrastructure etc and the ‘uncivilised’ or traditional countryside which was underdeveloped and was not modern. It can be argued that this is the individual citizen that is referred to by CLP. See Mahmood Mamdani 1996 *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* Fountain Publishers Kampala at 19. See also See Martin Murray ‘Review: Configuring the Trajectory of African Political History *Canadian Journal of African Studies / Revue Canadienne des Études Africaines*, Vol. 34, No. 2. (2000), pp. 376-386. <http://links.jstor.org/sici?sici=0008-3968%282000%2934%3A2%3C376%3ACTTOAP%3E2.0.CO%3B2-%23> accessed March 28, 2014.
- 147 Jane Stromseth ‘Strengthening Demand for the Rule of Law in Post-Conflict Societies’ 18 *Minn. J. Int’l L.* 415 (2009) at 420.
- 148 See generally S.C. McGuire, ‘Critical Legal Pluralism: A Thought-Piece on a Direction for Socio-Legal Studies’ (Doctoral dissertation, Faculty of Law, Mc Gill University, 1996 [Unpublished]. in Kleinmans & Macdonald., at 39.
- 149 id
- 150 The individual citizen subject negotiates the creation or amendment of the law in a political process. See Kleinmans and MacDonald (1997)40; See also Nakitto Saidat, ‘The International Criminal Court, National Courts, Truth Commissions and Peace Negotiations; Complimentary or Alternatives to the Restoration of Peace in Northern Uganda.’ <http://ssrn.com/abstract=1400048> at 14. See generally M. King , ‘The Truth About Autopoiesis’ (1993) 20 *Journal of Law and Society* 218 at 223., See also discussion by B. Z. Tamanaha, ‘An Analytical Map of Social Scientific Approaches to the Concept of Law’ ( 1995) 15 *Oxford Journal of Legal Studies* 501

perceived as justice among victims of Northern Uganda.<sup>151</sup> This means that for any post conflict intervention in Northern Uganda to be sustainable, it ought to ensure that it answers all the various needs and goals expressed by the survivors of the conflict.

Secondly, the citizen-subject is actively involved in generating normativity.<sup>152</sup> This is about active involvement in the invention as well as in abiding by the law.<sup>153</sup> As an inventor of the law, CLP considers the subject self as ‘an irreducible site of inter-normativity.’<sup>154</sup> Like the biological nucleus, the power to create, destroy and also recreate or amend and subsequently obey, is found in the nucleus and similarly in the subject.<sup>155</sup> The citizen-subject is not merely a subject of the law (that is, one that obeys and abides) but is also a creator and amender of the law. Confirming the role of the citizen subject, Martin Luther King Jr. argued, ‘one has not only a legal, but a moral responsibility to obey just laws. Conversely, one has a moral responsibility to disobey unjust laws.’<sup>156</sup>

In other words, the individual has the inherent capacity to resist a bad law and in this process cause it to be amended and or outlawed. It is the individual’s personal circumstances which will cause him to either resist or amend the prevailing laws or customs: For example, a refugee mother in England who hails from Sebei (Eastern Uganda) is faced with the challenge of foregoing her tribal rites of passage into womanhood which require that her six year old girl child be subjected to female genital mutilation. However, in light of the knowledge she receives in her host country about the medical dangers of FGM, as well as the threat of legal sanctions if she were to carry out the act, the mother would have to weigh her options. On the one hand, she would either substitute another rite of passage into womanhood for her daughter as is promoted in Sebei today, or she would risk being prosecuted for her actions since FGM is now an offence in both Uganda and England. In adopting the former (or even latter option), the mother is actively involved in either resisting, abiding or amending the custom or the prevailing laws. In such a situation, the critical pluralist is interested in the process through which the mother amends the said law

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151 Ibid.

152 B. De Sousa Santos, ‘Three Metaphors for a New Conception of Law: The Frontier, the Baroque, and the South’(1995) 29 *Law and Society Rev.* 59 at 573., See also P. Fitzpatrick, ‘Law, Plurality and Underdevelopment’ in D. Sugarman, ed., *Legality, Ideology and the State* (London: Academic, 1983) 159 at 175

153 Ibid., See also A. MacIntyre, *After Virtue: A Study in Moral Theory* (Notre Dame: University of Notre Dame Press, 1984) at 220. He states ‘I inherit from the past of my family, my city, my tribe, my nation, a variety of debts, inheritances, rightful expectations and obligations. These constitute the given of my life, my moral starting point.’

154 Kleinhans and Macdonald. ‘What is Critical Legal Pluralism?’ *ibid.*, 39.

155 Ibid.

156 Martin Luther King Jr., ‘Letter from a Birmingham Jail,’  
<[http://www.africa.upenn.edu/Articles\\_Gen/Letter\\_Birmingham.html](http://www.africa.upenn.edu/Articles_Gen/Letter_Birmingham.html)> accessed October 31, 2013.

or custom rather than the end product.<sup>157</sup> The example above reveals that the mother has a normative limit as a citizen subject – universal human rights which apply internationally. This means that she cannot do as she pleases simply because she has the ability to do so. Rather, her position as a citizen subject is subject to other universal standards. Since she does not live in an island, the citizen subject will also often be subjected to the rights of others as is envisaged in the Constitution of Uganda. Thus, in case of Northern Uganda, those who would rather forgive the perpetrators of the Northern Uganda conflict might only be able to express this desire as in the case of the relatives of Thomas Kwoyelo, but will be subjected to the interest of the State (GoU) which are to pursue criminal justice for the victims and survivors of his alleged actions. This same is true for Dominic Ongwen – there might be those who argue that Ongwen is a victim as well as a perpetrator who should not be tried at the ICC. These views, though legitimate in their own right, have not been upheld by those with the power to decide the way forward. As such, Ongwen is now facing trial before the ICC. What is important is that the views of the citizen subject be listened to but they should not trample on the views of others who may or may not be in the majority. Indeed, justice for some may only be the fact that they have had the opportunity to give their side of the story even if the courts do not agree with them in the final verdict. At the end of the day, democracy, the rule of law and constitutionalism ought to prevail as is expected in a free and democratic society.

In light of the above, it should not be surprising that those who supported a peaceful resolution of the conflict and amnesty will now advocate for retributive justice against those who initiated the conflict. This could be due to a number of reasons like the fact that the guns have since gone silent or a compromise has been reached with those who supported trial justice, to have some prosecutions carried out. Post conflict interventions should, therefore, be open to the fact that not only are the goals and needs of the victims and survivors numerous, they are also bound to change as their circumstances change.

The case study of the AAR was selected since it involves situations where the parties chose to create a new approach to resolving violent conflict even though the ICC had already indicted the top leadership of the LRA/M. The Juba case study revolves around the first indictments and arrest warrants in the history of the ICC, the first state referral, the first attempt by a state to withdraw a case from the ICC as well as the first attempt by a State to apply TJMs as an argument around the concept of complementarity. Uganda sought to

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157 R.A. McDonald, *R 'Here, There ... and Everywhere –Theorizing Legal Pluralism; Theorizing Jacques Vanderlinden'* in N. Kasirer, ed., *Étudier et enseigner le droit: hier, aujourd'hui et demain –Études offertes à Jacques Vanderlinden*, Montreal, Éditions Yvon Blais, 2006, 381.

reclaim its ability to address a situation previously referred to the Court through means that were never envisaged by the OTP/ICC.<sup>158</sup> This case study presented an opportunity to analyse why the parties to the AAR chose to provide for the use of TJMs in post conflict justice. Lastly, the case study opens the space for developing a framework through which the OTP/ICC can have a more effective understanding of how the key provisions of the AAR are in keeping with Uganda's commitments under the Rome Statute.

## 1.6 OUTLINE OF THE THESIS

Chapter one has presented the thesis claims in this study and outlined their significance to Uganda, to international criminal law and to the way we ought to think about pluralism. The chapter has given a brief overview of relevant literature on this subject so as to situate the specific contribution made by the study to the current debates in this area. The Chapter has also described the case study methodology and why it was chosen. Chapter Two gives a brief background to the peace process and highlights the multiple needs and goals which a sustainable settlement needs to address after violent conflict. Chapter Three engages with the Juba Peace process and describes the key aspects of the negotiations. It analyses the importance of the TJMs to the AAR and critically investigates how they are understood in terms of their perceived roles in responding to conflict as well as how they are debated and contested. The Chapter also analyses why TJMs were included in the AAR and investigates their capacity to address the multiple needs and goals of a sustainable settlement. Finally the chapter discusses how the GoU has sought to implement the provisions in the AAR.

Chapter Four concentrates on the referral of the LRA conflict to the ICC. It outlines the history, procedural, political and substantive strengths and weaknesses of international criminal law and notes the difficulties it has in engaging with a plurality of legal orders. It then discusses the concept of complementarity as it is understood by the Court and commentators on international criminal law, including an assessment of the significance of the ICC's complementarity approach to the conflict in Northern Uganda. The chapter

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<sup>158</sup> A state is deemed unable to carry out the investigation or prosecution, when there is a total or partial collapse of its judicial system and; (i) cannot detain the accused or have the accused surrendered to the authorities or bodies that hold him in custody; (ii) cannot collect the necessary evidence, or (iii) cannot carry out criminal proceedings. See Cassese (2003) 352. See also *Lubanga, Decision on the Prosecutor's Application for a Warrant of Arrest*, 10 February 2006, (ICC-01/04-01/06-8) para. 36. See also *Situation in the Democratic Republic of Congo ICC-01/04-01/06-32-Anx A1*, 21 March 2004 in Schabas (2011) 194-5. See also Paola Gaeta, 'Is the Practice of 'Self-Referrals' a Sound Start for the ICC?' (2004), (2) *J Int Criminal Justice* (2011) 9 (2) 949 -952; Andreas Muller, 'Self Referrals on Trial.', (2010) (8)(5) *J Int Criminal Justice* (2011) 9 (2) 1267 -1294; Darryl Robinson 'The Controversy Over Territorial State Referrals And Reflections On ICL Discourse.', (2011) *J Int Criminal Justice* (2011) 9 (2), 355-384

analyses how TJMs are treated within the ICC's approach and discusses whether this approach responds to the needs and goals of a sustainable settlement for Uganda.

Chapter Five analyses TLP's capacity to overcome the shortcomings of mainstream ICL. It gives an overview on the literature on TLP and analyses how TLP would interpret the TJM provisions in the AAR, drawing out similarities and differences with the interpretation proffered by ICL. The Chapter then considers how effectively a legal pluralist interpretation of the AAR responds to the needs and goals of a sustainable settlement for Uganda. Chapter Six gives an account of CLP and highlights the major differences between CLP and TLP. It analyses how CLP might interpret the TJM provisions in Juba, drawing out the similarities and differences with the interpretive frameworks proffered by ICL and TLP. It then considers how effectively a CLP interpretation of Agenda Item II responds to the needs and goals of a sustainable settlement for Uganda and spells out why it performs better than ICL and TLP. Chapter Seven concludes by reminding the reader of the analytical journey that has been taken and what has been learnt. It summarizes the thesis claims and findings briefly and restates the original contribution to knowledge. The Chapter also suggests implications of the research to the status role of TJMs in transitional justice negotiations as well as the implications of the research to Uganda. Finally the chapter suggests areas of further research to be done in the future.

# CHAPTER TWO: THE NEEDS AND GOALS OF SUSTAINABLE SETTLEMENT OF THE CONFLICT IN NORTHERN UGANDA

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## 2.1 THE HISTORY OF UGANDA AND THE LRA CONFLICT

Violent conflict in Uganda has taken place in various ways and as such, given rise to specific challenges. This chapter seeks to trace the key aspects of Uganda's history with the view to highlight some of the causes of conflict in the country generally and Northern Uganda in particular. In so doing, the chapter will identify the multiple needs and goals which a sustainable settlement needs to address in Northern Uganda.

The LRA/M rebellion can be traced back to the history of violence and conflict in the nation.<sup>1</sup> The bedrock of this was the British colonial system which increased the tension between the different ethnic groups in its bid to make the administration of the colony easier.<sup>2</sup> The result was a superficial divide between the northern ethnic groups and the Southern ethnic groups.<sup>3</sup> It would not be long before this system would give birth to the years of civil strife that were witnessed after Uganda became independent. With over thirty-five different ethnic groups, Uganda was a divided society right from the beginning, and these divisions would then play a major role in the conflicts that followed.<sup>4</sup>

## 2.2 AN EXPLORATION OF THE UGANDAN SOCIETY AND POLITICS

The world in general and Africa in particular is culturally heterogeneous. There is fusion of traditions across the porous borders. The peoples of Africa have continuously migrated within and out of Africa for a variety of reasons – wars, the search for food, land, water and good weather. These people's cultures, norms, traditions and laws changed as they travelled, amalgamated with other groups, broke off with others, conquered others, and so on.<sup>5</sup> Africa has over 3000 distinct ethnic groups.<sup>6</sup> Uganda has over 56 officially recognised

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1 See generally Edward Muteesa *The Desecration of My Kingdom* (London: Constable) 1972. See also Dirk Berg-Schlosser and Rainer Siegler, *Political Stability and Development: A Comparative Analysis of Kenya, Tanzania and Uganda* (Boulder: Lynne Rienner Publishers, 1990), 196. Gardner Thompson *Governing Uganda: British Colonial Rule and its Legacy* Fountain Publishers 2003), ., R.A. Atkinson, *The Roots Of Ethnicity: The Origins Of The Acholi Of Uganda Before 1800*, (Philadelphia, University of Pennsylvania Press, 1994); T.V Sathyamurthy, *The Political Development of Uganda 1900-1986* (1986) 77.

2 Thomas Pakenham, *The Scramble for Africa* (Abacus, London) 1991

3 Tanga, (2009), 66. See also Phares Mutiibwa., *Uganda Since Independence: A Story of Unfulfilled Hopes* (London: Africa World Press Inc., 1992).

4 Yoram Barongo, Ethnic Pluralism and Political Conflict in Kumar Rupesinghe (ed.) *Conflict Resolution in Uganda* (University Press, London 1989).

5 Ali A. Mazrui, 'The Africans: A Triple Heritage' BBC Publications London 1986.

ethnic groups.<sup>7</sup> These ethnicities can be divided mainly between the Bantu speaking groups of mainly the southern parts of the country and the Nilotic and Luo speaking groups who mainly occupy the Northern parts of the country. It is acknowledged that the main ethnic groups in the Bantu speaking groups, namely the Toro, Banyoro and Baganda, had and continue to have traditional monarchs whose ancestry is from the Luo speaking groups – a testimony to a ‘deeper plurality’ as explained by Santos.<sup>8</sup> In further testament to deeper plurality, there existed even smaller groupings or ethnic groups like the Banyala, the Baruuli and Bakooki which had been either conquered or amalgamated with the larger and stronger Kingdoms.<sup>9</sup>

To date some of these smaller groups are clamouring for recognition mainly by forming cultural institutions and demanding for recognition from the GoU.<sup>10</sup> This is normally accompanied by perks for the cultural leaders and political mileage for the GoU.<sup>11</sup> However, the recognition of these leaders has had the negative effect of causing division and segregation within the larger nationality of kingdoms and in some cases, has led to violence.<sup>12</sup> The GoU has been criticised for promoting disunity within these larger tribes

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6 See generally Christopher Ehret, *An African Classical Age: Eastern and Southern Africa in World History, 1000 B.C. to A.D. 400*, James Currey, London, 1998. See also Christopher Ehret and Merrick Posnansky, eds., *The Archaeological and Linguistic Reconstruction of African History*, University of California Press, Berkeley and Los Angeles, 1982. See also Anouk Zijlma, ‘Facts about Africa’ <<http://goafrica.about.com/od/africatraveltips/a/africafacts.htm>> accessed March 22, 2014.

7 Nigeria alone has more than 370 recognised tribes. This means that there are other groups like the Somalis, the Indians, the English and other nationalities who are not considered to be ethnic to the country but nevertheless are resident in its borders. See generally, RLP ‘Peace First, Justice Later: Traditional Justice in Northern Uganda 23

8 Merry refers to it as ‘new legal pluralism.’ See Santos Bds 2002 ‘*Toward a New Legal Common Sense: Law, Globalization and Emancipation*. Cambridge, UK/New York: Cambridge Univ. Press. 2nd edn. at 95, Woodman GR 1998 Ideological Combat and Social Observation: Recent Debate About Legal Pluralism’ *Journal of Legal Pluralism* 40 at 21-60 and Griffiths A. 2002 Legal Pluralism. In *An Introduction to Law and social Theory*, edn. R Banakar, M.Travers, pp. 289-310. Oxford: Hart

9 These smaller ethnic groups have only recently been recognised by the State. See also Joanna R. Quinn ‘Tradition?! Traditional cultural institutions on Customary Practices in Uganda’, <http://politicalscience.uwo.ca/faculty/quinn/traditionalculturalinstitutions.pdf> accessed March 2 2013. It has been argued that in order to undermine/curtail the growing power of the older Kingdoms especially Buganda, these subgroups have been legally recognised. At the same time, older Kingdoms like Ankole from which the current President originates have not been recognised to ensure that The President is not put in an awkward situation of saluting a subordinate to the State. See generally Musaaazi Namiti, ‘Is Buganda still relevant as a monarchy in the 21st century?’ *The Daily Monitor* on line July 23, 2013 <http://www.monitor.co.u/SpecialReports/Is+Buganda+still+relevant+as+a+monarchy+in+the+21st+century/-/688342/1924228/-/> accessed September 17, 2013.

10 This is normally accompanied by demands for new districts which are normally based on tribal and clan inclinations. The Minister for Local Government Mr. Adolf Mwesige, under whose docket these demands fall, the minister informed the author that over 80 applications had been made before the Ministry put a stop to the process. (Discussion on 10/7/2014) The Minister subsequently reported that there was no more money to run or create more districts. See Anita Ashaba, ‘Mwesige: Government Has No Money To Run New Districts’ *UG News*, September 4, 2014 <<http://news.ugo.co.ug/mwesige-government-money-run-new-districts/>> accessed November 4, 2014.

11 Some of the new Kingdoms include the Rwenzururu Kingdom in Western Uganda.

12 In September 2009, there were violent riots in Kampala, Mukono, Mpigi, Kayunga and Masaka as a result of the refusal by the GoU to allow the Kabaka of Buganda to travel to a part of his Kingdom (Kayunga) where the leader of the Banyala was trying to secede from Buganda Kingdom. See ‘2009 Buganda Crisis’, <<http://www.independent.co.ug/cover-story/2327-2009-buganda-crisis>> accessed September 17, 2012. See also

and refusing to recognise others like the Ankole Kingdom which existed even before the advent of colonialism. On the other hand, the creation of these hitherto nonexistent cultural institutions can be seen as a testament to the ability of human beings to organise themselves in various ways. It also confirms that human beings are agents of their own destiny and indeed are not homogenous. It can be concluded that the high number of ethnicities in the country, the rising population, as well as the intra tribal conflicts are already recipes for conflict as competition for the resources of the nation occurs.

### 2.2.1 Interlacustrine Kingdoms

The Kingdoms in the interlacustrine region of Uganda like Bunyoro-Kitara, Buganda, Toro, Ankole and the chiefdom of Busoga had very similar cultural practices in addition to a common heritage like the 'ntu' language dialect, names and idioms.<sup>13</sup> Apart from the chiefdom of Busoga, the Kingdoms were considered by the early explorers (and later the colonial masters) to be highly stratified and well organised.<sup>14</sup> They had similar laws and some of their leaders were formerly princes of the older Kingdoms.<sup>15</sup> The legislative power in these Kingdoms belonged to the Sovereign/King who ideally gave and took such power from his chiefs at will.<sup>16</sup> The King was responsible for the religious and ritual well-being of the state and the whole state pivoted around him.<sup>17</sup> Every edict and tax was collected in the name of the King and consequently there existed a 'huge bureaucratic network which

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Peter Greste 'Royal riots expose Uganda tensions' BBC News, September 12, 2009 <<http://news.bbc.co.uk/2/hi/americas/8260130.stm>> accessed September 12, 2012.

13 For example both Omukama Kabalega and later on Kabaka Daudi of Buganda used the name 'Chwa'. See Roscoe, J. 1923, 'The Bakitara' Cambridge: Cambridge University Press. For a detailed expose, see Bryan Kirwan, 'Place names, proverbs, idioms and songs' in *Prelude to East African History*, edn. M. Posnansky (London: OUP, 1966), 138. These similarities are common across Africa; for example in Sierra Leone, the 'cooling of hearts' process for the child ex-combatants is similar to the one carried out by the Acholi of Uganda. See generally, Rosalind Shaw, *Rethinking Truth and Reconciliation Commissions: Lessons from Sierra Leone*, United States Institute of Peace, Special Report 130 (February 2005),9

14 See generally T.V. Sathyamurthy, *The Political Development of Uganda, 1900-1986* (London: Gower, 1986)

15 The first King of Toro, Kaboyo Olimi I was the eldest son of the Omukama of Bunyoro-Kitara, Nyamutukura Kyebambe III. Similarly some of the chieftaincies of Busoga migrated (or broke away) from the huge Kingdom of Bunyoro Kitara. See generally Ingham, Kenneth. *The Kingdom of Toro in Uganda*. London: Methuen, 1975

16 Ham Mukasa recounts an incident when he had been erroneously arrested and the King came to his rescue. '...I was also at one time accused for having stolen the plunder for the king after a war. The chief called Sabakaki arrested me. But when they told the king he set me free. He told them, 'You have no right to imprison my servants without getting an order from me...' <<http://hammukasa-buganda.webs.com/theroadtofame.htm>> accessed September 17, 2013. See also Andrew Reid 'The character of urbanism in inter-lacustrine eastern Africa' at 2 <[http://www.uu.se/digitalAssets/9/9413\\_reid.pdf](http://www.uu.se/digitalAssets/9/9413_reid.pdf)> accessed September 17, 2013.

17 See Andrew Reid 'The character of urbanism in inter-lacustrine eastern Africa' <[http://www.uu.se/digitalAssets/9/9413\\_reid.pdf](http://www.uu.se/digitalAssets/9/9413_reid.pdf)> at page 2 accessed September 17, 2013. See also Roscoe, J. *The Baganda* (Cambridge University Press, 1911) Kiwanuka, M. S. M. 1971. *The Kings of Buganda*. (East African Publishing House, 1971).

administered political control' on his behalf.<sup>18</sup> In most interlacustrine Kingdoms, the law of the sovereign/King was paramount and chiefs largely governed at his behest.<sup>19</sup> The King and his chiefs assumed the role of 'judge' and personally dispensed with disputes. These chiefs would easily be demoted at the pleasure of the King.<sup>20</sup> There was a wide range of crimes for which citizens would be punished. The King was guided by the tradition of his ancestors, the culture of his people and new religions and technology when dispensing justice.<sup>21</sup> In some cases, human sacrifices were made to appease the gods and ancestors. Punishments were very diverse and tended to be largely retributive.<sup>22</sup> They included starvation,<sup>23</sup> firing squad, the confiscation of property, burning by fire,<sup>24</sup> banishment, beheading or being sold into slavery.<sup>25</sup>

A close scrutiny of the Kingship shows that there were checks to this power through the use of traditional and cultural practices.<sup>26</sup> Additionally, there were situations where the Kings' powers were challenged. These came in the form of wars from fellow kings, and rebellion from mainly princes. An example was the creation of the Kingdom of Toro by Omukama

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18 All this was made possible because of a more favourable climate as well as the possibility of getting labour from the Northern ethnic groups of Uganda either through raids or trade. See generally 'Uganda –Social Change' <http://countrystudies.us/uganda/33.htm> accessed February 19, 2013.

19 T.V. Sathyamurthy, *The Political Development of Uganda, 1900-1986* (London: Gower, 1986) citing John Middleton, *The Lugbara of Uganda* (New York; Holt, Reinehart and Winston, 1965); John Middleton and D. Tait (eds.), *Tribes without Rulers* (London: Rutledge and Kegan Paul, 1958), C.G Seligman, *The Races of Africa* (London: Oxford University Press, 1957), Ogot, B.A, 'Oral traditions and the historian' in *Prelude to East African History*, edn. M. Posnansky (London: OUP, 1966), 137,148. See generally 'Ingham, Kenneth. *The Kingdom of Toro in Uganda*. London: Methuen, 1975. J. Roscoe *ibid*, 51. Beattie notes that the value of the kingship is stressed in tradition, myth, ritual and ceremony(y). See J. H. M. Beattie, 'Bunyoro: An African Feudality?', (1964), 5( 1) *The Journal of African History*, 25-36.

20 J. Roscoe, *'The Bakitara or Banyoro' The First Part of the Report of the Mackie Ethnological Expedition to Central Africa* (London: CUP,1923) 87-113, J. H. M. Beattie, 'Bunyoro: An African Feudality?', *The Journal of African History*, 5( 1) (1964) 31., Some of the title reserved for the King are 'Agutamba' (he who relieves distress), and *Mwebingwa* (he to whom people run for help); the first name is part of his official title.

21 Roscoe, J. *The Baganda* *ibid*.

22 Ashe writes that ' Daily went up the terrible cries of unhappy victims, as they were deliberately hacked to pieces, with stripes of reed, sharp enough to be used as knives, condemned very often for nothing or merely for some breach of court etiquette. frequently furnaces were smoking, in which the agonised bodies of persons , innocent of any crime, were writhing in slow torture, till death, more merciful than their tormentors, ended their anguish and despair.' Ashe at 82. Mackay writes about gruesome human sacrifice meted out by Kabaka Mutesa. See A. Mackay letter, 29 September 1885, CMS Intelligencer, Feb 1886 quoted in T. Pakenham, *The Scramble for Africa* (London: Abacus, 1991), 302. Mutesa's son Mwanga also ordered the killing of Bishop Hannington as well as many of his royal pages who had converted to the Christian religion (T. Pakenham at 303)

23 John Hanning Speke: *Journal of the Discovery of the Source of the Nile* (London: William Blackwood and Sons, MDCCCLXIII) 375. However, Speke later recounts ordering a thief to be given 50 lashes for larceny and rebellion (403). Cunningham writes about personally witnessing a situation where a man lost his ears merely because his goat had 'nibbled a blade of corn on the King's land.' In another situation, 'inhabitants of a whole countryside were chased into Lake Victoria when the witches said it was required to relive the Queen Mother of a tooth ache or on some such frivolous pretext.'

24 Cunningham at 198. See also T. Pakenham, *The Scramble for Africa 1876-1912* (London:Time Warner Books 1991); John Hanning Speke: *Journal of the Discovery of the Source of the Nile* (London: William Blackwood and Sons, MDCCCLXIII) 375

25 Balikudembe, one of the King's men was beheaded for being a 'reader' that is, schooled in the ways of the missionaries as a Christian. (See Ashe 1890: 204)

26 Roscoe, J. *The Baganda* (Cambridge University Press 1911).

Kaboyo Olimi 1 who did so by rebelling against his father King Kyebambe III of Bunyoro Kitara.

These Kingdoms also expanded their territory either by force or by treaty. This involved outright conquest or amalgamating weaker ethnic groups into their 'protection'.<sup>27</sup> In some cases like Ankole, Rwenzururu and Basoga, colonial powers forged conglomerations of chiefdoms together into larger units so as to ease their governance work.<sup>28</sup> The end result was that the official law was not actually strictly pegged on the dictates of the King, but also on norms and customs operating within and contributing to what was considered the official laws of the land.<sup>29</sup> Additionally there were ethnicities like the Nubians who entered Uganda as mercenaries of the British Captain Fredric Lugard to subjugate the area now called Uganda. They were subsequently given land under the Buganda Land Law of 1908 which required that they pay allegiance to the King (Kabaka) of Buganda and as a consequence, a county chief (*Gombolola*) was appointed to manage their affairs as well as collect tax.<sup>30</sup> This also meant that they could also continue to practice their customs, practice their religion (Islam) and follow its edicts.<sup>31</sup> This means that the different cultural practices and laws of these smaller ethnic groups were slowly incorporated into the sovereign law of the land although some practices remained the preserve of these specific

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27 Prince Semei Kakungulu, a Muganda royalist General was also used by the colonialists to spread British colonial rule among the people of Eastern Uganda. In doing so, he was appointed President of Busoga, started a new religion of Judaism (Abayudaya) and helped to spread the Luganda language and culture in Eastern Uganda. See Arye Oded 'A History of the Abuyudaya Jews of Uganda' <<http://www.jewishvirtuallibrary.org/jsource/Judaism/uganda1.html>> accessed September 17, 2013. See also Michael Twaddle, 'The Nine Lives of Semei Kakungulu' (1985), *History in Africa*, (12) 325 <<http://www.jstor.org/stable/3171726>> accessed September 17, 2013.

28 Dr John Jean Barya notes 'Ankole kingdom has no historical legitimacy. It's a colonial creation. At the time of colonisation in 1901, Nkore kingdom comprised the present Kashari, part of Isingiro and Nyabushozi. There were also kingdoms like Mpororo, Igara, Buhweju and Buzimba. The British annexed them to Nkore kingdom and called it Ankole. Indeed, the king of Igara killed himself and refused to submit to the Nkore king. The one of Buhweju was killed in battle, [opposing the annexure of his kingdom]. Secondly, Ankole kingdom was very divisive. It had a caste system with Bahinda on top as the ruling group. Below them were the Bahima who owned cattle and the Banyankole or Bairu [who were agriculturalists]. Between 1962 -67, the kingship remained divisive because of those castes and political party lines along DP and UPC. Reviving it would be reviving those historical divisions, which we think have been minimized since the abolition of the kingdom. See Michael Mubangizi, 'Let's just forget Ankole kingdom' *The Observer Newspaper*, 15 December 2011 <[http://www.observer.ug/index.php?option=com\\_content&view=article&id=16319:lets-just-forget-ankole-kingdom](http://www.observer.ug/index.php?option=com_content&view=article&id=16319:lets-just-forget-ankole-kingdom)> accessed February 19, 2013.

29 See In the case of Ankole, Dr John Jean Barya, notes that the 'Kingdom' was inherently divided 'Besides, the rules of the kingdom in Ankole have never changed. The king, for instance, doesn't marry from Bairu, and, therefore, there is no cultural relationship between the Bahinda and the majority of the population. The kingship in Ankole has never been a cultural, but a political institution. The king had no cultural roles. Those roles were among the Bahinda. The rest of the society, he had nothing to do with them. So there was that cultural disconnect between the kingship and his so-called subjects. So, to say that we have a king of Banyankole now doesn't make any cultural sense. Since all the administrative, judicial and executive functions have been removed from the kings and cultural leaders, we think this would be an empty institution. Michael Mubangizi, 'Let's just forget Ankole kingdom' *The Observer Newspaper*, 15 December 2011 <[http://www.observer.ug/index.php?option=com\\_content&view=article&id=16319:lets-just-forget-ankole-kingdom](http://www.observer.ug/index.php?option=com_content&view=article&id=16319:lets-just-forget-ankole-kingdom)> accessed February 19, 2013.

30 See 'Abbey Kibirige Semuwemba, Who are the Nubians in Uganda? Where did they come from?' <<http://www.modernghana.com/news/336588/1/who-are-the-nubians-in-uganda-where-did-they-come.html>> accessed February 19 2013.

31 See A Brief History of Toro Kings <<http://www.torokingdom.org/dynasty.htm>> accessed September 17, 2013.

ethnic groups.<sup>32</sup> For example, the Nubians learnt to speak the language of their host nations but continued to speak their own language and to practice their own religion.

Whereas most Kingdoms were class based, having royalty, nobility (called the *Abalangira* in Buganda) and the equivalent of serfs (called *Bakopi* in Buganda Kingdom or *airu* in Ankole Kingdom), there still existed various opportunities for interaction between individuals of different strata in the society— be it through the military, religions, economics or traditional practices. It can be said that this pre- colonial society had always been ripe for the adoption of new ways of living, governance and culture.<sup>33</sup> For example, Buganda was characterised as being an ‘increasing penetration of mercantile capitalism, an expansion of literacy among a much wider segment of the population, as well as having a newly Christianized chiefly elite.’<sup>34</sup>

The above discussion highlights some important points: First, while the interlacustrine Kingdoms were viewed as being stratified with the King at the helm, the King was also bound by other normative orders and cultures which were part and parcel of the law of the land. The King was not a law unto himself. Secondly, Kingdoms were heterogeneous in so far as they had different classes of people as well as in the way they incorporated other smaller tribal practices in their ranks. This in itself would often be a cause of conflict as the smaller tribes continuously sought to fight for their existence within the bigger Kingdom. Thirdly, the influence of the colonialists showed that the Kingdoms incorporated other non-traditional practices into their ways of life – this included new religions, the use of guns, new dressing as well as language and writing.<sup>35</sup> It also shows that the laws of the land were a mixture of religious practices, foreign concepts, and newly created traditions.<sup>36</sup> This

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<sup>32</sup> For example, the Kingdom of the Rwenzururu was only recognised in 1962, having all along engaged in subjugation battles with the Banyoro and later the Batoro Kings. Around B.C. 2000 - AD 1200 the Rwenzururu Region was under several Bakonzo (Bayira) chiefdoms led by clan leaders with Kithasamba (a Spiritual being believed to have been in charge of Mount Rwenzori) as the overall King of nzururu (snow). For a detailed history see The History of Rwenzururu Kingdom <http://www.rwenzururu.org/history.php> accessed February 27 2013.

<sup>33</sup> For example the Kingdom of Buganda was considered as orderly with the advantage of having ‘extensive commercial ties throughout the region.’ Moreover, their Kabaka (King) was cooperative and welcomed ‘those who proselytized on behalf of world religions.’ This was therefore ‘an ideal environment for establishing a colonial presence.’ See Chanok, M. ‘Paradigms, Policies and Property: A Review of the Customary Law of Land Tenure. In: Kristin Mann and Richard Roberts (eds.), *Law in Colonial Africa*, (Portsmouth, NH: Heinemann Educational Books 1991) 61-84.

<sup>34</sup> See also Michael Twaddle, ‘The Nine Lives of Semei Kakungulu’ *History in Africa*, (1985), Vol. 12, 325 – 333 <<http://www.jstor.org/stable/3171726>> accessed September 17, 2013. See also Michael Twaddle ‘Kakungulu & the Creation of Uganda, 1868-1928, James Currey. London. 1993) <<http://www.questia.com/read/82313392/kakungulu-the-creation-of-uganda-1868-1928>> accessed September 17, 2013. Roscoe, J. *The Baganda* (Cambridge: Cambridge University Press 1911).

<sup>35</sup> For example, the Kingdom of Buganda has now introduced the use of leasehold landownership for those who have been occupying the Kabaka’s land under the customary land tenure.

<sup>36</sup> For example, the Kingdom of Buganda has abolished the ‘Nakku’ tradition which required the Kabaka to marry a 13 year old virgin girl as his ‘nakku’ or ‘first wife.’ See ‘Uganda abolishes the Nakku tradition’, 5 September 1999 <[allafrica.com/stories/199909050038.html](http://allafrica.com/stories/199909050038.html)> accessed January 7 2015. The King also abolished the tradition which forbade any of his subjects from having sex on his wedding night. The abolition of the Nakku tradition was as a

means that there was plurality in the cultural practices and laws of the Kingdoms. Such status quo is evident to this day and has an effect on the way conflicts in the Kingdoms are caused, sustained or resolved.<sup>37</sup>

### 2.2.2 The Segmentary Societies of Northern Uganda

The ethnic groups or nationalities in the northern region of Uganda include the Alur, Iteso, Madi, Akarimojong, Acholi and Langi peoples. These ethnic groups had 'developed a more sedentary economy relying largely on crop cultivation' and pastoralism.<sup>38</sup> The social organisation of these ethnic groups was mainly as gerontocracies where 'status distinctions were based on age, gender, and, in some cases, spiritual prowess.'<sup>39</sup> These ethnic groups were considered to be 'highly segmented societies, allowing their members to move away and rejoin a group without disrupting social relations or their pastoral life-style.'<sup>40</sup> Some ethnic groups like the Akarimojong had remained largely uninfluenced by external forces.<sup>41</sup> They lived 'separately from the rest of Uganda in a traditional and highly stratified society centred on cattle aspects of life'.<sup>42</sup> They were able to maintain their ancient cultures, indigenous knowledge, and judicial systems.<sup>43</sup> The Akarimojong are increasingly being encouraged to abandon their traditional nomadic lifestyle.<sup>44</sup>

To a large extent, the Akarimojong continue to 'rely heavily on the *akiriket* councils of elders to adjudicate disputes according to traditional custom.'<sup>45</sup> In spite of this, there is a change in this lifestyle mainly due to attempts by the state to address decades of political marginalisation, change of economic and cultural reliance on cattle, environmental change,

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result of criticism from Women and other human rights groups. See Michelle Boorstein, 'Uganda Tradition Stirs Questions –Wedding Fight Shows Updating 600-Year-Old Monarchy Isn't Easy, Seattle Times Newspaper, July 18, 1999 <community.seattletimes.nwsource.co./archive/?date=19990718&slug=297462> accessed January 7 2015., See also 'Uganda: Kabaka offered Virgin' The New Vision, March 30 1999 <allafrica.com/stories/199903300082.html> accessed January 7 2015.

37 The average Muganda has a plurality of fora through which he may resolve conflicts; through the formal courts, through the use of the Kabaka's chiefs or through the use of religious leaders.

38 Andrew Reid (n)2.

39 Ibid.

40 See generally 'Uganda –Social Change' <<http://countrystudies.us/uganda/33.htm>> accessed February 19, 2013.

41 Ben Knighton, *The Vitality of Karamojong Religion: Dying Tradition or Living Faith?* (Burlington: Ashgate, 2005).

42 Levi Ochieng, 'Peace Initiatives and Challenges in Karamojong Conflicts,' in *Living Beyond Conflict: For Peace and Tolerance* (Kampala: ABETO, 2000), 153. See also Bruno Novelli, *Aspects of Karimojong Ethno sociology* (Verona: Museum Combonianum No.44, 1988), 83.

43 Ben Knighton, *The Vitality of Karamojong Religion: Dying Tradition or Living Faith?* (Burlington: Ashgate, 2005).

44 See IRIN-Uganda: Weaning Karamoja off food aid' <<http://m.irinnews.org/report/96065/uganda-weaning-karamoja-off-food-aid#.VIJHAAAgLA>> accessed January 7 2015.

45 Bruno Novelli, *Karimojong Traditional Religion* (Kampala: Comboni Missionaries, 1999), 169-172, 333-340 quoted in Quinn and Hovil 2005:24

different development processes, and the ongoing forced disarmament process by the State's military forces.<sup>46</sup> This change has been brought about by the state and other actors like local leaders, the media, humanitarian agencies, and NGOs.<sup>47</sup> As a result, mainly young Akarimojong have abandoned their traditional lifestyles and moved into the urban and peri-urban areas.<sup>48</sup> These changes have had an impact on the people's attitudes towards wealth, development, conflict and justice. It also means that causes of conflict and the way they are resolved have changed. Wealth which was traditionally viewed in terms of cattle is now being viewed in terms of property, education, money in the bank and real estate. This brings with it new ways in which conflicts are created and resolved especially in light of the fact that the GoU carried out the forced disarmament mentioned above.

Another ethnic group – the Acholi – have also undergone similar changes. The ethnonym 'Acholi' did not exist before colonialism but was a creation of anthropologists.<sup>49</sup> The name was adapted from the word 'Shooli' which Arabic-speaking traders in the 19<sup>th</sup> century used to refer to the collection of over 60 chiefdoms living in the area that is now current day Northern Uganda and Southern Sudan.<sup>50</sup> These different chiefdoms were grouped together – for purposes of colonial administrative convenience- without due regard to their plurality of norms and traditions.<sup>51</sup> Some of these customs complimented each other while others were in conflict. In some cases, the customs shared commonality with the southern interlacustrine Bantu, while others did not.<sup>52</sup> The result of this 'merger' was the loss of some of these unique attributes within the different ethnic groups or clans at the expense of creating a new identity with which they are identified today.<sup>53</sup> This means that although the Acholi are considered the largest ethnic group in Northern Uganda, they were not a

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46 Eria Olowo Onyango 'Pastoralists in Violent Defiance of the State: The Case of the Karimojong in North Eastern Uganda' (Dphil thesis, University of Bergen 2010) 7 <[https://bora.uib.no/bitstream/handle/1956/3982/Dr.thesis\\_Eria%20Olowo\\_..?sequence=1](https://bora.uib.no/bitstream/handle/1956/3982/Dr.thesis_Eria%20Olowo_..?sequence=1)> accessed October 9, 2013.

47 Ibid.

48 Mubatsi Asinja Habati, 'Karamoja's Long Walk From Cattle Rustling To Modern Life' (*The Independent Magazine*, 20 May 2011) <<http://www.independent.co.ug/features/features/4203-karamojas-long-walk-from-cattle-rustling-to-modern-life>> accessed October 9, 2013; See also Eria Olowo Onyango (2010) supra.

49 The Acholi were also called 'Gang' or 'Gangi' or 'shuli' by their Langi and Nyoro neighbours R. Atkinson, 'The Evolution of ethnicity among the Acholi of Uganda: the pre-colonial phase', *Ethnohistory*, 36, 1 (1989), 19 - 43. See also Behrend 1999:14, Postlethwaite, J.R.P 'I Look Back' (T.V. Boardman 1947) 56 in Finnstrom (2008) 40-41.

50 See Webster, J. (1970) 'State formation and fragmentation in Agago, Eastern Acholi', *Provisional council for the social sciences in East Africa; 1st annual conference*, vol. 3., p. 168-197. See also Atkinson, Ronald Raymond (1994) *The roots of ethnicity: the origins of the Acholi of Uganda before 1800*. Kampala: Fountain Publishers.

51 id

52 F.K. Girling, *The Acholi of Uganda*, 120

53 David Ross Olanya, *Colonial Legacy, Access Political Economy of Land, and Legal Pluralism in Uganda: 1900-2010* <http://www.nai.uu.se/ecas-4/panels/121-140/panel-139/David-Olanya-full-paper.pdf> accessed February 19 2013.

homogenous group as evidenced by their different chieftaincies/clans like the Puranga, Lira-Palwo, Payera and Padibe among others.<sup>54</sup>

The Acholi also had inter-tribal relationships with other tribes in this region include the Langi, the Madi, the Ateker, the Alur, the Iteso, the Akarimojong, Lango-Omiro and the Lango-Dyang among others. Apart from raiding for each other's cattle, the relationship between the Acholi and their neighbours were in most cases cordial.<sup>55</sup> Relationships within the chieftaincies of the Acholi were soiled when some clans made alliances with other tribes.<sup>56</sup> Consequently, the region experienced both inter-tribal and intra-tribal conflicts – which were exacerbated by new comers like the Nubians, Arabs Egyptians and the British.<sup>57</sup> This was further complicated by the British system of indirect rule which also placed some tribes against others.<sup>58</sup> At the same time, for reasons such as self-preservation the Acholi joined with tribes like the Banyoro to fight the British and Buganda forces of conquest.<sup>59</sup> The above account is testimony to the different levels of interaction which the Acholi enjoyed.

The Acholi people also maintained a traditional government that was rooted firmly in their religious beliefs, norms and customs, which demanded peace and stability in Acholi land at all times.<sup>60</sup> This structure was maintained by anointed chiefs (*rwodi moo*) and traditional religion was the source of the principles of governance.<sup>61</sup> The appointment of the *rwodi moo*, was sealed with the anointment of sea butter tree oil which signified blessing from the supernatural powers.<sup>62</sup> They governed strictly through the intercession of 'masters of

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54 F Odoi-Tanga, 'Politics, ethnicity and conflict in post independent Acholiland, Uganda 1962-2006, (DPhil thesis, University of Pretoria 2009, 66 <<http://upetd.up.ac.za/thesis/available/etd-05162010-003240/>> accessed October 31, 2013.

55 Tanga 2009 at 66.

56 H. Behrend., Alice Lakhwena and the Holy Spirits, War in Northern Uganda, 1985-97 at 80. See F.K. Uma, 'Acoli-Arab-Nubian Relations in the (19th Century)', at 11 quoted in Tanga at 67., See also Titus Kakembo, 'The Conservative Nubians,' *The New Vision* Newspaper online 26 February 2009 <<http://allafrica.com/stories/200902270258.html>> accessed 11th February 2011.

57 It should be noted that Arab-Acholi relations were not always cordial. H. Behrend., *Alice Lakhwena and the Holy Spirits, War in Northern Uganda, 1985-97* at 80. See Uma, F. K. 'Acholi-Arab Nubian Relations in the Nineteenth Century.' B.A. Graduating Essay, Department of History, Makerere University (Kampala 1971) 11 quoted in Tanga (2009) 67.

58 J.P Barber, 'The Moving Frontier of British Imperialism in Northern Uganda 1888-1919, *Uganda Journal* (29) (1) 1965 27-40' quoted in Tanga (2009) 96.

59 Colville, H., *Land of the Nile Springs: Being Chiefly an account of how we fought Kabarega*: (London: Edward Arnold, 1895)

60 Latigo supra at 103.

61 Quinn notes that these chiefs are still referred to as the 'oiled' or anointed ones. See further Finnstrom (2008, 66). Ruddy Doom and Koen Vlassenroot, 'Kony's Message: A New *Koine*? The Lord's Resistance Army in Northern Uganda,' *Afr Aff (Lond)* (1999) 98 (390) 5, 11. The Lamogi rebellion, which was led by Rwot Onug and Otto, was carried out by clans like the Boro, Pamuca, Koch-Padaca and Pukure, against the imposition of chiefs that were unacceptable to their clan.

62 Latigo argues that the British colonialists stripped the chiefs of their political power, replacing them with colonial administrators. Cultural leaders were not sufficiently recognized again until a 1995 constitutional reform. Even then the re-emergence of the Ker Kwaro Acholi (KKA)—the cultural institution of the Acholi presided over by a paramount

ceremonies' known as the *luted-jok* and under the guidance of the most powerful Grand Council of Clan Elders.<sup>63</sup> This Council was the Supreme Court to try cases of mass killings and land disputes between different clans, essentially handling all cases of both a criminal and a civil nature.<sup>64</sup> Like the people in Gorongosa Mozambique, justice took both a spiritual and physical connotation. One couldn't do without the other.<sup>65</sup>

It is for this reason that the British colonial masters erred when they sought to appoint chiefs over people who did not want to be either ruled by strangers and by force. No wonder the appointed chiefs were referred to as *Kalam Omia*- which literally meant (authority derived from the 'pen of the colonialists').<sup>66</sup> Finnström notes that colonial officers appointed the *Kalam Omia* because they were frustrated that the local chiefs did not garner as much authority among their people as their counterparts did in either Buganda or England.<sup>67</sup> Hesketh Bell, a British colonial officer, captures the spirit of the appointments when he wrote -

(The native), unlike those of Uganda (Buganda) and Unyoro (Bunyoro), are apparently unwilling to submit to domination by chiefs. There are no powerful authorities through which we might transmit our directions and every group of families seems to live independently and to be more or less at variance with their neighbours.<sup>68</sup>

Such appointments were one of the contributing factors to intra tribal conflicts like the Labongo clan rebellion against Rwot (Chief) Eliya Alier from Payira clan.<sup>69</sup> The result of these appointments was animosity against the appointed chiefs and the colonial masters.<sup>70</sup>

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chief—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. Latigo, *supra* at 103.

63 *Ibid.*, The Grand Council also doubled as a 'Supreme Court' to try cases of mass killings and land disputes between different clans, essentially handling all cases of both a criminal and a civil nature.

64 See also Rev. Fr. Dr. Joseph Okumu: Acholi Rites of Reconciliation: The Amnesty Commission; Reconciliation in Action, Report 2007-2008

65 Victor Igreja et al. at 61., Cláudia Almeida, (2010) et al at 18.

66 Ford., M *Janani Luwum; The Making Of A Martyr*, ( London; Marshall Morgan & Scott 1978)15. See also Ruddy Doom and Koen Vlassenroot *supra* at 11.

67 Sverker Finnström (2008) 41

68 F.K. Girling , *The Acholi of Uganda*, 199

69 Dwyer, John O. *The Acholi of Uganda: Adjustment to Imperialism*. (Ann Arbor: University Microfilms International 1972) 19. See also R. M. Bere, 'An outline of Acholi History' *Uganda Journal* (1947) (11)(1), 8 quoted in Tanga (2009) 63., See also J. Lonsdale, 'Moral Ethnicity and Political Tribalism', in Kaarsholm and J. Hutlin (eds.) *Invention and Boundaries: Historical and Anthropological Approaches to the Study of Ethnicity and Nationalism*, (Roskilde, University: International Development Studies, Occasional Paper, (11) 1994)134.

70 Although the 'colonial ambition to unite the Acholi was ... a strategy to better administer the protectorate.' See Finnstrom (2008, 41). See also Postlethwaite, J.R.P 'I Look Back' (London: T.V. Boardman 1947)56 in Finnstrom (2008) 40-41. See also Tanga (2009)108.

In their bid to make governance easier, the colonial masters instead lit the fires of rebellion by clans like the *Boro*, *Pamuca*, *Koch-Padaca* and *Pukure*.<sup>71</sup> These rebelled against colonial policies like confiscation of their guns, payment of taxes, and the new social structure.<sup>72</sup> Most notable among the Acholi rebellions was the one conducted by the Lamogi clan between 1911 and 1912.<sup>73</sup> This rebellion, which was led by Rwot (Chief) Onug and Otto, the son of Rwot (Chief) Yai, was quelled with the help of both the Nubian and Ganda tribes.<sup>74</sup> The involvement of the Nubian and Ganda tribes in the Acholi rebellion is partly the reason why conflict between the interlacustrine kingdoms and some northern tribes exists.<sup>75</sup> It also partly explains why some post-independent governments like the one of Milton Obote and Idi Amin are reported to have targeted Acholi army officers for murder.<sup>76</sup> Additionally, since some Acholi clans had collaborated with the colonial masters, there existed mistrust and intertribal divisions within the Acholi. The mistrust between these Northern tribes and within the individual tribes exists to date and remains a source of conflict.<sup>77</sup>

In order to resolve the impasse within the Acholi tribe, a meeting was held in Gulu in August 1999. At the meeting, Acholi Elders from the different clans elected *Rwot* Acana II of the payira clan as the paramount chief (*Lawi Rowdi*).<sup>78</sup> The meeting also elected to choose the *Rwot* Atuka Otto Yai Otinga (who hailed from the Lamogi clan Gulu) and *Rwot* George

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71 When their rebellions failed, they run into the caves of Guruguru hills, but the British responded by poisoning them with chemicals until the people surrendered. They were then taken to Pece Internally Displaced People's camp, where many people died of diseases and starvation. See the Britain should pay reparation - demand Lamogi elders, Monday, 8th October, 2007 <http://www.newvision.co.ug/D/8/16/590848> accessed August 29, 2013

72 Similar rebellions included: The Nyangire-Abaganda rebellion of Bunyoro and Ankole, which was against the Baganda chiefs whom the colonial administration deployed in Bunyoro after the fall of the Omukama (king) Kabalega; the Nyabingi cult of Kigezi; the Mubende-Banyoro Association was formed in 1921 and revived in 1931 by E. Kaliisa to pressurize for the return of Bunyoro's lost counties from Buganda, among others <<http://www.enteruganda.com/about/history.php>> accessed 28th February 2011.

73 See the Britain should pay reparation - demand Lamogi elders, Monday, 8th October, 2007 <http://www.newvision.co.ug/D/8/16/590848> accessed August 29, 2013

74 Chris Ocowun., *Independence: Were the aims achieved?* The New Vision Newspaper, Friday, 8th October, 2010 <http://www.newvision.co.ug/D/9/183/734491> accessed 3 April 2011. Chiefs or *Rwots* appointed over these people like Awich of payira clan ( who later fell into disfavour with the British) used this colonial policy to settle personal scores and ended up 'exacerbating' division and manipulative politics that came to characterize British colonial rule in Uganda. See Finnstrom, *Living with Bad Surroundings: War and Existential Uncertainty in Acholiland in Northern Uganda* (Uppsala: Acta Universitatis Upsaliensis, Uppsala Studies in Cultural Anthropology No. 35, 2003), 64 -66. See further Tanga (2009), 99. See also 'Britain should pay reparation - demand Lamogi elders', Monday, 8th October, 2007 <<http://www.newvision.co.ug/D/8/16/590848>> accessed 3 April 2011.

75 See generally Hansen, H.B. & M. Twaddle (eds), *From Chaos to Order: The Politics of Constitution-Making in Uganda* (Kampala/London: Fountain/James Currey, 1995).

76 id

77 Per Professor Jakoyo Peter Occiti, of Gulu University in Peter Kimani 'Kony's Unholy War Spreads Terror in Uganda's North' June 16, 2005 <<http://www.mail-archive.com/ugandanet@kym.net/msg20256.html>> accessed 28th February 2011.

78 Liu Institute for Global Issues, Gulu District NGO Forum, '*Roco Wat I Acoli Restoring Relations I Acholi-Land: Traditional Approaches to Reintegration and Justice*', September 2005, at 31<[http://www.ligi.ubc.ca/sites/liu/files/Publications/JRP/15Sept2005\\_Roco\\_Wat\\_I\\_Acoli.pdf](http://www.ligi.ubc.ca/sites/liu/files/Publications/JRP/15Sept2005_Roco_Wat_I_Acoli.pdf)> accessed 2 July 2009.

William Lugai (from the Pajule clan in Kitgum-Pader) as deputy paramount chiefs.<sup>79</sup> In so doing, all the key clans within the Acholi ethnic groups were represented in its new leadership structure as a way of creating harmony within the tribe. This means that the current chiefdoms in Acholi land have evolved greatly compared to what they were before the advent of colonialism. This evolution testifies to the fact that the *modus operandi* of the traditional institution might change due to the underlying social, political and economic currents.<sup>80</sup> It is also an example of how local leaders will still use traditional institutions to find long lasting solutions to the issues that cripple their communities. Nonetheless, this might not always be the case as the chieftaincy of Busoga, (itself an amalgamation of the bid by the colonial powers to make governance easier), which had until recently, failed to resolve the impasse regarding who should be their next Paramount chief (Kyabazinga).<sup>81</sup>

In light of the above discussion, it can be concluded that; firstly, the colonial project privileged its own norms (state law) and those similar to them over those it did not quite understand or agree with.<sup>82</sup> Secondly, using its real (and sometimes perceived) power, the colonial project passed repugnancy clauses which declared as void, those normative orders which were seen to be particularly offensive.<sup>83</sup> The courts of the colonial powers would then be mandated to have the final say over these issues.<sup>84</sup> This meant that 'indigenous institutions and customs were largely untouched, unless they directly affected the state of the Europeans.'<sup>85</sup> The failure to erode these other normative orders meant that the colonial project had inadvertently created a 'dual legal system with various complex mixtures, combinations and mutual influences.'<sup>86</sup> As such there existed a 'hodgepodge of coexisting legal institutions and norms operating side by side, with various points of overlap, conflicts

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79 This *Larwi Rowdi* was also allowed to keep the title for life instead of having it rotate after every five years. In so doing, they hoped to avoid a rotation which would make the position vulnerable to political manoeuvring and cause disharmony.'

80 Postlethwaite, J.R.P 'I Look Back' (London: T.V. Boardman 1947)56 in Finnstrom (2008) 40-41.

81 Anthony Palapande, 'Busoga crowns new Kyabazinga' NBS News August 25, 2014 <http://www/nbs.ug/details.php?option=acta&a=3850> accessed 3 September 2014.

82 British Explorer John Speke's disdain for native practices is recorded in his diaries when he mentions 'Now I had made up my mind never to sit upon the ground as the natives and Arabs are obliged to do, nor to make my obeisance in any other manner than is customary in England.' By John Hanning Speke 'Journal of the Discovery of the Source of the Nile' (1868; Dover, 1996) -Reviewed by Sean Redmond in The Journal of African Travel-Writing, Number 3, September 1997 (pp. 87-91) 1997 The Journal of African Travel-Writing <http://www.unc.edu/~ottotwo/Spekereview.html>

83 See Uganda Order-in-Council, 1902 Section 20(a), contained a 'repugnancy clause'. It provided: 'In all cases, civil and criminal, to which the natives are parties, every court (a) shall be guided by native law so far as it is applicable and is not repugnant to justice and morality or inconsistent with any order-in-council or any regulation or rule made under any order-in-council or ordinance..' See also Morris, H.W. & J.S. Read, *Uganda: The Development of Its Laws and Constitution* (London: Stevens, 1966).

84 id

85 id

86 id

and mutual influence.<sup>87</sup> It is this state of affairs that was inherited by the post independent governments of Uganda.<sup>88</sup> These post-independence governments were faced with the herculean task of governing various communities that were ethnically and culturally divided and thus having conflicting allegiances to either their Kings or tribes.<sup>89</sup> The post-independence leaders sought to appease their closest constituencies at the expense of the nation and these led to military *coups d'état* and unnecessary killings as one group tried to gain control over the other.<sup>90</sup> This state of affairs remains to date.

### 2.3 THE LORD'S RESISTANCE ARMY REBELLION

Of all the armed conflicts that have happened in Uganda, the Lord's Resistance Army rebellion has been the most gruesome.<sup>91</sup> This rebellion has been led by Joseph Kony, and is itself a resurrection of Alice Lakhwena's Holy Spirit Movement.<sup>92</sup> The rebellion was partly triggered by the National Resistance Army (NRA)'s methods of consolidating control over parts of northern Uganda.<sup>93</sup> Doom and Vlassenroot<sup>94</sup> argue that in addition to north-south divide, the rebellion was also caused by factors like the use of mainly Acholi in the colonial

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87 This is what legal pluralists referred to as deeper pluralism. Lauren Benton describes one doomed British attempt to organise the unruly situation in India. He writes –

The relationship of indigenous and British forums, and indigenous and British legal practitioners, was specified in the 1772 reforms. A plan drawn up by Warren Hastings created two courts for each of the districts. One court, the Diwani Adalat, was to handle civil cases, while a second court, the Foujdari Adalat, was to oversee trials for crimes and misdemeanours. The revenue collectors of each district were to preside over the civil courts, thus consolidating in British hands control over revenue and property disputes. The civil courts would apply Muslim law to Muslims, and Hindu law to Hindus. The criminal courts would apply Muslim law universally. An appellate structure was also created, with one of two courts at Calcutta to hear appeals from inferior civil courts.... Though British (Company) officials would preside in civil courts, the system built in formal and informal roles for Mughal officials. In a move that was purely pragmatic, zamindars were allowed to maintain jurisdiction over local, petty disputes. They had no formal rights to such jurisdiction, but the system simply would not function effectively without their playing a role they had assumed in the Mughal system. The criminal country courts continued to be operated entirely by Mughal officers, and in the civil courts, Muslim and Hindu legal experts were given monthly salaries as Company employees for their work in advising on local and religious law.

See Lauren Benton, *Law and Colonial Cultures: Legal Regimes in World History, 1400-1900* (2002) at 134 in Tamanaha at 383.

88 For an in-depth account of the post independent governments of Uganda, see Ruddy Doom and Koen Vlassenroot, 'Kony's Message: A New *Koine*? The Lord's Resistance Army in Northern Uganda,' *Afr Aff* (Lond) (1999) 98

89 See generally Kanyeihamba, G.W., *Constitutional Law and Government in Uganda* (East African Literature Bureau, 1975).

90 See The Kabaka of Buganda, 'Desecration of My Kingdom' London: Constable 1967., Morris, H.W. & J.S. Read, *Uganda: The Development of Its Laws and Constitution* (London: Stevens, 1966), Oloka-Onyango, J., 'Judicial Power and Constitutionalism in Uganda', CBR Working Paper No. 30 (1993).

91 Catherine Barnes and Okello Lucima, 'Introduction,' *Accord* (2002) 11, 1., in Joanna R. Quinn, '*Getting to Peace? Negotiating with the LRA in Northern Uganda*, A Paper Prepared For Presentation At The Conference, 'Cross-Purposes? International Law and Political Settlements,' held by the Nationalism and Ethnic Conflict Research Group, The University of Western Ontario, London, ON: 9 June, 2007

92 This rebel force, which is a re-enactment of the late Alice Lakhwena's Holy Spirit Movement, has committed unspeakable war crime atrocities and crimes against humanity on the people of Northern Uganda, and surrounding areas. See Refugee Law Project 2004, Refugee Law Project 2005, Finnstrom 2008, Allen 2005, Waddell & Clark 2008).

93 Latigo, *supra* at 85.

94 Ruddy Doom and Koen Vlassenroot, 'Kony's Message: A New *Koine*? The Lord's Resistance Army in Northern Uganda,' *Afr Aff* (Lond) (1999) 98 (390) 5.

forces, militarisation of politics, the atrocities committed by Idi Amin against the Acholi, the alleged atrocities committed by Obote in the Luwero Triangle (during the NRA rebellion), the atrocities committed by the NRA against the people of Northern Uganda in 1986, and many others.<sup>95</sup>

A number of former Ugandan Army soldiers formed anti-government groups like the Uganda People's Democratic Forces, the Holy Ghost movement of Alice Lakhwena, the Lord's Army of Sevarinho Lukoya among others. These groups were either roundly defeated or they signed peace agreements with the GoU. However, apart from providing the rank and file of these rebel armies with resettlement packages, the root causes of the rebellions were never addressed.<sup>96</sup> This meant that there was fertile ground for the emergence of the LRA/M conflict, which enjoyed the support of the local people before it allegedly turned on them by abducting children, maiming, raping, plundering and killing.<sup>97</sup> Many people in the Greater Northern region of Uganda lost their lives, property, children and homes as a result of the rebellion. The abducted children were forced to participate in these actions by threat of death or witchcraft. Those children who were lucky to escape from the rebel hands and return home were left to deal with the horrendous psychological and physical effects of life as orphans, invalids, and the possibility of being shunned for either carrying babies produced as a result of rape or for killing their own kith and kin under duress.<sup>98</sup> It is contended that these are some of the reasons as to why the parties to the Juba peace process were successfully lobbied to provide for alternative justice processes including TJMs) to deal with the physical, mental, and psychological effects of this horrendous conflict.

The GoU reacted to this rebellion both militarily as well as through peace talks. Ugandan President Yoweri Kaguta Museveni, himself a former rebel leader, clearly preferred the

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95 See <http://www.issafrika.org/pubs/Monographs/No99/Append2.pdf> accessed 3 April 2014.

96 For example the Holy Ghost movement of Alice Lakwena and the Lord's Army of Sevarinho were defeated in 1987 and 1989 respectively.

97 The word 'allegedly' is used here because there are allegations that the UPDF also committed war crimes and crimes against humanity. See Olara Otunnu, *The Secret Genocide*, *Foreign Policy* (July/August) (2006)44-46. See also Human Rights Watch, 'Uprooted and Forgotten: Impunity and Human Rights Abuses in Northern Uganda' <<http://www.hrw.org/reports/2005/uganda0905/uganda0905.pdf>> accessed January 31 2014. Amnesty International AI Index: AFR 59/01/91 <<http://www.amnesty.org/en/library/asset/AFR59/009/1991/en/361d00c3-f946-11dd-92e7-c59f81373cf2/afr590091991en.pdf>> accessed February 4, 2014. See also Acholi Religious Leaders' Peace Initiative and the Justice & Peace Commission of Gulu Archdiocese 2001 'Let My People Go: The Forgotten Plight Of The People In The Displaced Camps In Acholi' <[http://www.archdioceseofgulu.org/JPC/LET\\_MY\\_PEOPLE\\_GO.pdf](http://www.archdioceseofgulu.org/JPC/LET_MY_PEOPLE_GO.pdf)> accessed January 31 2014., See also *Hon Okumu Reagan & Anor Vs Attorney General MA HCT 63/2002* where Justice Kania held in February 14, 2004 that one Oloya Peter a.k.a. Yumbe had been killed by the UPDF in Gulu Central Prison., *Nobert Mao Vs. Attorney General of Uganda* <<http://www.ulii.org/ug/judgement/constitutional-court/2003/3>> accessed 31 January 2014

98 Under Article 26 of the Rome Statute, the Court has no jurisdiction to try persons under the age of 18 years.

military option over the olive branch.<sup>99</sup> The military operations were numerous, and largely unsuccessful—with disastrous consequences for the masses.<sup>100</sup> For example, Operation Iron Fist which was conducted in 2002 and involved more than 10,000 UPDF soldiers. The LRA/M responded by carrying out vengeful attacks against civilians leading to many abductions, displacements and death.<sup>101</sup> The military operations were a failure and the humanitarian costs were so high that the Parliament of Uganda resolved to declare the Northern Uganda a disaster area.<sup>102</sup> This kind of devastating retaliation influenced organisations like the Acholi Religious Leaders Peace Initiative (ARLPI) to champion for peaceful ways to resolve the conflict.<sup>103</sup>

By 2004, over two million people in Northern Uganda had been displaced from their homes to internally displaced people's camps.<sup>104</sup> This figure didn't include those who were living in urban centres like Kampala.<sup>105</sup> The GoU also forced people into internally displaced people's (IDP) camps as a way of trying to protect them from the rebels.<sup>106</sup> These camps were allegedly poorly protected often, the LRA reportedly carried out attacks on the people living there. The camps were also poorly managed and some reports estimate that over 1000 people died each week as a result of the deplorable conditions in the camps.<sup>107</sup> Most of

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99 See Yoweri K Museveni 'Sowing the Mustard Seed: The Struggle for Freedom and Democracy in Uganda (Elizabeth Kanyogonya and Kevin Shillington eds) Macmillan Publishers Ltd London 1997. See also 'Uganda: Interview with President Yoweri Museveni.' IRIN, 9 June 2005, <<http://www.irinnews.org/report/54853/uganda-interview-with-president-yoweri-museveni>> accessed 31 January 2014. Mr. Museveni stated 'There are those who believe in the magic of the peace talks – which I do not believe in. However, I do not want to be obstructive to those who wish to pursue this avenue – if you believe that you can convince evil to stop being evil, go ahead. But in the meantime, I do not want to give up my option [the military option].' in Sarah M. H. Nouwen and Wouter G. Werner, 'Doing Justice to the Political: The International Criminal Court in Uganda and Sudan EJIL (2010), Vol. 21 No. 4) 941,948.

100 Lucy Hovil and Joanna Quinn, 'Peace First, Justice Later' Working Paper 17: (Kampala: Refugee Law Project, July 2005), 3. See also Joanna R. Quinn, 'Getting to Peace? Negotiating with the LRA in Northern Uganda.' A paper prepared for presentation at the conference, 'Cross-Purposes? International Law and Political Settlements,' held by the Nationalism and Ethnic Conflict Research Group, The University of Western Ontario, London, ON: 9 June, 2007.

101 Ibid.

102 This resolution was however rejected by the GoU for unclear reasons. Mercy Nalugo, 'House Sticks to Disaster Area Stance for North' *The Daily Monitor*, (Kampala, June 23, 2004) <<http://allafrica.com/stories/200406220997.html>> accessed March 18, 2014.

103 'DRC-Uganda: Deadly LRA Attacks Prompt Exodus in North Eastern DRC', IRIN, 30 Dec. 2008, <<http://www.irinnews.org/report/82140/drc-uganda-deadly-lra-attacks-prompt-exodus-in-northeastern-drc>> accessed March 17, 2014, and Eichstaedt, 'Uganda: Offensive against Kony Backfires', Institute for War and Peace Reporting, 8 Jan. 2009, <[www.friendsforpeacein africa.org/news/17-lra-updf-war/332-offensive-against-kony-backfires-iwpr.html](http://www.friendsforpeacein africa.org/news/17-lra-updf-war/332-offensive-against-kony-backfires-iwpr.html)> accessed March 17, 2014

104 Lomo, 'The International Criminal Court Investigations: Implications for the Search for Peaceful Solutions to the Conflict in Northern Uganda', Working Paper No. 2, (All Party Parliamentary Group on the Great Lakes and Genocide Prevention, July 2004) 3. See also Refugee Law Project, 'What About Us? The Exclusion of Urban IDPs from Uganda's IDP Related Policies and Interventions', Briefing Paper, Dec. 2007, <[http://www.refugeelawproject.org/files/briefing\\_papers/RLP.BP09.pdf](http://www.refugeelawproject.org/files/briefing_papers/RLP.BP09.pdf)> accessed March 17, 2014 .

105 id

106 Héloïse Ruaudel and Andrew Timpson, 'Northern Uganda – from a forgotten war to an unforgivable crisis – The War Against Children.' Institute for Security Studies Situation Report, 12 December 2005 <<http://www.issafrika.org/uploads/051212UGANDA.PDF>> accessed March 18, 2014.

107 Betty Bigombe and John Prendergast, 'Stop the Crisis in Northern Uganda,' *The Philadelphia Inquirer*, (21 February 2006).

them lacked basic human needs like food, clothing, adequate housing, and security. Resolve Uganda notes that the people suffered from starvation, poor sanitation, psychological trauma, lack of education, HIV/AIDS, among other social ills.<sup>108</sup> Local and international non-government organisations like MSF, Acholi Religious Leaders Peace Initiative (ARLPI), and others have also intervened through providing food relief, psychiatric counselling as well as medical care. Despite numerous declarations by the GoU that the LRA/M rebellion was over, the rebellion has continued to survive albeit in other countries.<sup>109</sup>

Earlier attempts at peace talks were made by the GoU in order to stop this rebellion. The talks were mainly initiated by the former Minister for the Pacification of the North, Betty Bigombe between 1992 and 1993. Surprisingly however, when the talks were about to be concluded, the President issued a seven-day ultimatum to the rebels ordering them to surrender or be dealt with by the GoU.<sup>110</sup> As a result, the peace talks crumbled and the LRA rebellion continued with the support of the Government of Sudan.<sup>111</sup> Other attempts at peace were made by the ARLPI which was formed in 1997, *Sant' Egidio*, a Catholic group from Rome, as well as *Kacoke Madit*, which was an assembly of mainly Acholi living in Europe and North America. When the aforementioned attempts at peace proved unsuccessful, local leaders began to campaign for amnesty as a way of encouraging the rebels to return home since most of them had been forcefully abducted at tender ages and forced into the rebellion.<sup>112</sup> Some of the local NGOs in Uganda which had advocated for amnesty to be given to the returning rebels argued that it was a sure way of encouraging those in rebellion to return home.<sup>113</sup> The group particularly targeted was the category of

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108 Resolve Uganda. 'Get Informed.' Updated: 27 November 2007. <http://www.resolveuganda.org/history> cited in Ruth Muth, *Child Soldiers in the Lords' Resistance Army: Factors in the Rehabilitation and Reintegration Process*, MA Thesis George Mason University 2008 at 18

109 Hudson Apunyo, 'Abia IDP Camp Marks 2nd Anniversary of Massacre,' (*The Monitor* (Kampala, 14 Feb. 2006).; Museveni stated 'the LRA have been defeated ... [t]he conflict in the north has been finished. We have defeated Kony,' and that 'security in northern Uganda has been restored.' See also 'Uganda: Museveni sets priorities after re-election,' *IRINnews.org*, 27 Feb. 2006, <<http://www.irinnews.org/report/58277/uganda-museveni-sets-priorities-after-re-election>> accessed March 18, 2014; See also Agnes Nandutu, 'Museveni blames donors over funds,' *The Monitor* (Kampala), 10 March 2006. in Joanna R. Quinn *Getting to Peace? ...* 2007, supra.

110 See Doom Ruddy and Koen Vlassenroot. 'Kony's Message: A New Koine? The Lord's Resistance Army in Northern Uganda.' *African Affairs*. (1999): 5-36.

111 See also Resolve Uganda. 'Get Informed.' Updated: 27 November 2007. <http://www.resolveuganda.org/history> cited in Ruth Muth, *Child Soldiers in the Lords' Resistance Army: Factors in the Rehabilitation and Reintegration Process*, MA Thesis George Mason University 2008 at 18

112 Comments from the Vice Chairman of the Acholi Religious Leaders' Peace Initiative Shiek Musa Khalil who is the Kahdi of Acholi Muslim District at the Consultative Meeting on Uganda's Transitional Justice Policy: Towards A Victim Centred Approach. Organised by the Foundation for Human Rights Initiative on the 22 May 2014 Colline Hotel Mukono Uganda

113 Patrick Hönig, 'The Monkey Cannot Preside Over A Case Concerning The Jungle: Why the International Justice is Guilty of Overreach in Northern Uganda.' Paper presented at the International Conference on 'Spheres of Justice' Organised by the Mahanirban Calcutta Research Group in September 2007

victim-perpetrators who had also been either indoctrinated or forced to become perpetrators.<sup>114</sup> It was for this reason that in October 2004, Acholi Paramount Chief Elect, Rwot Onen David Acana II, stated that,

The amnesty law and dialogue options are the most relevant solution that befits our current situation. Therefore, the ICC intervention at this particular moment sends conflicting signals to the on-going peace process and could easily jeopardise its success.<sup>115</sup>

Justice Onega, Chairperson of the Uganda Amnesty Commission has also argued that 'In such times of suffering and death, our paramount objective should be peace. Justice can come later.'<sup>116</sup> Other voices in support of amnesty and peace talks included Bishop McLeod Ochola who argued that the ICC probe would destroy all efforts for peace. He suggested that the ICC should intervene when the war had ended. Fr. Carlos Rodriguez, also noted that rebels would not be convinced to negotiate well knowing that they were going to be prosecuted.<sup>117</sup>

Advocates of trial justice like Allen,<sup>118</sup> Cassese, Amnesty International (AI), The Coalition for the International Criminal Court (CICC), Human Rights Watch (HRW), the Enough Project, Invisible Children, and others have criticized the advocacy for amnesty and AJMs for being mere vehicles for promoting impunity.<sup>119</sup> International criminal lawyers like

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<[http://uva.academia.edu/SuzannevanHooff/Papers/115839/Even\\_should\\_the\\_heavens\\_fall\\_Timing\\_and\\_sequencing\\_in\\_transitional\\_justice\\_a\\_gap\\_in\\_the\\_Rome\\_Statute\\_Or\\_towards\\_a\\_flexible\\_transitional\\_justice\\_scheme\\_for\\_the\\_21st\\_century](http://uva.academia.edu/SuzannevanHooff/Papers/115839/Even_should_the_heavens_fall_Timing_and_sequencing_in_transitional_justice_a_gap_in_the_Rome_Statute_Or_towards_a_flexible_transitional_justice_scheme_for_the_21st_century)> accessed 12 October 2011.

- 114 Lino Owor Ogora, 'Uganda versus Thomas Kwoyelo: A Review of the Lessons, Challenges and Opportunities for Civil Society' in A Report On The Civil Society Roundtable Meeting Under The Theme 'Assessing The Aspirations And Deliverables Of International And Transitional Justice In Uganda' December 2012.
- 115 Acholi Religious Leaders Peace Initiative and Acholi Paramount Chief Elect, 'Suggestions by the Acholi Religious and Cultural Leaders in Response to the Request by the International Criminal Court.' Statement, Gulu, and 12 November 2004. As reproduced in Tim Allen, *Trial Justice: The International Criminal Court and Lord's Resistance Army* (2006) 86–7, 75.
- 116 See 'Amnesty Group Rejects ICC Trial of Kony Rebels, The East African Newspaper', 16 February 2004 in Kasaiija Phillip Apuuli, 'Amnesty and International Law: The Case of the Lord's Resistance Army insurgents of Northern Uganda.' p. 53 <[www.ajol.info/index.php/ajcr/article/download/39391/30316](http://www.ajol.info/index.php/ajcr/article/download/39391/30316)> accessed 5 April 2014.
- 117 Adam Branch, 'Uganda's Civil War and the Politics of ICC Intervention' <<http://grad.sdsu.edu/~abranche/Publications/Ethics%20and%20International%20Affairs%2021.2,%20Summer%202007--Branch.pdf>> accessed March 23, 2014. Members of Parliament in Uganda like Betty Amongin also argued at that time that 'the indictment by the ICC against the LRA's five leaders would not end the conflict in Northern Uganda, in the same way that the peace process would. See IRIN, 'Uganda: Gov't Ready for Conditional Truce With Rebels', Kampala, 25 August 2006, <<http://www.irinnews.org/fr/report/60463/uganda-gov-t-ready-for-conditional-truce-with-rebels>> accessed April 6, 2014.
- 118 Tim Allen, *Trial Justice: The International Criminal Court and the Lord's Resistance Army* (London Zed, 2006) 168. See also Robert Rotberg and Dennis Thompson, 'Truth V. Justice: The Morality of Truth Commissions, (Princeton University Press, New Jersey 2000)., Marieke Wierda, Book Review of Tim Allen, *Trial Justice: The International Criminal Court and the Lord's Resistance Army* (2007) 1 IJTJ 308., Joanna R. Quinn, 'Tried and True: The Role of Informal Mechanisms in Transitional Justice,' a paper presented at the International Society of Political Psychology Annual Meeting, Toronto, 6 July 2005.
- 119 See generally *The Rome Statute of the International Criminal Court*, (17 July 1998) U.N. Doc A/CONF. 183/9.

Kalenge<sup>120</sup> and Cherif Bassiouni have separately argued against general amnesty for the ‘four *jus cogens* crimes of genocide, crimes against humanity, war crimes and torture.’<sup>121</sup> Chigara further argues that amnesty laws ‘disregard the rights of victims when they treat them as though they did not have pre-determined rights at the moment of abuse, and if they did, as if they had not been breached at all.’<sup>122</sup> Kasaijja tries to offer a middle ground when he argues that while amnesty is prohibited in the Rome Statute,<sup>123</sup> the abducted and conscripted foot soldiers of the LRA might be amnestied, but not the top leadership who have to be punished for the *jus cogens* crimes that have been and continue to be committed in the Northern Uganda conflict.<sup>124</sup> While the question of amnesty remains controversial to date, the Kasaijja compromise position resonates well with the AAR which provided for both prosecutorial and non-prosecutorial interventions in the case of Uganda.

### 2.3.1 BACKGROUND TO THE JUBA PEACE TALKS

Many reasons are given as to why the Juba Peace process was started. Some of these reasons include the existence of the ICC indictments against the top leadership of the LRA/M, the role of women’s groups and Non-government organizations,<sup>125</sup> the advocacy by the religious and cultural leaders of Northern Uganda, as well as the LRA/M loss of support of a key ally in the name of Sudan President Al-Bashir.<sup>126</sup> It can be argued that the LRA/M calculated that a political solution to the conflict would be more advantageous than a purely legal one. Further, that the GoU realised that the arrest warrants were not able to deliver the top leadership of the LRA/M to either the ICC or its national courts and yet the

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120 Brian, Kalenge ‘Challenges in Pursuing Justice: The Case of the International Criminal Court in Uganda’ Civil Society Roundtable Meeting. Theme: Assessing the Inspiration and Deliverables of International and Transitional Justice 11-12 December 2012, Esella County Hotel ASF/UCICC. See also Brian, Kalenge ‘Reconcile peace process with international law’ *The New Vision*, (Tuesday, 16th September, 2008) <<http://www.newvision.co.ug/D/8/459/649883>> accessed March 24, 2014.

121 Apuuli, Phillip, Kasaijja ‘The Government of Uganda, the ICC Arrest Warrants for the LRA Leaders and the Juba Peace Talks: 2006-2008’ (December 4, 2013). ESIL 2013 5th Research Forum: International Law as a Profession Conference Paper No. 2/2013. <<http://dx.doi.org/10.2139/ssrn.2363595>> accessed April 4, 2014.

122 B. Chigara, *Amnesty in International Law: The Legality under International Law of National Amnesty Laws*. 2002)4 in Kasaijja London: Longman cited in Kasaijja supra at 47.

123 See Par. 4, 6, and 10 of the Rome Statute

124 Phillip Apuuli, Kasaijja supra.

125 These traditional leaders have argued that the type of justice offered by the ICC for the victims of the LRA is not substantive. Sverker Finnström argues that it is important to involve traditional leaders in resolving the conflict since it’s the same traditional leaders who gave their blessing for the conflict to begin. See ‘Living with Bad Surroundings: War, History, and Everyday Moments in Northern Uganda (Durham: Duke University Press, 2008). See also Chris Coulter, ‘Bush Wives and Girl Soldiers: women’s lives through War and Peace in Sierra Leone’. Ithaca NY: Cornell University Press, 2009. See book review of Tim Allen Trial Justice. The International Criminal Court and the Lord’s Resistance Army,. Zed Books, June 2006 by Marieke Wierda, Senior Associate, International Centre for Transitional Justice in The International Journal of Transitional Justice, Vol. 1, 2007, 308–314.

126 Ibid.

rebellion continued unabated with disastrous effects. Since, the ICC relies on cooperation of States in order to function, it can be argued that the GoU must have realised that the arrest warrants were not helpful in ending the rebellion. It is on this basis that the GoU once again took a political decision to pursue the peace talks. This was not because President Museveni is a pacifist, but because it was a politically expedient to cease hostilities and end the rebellion without looking like a failure. Museveni's non pacifist ways can be evidenced by the way the GoU kept sending mixed signals which prolonged the peace process. On the one hand, he indicated a willingness to pursue peace while on the other hand he continued to signal that he was still bent on a military solution.<sup>127</sup> For example, in 2005, Museveni said 'this is the last warning to those fools. We are preparing a last dose for Kony... we want peace everywhere.'<sup>128</sup> This non commitment to the pursuit of peace is probably one of the reasons that Joseph Kony did not sign the CPA.<sup>129</sup>

Nevertheless, then Prosecutor of the ICC, Mr. Ocampo viewed the actions of the GoU as akin to ignoring the pursuit for justice for the victims by simply seeking peace at all costs.<sup>130</sup> The concerns of Ocampo were founded on the fact that Uganda had promised Kony 'full and guaranteed amnesty' if he responded positively to the talks.<sup>131</sup> Since Ocampo had issued arrest warrants for top LRA/M leadership, he resisted the grant of amnesty to the LRA/M. Mr. Ocampo vowed to resist any admissibility challenge to the case. He noted -

The arrest warrants issued by the Court against the LRA/M Commanders remain in effect and have to be executed. A challenge to the admissibility of the case before the Court remains hypothetical and in any event, would be a matter for the judges of the Court to decide upon. The Office is very

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127 See Hudson Apunyo, 'Abia IDP Camp Marks 2nd Anniversary of Massacre,' (*The Monitor* (Kampala, 14 Feb. 2006).; Museveni stated 'the LRA have been defeated ... [t]he conflict in the north has been finished. We have defeated Kony,' and that 'security in northern Uganda has been restored.'

128 id

129 'The LRA had demanded on several occasions that the Ugandan government seek the withdrawal of the ICC arrest warrants as a condition for peace, but the ICC Prosecutor rejected the possibility and the Uganda lacked the authority to meet the demand'; <<http://www.un.org/en/peacebuilding/pbso/pdf/Reconciliation-After-Violent-Conflict-A-Handbook-Full-English-PDF.pdf>> See also E.A. Witte, 'Putting Complementarity Into Practice: Domestic Justice for International Crimes in DRC, Uganda and Kenya,' Open Society Foundations (2011) 58. See also 'Joseph Kony: Profile of the LRA Leader,' *BBC News Africa*, (08-03-2012) <<http://www.bbc.co.uk/news/world-africa-17299084>> accessed October 3, 2013. Cited in Ndagire, S 'Complex Complementarity: An Analysis Of The Legal Challenges Crippling The International Crimes Division (ICD) Of The Uganda High Court From Prosecuting International Crimes Committed In Northern Uganda.' (Advanced Degree of Master of Laws in Public International Law (with a specialization in International Criminal Law), Leiden University 2012)25. 29. (Copy on file)

130 According to Article 87 (7) of the Rome Statute:

Where a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties . . .

131 See 'Uganda 'must arrest' rebel leader,' BBC News Online, 18 May 2006; <<http://news.bbc.co.uk/2/hi/africa/4992896.stm>> accessed October 3 2013; See also 'Tense start to Uganda peace talks,' BBC News Online, 15 July 2006; < <http://news.bbc.co.uk/2/hi/africa/5183656.stm> > accessed October 3 2013; in Joanna R. Quinn (2007) 19.

confident that the case for which warrants have been granted remains admissible.<sup>132</sup>

This meant that regardless of how genuine the national proceedings turned out to be- as required by the principle of complementarity- Ocampo was intent on keeping his case at the Court.<sup>133</sup> The implications of the AAR, which sought to oust the jurisdiction of the ICC, also prompted the Court to seek information from the GoU regarding the Status of the arrest warrants for the indicted LRA/M commanders.<sup>134</sup> The Court initiated proceedings pursuant to Article 19 (1) of the Rome Statute in order to determine whether the cases were still admissible before it.<sup>135</sup> The Court held that even though the GoU had agreed to establish the International Crimes Division of the High Court of Uganda (ICD), there were no laws, policies or procedures to support it. The Court also noted that since the Uganda Amnesty Act of 2000 was still in existence, the national systems were not able to assert jurisdiction over the accused persons leaving the Court as the ‘ultimate authority to determine the admissibility of the case.’<sup>136</sup> Nouwen & Werner argue that the ‘purpose of the proceedings was to establish that ‘it is for the Court, and not for Uganda’ to determine the admissibility of cases before the ICC’.<sup>137</sup> It can be argued that the literal interpretation of

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132 OTP statement in relation to events in Uganda, The Hague, 3 March 2008 <[http://www.icc-cpi.int/iccdocs/asp\\_docs/library/organs/otp/ICC-OTP-ST20080303-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/library/organs/otp/ICC-OTP-ST20080303-ENG.pdf)> accessed November 2, 2013.

133 Nouwen and Werner, (2010) 954 citing Glassborow, ‘Uganda Insists Peace not at Odds with ICC’, Institute for War and Peace Reporting, 14 Apr. 2008, < <http://iwpr.net/report-news/uganda-insists-peace-not-odds-icc> accessed March 17 2014. See also ICC-OTP, ‘OTP Statement in relation to Events in Uganda’, 4 March 2008.

134 When requested for a guarantee that it would arrest the indictees, Uganda merely expressed its commitment and efforts to secure DRC’s cooperation to trace the LRA within its territory. See *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen, Report by the Registrar on the Execution of the ‘Request for Further Information from the Republic of Uganda on the Status of Execution of the Warrants of Arrest’*, ICC-02/04-1/05-305-Anx2 (10-07-2008). See Ndagire (2012) 29-30. See also *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo, Raska Lukwiya and Dominic Ongwen, Request for Information from the Republic of Uganda on the Status of Execution of the Warrants of Arrest*, ICC-02/04-01/05-274 (29-02-2008).

135 *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen, Decision initiating proceedings under article 19, requesting observations and appointing counsel for the Defence*, ICC-02/04-01/05-320, (21-10-2008) <[http://www.worldcourts.com/icc/eng/decisions/2008.10.21\\_Prosecutor\\_v\\_Kony1.pdf](http://www.worldcourts.com/icc/eng/decisions/2008.10.21_Prosecutor_v_Kony1.pdf)> accessed October 3, 2013. in Ndagire (2012)30.

136 See *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen, Defence Appeal against ‘Decision on the admissibility of the case under article 19 (1) of the Statute’* dated 10 March 2009, ICC-02/04-01/05-379 (16-03-2009) <<http://www.icc-cpi.int/iccdocs/doc/doc694069.pdf>> accessed October 3 2013; See also *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen, Judgment on the Appeal of the Defence against the ‘Decision on the admissibility of the case under article 19 (1) of the Statute’* of 10 March 2009, ICC-02/04-01/05-408 at 27 and 31 (16-09-2009) <<http://www.iclklamberg.com/Caselaw/Uganda/Konyetal/AC/408.pdf>> accessed October 3, 2013. See also *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen, Decision on the admissibility of the case under article 19(1) of the Statute*, ICC-02/04-01/05-377, 47-48 (10-03-2009) at pp.50-51. <[http://www.worldcourts.com/icc/eng/decisions/2009.03.10\\_Prosecutor\\_v\\_Kony2.pdf](http://www.worldcourts.com/icc/eng/decisions/2009.03.10_Prosecutor_v_Kony2.pdf)> accessed October 3, 2013. This decision was however contested by the appointed defence counsel in an appeal on the 16th of April 2009 on the grounds that it was arrived at without the proper representation of the accused persons. See *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen, Submission of Observations on the admissibility of the Case under article 19(1) of the Statute*, ICC-02/04-01/05-350, (18-11-2008). Nonetheless the Appeals Chamber confirmed the decision of the Pre Trial Chamber. It reasoned inter alia that it did not have the power to suspend proceedings pending before another Chamber outside the framework of Article 82 (3) of the Statute. in Ndagire, (2012) 30.

137 Pre-Trial Chamber noted

the law by the Court compelled the GoU to quickly pass the requisite laws. As noted above, these *ex cathedra* pronouncements can also be viewed as an attempt by the Court to retain jurisdiction of the cases referred to it at whatever cost. In such a case, they are self-defeating since the ICC needs the cooperation of the states in order to perform its functions.<sup>138</sup>

The LRA/M rebels were also concerned that the GoU and the OTP/ICC only sought to punish them for the atrocities committed in Northern Uganda and yet there was evidence of atrocities committed by the State which the GoU had ignored to investigate.<sup>139</sup> It is argued that the rebels viewed the Juba peace process as a way to avoid the prosecution by the OTP/ICC while at the same time ensuring that the reasons for their rebellion were well documented and resolved.<sup>140</sup> President Museveni had also made it clear not to campaign for the withdrawal of the ICC warrants until the Comprehensive Peace Agreement (CPA) had been signed.<sup>141</sup> This means that he was more concerned about ending the rebellion than really bringing the rebels to justice.

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'articles 86, 87 and 93 of the Rome Statute of the Court, setting forth the obligation of States Parties to cooperate fully with the Court in any matter related to the investigation and prosecution of crimes within its jurisdiction and the modalities for such cooperation', and, 'in particular, article 87(7) of the Statute, according to which, where a State Party fails to comply with a request to cooperate, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties' and requested 'the Republic of Uganda to provide the Chamber, at the earliest convenience, preferably no later than 28 March 2008, with detailed information on the implications of the Annexure on the execution of the Warrants', in particular, The impact of the establishment of the special division of the High Court of Uganda and of recourse to traditional justice mechanisms or other alternative justice mechanisms on the execution of the Warrants and on the cooperation provided by the Republic of Uganda to the Court for their execution'. *Decision Initiating Proceedings under Article 19, requesting Observations and Appointing Counsel for the Defence*, Pre-Trial Chamber II, ICC-02/04-01/05-320, 21 Oct. 2008. See also at *Decision on the Admissibility of the Case under Article 19(1) of the Statute*, ICC-02/04-01/05-377, Pre-Trial Chamber II, 10 Mar. 2009, at para. 51.

138 id

139 See Uganda: Amnesty International Calls For Investigation Into Increasing Reports Of Killings And Torture In Uganda (AI Index: AFR 59/004/1989) <<http://www.amnesty.org/fr/library/asset/AFR59/001/2008/fr/5ba1f72b-f1e8-11dc-adcd-cdafd0ab0dfe/afr590012008eng.pdf>> accessed November 2, 2013; Uganda: Army Violates Human Rights, Government Evades Responsibility (AI Index: AFR 54/024/1991) <<http://www.amnesty.org/en/library/asset/AFR59/001/2008/en/5b9ec2da-f1e8-11dc-adcd-cdafd0ab0dfe/afr590012008eng.html>> accessed November 2, 2013; Uganda: Time For Action To Safeguard Human Rights (AI Index: AFR 59/006/1992) <<http://www.amnesty.org/en/library/asset/AFR59/001/2008/en/5b9ec2da-f1e8-11dc-adcd-cdafd0ab0dfe/afr590012008eng.html>> accessed November 2, 2013; Uganda: Amnesty International Condemns 'Callous And Calculated' Killings By Uganda's Rebels (AI Index: AFR 59/002/1996) <<http://www.amnesty.org/en/library/asset/AFR59/002/1996/en/89d9eed-eaee-11dd-b22b-3f24cef8f6d8/afr590021996en.html>> accessed November 2, 2013.

140 Some of the LRA/M grievances included the harsh treatment by the UPDF when they sought to pacify the North in late 1980's, as well as the marginalization of the people of Northern Uganda. See Otim M and Wierda M, 2008, 'Justice at Juba: International Obligations and Local Demands in Northern Uganda' in (Nicholas Waddell and Phil Clark eds.) *Courting Conflict? Justice, Peace and the ICC in Africa*, Royal African Society 2008)28 <[http://www.issafira.org/anij/uploads/Waddell\\_Clark\\_Courting\\_Conflict.pdf](http://www.issafira.org/anij/uploads/Waddell_Clark_Courting_Conflict.pdf)> accessed November 2, 2013.

141 Museveni noted, 'Why should we reward you before you give us peace?'... 'if the ICC indictments are removed, it will make the terrorists untouchable. The removal of the indictments will be a reward for their signing of the agreement. Otherwise you [rebels] will die in our hands or in the hands of the ICC.' See 'Uganda: ICC Indictments against Rebels Should Stay, Says President,' IRINnews.org (21 Sep. 2006); <<http://www.irinnews.org/report/61142/uganda-icc-indictments-against-rebels-should-stay-says-president>> accessed October 2, 2013. See also Joanna R. Quinn, 'Getting to Peace? ...' (2007) 20.

Due to the fact that the rebellion had lasted over two decades, it can be argued that it did not really matter to Mr. Museveni whether the rebels were tried at the ICC or in Uganda. For Mr. Museveni, the use of the ICC warrants was a kind of carrot and stick strategy.<sup>142</sup> The ICC was a stick while the peace process, the carrot. It is no wonder that when the leader of the LRA/M failed to sign the CPA, the GoU resorted to the stick - launching yet another ill-advised and expensive military expedition -code-named 'Operation Lightning Thunder'- against the LRA/M.<sup>143</sup> The operation was unsuccessful and resulted into a vicious retaliation by the LRA/M on the people of neighbouring Democratic Republic of Congo, South Sudan and the Central African Republic.<sup>144</sup> Many civilians were killed, raped, maimed and displaced.<sup>145</sup> To date, the LRA/M remains at large although some of their former captives and some junior commanders like Thomas Kwoyelo, Maj. General Caesar Acellam,<sup>146</sup> Colonel Alfred Onen Kamdulu, Major Thomas Opiyo, Abdul Razak, and Dominic Ongwen have continued to surrender or to be arrested.<sup>147</sup>

The above discussion shows that the Juba peace process was commenced under a lot of pressure on the GoU to end the rebellion. While the OTP/ICC was campaigning against the peace talks, local pressure groups campaigned to end the rebellion peacefully. In the end, the LRA/M did not sign the CPA and this is probably due to the fact that the GoU refused to withdraw the case against the LRA/M from the ICC before the CPA was signed.<sup>148</sup>

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142 Bas Shotel 'Doing Justice to the Political: The International Criminal Court in Uganda and Sudan: A Reply to Sarah Nouwen and Wouter Werner' (2011) (22) (4) EJIL, 1153 -1160.

143 This expedition was codenamed 'Operation lightning thunder' and was funded by the USA under the Lord's Resistance Army Disarmament and Northern Uganda Recovery Act 2009. See <<https://salsa.democracyinaction.org/o/9241/images/S1067%20Final.pdf>> accessed April 5, 2011. See also 'US to send troops to Uganda to help fight LRA rebels' *BBC Online* (15 October 2011) <<http://www.bbc.co.uk/news/world-africa-15317684>> accessed Nov 2, 2013.

144 J Spiegel and N Atama, 'Finishing the Fight Against the LRA' Enough Project, May 12, 2009, <[http://www.enoughproject.org/files/lra\\_strategy\\_paper\\_051209.pdf](http://www.enoughproject.org/files/lra_strategy_paper_051209.pdf)> accessed Nov 2, 2013.

145 Ibid.

146 See Tabu Butagira & Risdal Kasasira 'Was Acellam captured or did he surrender?' *The New Vision Newspaper*, Kampala, 14 May 2012 <<http://www.monitor.co.ug/News/National/Was-Acellam-captured-or-did-he-surrender/-/688334/1405298/-/xfp08p/-/index.html>> accessed 25, July 2013. Many child soldiers, bush wives and former rebels continue to escape the clutches of the LRA and return home where a blanket amnesty continues to exist and traditional mechanisms of justice continue to be performed to reintegrate them into society. See Allen, Tim and Vlassenroot, Koen, 'Introduction: The Lord's Resistance Army: Myth and Reality In: Allen, Tim and Vlassenroot, Koen, (eds.) *The Lord's Resistance Army: Myth and Reality* (Zed Books, London, UK 2010). See also Simon Jennings, 'Muted Applause for Ugandan Rebel's Arrest' *ACR Issue* 320, 16 May 2012 <<http://iwpr.net/report-news/muted-applause-ugandan-rebels-arrest>> accessed July 24, 2013.

147 Dominic Ongwen has since been transferred to the ICC where he has undergone confirmation proceedings for the charges for which he is indicted. See Farouk Chothia, 'Profile: Dominic Ongwen of Uganda's LRA' *BBC News* 26 January 2015 <<http://www.bbc.com/news/world-africa-30709581>> accessed February 29, 2016.

148 Former ICC chief prosecutor, Luis Moreno Ocampo stated, '(t)hose warrants must be executed. There is no excuse. There is no tension between peace and justice in Uganda: arrest the sought criminals today and you will have peace and justice tomorrow. Victims deserve both' See Felix Osike and Henry Mukasa 'ICC insists Kony must face prosecution' *The New Vision*, October 11, 2007.

### **2.3.2 The Juba Peace Negotiations**

The peace talks began on July 14, 2006 under the mediation of then Vice-president of Southern Sudan Riek Machar. The leader of the Ugandan delegation was Internal Affairs Minister Ruhakana Rugunda while the LRA/M delegation was initially led by Martin Ojul. The peace process had five agenda items, namely: the cessation of hostilities; comprehensive solutions to conflict; accountability and reconciliation; the ceasefire; and demobilization, disarmament, reintegration, and resettlement. These agenda items show that the parties sought to comprehensively deal with the causes of the conflict, address the different needs of victims and affected persons, as well as ensure that there was accountability for atrocities committed during the conflict.<sup>149</sup>

The Juba negotiations yielded five negotiated Agreements namely; the Agreement on Comprehensive solutions, Agreement on accountability and reconciliation, Agreement on Disarmament, Demobilization and Re-integration, Agreement on Implementation and Monitoring Mechanisms, and the Agreement on a Permanent Ceasefire.

Whereas the CPA was never signed by the leader of the LRA/M Joseph Kony, the Government committed to implement the recommendations in the aforementioned Agreements. These included, promotion of national legal enactments consisting of formal and non-formal mechanisms and measures for ensuring justice and reconciliation, establishing a Special Division of the High Court to try individuals alleged to have committed serious crimes,<sup>150</sup> restoring and strengthen the institutions of the rule of law in the conflict affected areas,<sup>151</sup> establishing a special fund for victims out of which reparations would be paid,<sup>152</sup> and establishing national mechanisms of accountability and reconciliation.<sup>153</sup>

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149 See the Agreement on Permanent Ceasefire 23/2/2008 whose preamble talks about commitment to finding just, peaceful and lasting solutions to the conflict and to promote accountability and reconciliation and restore harmony and tranquillity within the affected communities. < [http://www.beyondjuba.org/BJP1/peace\\_agreements.php](http://www.beyondjuba.org/BJP1/peace_agreements.php)> accessed Nov 2, 2011. See Agreement On Implementation And Monitoring Mechanisms 29/2/2008; Agreement On Comprehensive Solutions 2/5/2007; Agreement On Permanent Cease Fire 23/2/2008 – See Preamble That Talks About Commitment To Finding Just, Peaceful And Lasting Solutions To The Conflict And To Promote Accountability And Reconciliation And Restore Harmony And Tranquillity Within The Affected Communities; See Also Agreement On The Cessation Of Hostilities 26/ August/ 2006. < [http://www.beyondjuba.org/BJP1/peace\\_agreements.php](http://www.beyondjuba.org/BJP1/peace_agreements.php)> accessed Nov 2, 2011.

150 It is under the auspices of this Agreement, that the International Crimes Division was established in 2008.

151 The Agreement on Comprehensive Solutions

152 The Implementation Protocol to the Agreement on Comprehensive solutions

153 The Agreement on Implementation and Monitoring Mechanisms

Of the various agreements signed between the parties, this thesis focuses on the AAR.<sup>154</sup> The AAR was signed in Juba on 29 June 2007 and the Annexure to the AAR was signed in February 2008.<sup>155</sup> Arguably, the AAR remains one of the most comprehensive ways to address justice issues in any peace agreement to-date.<sup>156</sup> It is also arguably the first formal recognition of TJMs in the transitional process of the post-conflict situation in Northern Uganda. This is because it provided for a transitional justice framework in which criminal and civil remedies as well as TJMs would be used.<sup>157</sup> Paragraph 2.1 of the AAR provides for the use of both formal and non-formal institutions to ensure reconciliation and accountability. It stated that TJMs would be ‘a central part of the framework for accountability and reconciliation.’<sup>158</sup>

Under Paragraph 3.1 of the Principal Agreement, TJMs like *Culo Kwor Mato Oput*, *Kayo Cuk*, *Ailuc* and *Tonu ci Koka* and others practised in the communities affected by the conflicts would be applicable.<sup>159</sup> One of the most prominent of these rituals is *Mato Oput* or the drinking the bitter root, which involves a symbolic process of confession, mediation and payment of compensation in the case of murder and offers an all-encompassing process for promoting reconciliation within communities. Other symbolic rituals include: *Nyono Tong Gweno* (stepping on the egg), *Moyo Kom* (cleansing of the body), *Moyo Piny* (cleansing of an area) and *Gomo Tong* (bending of the spear), among others.<sup>160</sup>

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154 Greenawalt notes that by emphasising the dual goals of ‘accountability’ and ‘reconciliation,’ the Agreement endorses a combination of methods to achieve them. Greenawalt, Alexander K.A., ‘Complementarity in Crisis: Uganda, Alternative Justice, and the International Criminal Court’ (2009) (50) (107) VJIL <<http://ssrn.com/abstract=1500626>> accessed Nov 2, 2011.

155 M Otim and M, Wierda (2008)25

156 Isabelle Jaques, ‘Pursuing Justice In Ongoing Conflict: Examining The Challenge.’ (Report on Wilton Park Conference WPS08/S. Sunday 7 – Wednesday 10 December 2008. With support from The Foundation Open Society, Zug; the Swiss Federal Department of Foreign Affairs, Berne; the Norwegian Ministry of Foreign Affairs, Oslo; and the Foreign and Commonwealth Office, London, January 2009).

157 See Agenda Item 3 of Agreement on Accountability & Reconciliation <[http://www.beyondjuba.org/peace\\_agreements/Agreement\\_on\\_Accountability\\_And\\_Reconciliation.pdf](http://www.beyondjuba.org/peace_agreements/Agreement_on_Accountability_And_Reconciliation.pdf)> accessed April 5 2011. See also Linda M. Keller, (n.) 218. See generally, Timothy Nkonge, ‘Prosecution of International Crimes In Uganda: Prospects And Challenges, A Case Study Of Thomas Kwoyelo Alias Latoni V Uganda. (Lambert Academic Publishers, 2012) 54.

158 Para 20 of the Annexure to the Agreement requires the government to establish the most appropriate role of traditional justice mechanisms. And Para 21 of the Annexure to the Principle Agreement states that Mato Oput is to be employed among the Acholi, Kayo Cuk in Lango, Ailuc in Teso, Tonu ci koka in Madi and Okukaraba in Ankole. See Agreement On Accountability And Reconciliation, 29 June 2007., See <[http://www.iccnw.org/documents/Annexure\\_to\\_agreement\\_on\\_Accountability\\_signed\\_today.pdf](http://www.iccnw.org/documents/Annexure_to_agreement_on_Accountability_signed_today.pdf)> accessed 3 November 2011.

159 See all agreements on Juba Peace process at <[http://www.beyondjuba.org/peace\\_agreement\\_s.php](http://www.beyondjuba.org/peace_agreement_s.php)> accessed 4 April 2011.

160 Finnström (2008) 43. See also Adrian Croft, Uganda offers ‘blood settlement’ to LRA rebels, Reuters, 12 March 2008 In ‘Amnesty International: Uganda: Agreement and Annex on Accountability and Reconciliation falls short of a comprehensive plan to end impunity’, <<http://www.amnesty.org/en/library/asset/AFR59/001/2008/en/5b9ec2da-f1e8-11dc-adcd-cdafd0ab0dfe/afr590012008eng.html>>accessed 4, November 2011.

The suggestion to use TJMs as part of the AAR was initiated by local organisations like the Acholi Religious Leaders Peace Initiative (ARLPI)<sup>161</sup> and supported by the majority of the regional local human rights proponents, the AU, women's groups like the Ugandan Women's Coalition for Peace, civil society organizations, religious groups and traditional leaders.<sup>162</sup> These groups argued that the two-decade old war in Northern Uganda was a multifaceted affair, which needed a form of justice that was aimed at addressing 'the overall conflict dynamics including the promotion of peace, national political accountability' and the 'wider demands of state-building and the realization of rights more generally in the country.'<sup>163</sup> They also argued that the type of justice offered by the ICC for the victims of the conflict was unable to address the varied interests of the victims.<sup>164</sup> Moy also notes that

161 RLP states that '(t)he initiative for creating an amnesty came from within this region, spearheaded by the religious and cultural leaders, and was a clear rejection of a failed military approach to ending the way. The fact that the Amnesty Law was in keeping with the wishes of the victims of the conflict rather than by perpetrators trying to negotiate their own safety, is a crucial aspect of Amnesty.' Refugee Law Project, 'Whose Justice? Perceptions of Uganda's Amnesty Act 2000: The Potential for Conflict Resolution and Long-term Reconciliation' (February 2005)6. <[http://www.beyondjuba.org/BJP1/peace\\_agreements/Agreement\\_on\\_Accountability\\_And\\_Reconciliation.pdf](http://www.beyondjuba.org/BJP1/peace_agreements/Agreement_on_Accountability_And_Reconciliation.pdf)> accessed April 2012. Over 24,000 LRA members have been amnestied until 2010 of which 17,000 were combatants. [http://www.hrw.org/sites/default/files/reports/drc0310webwcover\\_0.pdf](http://www.hrw.org/sites/default/files/reports/drc0310webwcover_0.pdf) accessed April 2012.

162 See Greater North Women's Voices for Peace Network, Ugandan Women's Coalition for Peace, and Women's Initiatives for Gender Justice: Position Paper: Views of women from North and North Eastern Uganda on the Peace Talks Mechanisms for Accountability and Reconciliation, August 2007 <<http://www.iccwomen.org/documents/Views-of-women-from-North-and-North-Eastern-Uganda-on-the-Peace-Talks-2007.pdf>> accessed April 4, 2014. See also Joanna R. Quinn 'The Thing Behind The Thing: The Role and Influence of Religious Leaders On The Use of Traditional Practices of Acknowledgement In Uganda', (Paper presented at the Annual meeting of the Canadian Political Science Association, 28 May 2009, Ottawa Canada) <[http://politicalscience.uwo.ca/faculty/quinn/the\\_thing\\_behind\\_the\\_thing\\_review\\_faith\\_and\\_international\\_affairs\\_spring\\_2010.pdf](http://politicalscience.uwo.ca/faculty/quinn/the_thing_behind_the_thing_review_faith_and_international_affairs_spring_2010.pdf)> accessed 4 April 2011., Beyond Juba Project, 'Agreement on Accountability and Reconciliation between the Government of the Republic of Uganda and the Lord's Resistance Army/ Movement, Juba Sudan' <[http://www.beyondjuba.org/peace\\_agreements/Agreement\\_on\\_Accountability\\_And\\_Reconciliation.pdf](http://www.beyondjuba.org/peace_agreements/Agreement_on_Accountability_And_Reconciliation.pdf)> accessed 8 April 2011, See also 'Terrorist Organization Profile: Lord's Resistance Army (LRA) <[http://www.start.umd.edu/start/data\\_collections/tops/terrorist\\_organization\\_profile.asp?id=3513](http://www.start.umd.edu/start/data_collections/tops/terrorist_organization_profile.asp?id=3513)> accessed 6, November 2011.

163 See Robert Gersony, 'The Anguish of Northern Uganda 1997' <[http://www.huripeac.ac.ug/Hidden\\_War.pdf](http://www.huripeac.ac.ug/Hidden_War.pdf)> accessed 2 November 2011. Gersony reasoned that the war in the north was in fact a continuation of the war in the 'Luwero Triangle.' See also Linda M. Keller, 'Achieving Peace With Justice: The International Criminal Court and Ugandan Alternative Justice Mechanisms' (2008) 23 (2) CJIL 209, 215. See also Joanna Quinn, 'Spoiled Rotten? Outsiders and the Use of Traditional Mechanisms in Uganda' Paper presented at the annual meeting of the 'Theory vs. Policy? Connecting Scholars and Practitioners, New Orleans Hilton Riverside Hotel, The Loews New Orleans Hotel, New Orleans, LA, Feb 17, 2010 citing International Centre for Transitional Justice and Human Rights Centre, *Forgotten Voices: A population-based survey on attitudes about peace and justice in northern Uganda* (New York and Berkeley: ICTJ and HRC, UC Berkeley, 2005) <[http://www.allacademic.com/meta/p417012\\_index.html](http://www.allacademic.com/meta/p417012_index.html)> accessed 9 April 2011. See International Refugee Rights Initiative, *Steps Towards Justice, Frustrated Hopes: Some Reflections on the Experience of the International Criminal Court in Ituri* <[http://www.humansecuritygateway.com/documents/IRRI\\_StepsTowardsJusticeFrustratedHopes.pdf](http://www.humansecuritygateway.com/documents/IRRI_StepsTowardsJusticeFrustratedHopes.pdf)> accessed 15 February 2012. Barney Afako 'Reconciliation and justice: 'Mato oput' and the Amnesty Act'(2002), <<http://www.c-r.org/our-work/accord/northern-uganda/reconciliation-justice.php>> accessed 10 April 2011. See also Joanna R. Quinn, 'Tradition? Traditional cultural institutions on Customary Practices in Uganda' A Paper prepared for presentation at the Annual Convention of the International Studies Association, (16 Feb. 2009) <<http://politicalscience.uwo.ca/faculty/quinn/Traditionalculturalinstitutions.pdf>> accessed 5 April 2011.

164 'Victims' mean persons who have individually or collectively suffered harm as a consequence of crimes and human rights violations committed during the conflict. The 5th Draft of the National Transitional Justice policy defines Victims as means a person(s) who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or impairment of their fundamental rights, through acts or omissions that constitute gross violations/abuses of human rights and may include – a member of the immediate family or dependant of the victim or other person(s). See Patrick, Vinck,; Pham, Phuong; Eric, Stover; Andrew, Moss,; Marieke, Wierda 'Northern Uganda: Research Note on Attitudes About Peace and Justice in Northern Uganda. 2007. Berkeley, New Orleans and New York: Human Rights Centre, University of California; Payson Centre for International Development, Tulane University; and International Centre for Transitional Justice., see also Justice and Reconciliation Project.

'more flexible restorative measures might be more appropriate in situations involving mass atrocities with thousands of perpetrators.'<sup>165</sup> Dr. Ruhakana Rugunda, who was the Chief Negotiator for the GoU at the Juba peace talks, noted that the parties at Juba agreed that peace and justice would only happen through an inclusive process involving a wide range of actors – be they traditionalists, religious, victims, perpetrators or merely interested bystanders.<sup>166</sup> It was on this basis that the parties included the use of TJMs in (especially for those returning rebels) in the AAR.<sup>167</sup>

## 2.4 TOWARDS A SUSTAINABLE POST-CONFLICT SETTLEMENT

The devastating nature of the LRA conflict has given rise to a number of challenges, which need to be addressed in order to achieve a sustainable post-conflict settlement: Earlier reports on Northern Uganda have consistently indicated that victims have a multiplicity of needs that they seek to have addressed.<sup>168</sup> For example, in their 2007 population-based survey entitled 'When the War Ends', Phuong Pham (et al) reported that respondents identified a range of issues that they needed addressed. Of all those issues, only 3% were interested in justice while the rest were interested in 'health care (45%), peace (44%), education for the children (31%) and livelihood concerns (including food, 43%; land, 37%; money, 35%).'<sup>169</sup> Stover also notes –

Justice (is) far larger than criminal trials and the ex-cathedra pronouncements of foreign judges in The Hague. It mean(s) the return of stolen property; locating

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2007 The Cooling of Hearts: Community Truth Telling in Acholi-land. Gulu District NGO Forum and Liu Institute for Global Issues <[http://www.humansecuritygateway.com/documents/LIU\\_thecooling\\_ofhearts.pdf](http://www.humansecuritygateway.com/documents/LIU_thecooling_ofhearts.pdf)> accessed November 2, 2011.

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

166 Interview with Dr. Ruhakana Rugunda GoU Chief Negotiator at the Juba Peace Talks while Minister of Information Communication and Technology (September 2011). Dr. Rugunda is now the Prime Minister of Uganda with responsibility to ensure the implementation of the GoU's Juba commitments. See also Ojera Latigo supra at 100., Nkonge (n. 87) 38., Human Rights Watch, 'Uprooted and Forgotten, Impunity and Human Rights Abuses in Northern Uganda.' Vol.17, No.12 (A) Sept.2005.

167 Ibid.

168 See Refugee Law Project, Whose Justice? Perceptions of Uganda's Amnesty Act 2000 9, 23 (Working Paper No. 15, 2005), <<http://www.refugeelawproject.org/resources/papers/workingpapers/RLP.WP15.pdf>>, accessed 20 April 2011., Erin Baines, Alice's Story: Cultural and Spiritual Dimensions of Reconciliation in Northern Uganda 4 (Liu Institute for Global Issues, Field Notes No. 1, Feb. 2006), < <http://www.ligi.ubc.ca/?p2=/module/liu/publications/view.jsp&id=20> >accessed 20 April 2011., International Center for Transitional Justice and Human Rights Center, *Forgotten Voices: A population-based survey on attitudes about peace and justice in northern Uganda* (New York and Berkeley: ICTJ and HRC, UC Berkeley, July 2005) cited in Quinn, J. 'Spoiled Rotten? Outsiders and the Use of Traditional Mechanisms in Uganda' *Paper presented at the annual meeting of the Theory vs. Policy? Connecting Scholars and Practitioners, New Orleans Hilton Riverside Hotel, The Loews New Orleans Hotel, New Orleans, LA*, Feb 17, 2010 2010-11-15 available at <[http://www.allacademic.com/meta/p417012\\_index.html](http://www.allacademic.com/meta/p417012_index.html)> accessed 9 April 2011., See also Lucy Hovel and Joanna R. Quinn, 'Peace First. Justice Later: Traditional Justice in Northern Uganda,' (*Refugee Law Project Working Paper Series*, Working Paper No. 17, 8 July 2005).

169 Phuong Pham & Patrick Vinck., Human Rights Center, University of California, Berkeley School of Law, December 2010, 'When the War Ends: Peace, Justice, and Social Reconstruction in Northern Uganda', 3, 22.

and identifying the bodies of the missing; capturing and trying all war criminals, from the garden-variety killers (the so called ‘small fry’) in their communities all the way up to the nationalist ideologues who had poisoned their neighbours with ethnic hatred; securing reparations and apologies; leading lives devoid of fear; securing meaningful jobs; providing their children with good schools; and helping those traumatized by atrocities to recover.<sup>170</sup> (*Emphasis mine*)

Similarly, at a recently concluded War victims’ conference organised African Youth Initiative Network (AYINET) in Kampala, it was clearly evident that the majority of victims had a multitude of needs like compensation for lost property, memorisation for those who were lost, apology from the GoU for not protecting them as constitutionally mandated to do so, need for psychological support, need for reconstructive surgery, desire to continue criminal trials and witness protection, need for symbolic reparations, need to teach peace, need for inter – ethnic and inter regional reconciliation, the need for truth commissions, among others.<sup>171</sup> Other needs include job creation to encourage financial independence, improved health services, vaccinations, urgent medical intervention against diseases like the nodding disease as well as Ebola, to mention but a few. According to AYINET, the victims’ top priorities were reparations, recognition and reconciliation.<sup>172</sup>

Equally important, there is need for reintegration of former combatants (who include women and children) into the communities from which they were extracted (often by the threat of death).<sup>173</sup> Such reintegration is important whether the combatants were granted amnesty or have been completed their sentences in prison. Equally important, is the need to identify specialised reintegration programs for former child soldiers.<sup>174</sup> These former child soldiers are both victims and perpetrators of conflict.<sup>175</sup> In most cases, they were abducted

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170 Eric Stover, ‘Witnesses and the Promise of Justice in the Hague’, in Eric Stover and Harvey M. Weinstein (Eds), *My Neighbour, My Enemy: Justice and Community in the Aftermath of Mass Atrocity* (Cambridge University Press 2004) 115.

171 National War Victims’ Conference 28-30 May 2014 organised by African Youth Initiative Network (AYINET) – Uganda <<http://www.africanyouthinitiative.org/phone/national-war-victims-conference.html>> accessed December 12, 2014.

172 id

173 See generally Dolan, Chris. 2009. *Social Torture: The Case of Northern Uganda 1986-2006*, Berghahn Books, New York

174 Sandarsan Raghavan., ‘Weakened LRA Still Terrorizes villagers’ *The Washington Post* April 11, 2012 <[http://www.washingtonpost.com/world/africa/weakened-lra-still-terrorizes-villagers/2012/04/11/gI0AXIMsAT\\_story.html](http://www.washingtonpost.com/world/africa/weakened-lra-still-terrorizes-villagers/2012/04/11/gI0AXIMsAT_story.html)> accessed March 18, 2014. See also Peter Eichstaedt, ‘First Kill your Family: Child Soldiers of Uganda and the Lord’s Resistance Army’ Chicago Review Press 2009

175 The Justice and Reconciliation Project noted in 2008, that Dominic Ongwen ( one of the top LRA leaders indicted for war crimes) is ‘the first known person to be charged with the same war crimes of which he is also a victim’ See ‘Complicating Victims and Perpetrators in Uganda: On Dominic Ongwen.’ JRP Field Note 7, July 2008. See also IRIN-Analysis:Should Child Soldiers be prosecuted for their crimes? <<http://m.irinnews.org/reprot/93900/analysis-should-child-soldiers-be-prosecuted-for-their-crimes#.VK1ZOaNRW2c>> accessed January 7, 2015.

and forcefully inducted as fighters – often times at the threat of death.<sup>176</sup> Any interventions need to address both the psychological as well as physical needs of such individuals who are often rarely targeted for punishment by either the international criminal tribunals or the national courts.<sup>177</sup>

It is clear from the above inexhaustible list, that the needs of victims are insurmountable. This means that any sustainable post conflict intervention ought to take note of some specific goals that would prevent a situation like the one in Northern Uganda from happening. In the first place, for any intervention to be successful, it ought to be locally acceptable to the people for whom it is prescribed. This means that it should be clear that the people, for whom the settlement is being prescribed, do support and actively participate in it.<sup>178</sup> Their sense of justice should be commensurate with the interventions that are being prescribed for them. Better still, any proposed intervention should be able to give ear to what the people who are affected by the conflict or prioritise as crucial before doing anything for them. This is because these people (citizen subjects) are at the centre of creating, contesting, and amending the proposed interventions.<sup>179</sup> In the case of Northern Uganda in particular, the group of people who need to participate in these TJMs are mainly the victims of the conflict. This does not mean that affected persons and perpetrators should not be involved in the process. Rather, it means that the process ought to be victim-centred.

In this study, the citizen subject is viewed as a merger of three categories of people that were earlier identified by Mamdani as having existed during colonialism:<sup>180</sup> Mamdani describes the citizen as the creation of the colonial state – one who was accorded rights of free association, free publicity and eventually political representation.<sup>181</sup> Such citizenship was awarded to mainly the British settler, the *colon* and a handful of select indigenous

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176 This does not mean that some were not willing participants. It is possible that those born to rebel leaders will easily join the rebellion or others might run away from GoU army reprisals into rebel hands.

177 id

178 Beyond Juba Project, 'Tradition in Transition: Drawing on the Old to Develop a New Jurisprudence for dealing with Uganda's Legacy of Violence,' Beyond Juba Project of Refugee Law Project and Human Rights and Peace Centre of the Faculty of Law, Makerere University *Working Paper No. 1 July 2009*.

179 G. Bachelard, *La Poétique de l'espace* (Paris: Presses Universitaires de France, 1958) C. 10. in Kleinmans & Macdonald., 'What is Critical Legal Pluralism?' (1997)12 *Canada J.L& Soc.* 25 at 38. See also G. Bachelard, *La Poétique de l'espace* (Paris: Presses Universitaires de France, 1958) C. 10. in Kleinmans & Macdonald., 'What is Critical Legal Pluralism?' (1997) 12 *Canada J.L& Soc.* 25 at 38. Kleinmans and MacDonald 1997:40; See also Nakitto Saidat, 'The International Criminal Court, National Courts, Truth Commissions and Peace Negotiations; Complimentary or Alternatives to the Restoration of Peace in Northern Uganda.' <http://ssrn.com/abstract=1400048> at 14; See also Kleinmans and MacDonald 1997:40; See also Nakitto Saidat, 'The International Criminal Court, National Courts, Truth Commissions and Peace Negotiations; Complimentary or Alternatives to the Restoration of Peace in Northern Uganda.' <http://ssrn.com/abstract=1400048> at 14

180 Mahmood Mamdani 'Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism' 1996 Fountain Publishers Kampala at 19.

181 Ibid.

people. The subject on the other hand is described as the 'predominantly rural populace' who were *subjected* to both tradition and Native authority.<sup>182</sup> Mamdani also identifies another group of urban based natives who were 'middle- and working-class persons who were neither rights-bearing citizens, nor subject to the 'lash of customary law.'<sup>183</sup> In most post-colonial states, the citizen, the subject and the urban based native were, to a large extent, eradicated by the post-colonial governments. This left a new category of *citizen* that adhered to the dictates of tradition on the one hand, while enjoying the rights that accrue from being a citizen of the post-colonial state.<sup>184</sup>

The citizen subject is therefore that person who negotiates between respecting the dictates of tradition while at the same time enjoying or even resisting his or her rights to citizenship. He or she remains a citizen subject even when contesting or rejecting either tradition or citizenship because it is in that process that tradition and state law is either amended or even discarded. For Stromseth, such citizen subject has the option in choosing which forum of law to seek redress - either the national courts or the tribal dispute resolution system.<sup>185</sup> To this list one can add the international criminal law option especially in situations where violent conflict has occurred.

Such citizen subjects can be found anywhere – both in the urban or rural areas. For example, some victims of violent conflicts might opt to receive compensation rather than seek for retributive justice, or they might support the latter in addition to the former as well as any other intervention(s) that might be available. As such, the citizen subject may resist the prescribed remedy given by the State and 'choose' the option of seeking redress elsewhere. It is important that any sustainable intervention should take note of the fact that the citizen subject is an active player in determining what sort of justice makes sense to him or her subject to the limitations mentioned earlier. If the interventions prescribed ignore the voice of this citizen subject, then such intervention will most likely suffer from some legitimacy challenges since they will not be supported or even used by some of the citizen subjects. This partly explains why, in the case of Northern Uganda, there has been a resistance to the privileging of criminal trials in favour of TJMs and other non prosecutorial

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182 See Martin Murray 'Review: Configuring the Trajectory of African Political History *Canadian Journal of African Studies / Revue Canadienne des Études Africaines*, Vol. 34, No. 2. (2000), pp. 376-386. <http://links.jstor.org/sici?sici=0008-3968%282000%2934%3A2%3C376%3ACTTOAP%3E2.0.CO%3B2-%23> accessed March 28, 2014.

183 Mamdani 1996 id

184 Mamdani argues that colonial sub-saharan African countries were 'bifurcated' states; states divided distinctly into the 'civilised', white urban space with modern rules, development, infrastructure etc and the 'uncivilised' or traditional countryside which was underdeveloped and was not modern etc..

185 Jane Stromseth, 'Strengthening Demand for the Rule of Law in Post-Conflict Societies' 18 *Minn. J. Int'l L.* 415 (2009) at 420.

interventions. This is probably because some of the citizen subjects have arguably not bought the idea that justice will be served only or entirely through such trial process. This does not mean however, that the citizen subject speaks with one voice. The citizen subject is not a homogenous group. It is acknowledged that there will be those in support of the intervention regardless of the resistance from others. It should be expected that there will be different views regarding what a sustainable post conflict intervention should address first or even not address at all. As the reports from Northern Uganda showed, the survivors of the Northern Uganda conflict have different needs and these call for a multifarious approach to post conflict settlement.<sup>186</sup>

The crucial point here is that whereas the citizen subject(s) often have different views on what kind of justice will suit them, there might be situations where their views, though varied, might also be generally at variance with those of the community or the state. In such an event, the views of the citizen subject ought to be listened to with the hope that a negotiated settlement will be arrived at. This settlement might result into a staggered or sequenced process of diverse interventions, or one agreed position might suffice. Indeed it might be a situation where more than one intervention happens in the same time and space. The normative standard here would be that of universal human rights which ensure that neither the citizen subject nor the community in which he or she lives tramples, over the rights of the other. In any case, the citizen subjects are part and parcel of society. As earlier noted, it should be expected that in cases of conflict between the priorities of either the citizen or the community, negotiation takes place with the possibility that either party may drop their position and adopt the position of the other, or that at a point in future, the positions of either party may also change.

Interventions for post-conflict settlement also need to be adaptable to the times in which they are applied. This is especially crucial in light of the fact that society is not static but is always changing and influenced by global trends and issues such as human rights movements, globalisation, health concerns, the international economic situation, environment, etc.<sup>187</sup> This means that such interventions should remain relevant to the times at which they are being made. For example, where compensation is being given for people who have largely grown up in the villages, the compensation should be adequate to help the affected victims survive in the modern times. This means that in circumstances where two

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186 Phuong Pham & Patrick Vinck, *supra*.

187 For example, practices like throwing a pregnant unmarried girl off the water falls (Kigezi) and wife inheritance (among the Kenyan luos) have been stopped. However, there are still practices like Female Genital Mutilation and the killing of albinos (for witchcraft practices) which continue to survive in various parts of Africa.

head of cattle as well as banishment from the society was the traditionally accepted compensation for manslaughter, the current economic realities would probably require that such compensation be converted into monetary terms, and the punishment of banishment be replaced by some other form of just dessert. In addition, the times dictate that special provision has to be made for women who were traditionally excluded from participating in certain truth telling and reconciliation events because of the patriarchal nature of the society at the time. Where provision for such adaptability is not made, it becomes difficult for the people to own or accept such interventions as helpful for sustainable conflict settlement. Adaptability requires that any interventions, (be they locally inspired such as TJM's or internationally prescribed like the ICC), should be seen to 'repair and restore communal relationships via familiar, locally grounded processes that all community members can associate with'.<sup>188</sup>

As earlier indicated, truth telling processes are a very important requirement for a post conflict sustainable settlement. They are seen as necessary to promote healing as well as to deter reoccurrence of past atrocities. While these processes are easily prone to abuse or misuse, they are legitimate sources for documenting the history of the nation for posterity.<sup>189</sup> Due to their sensitive nature, truth-telling processes need to be used in conjunction with other processes such as amnesty, psychosocial support, prosecutions, TJMs and reparations.<sup>190</sup> This is because some of the testimonies given by perpetrators or witnesses may have negative repercussions upon the audience. In some cases, truth telling might lead to a resurgence of conflict as some might seek vengeance upon listening to what happened to their loved ones. In other cases, victims might be subjected to another form of abuse when they recount what happened before or in situations where heckling occurs. This means that before embarking on a truth-telling process, there ought to be adequate preparation for any eventualities. Allen has criticised such truth-telling processes for merely promoting impunity.<sup>191</sup> However, he ignores the fact that accountability may take different forms and it should not only be punitive. It should also be recalled that victims for whom

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188 Alie, Joe. 'Reconciliation and traditional justice: tradition-based practices of the Kpaa Mende in Sierra Leone', in Huyse L and Salter, M (eds.) *Traditional Justice and Reconciliation after Violent Conflict: Learning from African Experiences*, International Institute for Democracy and Electoral Assistance (2008).

189 See generally, Phil Clark, 2010 *supra*.

190 *Ibid*.

191 Tim Allen and Anna MacDonald, 'Post-conflict Traditional Justice: A Critical Review Justice and Security Research Program, 2013 Justice and Security Research Programme Paper 3, London [http://www.lse.ac.uk/internationalDevelopment/research/JSRP/downloads/JSRP3.Allen Macdonald.pdf](http://www.lse.ac.uk/internationalDevelopment/research/JSRP/downloads/JSRP3.Allen%20Macdonald.pdf) accessed October 9, 2013.

these interventions are targeted are often interested in more than one intervention. This should be the guiding point for achieving a sustainable post-conflict settlement.

In light of the above, it should also be noted that the sense of justice in some of these communities is steeped in myth, spirituality with the additional influence of religion.<sup>192</sup> For Kasenene argues that in any African society, religion is the strongest force that unites people as well as affects the way they behave.<sup>193</sup> Quinn notes that 'African traditional Religion (ATR) – a set of beliefs; practices, ceremonies and festivals; religious objects and places; values and morals-<sup>194</sup> continue to be revered and to influence other traditional practices in the same way that the belief in human rights, equality, and good governance affects the concept of justice in many western countries.<sup>195</sup> Ker Kwaro Acoli note that -

(t)he good health and happiness of the Acholi individual was always situated in the context of harmony and well-being of the clan. The ancestral and religious spirit worlds provided guidance to the Acholi people, maintaining the unity of the clan. Conversely, conflicts, misfortune and poor health could be 'sent' by angry spirits ad extended not only to the violator of moral codes, but to his or her family and clan. Thus one person's actions always had ramifications for his or her family and clan who in turn assumed collective responsibility for the offence.<sup>196</sup>

Ford also argues that the Acholi lifestyle is centred on the spirits who are called *jogi*, the *ajwaka* (clan ritual expert) and the *abila* (clan ritual shrine) around which Acholi or Nilotic life revolved.<sup>197</sup> The shrines (*abila*) may have been neglected, but they did not disappear.<sup>198</sup> Instead, 'the British administrator, the missionary and the *ajwaka* (*clan ritual expert*) walked unwittingly hand in hand together as they sought to minister to the spiritual and physical

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192 Joanna R. Quinn 'The Thing behind the Thing': The Role and influence of religious leaders on the use of traditional practices of acknowledgement in Uganda, paper presented at the Annual meeting of the Canadian Political Science Association, 28 May 2009, Ottawa Canada <[http://politicalscience.uwo.ca/faculty/quinn/the\\_thing\\_behind\\_the\\_thing\\_review\\_faith\\_and\\_international\\_affairs\\_spring\\_2010.pdf](http://politicalscience.uwo.ca/faculty/quinn/the_thing_behind_the_thing_review_faith_and_international_affairs_spring_2010.pdf) > accessed 4 April 2011. Ford argued that religion did not 'impinge on clan ritual but was incorporated in it. See Ford., M: *Janani Luvum; the making of a martyr*, ( London; Marshall Morgan & Scott 1978) at 15

193 Peter Kasenene, *Religious Ethics in Africa* (Kampala: Fountain Publishers, 1998), 18 in Quinn 2009 at 5.

194 John S. Mbiti, *Introduction to African Religion*, 2nd rev. ed., (Kampala: East African Educational Publishers, 1991), 11-12. In Quinn 2009 at 12

195 This influence of ATR on the practice of TJM has been highlighted by scholars (Finnstrom 2008, Behrend 1999). However, 'many social scientists have tended to sidestep the poorly understood importance of the spiritual in attempting to understand the social importance of TJM.' Mbiti, J.S. (1969) *African Religions and Philosophy*. Nairobi: East African Educational Publishers Ltd. See also Hansen & Twaddle, *Religion & Politics in East Africa* (Kampala: East African Educational Publishers, 1995); Jacob K. Olupona (ed.) *African Traditional Religions in Contemporary Society*, (St. Paul, Minn: Paragon House, 1991), 127; Douglas E. Thomas, *African Traditional Religion in the Modern World*( London: Marland 2005).

196 Ker Kwaro Acoli. 'Roco Wat I Acoli: *Restoring Relations in Acholi-Land: Traditional Approaches to Reintegration and Justice*, Lui Institute for Global Issues and Gulu District NGO Forum, September 2005 at 10 <<http://www.ligi.ubc.ca/admin/Information/543/Roco%20Wat%20I%20Acoli-20051.pdf>> accessed October 24, 2013.

197 Ford., M: *Janani Luvum; the making of a martyr*, ( London; Marshall Morgan & Scott 1978) at 15

198 id

needs of the Acholi.<sup>199</sup> LeRoy also explains how ATR is involved' in everything, is confused with everything: with laws and received customs, feasts, rejoicing, mourning, work and business, events, and accidents of life.<sup>200</sup> This means that ATR was never eradicated from the Acholi lifestyle by the introduction of other forms of religious belief.<sup>201</sup> Kasenene confirms that

Traditional values, beliefs, practices... continue to be revered and manifested in almost all spheres of life and co-exist with modern values and values of the other three religions Christianity, Islam, Baha'i, producing an interesting and complex mixture.<sup>202</sup>

As such, the sense of justice amongst the average Acholi is incomplete until the spiritual aspect is addressed.<sup>203</sup> Even after a person is granted amnesty by the GoU or duly punished by the ICD, the Acholi society into which he or she shall thereafter be reintegrated will require that the said perpetrator undergoes spiritual cleansing in order to make him or her acceptable to the community.

In conclusion, this chapter has analysed the major roots causes of violent conflict in Uganda and how they contributed to, and even sustained the LRA/M rebellion. It has shown that in order to effectively address the various needs and goals of post conflict Uganda, an effective and sustainable post conflict intervention ought to take heed and engage with the history, society and political set up of the nation. The chapter has also introduced the construct of the citizen subject without whom any sustainable post conflict intervention would fail. The subsequent chapters will show that only those interventions which engage with the citizen subject effectively respond to the needs and goals of a post conflict society.

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199 Where Witchcraft is far from dead, *The Mercatornet* 18 February 2007 <[http://www.mercatornet.com/articles/view/where\\_witchcraft\\_is\\_far\\_from\\_dead/](http://www.mercatornet.com/articles/view/where_witchcraft_is_far_from_dead/)>accessed 9 April 2011

200 Cited in Vincent Mulago, 'Traditional African Religion and Christianity, ' in *African Traditional Religions in Contemporary Society*, ed. Jacob K. Olupona (St. Paul, Minn: Paragon House, 1991), 127

201 It is also worth noting that Joseph Kony was a former altar boy and that both Alice Lakwena and her father were heavily involved in setting up and officiating at churches. See generally Behrend, H. 2000. *Alice Lakwena and the Holy Spirits: War in Northern Uganda, 1985-97*. James Currey.. See also Behrend, Heike. 1991. "Is Alice Lakwena a Witch? The Holy Spirit Movement and Its Fight against Evil in the North." In *Changing Uganda: The Dilemmas of Structural Adjustment and Revolutionary Change*, Holger B. Hansen and Michael Twaddle, eds. 162-177. London: James Currey. It is therefore not surprising that in some traditional justice ceremonies today, the role of the priest, blessing the reconciling parties is prevalent. See Ker Kwaro Acholi 2005 *supra*.

202 Kasenene, *Religious Ethics in Africa*, 18 in Quinn 2009 at 13.

203 This is further supported by the those former rebels who willingly return or escape from the bush are capable and have been participating in these traditional justice mechanisms. See Lacey Marc, 'Atrocity Victims in Uganda Choose to forgive', *New York Times*, April 18, 2005, available: <http://www.nytimes.com/2005/04/18/international/africa/18uganda.html?ex=1271476800&en=ccda03f538f39e24&ei=5090&partner=rssuserland&emc=rss>, accessed 7 April 2011

## CHAPTER THREE: THE JUBA PEACE TALKS

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### 3.0 INTRODUCTION

In this Chapter, focus is on Agenda Item III of the Juba Peace process which provided for the use of TJMs. The chapter commences with an investigation of what is meant by tradition before analysing what TJMs entail. Thereafter, it briefly lays out the chronology of events leading to the Juba peace talks and how the parties at Juba arrived at providing for TJMs. It then analyses the perceived roles of TJMs in responding to the conflict and shows how they are crucial in responding to Uganda's post-conflict needs and goals. It is finally argued that any interpretive framework for the implementation of Juba ought to take proper account of TJMs and ensure that there is scope for them to be used effectively.

### 3.1 EXPLORING THE CONCEPT OF TRADITION AND TRADITIONAL JUSTICE

#### 3.1.1 Tradition Defined

Tradition has been termed as a 'belief transmitted from one generation to another and accepted as authoritative, and or differed to, without argument.'<sup>1</sup> Furthermore, tradition has been generally defined as 'an inherited body of customs and beliefs'<sup>2</sup> or as 'ancient customs which have survived against modern influence.'<sup>3</sup> 'Tradition' also refers to 'customs and usages that derive their popular authority from practices and beliefs that pre-date the arrival of the modern state. However, 'tradition', is not a static or absolute phenomenon but one that is inherently dynamic, fluid and subject to change.'<sup>4</sup>

The term 'traditional' on the one hand, is considered to have Eurocentric connotations which tend to suggest 'profoundly internalized normative structures and patterns followed

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1 H.B Acton, 'Tradition and some other forms of order', Proceedings of the Aristotelian Society, N.S., Vol.53(1952-1953)<sup>2</sup> in JLOS, 'Traditional Justice and Truth Telling and National Reconciliation' Study Report( Final Draft) July 2012.

2 Richard Handler and Jocelyn Linnekin, 'Tradition, Genuine or Spurious', (Jul. - Sep., 1984), *The Journal of American Folklore* 97 (385) 273-290, <<http://www.jstor.org/stable/540610>> accessed October 31, 2013.

3 Reconciling Justice: 'Traditional' Law and State Judiciary in East Timor, Final Report, (Tanja and Rod Eds.,) United States Institute of Peace 2003 at 11

4 See UNICEF 'Traditional' Justice Systems in the Pacific, Indonesia and Timor-Leste,' 2009 Justice for Children in the Pacific, Indonesia and Timor-Leste, EAPRO Sub-Regional Workshop, Papua New Guinea at page 1.

from ‘time out of mind’ in static economic and social circumstances.<sup>5</sup> This view is disputed by Vansina who argues that ‘traditions are historical phenomena which occur everywhere.’<sup>6</sup> These phenomena respond to changes resulting from several factors and forces. Tradition contains ‘a constant process across time and in time, linking past with present, and ensuring continuity.’<sup>7</sup> It should be viewed as ‘dynamic and ever-changing as culture and societal needs alter.’<sup>8</sup> Huyse also states that ‘the events of history, including colonisation, modernisation, civil war, and genocides, have influenced original institutions exercising TJMs to such a degree that “strictly speaking, they are no longer traditional.”<sup>9</sup>

The first component of tradition is that it is transmitted. The same can be said of ICL which has developed over a period of time by adopting various practices and procedures.<sup>10</sup> Shils states that tradition is ‘anything which is transmitted or handed down from the past to the present.’<sup>11</sup> Shils further argues that the content of what is handed down, the manner it is handed down and for how long it is handed down, is immaterial.<sup>12</sup> The malleability of tradition is based on the fact that it generally starts at the personal/individual level. This means that the citizen subject is at the centre of engaging with the past and actively participates in transcending the tradition (s) in the present and laying ground for passing the same on for the future.<sup>13</sup> The personal participation of the citizen subject means that he or she will affect the very tradition by either, strengthening it, eliminating certain aspects from it, or deleting it altogether.<sup>14</sup> It is not merely a matter of preserving this tradition but engaging with it. Commenting on the traditions of the Akarimojong, Knighton writes that

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- 5 Joe A.D. Alie: Reconciliation and traditional justice: Tradition-based practices of the Kpaa Mende in Sierra Leone. Traditional Justice and Reconciliation after Violent Conflict, *Learning from African Experiences*, International Institute for Democracy and Electoral Assistance: P.133, 2008. He argues that African institutions, whether political, economic or social, have never been inert.
- 6 Vansina, Jan, *Paths in the Rainforests: Towards a history of political tradition in Equatorial Africa* (Oxford: James Currey 1990)
- 7 Mary Ellen Brown, *Burns and Tradition* (Champaign: University of Illinois Press, 1984, p. Xii).
- 8 *ibid.*
- 9 Huyse, L (2008) ‘Introduction: Tradition-based approaches in peacemaking, transitional justice and reconciliation policies’ & ‘Conclusions and recommendations’ in Huyse, L & M Salter (eds.) *Traditional Justice and Reconciliation after Violent Conflict. Learning from African Experiences*, International Institute for Democracy and Electoral Assistance at 8.
- 10 W.A. Schabas, *An Introduction to The International Criminal Court* (4th edn. 2011)191
- 11 S. Langlois, Traditions: Social, in Neil J. Smelser and Paul B. Baltes, (eds), *International Encyclopaedia of the Social & Behavioural Sciences*, (Pergamon, Oxford, 2001)15829-15833.
- 12 *Ibid.*
- 13 Tradition has also been defined as ‘a constant process across time and in time, linking past with present, thus ensuring continuity. It is also dynamic and ever-changing as culture and societal needs alter. One of the elusive but preserving cultural bases which bind people to one another, it unites individuals and refutes the isolation and insularity man as a social being fears. <<http://hercules.gcsu.edu/~mmagouli/tradition.htm>> accessed March 24, 2011.
- 14 Hymes, Dell. ‘Breakthrough into Performance’ In D. Hymes, (ed.) *In Vain I Tried to Tell You: Essays in Native American Ethno poetics*. (Philadelphia: University of Pennsylvania Press. 1981)79-141.

The Akarimojong do not need to invent tradition to bolster new and artificial institutions, for much of their tradition is given, and so long as they can decide collectively through many small incidents how that *givenness* is to be interpreted and applied, they will adhere to it.<sup>15</sup>

In Knighton's view, there is no need for a specific reform process of tradition. Instead the Akarimojong have incorporated these new traditions since they are 'so spontaneous and natural (and) ... often unperceived.'<sup>16</sup> Tradition is not merely 'inherited' or some 'static, immutable force from the past,<sup>17</sup> but (it is) 'those pre-existing culture-specific materials and options that bear upon the personal tastes and talents.'<sup>18</sup> As Knighton notes –

Traditions exist in Africa as elsewhere...new traditions are constructed through the collective choices of the people involved, even when the originating event has not been replicated... traditions are held dear when people feel they have participated in initiating, maintaining, modulating or reforming them. Traditions therefore emerge or die primarily through collective choice, which is why examining them frequently reveals significant features about people who maintain them.<sup>19</sup>

It is what Hymes refers to as a process of recreation by successive persons and generations. Bauman refers to tradition as 'a super organic temporal continuum'<sup>20</sup> where individuals actively participate by interpreting and attributing meaning to the present while at the same time making reference to the past.<sup>21</sup> Nyanzi et al note that it is these individuals at the grassroots who have the 'resources and ingenuity to modify rituals when these become unsuited to their outlook and way of life.'<sup>22</sup> They are best understood by analyzing their historicity in-depth rather than considering them as being a 'response to external interventions like slavery, colonialism, the cold war or development.'<sup>23</sup> It can be argued that the key determinant is the individual citizen who practices, contests and amends these

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15 Ben Knighton, *The Vitality of Karamojong Religion: Dying Tradition or Living Faith?* (Burlington: Ashgate, 2005).

16 See generally Ranger, TO and Vaughan, MO (eds) *Legitimacy and the State in Twentieth Century Africa* (London: Macmillan 1993).

17 Richard Bauman, 'Differential Identity and the Social Base of Folklore,' in *Toward New Perspectives in Folklore* (Austin: University of Texas Press, 1972) 33.

18 Barre Toelken, *the Dynamics of Folklore*, (Utah State University Press, 1996)10.

19 id

20 Richard Bauman, (1972) 33.

21 Handler R and Linnekin J (1984).

22 Nyanzi S, Nassimbwa J, Kayizzi V and Kabanda S 'African Sex Is Dangerous! Re-negotiating 'Ritual Sex' In Contemporary Masaka District' *Africa* (78 (4) 2008)518. Nyanzi argues that it is the meanings of the rituals that are important to individuals and society.

23 Jones 2009 at 25.

traditions. It is crucial to highlight the central role of the individual citizen as both a subject as well as an active participant in the sustenance or ‘continuity’ of this ‘tradition.’

This view has been criticised by Allen who argues that the uncertainty of traditions has opened them to being abused by individuals who seek to create traditions and then clothe them as such with the support of donors.<sup>24</sup> This is probably in light of the fact that there has been donor support for the *mato oput* ceremonies in Northern Uganda – ceremonies which did not envisage mass atrocities of the scale that was witnessed by the LRA rebellion.<sup>25</sup> Allen’s criticism is arguably based on the dominant view in the western tradition of legal positivism which does not focus on the agency of the citizen subject but rather emphasises procedure as being central to legitimacy.<sup>26</sup> The western tradition considers the law as a ‘monolithic united set of rules flowing from the State’s hierarchy.’<sup>27</sup> Western legal tradition gives attention to having a well elaborated process through which law is amended and contested. The rules of adherence to the law are strict and are not the preserve of the individual. To a certain extent, Allen’s criticism is justified in so far as the procedures in TJMs might not be as elaborate as those envisaged in procedural justice. However, there is certainly a procedure that is followed by most of these TJMs. It is admitted that one of the weaknesses of TJMs is that such procedures might – in some circumstances- be easily avoided for purposes of expediency. However, this weakness can also be viewed as strength in light of the fact that amendments can be made to the procedures to incorporate those that foster fair trial processes as elucidated in the ICCPR and the Constitution of Uganda, among others.

Each society, regardless of its level of development or demographics, has tradition. These traditions are found in different ways of doing business, social organisation, politics, justice systems to mention but a few. Conclusively, a reference to the ‘traditional,’ means that which is ‘inherently uncertain, with no clear guide to the amount, duration, frequency, and continuity.’<sup>28</sup> Brown argues that tradition is very essential in the preservation of cultural

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24 Allen T (2008) 132. Allen here criticises organisations like the U.S. Agency for International Development (USAID) and Northern Uganda Peace Initiative (NUPI) for supporting the Ker Kwaro Acholi (KKA)—the cultural institution of the Acholi- to carry out TJMs.

25 See generally Ker Kwaro Acholi 2005. ‘Roco Wat I Acoli: *Restoring Relations in Acholi-Land: Traditional Approaches to Reintegration and Justice*, Lui Institute for Global Issues, Gulu District NGO Forum at 10.

26 Drumbl (2007) 143.

27 Jones Richard ‘The Internet, Legal Regulation and Legal Pluralism’ 13th Annual BILETA Conference: ‘The Changing Jurisdiction’ March 27th & Saturday, March 28th, 1998 at 1. <<http://www.bileta.ac.uk/content/files/conference%20papers/1998/The%20Internet,%20Legal%20Regulation%20and%20Legal%20Pluralism.pdf>> accessed 2, November 2013.

28 Mearns argues that social systems are never static and are always subject to influences that cause cultural transformations. David Mearns, ‘Variations on a theme: Coalitions of Authority in East Timor: A Report on the Local

bases which bind people to one another.<sup>29</sup> This shows that tradition cannot be sustained in isolation but needs a community. It needs acceptance. This process dispels the false dichotomy that tradition and modernity are mutually exclusive states. For Smith, the 'tradition' and the 'new' are interpretive rather than descriptive terms: since cultures change ceaselessly, there can only be what is 'new', although what is new can take symbolic value as 'traditional'.<sup>30</sup> Rather, it should be seen as an interpretative process since it embodies both continuity and discontinuity.<sup>31</sup> This is because there is cross penetration between the two: the modern is supported by what is considered as 'old and unchanging' tradition and vice versa. Any reference to what is often seen as 'modern law' actually is a reference to a collection of diverse centuries-old practices that have been developed and improved over time.<sup>32</sup> This means that modern law is not 'modern' *per se* but is a term used to contrast itself from those communities which have been classified as barbaric,<sup>33</sup> under-developed, uncivilised or un-cultured. In law, the term 'modern' is used to present a 'supposedly rational social order in contrast to alternative, less civilised means of achieving the same objective.'<sup>34</sup> Nonetheless, modern law cannot be separated from the culture in which it is developed. As Fitzpatrick notes, concepts of scientific rationality, universal knowledge, rational judgement and reasonable laws are myths just like modern law because they are conceived by individuals who are operating in a specific time and space. These individuals arrive at such decisions based on specific biases and prior knowledge. It can be argued that in the case of Africa, when the colonial masters simply imported this 'modern law' into the colonies, they ignored its 'detailed tentacular non-legal controls.'<sup>35</sup> To an extent, this explains why the traditions, cultures and other laws which were found by these colonialists were never completely eradicated. It additionally explains why the colonised people interpreted the modern law through their own practices and cultures. This aforementioned discussion lays a firm foundation for an active role of TJMs in post conflict Uganda,

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and National Justice Systems as a basis for Dispute Resolution. Australian Legal Resources International. (Dec. 2001) 8-9.

29 Mary Ellen Brown (1984) *supra*

30 Richard Handler and Jocelyn Linnekin, 'Tradition, Genuine or Spurious', (Jul. - Sep., 1984), *The Journal of American Folklore* 97 (385) 273-290, <<http://www.jstor.org/stable/540610>> accessed October 31, 2013

31 *id*

32 See Fitzpatrick P 'The Mythology of Modern Law (London and New York: Routledge 1992) 11. See Fitzpatrick argues that law is not unique but is 'merely a form of modernist rationality traceable back to the Enlightenment. See Adelman Sammy, 'Review of Fitzpatrick P 'The Mythology of Modern Law (London and New York: Routledge), 1992, in 59 *Review of African Political Economy* (1994) 137-142 <<http://www.roape.org/pdf/5920.pdf>> accessed October 31, 2013.

33 See Vitoria, F., *De Indis* (1539), 'The just titles by which the barbarians of the New World passed under the rule of the Spaniards,' in Pagden A. & Lawrence J.(eds), *Francisco de Vitoria-Political Writings* (Cambridge CUP) 277-284.

34 Adelman Sammy, 1994 *supra* page 137 - 142.

35 Fitzpatrick P 1992 *ibid*.

especially in the light of the fact that victim groups, women groups, religious and cultural leaders and sections of the populace were in support of their inclusion in the transition process.<sup>36</sup>

### 3.1.2. Traditional Justice Mechanisms Defined

TJMs have been described as a body of traditional systems of law and justice that reflects principles of conflict management with both retributive and restorative elements.<sup>37</sup> Since all societies (ancient and modern) have got traditions, they too have traditional mechanisms in which they carry out their version of justice. These ways of justice are not cast in stone but remain dynamic. To put it otherwise, the only constant thing about the traditional ways of justice is ‘change.’

Although most societies will have more than one form of justice mechanism, some forms of traditional justice are more predominant than others. Like tradition, these justice mechanisms have evolved over time and continue to change. Changes may occur in form of procedure, penalties or judgements given, types of compensation, formation of the tribunal or personnel that make the decisions, among others.<sup>38</sup> For example, before the death penalty was abolished in England, it took different forms like quartering, hanging, boiling, dismembering, shooting, and drowning among others.<sup>39</sup> The current jury system has evolved over centuries to where it is today. Whereas all societies will view their own judicial systems as their form of ‘traditional’ justice, a difference has to be made between the traditional justice as viewed by the more powerful and developed states, on the one hand, and the TJMs of the developing states on the other.<sup>40</sup>

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36 See Phuong Pham and Patrick Vinck, *'Transitioning to Peace: A Population based Survey on Attitudes about Social reconstruction and Justice in Northern Uganda,'* December 2010 Human Rights Centre, University of California, Berkeley School of Law. , *'The Cooling of Hearts: Community Truth-Telling in Acholi-Land'*, Justice and Reconciliation Project (JRP), Gulu District NGO Forum, Liu Institute for Global Issues, July 2007., Lino Owor Ogora, 'Moving Forward: Traditional Justice and Victim participation in Northern Uganda' (*Andre du Toit* ed.) Institute for Justice and Reconciliation 2009

37 The term justice its broadest and widest definition to include and not limit all those measures which can be attempted to resolve conflict, punish individuals, deter crime, fight impunity, salvage dignity, pursue equality, seek forgiveness and conciliation, etc. See also James Ojera Latigo, 'Northern Uganda: Tradition-based practices in the Acholi Region in (L. Huyse, M.Salter, (eds.) *'Traditional Justice and Reconciliation after Violent Conflict: Learning from African Experiences,'* IDEA, (2008)108.

38 See generally Jarvis F. Stephen, *A History of the Criminal Law of England* (B. Franklin NY 1883) in Ruhweza Ronald Daniel, *'A Review of the Application of the Death Penalty in Uganda,'* LLB Dissertation Makerere University 2000 (unpublished) copy with researcher.

39 Leon Radzinowicz, *A History of English Criminal Law& Its Administration from 1750* (Stevens & Sons Ltd, London 1948) 220.

40 Fitzpatrick supra.

### 3.1.3 West European Traditional Justice Mechanisms

In the first category is a traditional justice legal system that has grown from particular social conditions and legal traditions of the countries mainly located in Western Europe.<sup>41</sup> It is characterised by codification, the use of judges, juries, assessors, rules of evidence, and elaborate procedures of arriving at the truth based on principles of rationality. This system is common in many parts of continental Europe, the British Commonwealth, and those regions that are often referred to as the Western world.<sup>42</sup> Countries in the aforementioned category include Great Britain,<sup>43</sup> France,<sup>44</sup> Spain and others whose governance systems had developed to become centralised with either autocratic or semi-autocratic rule of the monarchies, checked by courts and houses of parliament.<sup>45</sup> These States have developed a *tradition* of law over time that is based on Western legalist ideas although it can no longer be exclusively owned by the West.<sup>46</sup> This is because these countries participated in the colonisation of lands in the Southern Hemisphere and transplanting their own laws in these colonies.<sup>47</sup> As a result, the colonies re-interpreted and transformed these western laws in accordance with their local legal conceptions so as to construct a new law out of the fragments of these old colonial laws.<sup>48</sup> As these former colonies acknowledge this new brand of law as their official or State law, the hitherto 'old' colonial laws have not been static but have continued to be transformed by their States.<sup>49</sup>

Drumbl further notes that the transplantation of domestic law into the international context is based on the pernicious fiction that Western justice modalities are value-neutral and

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41 Tim Allen and Anna MacDonald, 'Post-conflict Traditional Justice: A Critical Review Justice and Security Research Program, (Paper 3, London 2013)1.

42 Merry, Sally Engle 'Legal Pluralism and Transnational Culture: The *Ka Ho'okololoniui Kanaka Maoli* Tribunal, Hawai'i, 1993 in Richard A. Wilson, '*Human Rights, Culture and Context: Anthropological Perspectives*, (Pluto Press 1997) 29.

43 See generally Kieth Feiling '*A History of England: From the Coming of the English to 1918*' (Redwood Press Limited London 1950).

44 See generally Roger Price, '*Concise History of France* (CUP Glasgow 1993) 47.

45 See for example Christopher Harvie, *The Revolution and The Rule of Law (1789-1815)* in Kenneth O. Morgan (ed) *The Oxford Illustrated History of Britain* (Guild Publishing London 1984) 523.

46 See Merry, Sally Engle 'Legal Pluralism and Transnational Culture: The *Ka Ho'okololoniui Kanaka Maoli* Tribunal, Hawai'i, 1993 in Richard A. Wilson, '*Human Rights, Culture and Context: Anthropological Perspectives* , Pluto Press 1997 at 29.

47 For Uganda, this was through the Foreign Jurisdiction Act 1890 and the African Order-in-Council 1889. An Order-In-Council 1911 made the common law, doctrines of equity and Statutes of General Application which were in force in England as at August 11, 1902 to be applicable to the Ugandan protectorate.

48 Kenneth O. Morgan (ed) *The Oxford Illustrated History of Britain* (Guild Publishing London 1984) 523

49 id

universal when 'they are in fact deeply culturally contingent'<sup>50</sup> Kelsall agrees by arguing that-

Courts (in the Anglo-American 'rationalist' tradition of evidence) function according to the principle that there exists an objective reality independent of what anyone thinks about the world, that knowledge corresponding to his value-free reality has the status of truth, and that the truth can be discovered by drawing inferences inductively from relevant evidence. In this tradition, judicial decision-making consists essentially in applying substantive law to the objective 'facts', as scientifically ascertained<sup>51</sup>.

Kihika aptly puts it this way-

We should resist the urge to define justice primarily by western conceptions of retribution and accountability. As Brian Kagoro rightly observes in the Refugee Law Project's 2011 publication, 'When Law meets Reality', for most post conflict societies on the continent, it doesn't make sense to devote billions of dollars pursuing a few criminals at the expense of reconstruction, rehabilitation of victims and development. It doesn't make sense to spend billions prosecuting perpetrators yet survivors of the gross violations of human rights remain impoverished and living with continuing effects of the violations they suffered, with very little access to rehabilitation programs and basic social services. To be clear, I believe accountability and social reconstruction are not mutually exclusive; however when a post conflict society confronted with numerous competing demands, policy choices and priorities should be based on interventions that have a greater impact in empowering and restoring the dignity and humanity of those most affected. <sup>52</sup>

West European traditional justice systems are therefore constantly changing and are not static. They continue to be amended to suit the purposes of those who seek to use them.

### **3.1.4 Traditional Justice Mechanisms in Developing Countries**

The second category of traditional justice is where communities innovate and utilize in resolving localized disputes to attain safety and access to justice by all.<sup>53</sup> As opposed to the

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50 Drumbl, Mark A. 'Collective violence and individual punishment: the criminality of mass atrocity. Northwestern University Law Review [2005] 99 (2) 539, 551 in Kelsall (2009) 9.

51 Nicolson, Donald 1994 Truth, Reason and Justice: Epistemology and Politics in Evidence Discourse. Modern Law Review 57(5): 726-44 in Kelsaall at 9.

52 Kasande Sarah Kihika, Uganda: Shifting the Discourse From Victimhood to Reconstruction' available at <http://allafrica.com/stories/201412041627.html>

53 The Justice Law and Order Sector, (JLOS), 'Traditional Justice and Truth Telling and National Reconciliation. Study Report. (Final Draft)' July 2012. <[http://www.jlos.go.ug/index.php/document-centre/document-centre/doc\\_download/213-report-traditional-justice-and-truth-telling-report-validation-workshop](http://www.jlos.go.ug/index.php/document-centre/document-centre/doc_download/213-report-traditional-justice-and-truth-telling-report-validation-workshop)> accessed August 6, 2013.

State law, these TJMs are as informal or cultural ways of resolving conflicts within and among their various nationalities and ethnic groups.<sup>54</sup> Other words used to describe these TJMs include; popular justice, customary justice, community justice, grass-roots justice, indigenous justice,<sup>55</sup> and non-state justice.<sup>56</sup> The term TJMs is used as a 'catch-all designation to describe procedures that other kinds of justice provision cannot reach.'<sup>57</sup> These TJMs are diverse forms of dispute resolution that form part of the beliefs, customs or way of life of a particular group of people. For Mearns, TJMs are highly localised collection of local practices which are numerous in application and format.<sup>58</sup> Caroline Sage and Michael Woolcock argue –

First, the failure to recognize different systems of understanding may in itself be discriminatory or exclusionary, and hence inequitable. Second, there are often very good reasons why many people chose to use informal or customary systems which should be considered and understood. Third, there is ample evidence that ignoring or trying to stamp out customary practices is not working, and in some cases is having serious negative implications. Fourth, ignoring traditional systems and believing that top-down reform strategies will eventually change practice at the local level may mean that ongoing discriminatory practices and the oppression of marginalized groups in the local context goes unchallenged. Finally, focusing purely on state regimes and access to formal systems in some ways assumes that such systems can be made accessible to all, while clearly even in the most developed countries this is not the case.<sup>59</sup>

Whereas these TJMs vary from community to community, many proponents have argued that one key characteristic is the principle of restoration and reconciliation.<sup>60</sup> This however does not mean that they do not prescribe retributive and deterrent sentences as and when the need arises.

It is this therefore this second type of TJMs that is the focus of this study's analysis in light of a sustainable post conflict settlement. A comprehensive meta-analysis of various TJMs

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<sup>54</sup> ACCORD , 'Background Papers Presented To The Conference On 'Peace Research And The Reconciliation Agenda', Gulu, northern Uganda, September 1999, COPE Working Paper No. 32, London . See also Latigo, (2008)108.

<sup>55</sup> See generally Bojosi Kaeleboga, 'International Law, Colonialism and the Concept of Indigenous Peoples in Africa' (Dphil thesis, University of Oxford 2012). See also Ronald Kakungulu-Mayambala, 'Indigenous People, Human Rights, and the African Problem: The Case of the Twa, Ogiek and Maasai' (SID Thesis, University of Arizona, 2010).

<sup>56</sup> JLOS, (2012) *supra*.

<sup>57</sup> Tim Allen & Anna MacDonald, *supra*.

<sup>58</sup> Mearns D, 'Variations on theme: Coalitions of Authority in East Timor. A Report on the Local and National Justice Systems as a basis for dispute resolution, December, Australian Legal Resources International. 2001. See also Hohe T and R Nixon, 'Reconciling Justice 'Traditional' Law and State Judiciary in East Timor,' January 2003, United States Institute of Peace.

<sup>59</sup> Leila Chirayath, Caroline Sage and Michael Woolcock, 'Customary Law and Policy Reform: Engaging with the Plurality of Justice Systems July 2005) 5 <[http://siteresources.worldbank.org/INTWDR2006/Resources/477383-1118673432908/Customary\\_Law\\_and\\_Policy\\_Reform.pdf](http://siteresources.worldbank.org/INTWDR2006/Resources/477383-1118673432908/Customary_Law_and_Policy_Reform.pdf)> accessed July 26, 2013.

<sup>60</sup> Latigo, (2008) *supra*.

in Uganda has been carried out and attached to this thesis as Annexure Tables A and B. It is upon this background, that the thesis argues that such TJMs have all the qualities of the kind of sustainable post conflict intervention needed for post violence situations as enumerated in 2.4 above.

### **3.2 TRADITIONAL JUSTICE MECHANISMS AND THEIR ROLE IN POST CONFLICT SITUATIONS**

In post-conflict situations, TJMs have been suggested by community and tribal leaders as being part of a 'fully integrated approach' in which multiple paths to justice are promoted.<sup>61</sup> This means that while there may be other interventions operating in the same time and space as TJMs, these suggest that TJMs are more attentive to social integration and reconstruction as compared to other interventions like trial justice or amnesties.<sup>62</sup> In situations like Northern Uganda, where familial, community and state institutions broke down due to conflict, TJMs are indeed viewed as being 'more accessible to the poor, are relatively quick and cheap and, crucially, the arbiter of issues of great social and economic concern, namely land and family/lineage issues.'<sup>63</sup> The view that TJMs are seen as a worthy mechanism to 'repair and restore communal relationships via familiar, locally grounded processes that all community members can associate with' has also been supported by the Office of the High Commissioner for Human Rights (OHCHR)<sup>64</sup> which notes that-

Parallel to the formal justice system, traditional and cultural chiefs and elders continue to play a significant role in resolving disputes, notwithstanding the erosion of their authority during the conflict... Traditional justice in Acholi is restorative in nature and includes aspects of trust, the voluntary nature of the process, truth telling, compensation and restoration. The revival of *Ker Kwaro* in the 1995 Ugandan Constitution together with the efforts of its leadership has strengthened this institution. It has modified cleansing rituals for returnees, which has had positive

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61 For a list and brief description of the various types of TJMs in Northern Uganda, see Roco Wati Acoli ( n. ) *supra*. See also UCICC 'Approaching National Reconciliation In Uganda. Perspectives On Applicable Justice Systems,' <[http://www.iccnw.org/documents/ApproachingNationalReconciliationInUganda\\_07aug13.pdf](http://www.iccnw.org/documents/ApproachingNationalReconciliationInUganda_07aug13.pdf) > accessed April 3, 2014.

62 UN Security Council (2004) '*The rule of law and transitional justice in conflict and post-conflict societies*', Report of the Secretary-General. New York, 23 August 2004) 1. See also Roht-Arriaza, Naomi. *Transitional justice in the twenty-first century: beyond truth versus justice*. (Cambridge University Press 2006) 8 in Allen & MacDonald *supra*.

63 See An-Na'im A. and Hammond, 'Cultural Transformation and Human Rights in African Societies', in An-Na'im (ed.), *Cultural Transformation and Human Rights in Africa*, (Zed Books, London 2002).

64 Alie, Joe. 'Reconciliation and traditional justice: tradition-based practices of the Kpaa Mende in Sierra Leone', in Huyse L and Salter, M (eds) *Traditional Justice and Reconciliation after Violent Conflict: Learning from African Experiences*, International Institute for Democracy and Electoral Assistance (2008).

effects on the sensitization of the population and relief for returnees, as well as in bringing about unity and confidence building.<sup>65</sup>

Graydon also argues that TJMs are viewed as being popular practices among the masses because they are easily accessible, affordable and provide immediate effective within mainly grassroots communities.<sup>66</sup> Waldorf also argues that TJMs focus on creating harmony and restitution and being characterised by public participation.<sup>67</sup> This view is also supported by the Penal Reform International which notes that the approach taken by TJMs is one of –

viewing a problem as that of the whole community or group, emphasis on reconciliation and restoring social harmony, traditional arbitrators are appointed from within the community on the basis of status or lineage, a high degree of public participation, customary law is merely one factor considered in reaching a compromise, the rules of evidence and procedure are flexible, there is no professional legal representation, the process is voluntary and the decision is based on agreement, an emphasis on restorative penalties, enforcement of decisions secured through social pressure and the decision is confirmed through rituals aiming at reintegration.<sup>68</sup>

The aforementioned list is neither exhaustive nor entirely true since other TJMs provide penal sanctions for those found at fault. They are also capable of including non penal sanctions where none were used before. Such sanctions may include imprisonment, compensation, community service and other punishments.<sup>69</sup>

One of the strengths of TJMs is the ability to be amenable to the circumstances under which they are applied. At the height of the conflict in Northern Uganda, the inability of the state machinery to access all people provided opportunity for the people to resort to their easily accessible methods of resolving conflicts within the Internally Displaced Peoples

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65 *Report of the High Commissioner for Human Rights on the activities of her office in Uganda*, U.N. Doc. A/HRC/4/49/Add.2), 12 February 2007, paragraph 37.

66 Graydon, C. 'Local Justice Systems in Timor-Leste: Washed up or watch this space?' *Development Bulletin*, (No. 668, 2005) 66-70. By *grassroots communities*, we refer to a social and political group that is normally resident in the rural and semi-urban communities. They have rudimentary means of income and are generally part of what is called the bottom billion today. See Paul Collier, *The Bottom Billion: Why the Poorest Countries are Failing and What Can Be Done About It* 2007. See also Terry O'Brien, *The Bottom Billion: Why the Poorest Countries are Failing and What Can Be Done About It: Some insights for the Pacific?* <[http://www.treasury.gov.au/documents/1304/HTML/docshell.asp?URL=05\\_The\\_Bottom\\_Billion.asp](http://www.treasury.gov.au/documents/1304/HTML/docshell.asp?URL=05_The_Bottom_Billion.asp)> accessed August 6, 2013.

67 Waldorf, L. 'Mass justice for mass atrocity: Rethinking local justice as transitional justice.' *Temple Law Review*, (2006) 1, 1-88.

68 Penal Reform International, 'Access to Justice in Sub-Saharan Africa: The Role of Traditional and Informal Justice Systems', Penal Reform International, London 2001, <[www.gsdr.org/docs/open/SSAJ4.pdf](http://www.gsdr.org/docs/open/SSAJ4.pdf)> accessed June 25, 2013.

69 See for example, Allen T, 'War and Justice in Northern Uganda: An Assessment of the International Criminal Court's Intervention: An Independent Report, February 2005'<sup>87</sup> (Copy in file with author). It should be noted that TJMs work well where the community is relatively homogenous both linguistically and culturally and is bound by ties of mutual dependency. See Ewa Wojkowska, 'Doing Justice: How informal systems can contribute, UNDP, 2006'<sup>18</sup>.

camps.<sup>70</sup> This partly explains why the use of *Mato Oput* was encouraged by the leaders even if it was never designed for situations where mass atrocities had been committed. This is an example of how the citizen subject can be actively involved in the creation of normative orders that can help him or her to adapt to the challenges of the day. One of the salient strengths of any justice system is the 'confidence of the community' in the 'people who would carry out justice' on their behalf.<sup>71</sup> TJMs enjoy a lot of public confidence and this is strength that helps them to continue existing within their specific societies. Additionally, the ontology of societies plays a vital role in propagating and strengthening the use of TJMs. Many of these judicial practices are steeped in both myth and spirituality.<sup>72</sup> The introduction of foreign religions like Islam and Catholicism did not 'impinge on clan ritual or even TJMs.'<sup>73</sup> As Ford notes, due to the fact that the life of the average Acholi is most probably heavily intertwined with ATR, this makes it easier for them to continue being receptive to TJMs.<sup>74</sup> However, this strength has also been one of TJMs greatest weaknesses especially with the advent faith movements like Pentecostalism which have by and large criticised TJMs for engaging in archaic practices which they view as being of no or lesser relevance in this day and age. We analyse this further in the next section. Therefore, whereas the aforementioned authors are, to a large extent correct in their opinions and observations about TJMs, it is also true that sometimes TJMs are spoken of in more glorified terms than the reality. In the next section, we shall analyse a few circumstances a few scenarios where TJMs have been studied.

### 3.3 THE EFFICACY OF TRADITIONAL JUSTICE MECHANISMS

In this section, an analysis of the efficacy of TJMs is made with specific reference to what they are able to do as part of the transitional justice framework. The authors analysed here

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70 Jones, B. (2009, 26),. See also Joanna R. Quinn 'The Thing behind the Thing': The Role and influence of religious leaders on the use of traditional practices of acknowledgement in Uganda, paper presented at the Annual meeting of the Canadian Political Science Association, 28 May 2009, Ottawa Canada <[http://politicalscience.uwo.ca/faculty/quinn/the\\_thing\\_behind\\_the\\_thing\\_review\\_faith\\_and\\_international\\_affairs\\_spring\\_2010.pdf](http://politicalscience.uwo.ca/faculty/quinn/the_thing_behind_the_thing_review_faith_and_international_affairs_spring_2010.pdf)> accessed 4 April 2011. See also Beyond Juba Project, *Tradition in Transition* (2009,30).

71 *ibid*

72 Joanna R. Quinn 'The Thing behind the Thing': The Role and influence of religious leaders on the use of traditional practices of acknowledgement in Uganda, paper presented at the Annual meeting of the Canadian Political Science Association, 28 May 2009, Ottawa Canada <[http://politicalscience.uwo.ca/faculty/quinn/the\\_thing\\_behind\\_the\\_thing\\_review\\_faith\\_and\\_international\\_affairs\\_spring\\_2010.pdf](http://politicalscience.uwo.ca/faculty/quinn/the_thing_behind_the_thing_review_faith_and_international_affairs_spring_2010.pdf)> accessed 4 April 2011

73 Ford., M: *Janani Luxwum; the making of a martyr*, ( London; Marshall Morgan & Scott 1978) at 15

74 It is also worth noting that Joseph Kony was a former altar boy and that both Alice Lakhwena and her father were heavily involved in setting up and officiating at churches.

write on various aspects of how TJMs work in the different circumstances and situations in the world and how they seek to keep relevant to the justice demands today.

In a case study on traditional justice in Aceh and East Timor, Horne demonstrates that the part played by TJMs in resolving post conflict violence is actually a modest one. He argues that just because something is viewed as 'tradition' does not necessarily equate with legitimacy or efficacy.<sup>75</sup> He further notes that much as traditional practices are frequently used in the community, to suggest that such traditional *ceremonies* should trump other formal types of dispute resolution mechanisms, such as trials or lustration procedures, would fail to represent the stated desires of local citizens for other justice options. Over reliance on TJMs would also ignore the class and gender implications of these decisions in so far as they level the often paternalistic playing field that many TJMs avoid to disrupt.<sup>76</sup>

Horne also notes that just as it would be equally problematic for external actors to impose Western notions of justice, imposing re-imagined notions of traditional justice would do the same thing. In essence, traditional justice should be viewed as being part of the larger transitional justice project which includes, but is not limited to trial justice, reconciliation ceremonies, compensation; peace building, et al. Allen and Macdonald also argue that

Although findings remain rather vague, inconclusive and anecdotal, studies of places as varied as Peru, Burundi and Afghanistan tend to suggest that traditional processes are "partially effective" and "partially legitimate" in addressing post-conflict justice issues, and that they could effectively combine with other strategies for dealing with accountability and reconciliation.<sup>77</sup>

This means that no single one intervention should ideally be prioritised over the other since they all accomplish different purposes. In the case of Northern Uganda, the earlier *romantisization* of TJMs at the expense of trial justice and other interventions has thankfully been overtaken by events as more and more research has revealed that there are inherent weaknesses in TJMs.<sup>78</sup>

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75 Cynthia M. Horne, Reconstructing 'Traditional' Justice from the Outside in: Transitional Justice in Aceh and East Timor, *Journal of Peacebuilding & Development*, 9:2, 17-32, DOI: 10.1080/15423166.2014.937654

76 Often times TJMs are viewed as being gender insensitive, often fronting the rights of men over those of women, children and the vulnerable.

77 Tim Allen and Anna MacDonald, 'Post-conflict Traditional Justice: A Critical Review Justice and Security Research Program, 2013 Justice and Security Research Programme Paper 3, London [http://www.lse.ac.uk/internationalDevelopment/research/JSRP/downloads/JSRP3.Allen\\_Macdonald.pdf](http://www.lse.ac.uk/internationalDevelopment/research/JSRP/downloads/JSRP3.Allen_Macdonald.pdf) accessed October 9, 2013.

78 Tim Allen, *Trial Justice: The International Criminal Court and the Lord's Resistance Army* (London Zed, 2006)

Relatedly, Vieille Stephanie also analyses the concept of traditional justice in New Zealand.<sup>79</sup> She observes that the government equates the Māori traditional approach to doing justice with its State family group conferences (FGC) which embodies Māori values and preferences.<sup>80</sup> However, the author cautions that this type of 'justice' (FGC) which is embodied in customary mechanisms, has often been taken out of context, and rendered universal and ahistorical through its representation as restorative justice mechanisms. In so doing, the very nature and purpose of the traditional approach is lost. Stephanie therefore concludes that the tendency to equate national restorative justice mechanisms with indigenous approaches to law and justice is harmful and dangerous for it risks rendering the scholarship homogenizing and universalizing restorative justice, to the detriment of local preferences and practices. To do so, would certainly misrepresent the uniqueness of traditional justice mechanisms which are diverse and aimed at achieving different objectives. For example, in Northern Uganda 'each ceremony or ritual has a unique purpose, and the suitability of a particular practice depends on the nature of the violation that occurred.'<sup>81</sup> The detailed steps and requirements of traditional ceremonies also vary slightly by clan and geographic location.'<sup>82</sup> In essence, whereas traditional systems are not static, it is important not to simply incorporate them into one homogenous process that makes them lose their essence and value.

In confirmation of the central role played by the citizen subject in transitional justice, as well as the ability of these systems to adapt with the various challenges of the day, Igreja, Victor<sup>83</sup> analyses how survivors of conflict have attempted to persuade judges of traditional courts to adjudicate in serious wartime disputes. To this end, it is important to note that the survivors identified a need which they sought out the judges to fulfil. The author noted that the judges were faced with the challenge of trying to stick to their mandate while at the same addressing the demands of the litigants. Igreja further highlights the challenges faced when doing justice in new territory. This includes confronting the reality that uneven power relationships in the community and gender politics affect the way some cases are either adjudicated upon and others not. This confirms the assertion made by critical legal

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79 Vieille, Stephanie, Frenemies: restorative justice and customary mechanisms of justice, *Contemporary Justice Review*, 2013, Vol.16(2), p.174-192

80 Ibid.

81 See Justice and Reconciliation Project, 'Gender and Generation in Acholi Traditional Justice Mechanisms,' JRP Field Note XVII, November 2012 at 3

82 See Justice and Reconciliation Project, 'Gender and Generation in Acholi Traditional Justice Mechanisms,' JRP Field Note XVII, November 2012 at 3

83 Igreja, Victor, Traditional Courts and the Struggle against State Impunity for Civil Wartime Offences in Mozambique, *Journal of African Law*, 2010, Vol.54(1), pp.51-73

pluralists that there is a mishmash of relationships operating in the same time and space and it is often difficult to be certain how the final result will turn out. Nevertheless, Ireja noted that some of the interventions indicated that national and international institutions of justice are not the only ones engaged in the struggle against impunity for wartime crimes. Thus in the case of Mozambique, the authors confirm that specific attention must be paid to the study of traditional justice mechanisms as avenues of redress for wartime crimes and for the long-term contribution they can make.

Andrew McWilliam,<sup>84</sup> in the same vein, studies the cultural institution known as *nahebitilookused* which is concerned with the customary protocols of peace making in Timorese cultural history. The author suggests that the practice resonates with all groups and offers an avenue for constructive dialogue and a renewed commitment to nation building.

Nonetheless, TJMs have been criticised for a number of reasons: Allen contests the claim that TJMs are locally grounded processes.<sup>85</sup> He argues that the claim of originality given to TJMs is unjustifiable because language, religion, NGOs and western donors have greatly influenced their practice.<sup>86</sup> Allen further argues that traditional rituals are an inadequate way to deal with mass atrocities.<sup>87</sup> He sees no way in which social healing rituals can be equated to justice and criticises the historical legitimacy of traditional elders who officiate at TJMs for having no relevance in the conflict communities.<sup>88</sup> For Waldorf, 'traditional justice often concerns invented traditions rather than traditional customs.'<sup>89</sup> Proponents of TJMs have also been criticised for being coercive and ignoring the voices of those individuals who have been exposed to other external influences in other local communities be they cosmopolitan lifestyles, globalisation and development.<sup>90</sup> Waldorf notes that this coercion is meant to '(re)assert social control and political ideologies.'<sup>91</sup>

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84 Andrew McWilliam, Introduction: Restorative Custom: Ethnographic Perspectives on Conflict and Local Justice in Timor, *The Asia Pacific Journal of Anthropology*, 8:1, 1-8, DOI: 10.1080/14442210601161716

85 Allen, T., *Trial Justice: The International Criminal Court and the Lord's Resistance Army* (London: Zed, 2006).

86 Pain, D, *The Bending of Spears: Producing consensus for peace and development in northern Uganda*. London: International Alert, (1997). See also Refugee Law Project, Position Paper on ICC (July 28, 2004), <<http://www.refugeelawproject.org/resources/papers/archive/RLP.ICC.investig.pdf>> accessed 26, July 2013.

87 Allen supra 87.

88 id

89 Waldorf, L. (2006) *supra*.

90 See generally, Beyond Juba Project, 'Tradition in Transition: Drawing from the Old to Develop a New Jurisprudence for dealing with Uganda's Legacy of Violence', (Refugee Law Project Working Paper No. 1, (July 2009).

91 Waldorf, (2006) 1, 1-88 in Hester Bosman, 'Gacaca Courts In Post-Conflict Rwanda The Quest For Reconciliation And Justice' Graduation Thesis, Criminology, Faculty Of Law, Vu University Amsterdam, December 2007 <<http://www.rechten.vu.nl/en/Images/Gacaca%20Courts%20in%20Post->

In some cases, the TJMs were viewed as archaic, harsh and nugatory compared to the national laws.<sup>92</sup> In essence, they have been criticised for ‘paying due attention to global influences on such mechanisms and the structures on which they are built.’<sup>93</sup>

Additionally TJMs have been criticised for excluding victims or traditionally marginalised groups like women and children, in the same way as formal mechanisms.<sup>94</sup> Furthermore, the critics have argued that remedies provided by TJMs seek to maintain the power hierarchies between genders. Allen additionally notes that his research revealed that the enthusiasm for some TJMs was neither as widespread nor as consistent as is often asserted in some circles.<sup>95</sup> He rejects the call to use TJMs as a possible alternative to new international mechanisms before their applicability and efficiency is tested.<sup>96</sup> Traditional remedies like expulsion from communities have been cited as examples of where TJMs have failed to either promote social cohesion or be forgiving.<sup>97</sup> Graydon also criticises TJMs for lacking safeguards against human rights violations,<sup>98</sup> as well as lacking certainty in decision making, being vulnerable to partiality, emotionalism, corruption, lacking intelligent rigour in investigation and the absence of fair trial standards.<sup>99</sup> Allen and Macdonald also argue that ‘institutions like the *gacaca* have come under widespread criticism for an apparent

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Conflict%20Rwanda.%20The%20Quest%20for%20Reconciliation%20and%20Justice Hester%20Bosman tcm23-63716.pdf> accessed March 15, 2014.

92 See Robert Lukwiya- Ochola, ‘The Acholi Religious Leaders’ Peace Initiative in the Battle of Northern Uganda: An Example Of An Integral, Inculturated And Ecumenical Approach To Pastoral Work In A War Situation, (Innsbruck, June 2006), <[http://www.comboni.de/literatur/ochola\\_diplomarbeit.pdf](http://www.comboni.de/literatur/ochola_diplomarbeit.pdf)> accessed March 15, 2014.

93 Alie, J (2008) ‘Reconciliation and Traditional Justice: Tradition based practices in Kpaa Mende in Sierra Leone’ in Huyse L & M Salter (eds.) *Traditional Justice and Reconciliation after violent Conflict. Learning from African experiences*, International Institute for Development and Electoral Assistance, Huyse, L (2008) ‘Introduction: Tradition-based approaches in peacemaking, transitional justice and reconciliation policies’ & ‘Conclusions and recommendations’ in Huyse, L & M Salter (eds.) *Traditional Justice and Reconciliation after Violent Conflict. Learning from African Experiences*, International Institute for Democracy and Electoral Assistance, Obarrio, J (2011) ‘Traditional justice as rule of law in Africa: An Anthropological perspective’ in Sriram, C L et al (eds.) *Peacebuilding and rule of law in Africa - Just Peace?*, Routledge

94 Lorna Mcgregor *supra* at 61.

95 Allen *supra* at 131.

96 See Allen & MacDonald *supra*. See also Graydon(2005) *supra*.

97 Tim Allen, ‘Ritual (A)buse? Problems with Traditional Justice in Northern Uganda’, in (Nicholas Waddell and Phil Clark eds.), *Courting Conflict? Justice, Peace and the ICC in Africa* (Royal African Society, London) 2008.

98 Human Rights Watch, noted that “Traditional justice measures may have an important role to play in broader accountability efforts, but they are unlikely to provide prosecution accompanied by fair-trial guarantees as required under international law for serious crimes.”). See *Uganda: UN Should Stress Peace, Justice Go Hand in Hand*, 16 November 2006 The OHCHR has stated that ‘Relying solely on traditional justice mechanisms, including for the most serious crimes, would set a dangerous precedent for impunity.’ *Report of the High Commissioner for Human Rights on the activities of her office in Uganda*, U.N. Doc. A/HRC/4/49/Add.2), 12 February 2007, paragraph 62.

99 Bamaturaki Musinguzi, ‘Getting justice in Uganda, the traditional way’ *The East African Newspaper* July 18, 2013 available <http://www.theeastafrican.co.ke/magazine/Getting-justice-in-Uganda-the-traditional-way--/434746/1918978/-/13p908m/-/index.html> at accessed July 26, 2013.

failure to ensure due process, including, for example, professional representation and rules of evidence.<sup>100</sup>

In their report on TJMs, the Cross Cultural Foundation of Uganda (CCFU), also noted that

One must avoid any romanticism about traditional governance systems, as these cases show: clan court judgments may be seen as arbitrary; cultural institutions are generally accountable to none but themselves, they may exhibit a tendency towards 'big man' politics that we recognise in other institutions, and may succumb to the power of the wealthy. They may experience a credibility gap, especially towards the urban elite and mobile cosmopolitan youth.<sup>101</sup>

The case has often been made that societies that use TJMs are often viewed as being homogenous, peaceful and united.<sup>102</sup> For example, the Justice and Reconciliation Project write about the Acholi community as having a 'homogenous set of practices' which 'are in fact a wide variety of ceremonies and rituals that can be used to address post-conflict healing and recovery.'<sup>103</sup> The UNICEF also writes about 'relatively homogenous character of indigenous Fijian culture Fijian and Samoan societies'<sup>104</sup> which is 'increasingly contested in light of broader processes of social and political change, including the chronic political instability that has taken root since 1987.'<sup>105</sup> However such claims are often essentialist. This is because they tend to overshadow the fact that TJMs are influenced by both internal and external factors.<sup>106</sup> Allen additionally criticises those who front the forgiving attributes of TJMs especially in Acholi as being disingenuous since history of the country has always depicted the Acholi as being 'warlike'.<sup>107</sup>

The aforementioned criticisms to a large extent are justified especially because TJMs are neither entirely reconciliatory nor are they entirely punitive. They are not wholly acceptable to everyone and indeed they need to be amended in order to fit within the dictates of the times in which they are operating. In most cases, they have been used as part of a bigger post-conflict settlement intervention with varying degrees of success in

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100 See Allen & MacDonald *supra*. See also Graydon(2005) *supra*.

101 *Ibid*.

102 Barney Afako *supra*.

103 See Justice and Reconciliation Project, 'Gender and Generation in Acholi Traditional Justice Mechanisms,' JRP Field Note XVII, November 2012 at 3

104 See UNICEF 'Traditional' Justice Systems in the Pacific, Indonesia and Timor-Leste,' 2009 Justice for Children in the Pacific, Indonesia and Timor-Leste, EAPRO Sub-Regional Workshop, Papua New Guinea at page 28

105 *Ibid*.

106 Tim Allen and Anna MacDonald, *supra*.

107 See Latigo, (2008) 85., Allen (2008) 53, Barney Afako, *supra*.

situations like Rwanda, Sierra Leone, East Timor and Mozambique.<sup>108</sup> An examination of these situations reveals that different TJMs work in different situations. They cannot be merely transplanted from one situation to another because each situation presents its own unique circumstances.<sup>109</sup> Neither should TJMs be privileged over other interventions or sequenced. Rather, in a bid to respond to the different needs and goals of a society emerging from conflict, there ought to be a deliberate effort to ensure that TJMs and other interventions operate in the same time and space in order to achieve a sustainable post-conflict transition.

Some of the criticisms expressed by Allen and Waldorf are also unfortunately based on the wrong view that 'tradition' and 'traditional justice' are static and unchanging. This could not be any further from the truth. TJMs are influenced by globalisation, human rights movements, NGOs, religious practices,<sup>110</sup> customs, cosmology and even decisions of national or other tribunals.<sup>111</sup> As noted earlier, while TJMs do have a historical basis as has been traced by Odoi and Latigo,<sup>112</sup> it is important to note that the dynamic nature of TJMs is what makes them uniquely suitable for contributing to post-conflict interventions by foregoing those aspects that would have otherwise made them unsuitable for the demands of the day.<sup>113</sup> This means that where TJMs were procedurally unfair to the rights of the accused, amendments can be made to correct this.

The criticism of the role of local NGOs in Uganda should not ignore the fact that these NGOs have interacted with, and indeed are able to represent the diverse views of the local populace with whom they are involved. Additionally, these NGOs are led by individuals who, by their own right, have specific needs and desires. A case in point is Bishop Macleod Baker Ochola II, who also lost a daughter and wife during the LRA/M rebellion. Ochola

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108 See generally Naomi Roht-Arriaza and Javier Mariezcurrena (eds.) *Transitional Justice in the Twenty-First Century: Beyond Truth versus Justice* (CUP Cambridge United Kingdom)

109 McCleary confirms that 'all reflection is situational, none can be total, and the essences which we determine are justified only by the experience they clarify and are always subject to revision.' See McCleary, Richard C. 1964. 'Translator's Preface to Maurice Merleau-Ponty's *Signs*.' Evanston, ILL. Northwestern University Press. in Sverker Finnström 2008 *Living in Bad Surroundings: War, History, and Everyday Moments in Northern Uganda* Duke University Press Durham, London (2008)25.

110 For example Quinn reports that 'Under the umbrella of the Acholi Religious Leaders' Peace Initiative, for example, Catholic priests regularly participate in the *mato oput* ceremony.' Quinn 2009 at 15

111 Senier Amy., 'Traditional Justice as Transitional Justice: A Comparative Case study of Rwanda and East Timor,' *Praxis, The Fletcher Journal of Human Security* XXIII (2008) 68. See also William Schabas, 'Genocide Trials and Gacaca Courts,' *Journal of International Criminal Justice* 3 (2005) 891.

112 Odoi-Tanga, F, 'Politics, Ethnicity and Conflict in Post Independent Acholiland, Uganda 1962-2006, (DPhil thesis, University of Pretoria 2009) 66 <<http://upetd.up.ac.za/thesis/available/etd-05162010-003240/>> accessed October 31, 2013. See also Latigo, (2008) 85.

113 For example, the TJMs practiced in Northern Uganda today involve leaders from religions which were only introduced into Uganda with the advent of colonialism. See *Roco Wati Acoli* 2005, supra.

chose to advocate for forgiveness and reconciliation instead of retribution.<sup>114</sup> This means that in order to have a better understanding of NGOs like the ARLPI, it is important to engage with individuals like Bishop Ochola who work or head these institutions so as to appreciate how their personal circumstances and cultures inform the goals and priorities of such institutions.<sup>115</sup>

In spite of the above, what ought to be emphasised is that TJMs are continuously changing.<sup>116</sup> Knighton notes that while TJMs are relatively resilient and persistent over time, they are 'built up through a process of accretion (growth) rather than transformation.'<sup>117</sup> They operate with 'one foot in the past' and another in the present.<sup>118</sup> In other words, 'each superficial change gets laid on top of what is already there, which helps determine the overall pattern of development and change.'<sup>119</sup> These new traditions were and continue to be constructed through the collective choices of the people involved, even when the originating event has not been replicated.<sup>120</sup> Others have unknown origins but 'continue to be owned by the various individuals who hold out as custodians of these practices whether erroneously, illegally or as accepted by their varying communities, nationalities and ethnic groups.'<sup>121</sup> CCFU reports that 'while the traditional institution is likely to remain resilient as a source of cultural identity, its relevance in other spheres of development will largely depend on its ability to reinvent itself by retaining core traditional values and principles, while responding to the changes in the modern world.'<sup>122</sup> It can be argued that TJMs are adaptive, heterogeneous and not frozen in the past.<sup>123</sup>

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114 ARLPI: *Religious Leaders Biographies* <<http://www.arlpi.org/arlpi-religious-leaders-biographies>> accessed 19 November 2013.

115 Allen 2006

116 Ben Knighton, 'The Vitality of Karamojong Religion: Dying Tradition of Living Faith?' Ashgate (2005); See also Senior Amy., 'Traditional Justice as Transitional Justice: A Comparative Case study of Rwanda and East Timor,' *Praxis, The Fletcher Journal of Human Security* XXIII (2008) 68. See William Schabas, 'Genocide Trials and Gacaca Courts,' *Journal of International Criminal Justice* 3 (2005) 891.

117 Nuitjen, M. 'Local Organisation As Organising Practices: Rethinking Rural Institutions' in N. Long and A. Long (eds.), *Battlefields Of Knowledge: The Interlocking Of Theory And Practice N Social Research And Development*, (London: Routledge 1992) 189,196.

118 id

119 Ben Knighton *supra*.

120 id

121 French Sociologist Marcel Mauss calls this a 'total social fact'. See Marcel Mauss 'Essai sur le Don. Forme archaïque de l'Echange,' In: *Sociologie and Anthropologie precede d'une Introduction 'a l'oeuvre de Marcal Mauss par Claude L'evi-Strauss*. (Presses Universitaires de France, Paris (1950).

122 See Cross Cultural Foundation of Uganda, 'The Alur Chieftdom and Managing Conflicts in Fishing Communities: The Interaction Between The Traditional And Local Governance Systems in Panyimur' in Bamaturaki Musinguzi, *supra*. See also Cross Cultural Foundation of Uganda 'Culture in Governance: Does it work?' (2010) 23. <[http://www.crossculturalfoundation.or.ug/Downloads/culture\\_in\\_governance\\_report.pdf](http://www.crossculturalfoundation.or.ug/Downloads/culture_in_governance_report.pdf)> accessed 19 November 19, 2013.

123 Nyanzi *et al* 2008.

This makes them suitable to address post conflict situations in Uganda, while remaining adaptable to new challenges. It is in this light that Ijeweimen Ikhidero and Idumwonyi<sup>124</sup>, argue that the continual preference for traditional methods of obtaining justice by the people of Benin (in Africa), is not unconnected to the inherent limitations of the received English legal system within an African terrain. The authors propose a middle ground – one of harmonization that creates a ‘euro-afro-centric judicial system’, as they believe that this would be beneficial and progressive for Benin as a people in quest for justice in a postcolonial Benin (African) society.

### **3.4 THE CAPACITY OF TRADITIONAL JUSTICE MECHANISMS TO RESPOND TO A SUSTAINABLE POST CONFLICT SETTLEMENT**

As noted in Chapter two, a sustainable post conflict settlement in Uganda requires an amalgam of social, economic, judicial and political responses. These responses should be aimed at addressing the root causes of the conflict as well as its diverse after effects. TJMs are not able to contribute to many of the needs and goals of a community emerging from conflict because they have to be resurrected by the people themselves as useful tools for specific goals and also because most of the economically based interventions for Northern Uganda (such as the need for reconstructive surgery, fighting diseases like the nodding disease, HIV/AIDS, malaria and others, funding for adequate housing, water and other amenities) are outside the purview of TJMs. TJMs are also unable to address issues like the need for reparations, education, food, and medicines.

However, TJMs can make significant contributions to four special groups: The first is the group of ‘reporters’<sup>125</sup> who participated in the LRA/M rebellion and were later granted amnesty.<sup>126</sup> While the GoU is able to prosecute both the top leaders of the rebellion as well as middle cadre commanders as prescribed by the ICC Act, it is legally barred from

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124 Itohan Mercy Idumwonyi Solomon IjeweimenIkhidero , Resurgence of the Traditional Justice System in Postcolonial Benin (Nigeria) Society, *African Journal of Legal Studies*, Volume 6, Issue 1, pages 123- 135

125 A reporter means a person seeking to be granted amnesty under the Amnesty Act. See Section 1, Amnesty Act Chapter 294 Laws of Uganda. Under Section 3, (1) A reporter shall be taken to be granted the amnesty declared under section 2 if the reporter— (a) reports to the nearest army or police unit, a chief, a member of the executive committee of a local government unit, a magistrate or a religious leader within the locality; (b) renounces and abandons involvement in the war or armed rebellion; (c) surrenders at any such place or to any such authority or person any weapons in his or her possession; and (d) is issued with a certificate of amnesty as shall be prescribed in regulations to be made by the Minister.

126 Some middle rank officers have been arrested and a trial process has commenced against one of them. Prosecutor V. Thomas Kwoyelo alias Latoni (International Criminal Court Division of the High Court of Uganda) HCT-00-ICD-Case No. 02/10. Though this prosecution was successfully challenged in the Ugandan Constitutional Court. This further illustrates the relevance of TJMs especially when all trial justice mechanisms seem to fail to bring perpetrators to account or when they are successfully challenged in courts of law.

prosecuting those reporters who it had granted unconditional amnesty.<sup>127</sup> It is the conflict-riddled societies to which this group returns that is left with the task of reintegrating and resettling them. In all cases, the Amnesty Commission gives these returning reporters some basic commodities like blankets, hand hoes, basins and seeds to help them resettle.<sup>128</sup> However, such gestures are often viewed by the victims of the atrocities as unfair and unjust rewards whilst the societies to which the amnestied are returned continue to suffer from the physical, psychological and social effects of the atrocities which these perpetrators willingly or unwillingly committed.<sup>129</sup> In order for the reintegration and resettlement to be sustainable and successful, there is need to heal the psychological wounds of the victims and the reporters.<sup>130</sup> It is for such purposes that TJMs are crucial because they give an opportunity to the perpetrator to acknowledge, apologise, truth-tell and recompense (where the need arises) for the wrongs allegedly committed.<sup>131</sup> Latigo notes that almost all the LRA/M returnees (over 12,000), including victims from other ethnic groups, have undergone the *Nyono tong gweno* ceremony under the Acholi cultural institution Ker Kwaro Acholi (KKA). This initiative has been supported by the U.S. Agency for International Development (USAID) under the GoU's Northern Uganda Peace Initiative (NUPI). These organisations have also supported 54 *mato oput* ceremonies, which were conducted between 2004 and 2006.<sup>132</sup>

The second group for which TJMs were also included in the AAR are those referred to as victim-perpetrators.<sup>133</sup> This is a group of mainly abducted children and such persons who were forced to join the LRA/M rebellion and part of their initiation period involved killing their close relatives, parents and friends. In such situations where criminal prosecutions are unable to either apportion responsibility or mete out punishment due to the 'blurred line

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127 id

128 Paul Bradfield, 'Uganda Announces Transitional Justice Policy' August 9, 2013 <<http://beyondthehague.com/2013/08/09/the-lapse-of-amnesty-in-uganda-stimulating-accountability-or-prolonging-conflict/>> accessed March 29, 2014.

129 Comments expressed by victims at the National War Victims' Conference 28-30 May 2014 organised by African Youth Initiative Network (AYINET) – Uganda <http://www.africanyouthinitiative.org/phone/national-war-victims-conference.html> accessed December 12, 2014.

130 Rose Nakayi, 'Reaching out for Justice and Reconciliation in Northern Uganda: The Proposed War Crimes Court and Traditional Justice' University of Notre Dame, Center for Civil and Human Rights, Working Paper No. 5, Winter 2008 <[http://www3.nd.edu/~ndlaw/cchr/papers/rose\\_uganda.pdf](http://www3.nd.edu/~ndlaw/cchr/papers/rose_uganda.pdf)> accessed March 17, 2014.

131 Comments from victims at the National War Victims' Conference 28-30 May 2014 organised by African Youth Initiative Network (AYINET) – Uganda <http://www.africanyouthinitiative.org/phone/national-war-victims-conference.html> accessed December 12, 2014. See also DRC-Uganda: Male Sexual abuse survivors living on the margins, IRINews, <http://m.irinnews.org/report/93399/drc-uganda-male-sexual-abuse-survivors-living-on-the-margins#.VJaMyloB> accessed December 12, 2014.

132 Latigo, supra 105-106.

133 Traditional & Informal Justice Systems: Traditional & Informal Justice & Peacebuilding Processes <<http://www.peacebuildinginitiative.org/index.cfm?pageId=1876>> accessed November 2, 2011.

between perpetrators and victims,<sup>134</sup> TJMs become crucial. This is because they provide a way-out to enable such individuals to take responsibility for the atrocities they were forced to commit as well as be reconciled into their communities.<sup>135</sup>

The third group for which TJMs are extremely important are those who are involved in long running inter-tribal or inter-ethnic disputes. Some of these disputes which originate from pre-colonial days continue to be sustained either through oral tradition, cultural practices, memorialisation or storytelling. Some of these conflicts carried on through the colonial and postcolonial days. Such conflicts continue to be fermented by issues such as perceiving that another tribe is being given more post-conflict financial and material assistance than their own.<sup>136</sup> Such disputes that involve historical biases are best resolved by using TJMs. A practical example of the ceremony was in 1985, in an effort to resolve the serious tensions between the Acholi, who were killed on a large scale by Idi Amin and his henchmen during his dictatorial regime, and the people of West Nile who suffered severe reprisals in 1980 after Amin's fall. As a result, members of a former rebel group, the West Nile Bank Front (WNBF) refused to be deployed by the UPDF to fight the LRA/M because they are eternally bound to the 1985 *gomo tong* ceremony.<sup>137</sup>

The fourth group, which is all-encompassing of other groups, is one which has strongly held beliefs in the spiritual world.<sup>138</sup> Spirituality is prevalent in all spheres of life in Uganda generally and Northern Uganda in particular.<sup>139</sup> Kelsall notes that many Africans 'believe in the close relation between the visible and invisible worlds, with power in the former hinging on relations in the latter.'<sup>140</sup> Each of the Acholi clans has its own *spirit* ancestors (*jok*) who guide the Acholi moral order. When a wrong is committed, 'the *jok* send misfortune and

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134 id

135 Ibid.

136 Views expressed at a Workshop where the author delivered a talk on how to incorporate Transitional Justice (TJ) into the Proposed Peace Recovery and Development Plan Phase 3 (PRDP 3) organised for Members of Parliament from the Greater North Region of Uganda, October 3, 2014 at J & m Airport Hotel Bwebwaja Entebbe Road Uganda.

137 The WNBF had been reintegrated into the national army at the end of their rebellion. See Latigo, supra.

138 Kunnie J.E & Nomalungelo I.G., (Eds), 'Indigenous Peoples' Wisdom and Power: Affirming our knowledge through narratives', (Birlington:Ashgate 2006). See further Sverker Finnström (2008, 7)

139 Kasenene, P., *Religious Ethics in Africa* (Kampala: Fountain Publishers, 1998), 18 cited in Quinn 2009, 5 13. Cunningham.J.F, *Uganda and its Peoples: Notes on the Protectorate of Uganda especially the anthropology and Ethnology of its Indigenous Races*, (London Hutchinson & Co., 1905) 12., Daniel Etounga-Manguelle., *Does Africa Need a Cultural Adjustment Program? In Culture Matters: How Values Shape Human Progress*, 73 Lawrence E. Harrison & Samuel P. Huntington eds., 200)

140 His reference to Africans however is essentialist as there are diverse practices in this continent. I would rather limit his reference to sub-saharan africa. However even other nationalities like the Hindu believe in the supernatural with reference to reincarnation. See Kelsall, T., *Culture under cross-examination: International Justice and the Special Court for Sierra Leone* (Cambridge:CUP 2009).

illness (*cen*) until appropriate actions are taken by Elders and the offender.<sup>141</sup> While the perpetrator is never obligated to confess his crime, there is a common belief that 'spirits or departed ancestors will punish him until he confesses.'<sup>142</sup> It is on this basis that when a 'person has a string of bad luck, the community presumes this is a result of his past misdeed and that he is covering it up.'<sup>143</sup> The Acholi – like many other tribes - discouraged individuals from perpetrating crime since the actions of one individual would affect the whole clan to which he or she belonged.<sup>144</sup> The concept or phenomenon of evil (*cen*) illustrates the 'centrality of relationships between the natural and the supernatural worlds in Acholi, the living and the dead, the normative continuity between an individual and the community.'<sup>145</sup> More importantly, it shows how the societies constructed their justice system as being in consonance with their belief system. Judicial redress was not only aimed at redressing the evil, but also ensuring this delicate balance between the physical and metaphysical world.<sup>146</sup> As an example, Finnström argues that for the LRA/M, it was important to involve traditional elders in resolving the conflict since the said elders had earlier given their blessing for the rebellion to commence.<sup>147</sup> The blessing given by the elders at the start of the LRA rebellion involved performing ceremonies which had a spiritual relevance. This means that such ceremony was spiritually relevant to signify the end of the conflict. While it was not envisaged that TJMs would be used to deal with

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- 141 Okot p'Bitek translates *cen* to mean 'vengeance ghost'. See Okot P'Bitek, 'Religion of the central Luo. Nairobi: East African Literature Bureau 1971, 40. Odoki refers to it as a 'troublesome spirit' Odoki, s.o. *Death rituals among the kwos of Uganda: Their significance for the theology of death*. Gulu, Uganda: Gulu Catholic Press 1997) 40, cited in Finnström (2008, 1580. See also Liu Institute for Global Issues and Gulu District NGO Forum, 'Roco Wati Acoli: Restoring Relations in Acholi-land Traditional Approaches to Reintegration and Justice', September 2005, 10 available: [http://www.ligi.ubc.ca/sites/liu/files/Publications\\_/JRP/15Sept2005\\_Roco\\_Wat\\_I\\_Acoli.pdf](http://www.ligi.ubc.ca/sites/liu/files/Publications_/JRP/15Sept2005_Roco_Wat_I_Acoli.pdf)> accessed 7 April 2011.
- 142 Kimberly Hanlon 'Peace or Justice: Now that Peace is being negotiated in Uganda Will the ICC still Pursue Justice?' 14 *Tulsa Journal of Comparative and International Law* 295 (2006) 295 at 316 <http://digitalcommons.law.utulsa.edu/tjcil/vol14/iss2/4> accessed 7 April 2011.
- 143 id
- 144 Tom Patrick, 'The Acholi Traditional Approach to Justice and the War in Northern Uganda' August 2006 <[http://www.beyondintractability.org/case\\_studies/acholi\\_traditional\\_approach.jsp?nid=6792](http://www.beyondintractability.org/case_studies/acholi_traditional_approach.jsp?nid=6792)> accessed 7 April 2011. See also Finnström (2010)143.
- 145 Liu Institute for Global Issues and Gulu District NGO Forum, 'Roco Wati Acoli: Restoring Relations in Acholi-land Traditional Approaches to Reintegration and Justice', September 2005, available: [http://www.ligi.ubc.ca/sites/liu/files/Publications\\_/JRP/15Sept2005\\_Roco\\_Wat\\_I\\_Acoli.pdf](http://www.ligi.ubc.ca/sites/liu/files/Publications_/JRP/15Sept2005_Roco_Wat_I_Acoli.pdf)> accessed 7 April 2011 at 72.
- 146 Sverker Finnström, 'Reconciliation Grown Bitter? War, Retribution and Ritual Action in Northern Uganda' in Rosalind Shaw and Lars Waldorf, with Pierre Hazan (eds.). *Localizing Transitional Justice: Interventions and Priorities after Mass Violence*. Stanford: Stanford University Press/Stanford Studies in Human Rights, 2010.
- 147 Riyo-tal which is '(M)ediation conducted by the Elders and Rwodi in times of conflict to approve the waging of wars by symbolically handing over *oboke olwedo* leaves. According to Roco Wat I Acoli, it is speculated that 'some Elders had given their blessings to Kony and this is why the war is not ending. Elders cannot undo a blessing once it has been given.' see Liu Institute for Global Issues and Gulu District NGO Forum, "Roco Wati Acoli: Restoring Relations in Acholi-land Traditional Approaches to Reintegration and Justice", September 2005, available: <<http://www.ligi.ubc.ca/admin/Information/543/Roco%20Wat%20I%20Acoli-20051.pdf>> accessed October 24, 2013. See also Finnstrom, Sverker. *Living with Bad Surroundings: War and Existential Uncertainty in Acholi land in Northern Uganda*. (Uppsala: Acta Universitatis Upsaliensis, Uppsala Studies in Cultural Anthropology No. 35, 2003)

situations where mass violence has been taken place, the flexibility of TJMs makes them easily adaptable to deal with situations like in Northern Uganda.<sup>148</sup>

### 3.5 CONCLUSION

The above discussion shows that TJMs are crucial to the successful implementation of the AAR. They are responsive to Uganda's post-conflict needs and goals and this confirms that any sustainable post conflict intervention in Uganda must include them. Whereas TJMs may not offer comprehensive answers to all the problems of accountability and reconciliation in northern Uganda, they remain a significant part of that solution and could ably do some of the things which ICL cannot do.<sup>149</sup> Jacques also agrees that Uganda's experience demonstrates the importance of a comprehensive approach to justice, combining different mechanisms, retributive and restorative, rather than preferring one mechanism over another.<sup>150</sup> The above is confirmed by former Prosecutor of the ICC Luis Moreno-Ocampo who has noted that:-

International justice, national justice, the search for truth and peace negotiations can and must work together...; they are not alternative ways to achieve a goal; they can be integrated into one comprehensive solution....The Court...was created to investigate and punish the worst perpetrators, the organizers, the planners and commanders-; national proceedings and other accountability mechanisms remain essential for the purpose of achieving comprehensive solutions.<sup>151</sup>

In light of the above, the GoU, through the Justice Law and Order Sector (JLOS), has proceeded to implement the provisions in the AAR, as part of its National Transitional Justice Framework (NTJF) policy.<sup>152</sup> The JLOS Strategic Investment Plan (SIP III) prioritised transitional justice which includes developing and implementing a comprehensive transitional justice policy and legal framework covering formal justice,

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148 It is for this reason that the AAR provided that TJMs will be applied with necessary modifications. see Section 22 of the Annexure to the Agreement on Accountability and Reconciliation. See also Clause 3.1. of the AAR.

149 This view was equally fronted by lobby groups like the ARLPI. Of note is the role of personalities like Bishop Macleod Baker Ochola who championed the case for a comprehensive response to situation in Northern Uganda. See Bishop Ochola Speech to Anglican Convention June 23, 2006 <<http://friendsforpeaceinafrica.org/documents/20-features/79-bishop-ocholas-response-and-convention-speech.html>> accessed March 17, 2014. See also JLOS (2012)80

150 Isabelle Jaques, 'Pursuing Justice in Ongoing Conflict: Examining The Challenge.', Report on Wilton Park Conference WPS08/S. Sunday 7 – Wednesday 10 December 2008. <<https://www.wiltonpark.org.uk/wp-content/uploads/wps08-7-report.pdf>> accessed October 31, 2013.

151 Mr Luis Moreno-Ocampo, Prosecutor of the International Criminal Court 'Building a Future on Peace and Justice' Nuremberg June 24/25 2007 <[http://www.icc-cpi.int/NR/rdonlyres/4E466EDB-2B38-4BAF-AF5F-005461711149/143825/LMO\\_nuremberg\\_20070625\\_English.pdf](http://www.icc-cpi.int/NR/rdonlyres/4E466EDB-2B38-4BAF-AF5F-005461711149/143825/LMO_nuremberg_20070625_English.pdf)> accessed March 17, 2014.

152 Paul Bradfield, 'Uganda Announces Transitional Justice Policy' August 9, 2013 <<http://beyondthehague.com/2013/08/09/the-lapse-of-amnesty-in-uganda-stimulating-accountability-or-prolonging-conflict/>> accessed March 29, 2014.

TJMs, truth telling, reparations, reconciliation and reintegration.<sup>153</sup> The 5<sup>th</sup> Draft of the NTJP policy includes provisions for reparations, prosecutions, truth telling and traditional justice.<sup>154</sup> The NTJP has taken two approaches to transitional justice: The first one is based on the principle of restorative justice which deals with the socio economic recovery of victims of mass human rights violations. Interventions like acknowledgement and truth telling, reparations, institutional reform, memory, forgiveness and amnesty fall under this approach. The second approach, which is based on retributive justice, focuses on prosecuting the perpetrators of gross human rights violations.<sup>155</sup> In the policy, the GoU proposes to protect witnesses who participate in formal justice proceedings and ensure that victims can participate in the same. The inclusion of TJMs in the NTJP is an acknowledgement by the GoU of the importance of their importance in sustainable post conflict transition in Uganda.

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153 The JLOS carried out studies on transitional justice, criminal prosecutions and traditional justice in 2008, 2009 and 2011 respectively. It is from these studies that the NTJP was formulated. See Justice Law and Order Sector, 'Transitional Justice in Uganda' <<http://www.jlos.go.ug/index.php/2012-09-25-13-11-16/2012-09-28-06-56-14/transitional-justice>> accessed March 29, 2014.

154 The Policy describes Traditional Justice as 'localized cultural practices by communities to attain justice and reconciliation; it encompasses all community driven cultural practices that the communities develop and utilize in resolving localized disputes to attain safety and access to justice by all.' See paragraph 19 of the Annex states: 'Traditional justice shall form a central part of the alternative justice and reconciliation framework identified in the Principal Agreement.'

155 *JLOS - TJ Policy, (draft 5), October 2013 ( Copy with researcher)*

## CHAPTER FOUR: THE INTERNATIONAL CRIMINAL PROCESS

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### 4.0 INTRODUCTION

The strengths and weaknesses of international criminal law as a practice of post-conflict intervention are central in the analysis in this chapter. The Chapter particularly examines the concept of complementarity as used in the Rome Statute and assesses how the ICC's approach to post conflict settlement treats the use of TJMs. Finally, the chapter analyses how well the ICC approach responds to the multitude of needs that are created as a result of violent conflict.

### 4.1 THE CASE FOR INTERNATIONAL CRIMINAL LAW

The core purposes of the international criminal law (ICL) are to uncover the truth about past atrocities, punish perpetrators,<sup>1</sup> help victims, provide the rule of law, support reconciliation, and serve as deterrent<sup>2</sup> for future crimes.<sup>3</sup> This position was emphasised in 2002, by the United Nations Secretary-General Kofi Annan when he stated:

Our hope is that, by punishing the guilty, the ICC will bring some comfort to the surviving victims and to the communities that have been targeted. More important, we hope it will deter future war criminals, and bring nearer the day when no ruler, no State, no junta and no army anywhere will be able to abuse human rights with impunity.<sup>4</sup>

Criminal prosecutions, as practiced today, have been greatly influenced by western legal thought which privileged law as the solution to many of the societal ills. This does not in

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1 The rationale for prosecutions is to individualize guilt instead of 'perpetuating divisive categories of framing the conflict exclusively in group terms.' Cassese, A. (2004). First Annual Report of the President of the ICTY to the United Nations General Assembly <<http://www.icty.org/tabs/14/1>> accessed 27 March, 2014. Schabas also argues that 'where obligations are breached, the individual may be punished for such international crimes as a matter of international law, even if his or her own state, or the state where the crime was committed refused to do so.' See Schabas, W.A. *Genocide in International Law* Cambridge: Cambridge University Press 2000)2.

2 Some scholars have since disputed the claim that ICL can deter crime. See Hyeran Jo & Beth A. Simmons, 'Can the International Criminal Court Deter Atrocity?' Available at <[http://www.cidcm.umd.edu/workshop/papers/Jo-Simmons\\_ICC\\_deterrence\\_18Dec\\_2014.pdf](http://www.cidcm.umd.edu/workshop/papers/Jo-Simmons_ICC_deterrence_18Dec_2014.pdf)> accessed 27 April, 2016. See also Julian Ku & Jide Nzelibe, 'Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities?' Hofstra University School of Law Legal Studies Research Paper Series Research Paper No. 06-22, Northwestern University School of Law Research Paper Series available at <<http://ssrn.com/abstract=931567>> accessed 27 April, 2016.

3 Nettelfield, L. J. (2010). *Courting Democracy In Bosnia And Herzegovina: The Hague Tribunal's Impact in A Post-war State* (New York: Cambridge University Press) 10.

4 United Nations Secretary-General Kofi Annan (March 21, 2005) quoted at <<http://www.un.org/news/facts/iccfact.htm>>. accessed 21 March, 2016. See also Report of the Secretary-General, In Larger Freedom – Towards Development, Human Rights, and Security for All, UN Doc. A/59/2005, 138.

mean that other communities didn't or do not use criminal justice.<sup>5</sup> There is a lot of literature that shows that criminal prosecution and criminal sanction was very common all over the world.<sup>6</sup> This dominant approach to law is often referred to as either 'legal centralism' or 'legal formalism' or legal 'monism'<sup>7</sup> or 'legal positivism.'<sup>8</sup> It postulates that the law is the only legitimate legal order created and applied by a monolithic entity<sup>9</sup> called the state or the 'politically superior sovereign.'<sup>10</sup> Legal centralism is based on the idea that the sovereign/ state is considered the ultimate legal authority, capable of legislating on any matter and being able to control any behaviour within the State.<sup>11</sup> Legal centralists argue that the law is and should be the law of the state, uniform for all persons, exclusive of all other law and administered by a single set of State institutions while other institutions like the church and the family are hierarchically subordinate to it.<sup>12</sup> In essence, law is considered a 'monolithic united set of rules flowing from the state/sovereign's hierarchy'.<sup>13</sup> The legal centralism theory also argues that social change can be effected by legal innovation or law.<sup>14</sup>

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- 5 Lydia Apori Nkansah, 'International Criminal Justice in Africa: Some Emerging Dynamics,' *Journal of Politics and Law* Vol. 4, No. 2; September 2011 available at <<http://ssrn.com/abstract=1927947>> and <[www.ccsenet.org/jpl](http://www.ccsenet.org/jpl)>
- 6 See discussion on interlacustrine kingdoms in Chapter 2. See also generally Ruhweza Ronald Daniel, '*A Review of the Application of the Death Penalty in Uganda*,' LLB Dissertation Makerere University 2000 (unpublished) copy with researcher.
- 7 While legal pluralism relates to equitable treatment, legal monism correlates with identical treatment. See Dr. A. P. Singh, 'Legal Pluralism : The Essence of India's Classical Legal ordering' in Christoph Eberhard & Nidhi Gupta (eds.), *Legal Pluralism in India*, Special Issue of the *Indian Socio-Legal Journal*, Vol. XXXI, 148 p (95-106) in Christoph Eberhard & Nidhi Gupta (eds.), James Tully and Alain G-Gagnon (eds.) *Multinational Democracies* (Cambridge: Cambridge University Press 2001), p. 329. See also Alemayehu 2004 at 6.
- 8 Ibid.
- 9 See Gilissen J. Introduction à l'étude comparée du pluralisme juridique. In *Le Pluralisme juridique: Études publiées sous la direction de John Gilissen*, (Editions de l'Université de Bruxelles, 1971)7,18. Woodman GR. 1998. Ideological combat and social observation: recent debate about legal pluralism. *J. Legal Plur.* 40 at 21-60 at 23., Moore SF. 2001. Certainties undone: fifty turbulent years of legal anthropology, 1949– 1999. *J. Royal Anthropol. Inst.* 7:95–116 at 107., Griffiths A. 2002. Legal pluralism. In *An Introduction to Law and Social Theory*, edn. R Banakar, M Travers, pp. 289 -310 See pp. 296-97. Oxford: Hart., Shahar I. State, society and the relations between them: implications for the study of legal pluralism. 2008. *Theor. Inq. Law* 9 at 417–41 in Ralf Michaels, 'Global Legal Pluralism' *Annual Review of Law and Social Science* Volume 5 <[http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2679&context=faculty\\_scholarship](http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2679&context=faculty_scholarship)> accessed September 13, 2013 at 14.
- 10 See Sally Falk Moore, *Law as a Process: An Anthropological approach*, 1993, Routledge and Kegan Paul, London. See also Dr. A. P. Singh, 'Legal Pluralism : The Essence of India's Classical Legal ordering' in Christoph Eberhard & Nidhi Gupta (eds.), *Legal Pluralism in India*, Special Issue of the *Indian Socio-Legal Journal*, Vol. XXXI, 148 pp.95-106.
- 11 See Roberts S. 1998. Against legal pluralism: some reflections on the contemporary enlargement of the legal domain. *J. Legal Plur. Unoff. Law* 42:95–106 at 98; See also Wastell S. 2001. Presuming scale, making diversity: on the mischiefs of measurement and the global: local metonym in theories of law and culture. *Crit. Anthropol.* 21:185 – 210 at pp. 188– 92 in Ralf Michaels, 'Global Legal Pluralism' *Annual Review of Law and Social Science* Volume 5 <[http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2679&context=faculty\\_scholarship](http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2679&context=faculty_scholarship)> accessed September 13, 2013 at 14.
- 12 Griffiths 1986 at 3.
- 13 Jones Richard 'The Internet, Legal Regulation and Legal Pluralism' 13th Annual BILETA Conference: 'The Changing Jurisdiction' March 27th & Saturday, March 28th, 1998 at 1. <<http://www.bileta.ac.uk/content/files/conference%20papers/1998/The%20Internet,%20Legal%20Regulation%20and%20Legal%20Pluralism.pdf>> accessed November 2, 2013.
- 14 As argued by some of its proponents like Roscoe Pound argue that law is 'a tool for social engineering.'. See Sally Falk Moore, *Law as a Process: An Anthropological approach*, 1993, Routledge and Kegan Paul, London. Griffiths 1986 at 3.

It assumes that 'social processes are susceptible to conscious human control and the instrument by means of which this controls is to be achieved is law check.'<sup>15</sup> The law is seen as 'society's attempt through the state to control human behaviour and prevent anarchy, violence, oppression, and injustice by providing and enforcing orderly, rational, fair and workable alternative to the indiscriminate use of force by individuals or groups in advancing or protecting their interests and resolving their controversies'.<sup>16</sup> It is on this basis that ICL had been earlier founded as a superior response that binds all and sundry. This has had an impact on the way ICL views other forms of legal orderings as superior or inadequate responses to post conflict situations.<sup>17</sup> To date however, there is a more nuanced approach which acknowledges that ICL is but one of the various interventions to post conflict situations which might not singularly be able to either deter crime or contribute to peace on its own. As Stahn notes

The role of international criminal justice is modest, but important. International criminal law strengthens the claim that reconciliation should not be conceived "as an alternative to justice". It is questionable to what extent reconciliation should be framed as a goal of international criminal justice per se. The latter can neither stop conflict nor create reconciliation. A Court can judge, but only people can build or repair social relations. A Chamber cannot order an apology by the perpetrator, or forgiveness by victims. The liberal criminal trial may require respect of the will of those who do not want to forgive.<sup>18</sup>

In light of the above, the jurisdiction of ICL is limited to handling only 'the most serious crimes of concern to the international community as a whole.'<sup>19</sup> These include genocide, crimes against humanity, war crimes and potentially, the crime of aggression.<sup>20</sup> Currently,

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15 Ibid.

16 Ibid.

17 For example, the Office of the High Commissioner for Human Rights (OHCHR), which is one of the supporters of ICL, while commenting on TJMs, has stated -

Traditional mechanisms which fully respect the human rights of those accused and the victims can play an important role in national efforts to respond to human rights violations and promote reconciliation. In particular, they can play an important part in facilitating truth telling and the reintegration of abducted persons, including children, back into the community. See However, such mechanisms should supplement, but not replace, the criminal justice process. (*Emphasis mine*). *Report of the High Commissioner for Human Rights on the activities of her office in Uganda*, U.N. Doc. A/HRC/4/49/Add.2), 12 February 2007, paragraph 37.

18 Carsten Stahn, 'International Criminal Justice and Reconciliation: Beyond the Retributive v. Restorative Divide', FICHL Policy Brief Series No. 36 (2015) available at <[https://www.ficlh.org/fileadmin/ficlh/documents/FICHL\\_Policy\\_Brief\\_Series/150521\\_PBS\\_No\\_36\\_2015\\_Stahn.pdf](https://www.ficlh.org/fileadmin/ficlh/documents/FICHL_Policy_Brief_Series/150521_PBS_No_36_2015_Stahn.pdf)> accessed March 13, 2016.

19 Preambular 3 to the Rome Statute of the International Criminal Court, Adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 17 July 1998, UN Doc. A/CONF.183/9. (Hereinafter referred to as 'The Rome Statute'). (Adopted 17 July 1998, entered into force on 1 July 2002) It was corrected by process-verbaux of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002.

20 See Articles 5, 6, 7, 8, sibus of the Rome Statute.

the mandate to prosecute these crimes falls under the Rome Statute of the ICC whose primary jurisdiction is criminal.<sup>21</sup>

The crimes for which the court can have jurisdiction must fall within three categories:<sup>22</sup>

- 1) The crimes must either be defined as war crimes, crimes against humanity, genocide and the crime of aggression.<sup>23</sup> This is what has been referred to as jurisdiction *ratione materiae*. The Court is currently prevented from exercising jurisdiction over the crime of aggression because it has not yet been defined.<sup>24</sup> It was subsequently agreed at the Kampala Review Conference that the crime of aggression be defined as provided in *Article 8bis*.<sup>25</sup> The parties agreed that the amendments would come to force pursuant to Article 121(5) of the Rome Statute.<sup>26</sup>

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21 Cassese, A. *International Criminal Law* (Oxford, New York, OUP 2003). See Cryer, R, Friman H, Robinson D, Wilmschurst E, 'An Introduction to International Criminal Law and Procedure' (CUP, 2nd Edn, 2010) 7. See generally Cassese Antonio, *The Rome Statute of the International Criminal Court: A Commentary* (New York, OUP 2002), Lattanzi F and Schabas William, *Essays on the Rome Statute of the International Criminal Court* (Teramo, Sirente Press, 1999), R.S. Lee (ed.) 'The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations and Results (The Hague, Kluwer Law International 1999), See also Bassiouni, C (ed.), 'The Statute of the International Criminal Court: A Documentary History' (Transitional Publishers, New York 1998). Allen, T., *Trial Justice: The International Criminal Court and the Lord's Resistance Army* (London: Zed, 2006).

22 see Pre-Trial Chamber II, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, No. ICC-01/09-19-Corr, 31 March 2010, ('Kenya Investigation Authorization Decision'), paras. 17-69.

23 Article 5(1)(d) of the ICC Statute

24 Tashobya notes that the 'crime of aggression was included by the 1998 in the Diplomatic Conference in Article 5 of the Rome Statute, a provision that constitutes the catalogue of the most serious international crimes that shock the consciousness of the world. Article 5 reflects obligations on individuals that exist not only since 1945, but as indicated by the Nuremberg Tribunal, since the 1928, when a non-aggression treaty was signed in Europe (Kellog-Briand Pact), reaffirmed by the Allied Powers in 1943 with the Moscow Declaration and stipulated in 1945 in the London Charter that established the International Military Tribunal in Nuremberg. We must remember, that in 1946, the UN General Assembly unanimously declared the Statute, containing the criminal prohibition of crimes against peace, as part of customary international law.' See Stephen Tashobya 'Towards Stability and the Rule of Law: Why African States, including Uganda, should ratify the Kampala Amendments to the Rome Statute' Workshop for African ICC States Parties on the Ratification and Implementation of the Kampala Amendments to the Rome Statute of the ICC', Gaborone International Convention Centre, Botswana, 15 April 2013.

25 Ntanda notes that 'Aggression involves the use of force by one state against the territory of another state. According to the United Nations General Assembly, it is 'the most serious and dangerous form of the illegal use of force, being fraught, in the conditions created by the existence of all types of means of mass destruction, with the possible threat of a world conflict and its catastrophic consequences'. See Daniel D. Ntanda Nsereko 'Aggression under the Rome Statute of the International Criminal Court' *Nordic Journal of International Law* 71: 497-521, 2002., See also W. W. Burke-White, 'Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice' (2008) 49 *Harvard International Law Journal* 54., For a discussion of the Kampala Review Conference, see Roger S. Clark, 'Amendments to the Rome Statute of the International Criminal Court Considered at the first Review Conference on the Court, Kampala, 31 May-11 June 2010' *Goettingen Journal of International Law* 2 (2010) 2, 689-711 at 692

26 The parties at Kampala also agreed to impose additional conditions before the Court can prosecute for aggression: In the first place, the court will exercise jurisdiction one year after 30 states have ratified the amendments. Secondly, the jurisdiction of the Court will only commence after 1 January 2017, 'once a decision is made to that effect by the States parties. Thirdly, such decision will have to be made by 2/3rds majority.'<sup>26</sup> These conditions will apply to prosecutions commenced as a result of state party referrals and *proprio motu* prosecutions under Article 15bis as well as to prosecutions resulting from a Security Council referral under Article 15. See Dapo Akande, What Exactly was Agreed in Kampala on the Crime of Aggression? Blog of the European Journal of International Law, June 21, 2010 <http://www.ejiltalk.org/what-exactly-was-agreed-in-kampala-on-the-crime-of-aggression/> accessed 26 December 2014. See Article 121 (5) states that 'Any amendment to articles 5, 6, 7 and 8 of this Statute shall enter into force for those States Parties which have accepted the amendment one year after the deposit of their instruments of ratification or acceptance. In respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party's nationals or on its territory.' *Rome Statute of the International Criminal Court* ['Rome Statute'], signed 17 July 1998, (entered into force 1 July 2002).

- 2) The crimes should have been committed by a national of a State party (jurisdiction *ratione personae*) or on the territory of a State party (jurisdiction *ratione loci*);<sup>27</sup> or be referred by Security Council.,
- 3) The crimes must have been committed after 1 July 2002 or after the date upon which the Rome Statute entered into force for the aforementioned State (jurisdiction *ratione temporis*).<sup>28</sup>

The Court acts on the basis of three principles in order to determine admissibility of cases before it. The first is complementarity, the second is gravity,<sup>29</sup> and the third is *ne bis in idem* or *non bis in idem* (double jeopardy) which seeks to protect a person from being tried before the ICC for conduct which has already been tried by the Court itself or by other courts in previous proceedings.<sup>30</sup> The principle of *ne bis in idem* has its origins in Roman civil law, and it exists today in both civil law and common law countries alike.<sup>31</sup> This principle is drawn from international instruments such as the ICCPR (Art. 14(7), the ICTY Statute (Art. 10), the ICTR Statute (Art. 20), and the ECHR (Art. 4, Protocol 7).<sup>32</sup> Additionally, under Article 53, an investigation might not be carried out if it would not serve the interests of justice.<sup>33</sup>

To date, the ICC is exercising jurisdiction over 23 cases in 10 situations.<sup>34</sup> Of the eight cases in Africa, four are based on self referrals (Uganda, Democratic Republic of Congo, Central African Republic and Mali), two non-States parties were referred by the United Nations Security Council (Darfur, Sudan and the situation in Libya), and two instances begun by the OTP acting *proprio motu* (Kenya<sup>35</sup> and Cote d'Ivoire). There has also been an

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27 Under Article 12(3) of the Rome Statute a State that is not a State Party can lodge a declaration accepting the ICC's jurisdiction over alleged crimes committed on its territory or by its nationals.

28 Manuel Ventura 'Proprio motu investigation by the ICC Prosecutor :Under what circumstances can the Prosecutor initiate investigations *proprio motu*? Peace and Justice Initiative <http://www.peaceandjusticeinitiative.org/implementation-resources/proprio-motu-investigation-by-the-icc-prosecutor> accessed October 4, 2013.

29 This has since been contested as shall be discussed in the preceding sub-sections.

30 Articles 17(1)(c), 20(1) and (3) of the ICC Statute.

31 The principle is considered as a fundamental human right and is reflected in ICCPR art 14 (7) and ECHR Art 4 (7). Candidate Number 7 'The Principle of Complementarity: Admissibility to the International Criminal Court' (2006) 9 <<https://www.duo.uio.no/bitstream/handle/10852/22754/4/2606.pdf?sequence=1>> accessed 20, September 2013.

32 Articles 10 (2) ICTY The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, established in accordance with UNSC Res 827 (adopted on 25 May 1993) (ICTY); Article 9 (2) (ICTR) The International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan citizens responsible for genocide and other violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994, established in accordance with UNSC Res 955 (adopted on 8 November 1994) (ICTR).

33 Rome Statute of the ICC, Article 53

34 See ICC> Situations and Cases <[http://www.icc-cpi.int/en\\_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx](http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx)> accessed September 10, 2013.

35 Pre-Trial Chamber II granted the Prosecution authorisation to open an investigation in Kenya on 31 March 2010, and Pre-Trial Chamber III granted the Prosecution authorisation to open an investigation in Cote d'Ivoire on 3 October 2011.

investigation prompted by a law firm with powers of Attorney from the Union of the Comoros, concerning the situation on the Comorian-flagged MV Mavi Marmara vessel to the Court. Preliminary investigations are also being conducted in situations in Afghanistan, Georgia(South Ossetia), Guinea, Colombia, Iraq, Palestine, Ukraine, Burundi, Honduras, Korea and Nigeria.

#### 4.2 AN ANALYSIS OF UGANDA'S REFERRAL OF THE LRA/M TO THE ICC

Uganda became a signatory to the Rome Statute on 17<sup>th</sup> March 1999 and ratified the Statute on the 14<sup>th</sup> of June 2002. Uganda also signed the declaration on temporal jurisdiction which allowed the ICC retroactive jurisdiction on 1<sup>st</sup> July 2002, the date on which the Statute came into force. Pursuant to Article 14 of the Rome Statute, Uganda became the first country to refer a situation to the ICC.<sup>36</sup>

It can be argued that due to international and local condemnation of the failure by the GoU to resolve the conflict in Northern Uganda militarily, it yielded to international, national and political pressure to refer the situation to the OTP/ICC.<sup>37</sup> In its referral, the GoU, stated that it was unable to arrest the leadership of the Lords' Resistance Army – a rebel outfit which it held responsible for the atrocities wrought on the people of Northern Uganda.<sup>38</sup> Uganda also indicated that it had not conducted any national proceedings against these suspects and did not intend to do so.<sup>39</sup> Upon receipt of this referral, the OTP began investigations into the situation in Northern Uganda on the 29 July 2004.<sup>40</sup> On the 6 May 2005, the OTP sought for arrest warrants from the Pre-Trial Chamber II for the top

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36 This was done on the 16th of December 2003. See President of Uganda Refers situation concerning the Lord's Resistance Army (LRA) to the ICC, ICC Press Release, ICC-20040129-44 <[http://www.icc-cpi.int/en\\_menus/icc/press%20and%20media/press%20releases/2004/Pages/president%20of%20uganda%20refers%20situation%20concerning%20the%20lord%20s%20resistance%20army%20lra%20to%20the%20icc.aspx](http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/2004/Pages/president%20of%20uganda%20refers%20situation%20concerning%20the%20lord%20s%20resistance%20army%20lra%20to%20the%20icc.aspx)> last visited September 6 2013.

37 See Honig Patrick, 'The Monkey Cannot Preside over a case concerning the Jungle: Why the International Justice is Guilty of Overreach in Northern Uganda', paper presented at the international Conference on 'Spheres of Justice' held by the Mahanirban Calcutta Research Group in September 2007 in <[http://uva.academia.edu/SuzannevanHooff/Papers/115839/Even should the heavens fall](http://uva.academia.edu/SuzannevanHooff/Papers/115839/Even%20should%20the%20heavens%20fall) Timing and sequencing in transitional justice a gap in the Rome Statute Or towards a flexible transitional justice scheme for the 21st century> accessed October 12, 2011.

38 Ibid.

39 *Situation in Uganda, Warrant of Arrest for Joseph Kony* issued on 8 July 2005 as amended on 27 September 2005, ICC-02/04-01/05-53 (27-09-2005) at 37. President of Uganda Refers situation concerning the Lord's Resistance Army (LRA) to the ICC, ICC Press Release, ICC-20040129-44 <[http://www.icc-cpi.int/en\\_menus/icc/press%20and%20media/press%20releases/2004/Pages/president%20of%20uganda%20refers%20situation%20concerning%20the%20lord%20s%20resistance%20army%20lra%20to%20the%20icc.aspx](http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/2004/Pages/president%20of%20uganda%20refers%20situation%20concerning%20the%20lord%20s%20resistance%20army%20lra%20to%20the%20icc.aspx)> last visited September 6 2013.

40 Prosecutor of the International Criminal Court opens an investigation into Northern Uganda, ICC Press Release, ICC-OTP-20040729-65 <[http://www.icc-cpi.int/en\\_menus/icc/situations%20and%20cases/situations/situation%20icc%200204/press%20releases/Pages/prosecutor%20of%20the%20international%20criminal%20court%20opens%20an%20investigation%20into%20northern%20uganda.aspx](http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200204/press%20releases/Pages/prosecutor%20of%20the%20international%20criminal%20court%20opens%20an%20investigation%20into%20northern%20uganda.aspx)> accessed October 3, 2011.

leadership of the LRA/M.<sup>41</sup> They included: Joseph Kony, Vincent Otti, Okot Odhiambo, Raska Lukwiya and Dominic Ongwen.<sup>42</sup> The arrest warrants were issued on the 8<sup>th</sup> of July 2005, under seal and were later unsealed on the 13<sup>th</sup> of October 2005.<sup>43</sup> The accused persons had been charged with being individually criminally liable for 33, 32, 10, and 7 counts of war crimes and crimes against humanity respectively contrary to Article 25 (3) (a) and (b) of the Rome Statute.<sup>44</sup> Kreß argues that state referrals have been justified as a means in which a case is admissible before the ICC.<sup>45</sup> Ocampo also supported the philosophy that States could respect their obligation to prosecute *by failing to prosecute*.<sup>46</sup> He argued that:

There may be cases where inaction by States is the appropriate course of action. For example, the Court and a territorial State incapacitated by mass crimes may agree that a consensual division of labour is the most logical and effective approach. Groups bitterly divided by conflict may oppose prosecutions at each other's hands and yet agree to a prosecution by a Court perceived as neutral and impartial.<sup>47</sup>

This argument by Ocampo is contestable. In the first place, the sixth Preambular to the Rome Statute confirms that the duty to prosecute those responsible for international crimes lies primarily with the State. Consensual division of labour would only come in when the Court provides technical support to the prosecuting state as envisioned by the drafters of the Rome Statute.<sup>48</sup> Additionally, the Rome Statute did not envision that the Court would be used in situations where belligerents are unable to agree on prosecution. This position is

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41 Chief Prosecutor Luis Moreno-Ocampo, 'The Investigation in Northern Uganda,' International Criminal Court, 14 October 2005; <<http://www.icc-cpi.int/library/organs/otp/Uganda-presentation.pdf>> accessed October 12, 2011.

42 *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen, Warrant of Arrest for Vincent Otti*, ICC-02/04-01/05-54, (13-10-2005). The accused persons were the Chairman and Commander –in- Chief, Vice-Chairman and Second in Command, Deputy Commander, Army Commander and Sinai Brigade Commander respectively. One of the remaining two indicted leaders, Dominic Ongwen is now reported to have surrendered to the United States forces in the Central African Republic. See LRA rebel Dominic Ongwen surrenders to US forces in CAR, BBC News, January 7, 2015 <<http://www.bbc.com/news/world-africa-30705649>> accessed January 7, 2015.

43 Ibid.

44 On July 11 2007, proceedings against Raska Lukwiya were formally terminated when it was confirmed that he had died. See *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo, Raska Lukwiya and Dominic Ongwen, Decision to Terminate the proceedings against Raska Lukwiya*, ICC-02/04-01/05-248 (11-07-2007).

45 Kreß argues that the state referral is 'firmly grounded in law and commendable as a matter of legal policy'. See Claus Kreß, 'Self-Referrals' and 'Waivers of Complementarity': Some Considerations in Law and Policy', (2004) 2 *Journal of International Criminal Justice* 944 at 945. Schabas 2009 at 165.

46 Jurisdiction in this case would be granted to the ICC by virtue of Article 17 on the grounds of inability to prosecute. See Schabas 2008 at 26

47 'Paper on some policy issues before the Office of the Prosecutor', September 2003, 2 <[http://www.icc-cpi.int/NR/rdonlyres/1FA7C4C6-DE5F-42B7-8B25-60AA962ED8B6/143594/030905\\_Policy\\_Paper.pdf](http://www.icc-cpi.int/NR/rdonlyres/1FA7C4C6-DE5F-42B7-8B25-60AA962ED8B6/143594/030905_Policy_Paper.pdf)> accessed June 12, 2012

48 See Comments by Mr. Wako (Attorney General of Kenya ) as he was then. Proceedings at Rome Conference , 3rd plenary meeting on Agenda Item 11, 'Consideration of the question concerning the finalization and adoption of a convention on the establishment of an international criminal court in accordance with General Assembly resolutions 51/207 of 17 December 1996 and 52/160 of 15 December 1997 (A/CONF. 183/2/Add. 1 and Coir. 1), A/CONF.183/SR.3 paras. 63 – 68 at 77 <[http://untreaty.un.org/cod/icc/rome/proceedings/E/Rome%20Proceedings\\_v2\\_e.pdf](http://untreaty.un.org/cod/icc/rome/proceedings/E/Rome%20Proceedings_v2_e.pdf)> accessed October 3, 2013.

supported by the drafters of the Rome Statute who resisted the involvement of the Court in the internal affairs of States.<sup>49</sup> Rather, the Court only assumes jurisdiction under specific circumstances delineated in Article 17 of the Rome Statute. More importantly, its jurisdiction is for the ‘most serious crimes of concern to the international community’ as set out in the 9<sup>th</sup> Preambular of the Rome statute. In 2003, the Prosecutor further argued that :

Where the OTP receives a referral from the State in which a crime has been committed, the OTP has the advantage of knowing that the State has the political will to provide his Office with all the cooperation within the country that it is required to give under the Statute. Because the State, of its own volition, has requested the exercise of the Court’s jurisdiction, the OTP can be confident that the national authorities will assist the investigation, will accord the privileges and immunities necessary for the investigation, and will be anxious to provide if possible and appropriate the necessary level of protection to investigators and witnesses.<sup>50</sup>

Gaeta argues that ‘soliciting self-referrals not only has the practical advantages listed in the OTP policy paper but also means that the Prosecutor can avoid having to act *proprio motu*,<sup>51</sup> which would be far more politically controversial.’<sup>52</sup> It has since been held in *Lubanga* that this process of state referrals is consistent with the ‘ultimate purpose of the complementarity regime.’<sup>53</sup> It can be argued that the Prosecutor took a big gamble in assuming that a self-referral also means that a State has political will to support the work of the court.

As the referral of Uganda suggests, the state was only willing to cooperate as long as investigations focused on the LRA/M. There was no requirement to cooperate in investigations concerning the UPDF. Secondly, the Prosecutor erroneously assumed that the national authorities would have the necessary capacity to arrest the accused persons

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49 Schabas 2008 at 165

50 ‘Annex to the ‘Paper on some policy issues before the Office of the Prosecutor’: Referrals and Communications’, September 2003 <<http://www.amicc.org/docs/ICC%20OTP%20Policy%20Paper%20Annex%20210404.pdf>> accessed June 16, 2012.

51 In situations when the OTP has opted to commence investigations *pro proprio motu*, the OTP has to conduct a preliminary examination of information it has received regarding the alleged crime(s), and conclude that there is a ‘reasonable basis for proceeding with an investigation.’ (Article 15(2) of the Rome Statute.) The Prosecutor is then required to submit a request to the Pre-Trial Chamber for authorization to initiate an investigation. (See Article 15(3) of the Rome Statute and Rules of Procedure and Evidence, ASP/1/3/ Rule 50.) The Pre-Trial Chamber (PTC) is then required to establish whether there is reasonable basis for proceeding with the investigation using the criteria set out in Article 53(1). (Situation in 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, (Kenya Investigation Authorization Decision) para. 24.) See Manuel Ventura, ‘Proprio motu investigation by the ICC Prosecutor: Under what circumstances can the prosecutor initiate investigations proprio motu? The Peace and Justice Initiative <<http://www.peaceandjusticeinitiative.org/implementation-resources/proprio-motu-investigation-resources/proprio-motuinvestigation-by-the-icc-prosecutor>> accessed January 7, 2015.

52 See Paola Gaeta, ‘Is the Practice of ‘Self-Referrals’ a Sound Start for the ICC?’ (2004) 2 Journal of International Criminal Justice 949, 952.’

53 Pre-Trial Chamber 1 confirming the arrest warrant of Thomas Lubanga. See The Hague Justice Portal ‘Thomas Lubanga’ <<http://www.haguejusticeportal.net/index.php?id=8156>> accessed October 7, 2013.

once the indictments had been made. As the LRA/M situation has shown, Uganda failed to arrest the indictees until recently when Dominic Ongwen allegedly surrendered to US forces in the Central African Republic.<sup>54</sup> Similarly, the DRC which referred the situation in Eastern DRC to the Court was unable to arrest General Bosco Ntaganda.<sup>55</sup> It was only when Ntaganda surrendered himself voluntarily to the Court that proceedings in his case commenced.<sup>56</sup>

Additionally, since civil strife involves two or more parties, the state is -in most cases- one of the belligerent parties. A State cannot *ideally* refer a case 'against itself.' The result of a self-referral is that there is a major problem of selective prosecution in cases where governments are also suspected of being culpable for similar crimes.<sup>57</sup> The self-referral is an example of an abuse of the OTP when States Parties begin to use it to resolve their internal strife.<sup>58</sup> For example, the Ugandan President, who had often opted for a military solution to end the over two-decade rebellion by the LRA/M, has been criticised for having chosen a 'simplistic super-imposition of exogenous criminal law on (a) terribly complex conflict.'<sup>59</sup> Moy argues that since President of Uganda had failed to stop the LRA/M rebellion, he chose to use the ICC as a tool to amass the international community against the LRA/M. In the same vein, Moy argues, President Museveni ensured that he distanced himself from any negativity that would arise from the referral.<sup>60</sup> Moy's argument is plausible in light of the fact that the GoU was and indeed remains primarily responsible (and better placed) to arrest

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54 See, 'LRA rebel Dominic Ongwen surrenders to US forces in CAR,' BBC News, 7 January 2015 available at <http://www.bbc.com/news/world-africa-30705649> accessed April 22, 2016.

55 See the Situation in the Democratic Republic of the Congo: Warrant of Arrest in the case of The Prosecutor Vs. Bosco Ntaganda ICC-01/04-02/06 , 22 August 2006 <<http://www.icc-cpi.int/iccdocs/doc/doc305330.pdf>> accessed October 7, 2013.

56 ICC » Situations and Cases » Situations » ICC-01/04 » Related Cases » ICC-01/04-02/06, The Prosecutor v. Bosco Ntaganda, <[http://www.icc-cpi.int/en\\_menus/icc/situations%20and%20cases/situations/situation%20icc%200104/related%20cases/icc%200104%200206/Pages/icc%200104%200206.aspx](http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200104/related%20cases/icc%200104%200206/Pages/icc%200104%200206.aspx)> accessed October 7, 2013.

57 ICC Watch., Press Release: 'ICC Chief Prosecutor challenged to account for 'partisan' refusal to take action against Museveni regime.' 10 June 2010 <[http://www.iccwatch.org/pressrelease\\_10june10.html](http://www.iccwatch.org/pressrelease_10june10.html)> accessed June 16, 2012.

58 'In Uganda for instance, although the judiciary is among the best in Africa, any trials of the LRA leaders before national courts may be perceived as biased in view of a deep suspicion of the government held by elements of the Acholi population in the North [...] Considering the risk that any potential domestic tribunal could be tainted as an extension of the conflict by other means, resort to the ICC as a disinterested third party may prove opportune.' C. Stahn and M.El Zeidy, *The International Criminal Court and Complementarity: From Theory to Practice*, Vol. 1 at 73 (2011) at 299 in Ndagire 2012 at 42.

59 See Situation in Uganda (ICC-02/04-01/05) Decision to Convene A Status Conference on the Situation in Uganda in Relation to the Application of Article 53, 2 December 2005; See also Mohamed El Zeidy, *The Ugandan Government Triggers the First Test of the Complementarity Principal: An Assessment of the First State's Party Referral to the ICC, 2005(5) International Criminal Law Review* 83.

60 See Moy Abigail H., 'The International Criminal Court's Arrest Warrants and Uganda's LRA: Renewing the Debate Over Amnesty and Complementarity.' 19 *Harvard Human Rights Journal* (2006) 267, 273.

the indicted leaders of the LRA/M.<sup>61</sup> Uganda has also always had a well-functioning judicial system.<sup>62</sup> This means that there were no circumstances in which Uganda was unable to try the indictees itself. On the other hand, the ICC does not have an enforcement mechanism but only waits to act when indicted persons are either arrested or voluntarily surrender to the Court for trial.<sup>63</sup> The Court requires Uganda or any other State Party to arrest and either collect evidence or guarantee the security of the OTP personnel to carry out their investigations.<sup>64</sup> It can be argued that the 28 May 2004 letter from the GoU to the ICC, which stated that the Court was ‘the most appropriate and *effective* forum for the *investigation and prosecution* of those bearing the greatest responsibility,’ was to a large extent, erroneous.<sup>65</sup> It is more plausible to believe that the GoU used the self-referral for purposes of putting pressure on the LRA/M (and its alleged financial funder, the Government of Sudan) to end the rebellion. There is no evidence to show that the GoU was unwilling and unable to carry out national proceedings to address the crimes committed by the rebels.

The other criticism levelled against self-referrals is the way they have been previously procured. Schabas notes that upon assuming office, Ocampo approached certain countries which had conflicts within their jurisdiction (like Uganda) and encouraged them to refer them to the Court pursuant to Article 14 of the Rome Statute.<sup>66</sup> Ocampo was also criticised for being biased in the way he handled the investigations in Uganda. The press release by the OTP seemed biased from the start when it singled out ‘locating and arresting the LRA/M leadership’<sup>67</sup> even before investigations begun. Further, the Prosecutor held a joint

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61 Moy *ibid*. See also Denise Kodhe ‘President Museveni’s condemnation of ICC hypocritical’ Standard Digital, Wednesday, April 10th 2013 [http://www.standardmedia.co.ke/?articleID=2000081239&story\\_title=Kenya-President-Museveni%E2%80%99s-condemnation-of-ICC-hypocritical](http://www.standardmedia.co.ke/?articleID=2000081239&story_title=Kenya-President-Museveni%E2%80%99s-condemnation-of-ICC-hypocritical) accessed October 7, 2013.

62 C. Stahn and M.El Zeidy, *The International Criminal Court and Complementarity: From Theory to Practice*, Vol 1 at 73 (2011) at 299. See Pre-Trial Chamber II, ‘Warrant of Arrest for Joseph Kony Issued on 8 July 2005 as Amended on 27 September 2005’ (ICC-02/04-01/05-53), 27 September 2005; Pre-Trial Chamber II, ‘Warrant of Arrest for Vincent Otti’ (ICC-02/04-01/05-54), 8 July 2005; Pre-Trial Chamber II, ‘Warrant of Arrest for Raska Lukwiya’ (ICC-02/04-01/05-55), 8 July 2005 (proceedings terminated pursuant to ICC-02/04-01/05-248); Pre-Trial Chamber II, ‘Warrant of Arrest for Okot Odhiambo’ (ICC—02/04-01/05-56), 8 July 2005; Pre-Trial Chamber II, ‘Warrant of Arrest for Dominic Ongwen’ (ICC-02/04-01/05-57), 8 July 2005. in Ndagire 2012 at 42

63 See also Mark Kersten ‘Why the ICC Won’t Prosecute Museveni’ Justice In Conflict Blog: On the Challenges of pursuing justice available at <https://justiceinconflict.org/2015/03/19/why-the-icc-wont-prosecute-museveni/>.> accessed April 2, 2016.

64 *Ibid*

65 Pre-Trial Chamber II, ‘Warrant of Arrest for Joseph Kony Issued on 8 July 2005 as Amended on 27 September 2005’ (ICC-02/04-01/05-53), paragraph 37.

66 W.A. Schabas, ‘Complementarity In Practice: Creative Solutions of a Trap for the Court?’ , in (Mauro Politi and Federica Gioia, (eds.) *The International Criminal Court and National Jurisdictions* Aldershot, Hants, England; Burlington, VT: Ashgate, 2008 at 25.

67 President Of Uganda refers Situation Concerning the Lords’ Resistance Army (LRA) to the ICC’, ICC-20040129-44 -En accessible at [http://www.icc-cpi.int/en\\_menus/icc/situations%20and%20cases/situations/situation%20icc%200204/press%20releases/Pages/president%20of%20uganda%20refers%20situation%20concerning%20the%20lord%20s%20resistance%20army%20%20lra%20%20to%20the%20icc.aspx](http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200204/press%20releases/Pages/president%20of%20uganda%20refers%20situation%20concerning%20the%20lord%20s%20resistance%20army%20%20lra%20%20to%20the%20icc.aspx) accessed June 17, 2012.

press conference and shook hands with President Museveni, one of the belligerents of the Northern Uganda conflict who should have been a subject of the ICC investigation.<sup>68</sup> It could be argued for the Prosecutor that he was acting well within his powers when he investigated the situations referred to him.<sup>69</sup> That notwithstanding, at the fore of the principle of complementarity is the requirement to encourage Sovereign States to carry out their primary obligations of investigating and prosecuting the said crimes in their territories *first* before seeking the assistance of the OTP. More so, others have argued that the OTP ‘could well have launched investigations using his *proprio motu* powers in accordance with Article 15, (but) he chose to proceed otherwise.’<sup>70</sup> The solicitation of State referrals is therefore not recommended as it goes against the essence of complementarity generally and positive complementarity in particular.

There are conflicting opinions as to where the initial idea of referring the LRA/M arose. While Mr. Ocampo said that it was his idea,<sup>71</sup> others suggest that it was the work of Uganda’s foreign legal advisors<sup>72</sup> or the lobbying of non government organisations.<sup>73</sup> Nouwen & Werner argue that the GoU was hard pressed to do so because not only had its image been tarnished for being sued for violating international law in DRC,<sup>74</sup> the humanitarian situation in Northern Uganda had been described by the UN Under-Secretary General for Humanitarian Affairs as the ‘most forgotten and neglected crisis in the world.’<sup>75</sup> The country’s donor partners were also pressurising it to resolve the conflict. Sun Lau also suggests that ‘while the conflict has undeniably blemished the record of the Museveni

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68 Amnesty International, ‘Uganda: First ever arrest warrants by International Criminal Court- a step towards addressing impunity’, 14 October 2005, AI Index: AFR 59/008/2005; Human Rights Watch, ‘ICC Takes Decisive Step for Justice in Uganda’, 14 October 2005.

69 Luis Moreno-Ocampo, Prosecutor of the ICC, Statement Made at the Ceremony for the Solemn Undertaking of the Chief Prosecutor of the International Criminal Court (June 16, 2003), <[http://www.iccpi.int/library/organs/otp/030616\\_moreno\\_ocampo\\_english\\_final.pdf](http://www.iccpi.int/library/organs/otp/030616_moreno_ocampo_english_final.pdf)> accessed June 17, 2012.

70 This is probably because he needed the backing of either the State under whose jurisdiction the situation lies or wanted to act with the solid backing of the UNSC. See for example, on the 26 February 2011, the United Nations (UN) Security Council unanimously passed Resolution 1970 (2011), referring the ‘situation’ in Libya to the International Criminal Court (ICC). ‘UNSC Referral of Libya Gives ICC the Opportunity to Prove its Worth’, <<http://www.issafrika.org/iss-today/unsc-referral-of-libya-gives-icc-the-opportunity-to-prove-its-worth>> accessed June 17, 2012.

71 In ‘The Tenth Anniversary of the ICC and Challenges for the Future: Implementing the Law’, London School of Economics, 8 Oct. 2008. This view is supported by W.A. Schabas, ‘Complementarity In Practice: Creative Solutions of a Trap for the Court?’ , in (Mauro Politi and Federica Gioia, (eds.) *The International Criminal Court and National Jurisdictions* Aldershot, Hants, England; Burlington, VT: Ashgate, 2008 at 25.

72 B.N. Schiff, *Building the International Criminal Court*. CUP.New York (2008), 198.

73 Allen notes that in 1998, four years before ratification of the Rome Treaty, UNICEF suggested that the LRA be prosecuted by the ICC. See Allen, (2006), 82–83.

74 See *In Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* [2005] ICJ Rep 168, at para. 207 (see also paras 211 and 250), where the ICJ found that UPDF had committed ‘massive human rights violations and grave breaches of international humanitarian law’ on the territory of the DRC. in Sarah M. H. Nouwen and Wouter G. Werner, ‘Doing Justice to the Political: The International Criminal Court in Uganda and Sudan EJIL (2010), Vol. 21 No. 4, 941–965.

75 J. Egeland, *A Billion Lives: An Eyewitness Report from the Frontlines of Humanity* (Simon & Schuster 2008), 201.

government, the LRA abductions and brutality indirectly strengthened the ‘victim’ image of the GoU as it helps promote a simplistic, black-and-white view of the war as essentially ‘good’ (GoU) versus ‘evil’ (the LRA).<sup>76</sup>

It should also be recalled that while the situation in the Northern Uganda had commenced in 1986, the OTP/ICC was limited by the principle of *ratione temporis*. This means that the ICC is mandated to *only* investigate crimes which took place after the Rome Statute had come into existence in 2002.<sup>77</sup> The OTP/ICC could not investigate the alleged crimes committed by both the LRA/M and UPDF before 2002 and yet this is the crucial period for which the UPDF has been blamed for igniting and prolonging the conflict.<sup>78</sup> It has been argued that investigating only the crimes committed by the LRA/M after 2002 is a disservice to both the victims of the prior crimes who seek for lasting solutions to the conflict.<sup>79</sup> However the ICC cannot be blamed for this because it is a creature of statute. This is a matter for the Assembly of States Parties to resolve and not for the OTP/ICC. To-date, the ICC has never opened investigations into the acts of the UPDF in this conflict.<sup>80</sup> The OTP/ICC defended its inaction against the UPDF on the basis that the gravity of crimes committed by the LRA/M was more than the crimes committed by the UPDF.<sup>81</sup> We shall explore these two terms further in Section 4.2.2.

In all the aforementioned scenarios, it is clear that there was a political aspect that influenced the referral of the situation to the ICC. The ICC cannot shed off this reality by

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76 Raymond Kwun Sun Lau, 2011, *ibid*.

77 Article 11 Rome Statute

78 See Finnström S, *Living with Bad Surroundings: War and Existential Uncertainty in Acholiland in Northern Uganda* (Uppsala: Acta Universitatis Upsaliensis, Uppsala Studies in Cultural Anthropology No. 35, 2003), 64 –66.

79 Julius Ocungi, ‘Otunnu raps ICC over ‘soft’ target trials,’ *The Daily Monitor* 29 January 2016 available at <http://www.monitor.co.ug/News/National/Otunnu-raps-ICC-over-soft-target-trials/-/688334/3053086/-/smxpr5z/-/index.html> accessed April 25, 2016.

80 The OTP argued that ‘We selected our first case based on gravity. Between July 2002 and June 2004, the . . . LRA . . . was allegedly responsible for at least 2200 killings and 3200 abductions in over 850 attacks. It was clear that we must start with the LRA.’ See ICC-OTP, ‘Statement by the Chief Prosecutor on the Uganda Arrest Warrants’, The Hague, 14 Oct. 2005. See also ‘Statement by Luis Moreno-Ocampo, Prosecutor of the International Criminal Court, Fourth Session of the Assembly of States Parties’, 28 Nov. – 3 Dec. 2005, The Hague, 28 Nov. 2005, attached to ICC-02/04-01/05-67, 2 Dec. 2005, at 2 Nouwen and Werner,(2010), 951.

81 See also Mugisa and Nsambu, ‘ICC Clears UPDF in the North’, *Saturday Vision*, Kampala, 30 Aug. 2008. At the Lord’s Resistance Army: War, Peace and Reconciliation Workshop, London School of Economics, 3 March 2007, Ocampo is quoted as saying, ‘LRA killings were many times worse than those by the UPDF. There’s no question we had to start by investigating LRA crimes.’ in Ndagire, ‘Complex Complementarity: An Analysis Of The Legal Challenges Crippling The International Crimes Division (ICD) Of The Uganda High Court From Prosecuting International Crimes Committed In Northern Uganda.’ Advanced Degree of Master of Laws in Public International Law (with a specialization in International Criminal Law, Leiden University 2012)25. (Copy on file) See also P. Clark, ‘Law, Politics and Pragmatism: The ICC and Case Selection in the Democratic Republic of Congo and Uganda, Courting Conflict? Justice, Peace and the ICC in Africa, March 2008, <<http://www2.lse.ac.uk/internationalDevelopment/research/crisisStates/download/others/ICC%20in%20Africa.pdf>> accessed September 6, 2013. The actions of the Prosecutor have been criticised by some organisations. See ICC Watch, ‘ICC Chief Prosecutor challenged to account for ‘partisan’ refusal to take action against Museveni regime’ 10 June 2010 [http://www.iccwatch.org/pressrelease\\_10june10.html](http://www.iccwatch.org/pressrelease_10june10.html) accessed October 3, 2013.

simply arguing that it is apolitical.<sup>82</sup> Nouwen and Werner argue that the '(ICC) was created by political decisions, it adjudicates crimes which are frequently related to politics, and it depends on a mysterious and seemingly magical 'political will' for the enforcement of its decisions.'<sup>83</sup> It is when the ICC seeks to engage with the politics surrounding its operations that it will be in a better position to have a better understanding of how similar interventions like the AAR seek to fight impunity.<sup>84</sup> In acknowledging that the referral was his idea, Ocampo inadvertently admitted that he took a political decision on behalf of his institution, by choosing who he considered as the aggressor and who was the aggrieved.<sup>85</sup> The OTP chose who was an enemy of humankind (*hostis humani generis*) and who was a friend or supporter of humankind even before investigations had begun.<sup>86</sup> The referral was announced as 'concerning the Lords' Resistance Army' but was later re-titled as the 'situation in Northern Uganda' after criticism from some NGOs.<sup>87</sup>

Additionally, it can also be argued that the GoU referred the situation in Northern Uganda to the ICC, not because of the GoU's commitment to law and justice, but because it viewed the referral as yet another political strategy to defeat the LRA.<sup>88</sup> This view is supported by the then Minister of Defence Amama Mbabazi who noted that the referral was meant 'to intimidate these thugs; the LRA, to show that they were sought by many more (institutions).'<sup>89</sup> Similarly, the Solicitor General of Uganda noted that Uganda's national judicial system was 'widely recognised for its fairness, impartiality, and effectiveness'.<sup>90</sup> This

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82 At the conclusion of the Rome Conference, Chérif Bassiouni claimed that 'The ICC reminds governments that realpolitik, which sacrifices justice at the altar of political settlements, is no longer accepted.' M.C. Bassiouni, *The Legislative History of the International Criminal Court* (2005), at 121. The former President of the Court also assured states that '[t]here's not a shred of evidence after three-and-a-half years that the court has done anything political. The court is operating purely judicially.' See, Steve Herman, 'Japan's Expected to Support International Criminal Court', *Voice of America*, 6 Dec. 2006, <[www.amazines.com/article\\_detail.cfm/183987?articleid=183987](http://www.amazines.com/article_detail.cfm/183987?articleid=183987)> accessed March 17, 2014. Mr. Ocampo, former Prosecutor OTP has also stated that 'I apply the law without political considerations. But the other actors have to adjust to the law.' 'Keynote address Mr. Luis Moreno-Ocampo, Prosecutor of the International Criminal Court, Council on Foreign Relations', Washington DC, 4 February 2010. in Nouwen and Werner, 'Doing Justice to the Political: The International Criminal Court in Uganda and Sudan (2010), (21) (4) EJIL, 941-965.

83 Sarah M. H. Nouwen and Wouter G. Werner, (2010) 943. See also M. Koskeniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (2002), 177.

84 Interview with Moses Okello, Fmr Snr Researcher, Refugee Law Project, (18 August 2011).

85 See 'The Tenth Anniversary of the ICC and Challenges for the Future: Implementing the Law', London School of Economics, 8 Oct. 2008.

86 Nouwen and Werner, (2010), supra.

87 This is further evidenced by the joint Press conference which Mr. Ocampo held with the President of Uganda where they shook hands. To date, no investigations have ever been opened despite spirited campaigns by eminent personalities like Olara Otunnu, former UN Undersecretary and Special Representative for Children and Armed Conflict. ICC, 'President of Uganda Refers Situation Concerning the Lord's Resistance Army (LRA) to the ICC', ICC-20040129-44-En, 29 Jan. 2004. See Cyprian Musoke and Milton Olupot, 'ICC prosecutor rejects Otunnu war case' *The New Vision online* (3 June, 2010) <<http://www.newvision.co.ug/D/8/12/721698>> accessed March 17, 2014.

88 Nouwen and Werner (2010), 949.

89 Ibid.

90 See Decision on the Admissibility of the Case under Article 19(1) of the Statute, ICC-02/04-01/05-377, Pre-Trial Chamber II, 10 Mar. 2009, para. 37.

meant that the country was both *able* and *willing* to investigate and prosecute the LRA but instead opted to refer the matter to the ICC more for political rather than legal expediency. Indeed, as a result of the referral, Uganda was able to garner international support against the LRA which forced the latter back to the negotiating table.<sup>91</sup> Consequently, the government of the DRC allowed Uganda to enter its territory and pursue the LRA.<sup>92</sup>

The insistence by some of the proponents of ICL, on retributive and deterrent methods of justice, while ignoring the nuanced literature on ICL which acknowledges that ICL can only make a modest contribution to the holistic fight against impunity, needs to be revisited. More importantly, they need to appreciate that there are very many factors at play, which might not make it easy to achieve retributive justice. For example, a government that is alleged to be involved in the commission of ‘crimes against civilians’ cannot be trusted to deliver the kind of justice expected.<sup>93</sup>

It can be argued that the OTP opted to pursue only the LRA/M and not the UPDF because not only had the OTP requested for this referral from the GoU, Ocampo also needed the cooperation of the State of Uganda to have the indictees arrested.<sup>94</sup> This signifies a core weakness with the ICC. It is unable to operate without the support of states parties or third parties like NGOs. In the case of Uganda, the ICC had to rely on the UPDF to protect its investigators as they carried out their initial investigations. In similar situations like the DRC and Sudan, the ICC has to rely on NGOs operating in the country to help it carry out its investigations.<sup>95</sup> In the recently withdrawn case against Uhuru Kenyatta, the ICC could not independently carry out its functions without the help of the Kenyan state.<sup>96</sup> In the case of the LRA/M, the ICC had, until the recent surrender of Ongwen, failed to proceed against the indicted unless and until the GoU arrests the accused persons and hands them over for prosecution. This inability to independently carry out its activities is the Achilles heel of the

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91 Statement by the President of the Security Council, SC-Statement-LRA-Great-Lakes-2008, S/PRST/2008/48 <<http://watchlist.org/wordpress/wp-content/uploads/SC-Statement-LRA-Great-Lakes-2008.pdf>> accessed March 17, 2014.

92 The DRC had earlier sued Uganda before the ICJ for plundering the former’s resources *Case concerning Armed Activities on the Territory of the Congo*, ICJ, 19 December 2005; <<http://www.icj-cij.org/docket/files/116/1045.pdf>> accessed March 17, 2014.

93 Sarah M. H. Nouwen and Wouter G. Werner, ‘Doing Justice to the Political: The International Criminal Court in Uganda and Sudan’ *EJIL* (2010), Vol. 21 No. 4, 941 at 951. See also Schabas, ‘Prosecutorial Discretion v. Judicial Activism at the International Criminal Court’, 6 *J Int’l Crim Justice* (2008) 731, at 748.

94 Comments by Judi Ajalo Erongot, Former Abductee and currently Focal Person, National Coalition on Transitional Justice in Uganda at the Consultative Meeting on Uganda’s Transitional Justice Policy: Towards A Victim-Centred Approach., 22 May 2014, Colline Hotel Mukono. Organised by Foundation for Human Rights Initiative (FHRI).

95 In analysing the seriousness of the information received, the OTP may seek additional information from States, organs of the United Nations, intergovernmental or nongovernmental organizations or other reliable sources that he or she deems appropriate. See Article 15(2) of the Rome Statute.

96 ICC drops Uhuru Kenyatta charges for Kenya ethnic violence, BBC News December 5 2014 <<http://www.bbc.com/news/world-africa-30347019>> accessed December 5 2014.

ICC. For Drumbl, such circumstances would warrant a non-prosecutorial intervention rather than a prosecution that does not meet the international standards.<sup>97</sup> Drumbl also criticizes the ICC's over-emphasis on trial justice which he terms as 'the externalization of justice'<sup>98</sup>- that is, interventions that are removed from the social and cultural realities of the home country.<sup>99</sup> This criticism however might not be entirely justified. This is because Uganda was an active participant in the creation of the ICC and was even the first State to refer a situation to the Court. In any case, trial justice is indeed part and parcel of the criminal justice options of the state of Uganda as well as its traditional justice mechanisms.

Drumbl further cites the difficulty in apprehending indictees, the selectivity of who should be tried and the rigours of the trial process itself as undermining the trial process and deterrence theory.<sup>100</sup> In essence, he argues that the root causes of the said conflicts are not addressed by trial justice and this calls for a more comprehensive way of dealing with post conflict resettlement.<sup>101</sup> This view is however disputed by Bogoeva who argues that 'historical experience, from Germany to South Africa, accords with the indications of the past 20 years that credible international criminal prosecution is essential and irreplaceable in the process of reconciliation. '<sup>102</sup> He suggests that the OTP/ICC should be guided by the quality of justice at national level and the broader political ramifications when deciding

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97 This is especially so given the fact that the dominant view of key international criminal lawyers is that the due process of the proceedings is a crucial measure of their legitimacy. The dominant view among international criminal lawyers is that the *processual* content of international criminal law is central to its legitimacy. See Alain Pellet, *Internationalised Courts: Better than Nothing* in *Internationalised Criminal Courts* 439 (Romano, Nollkaemper, & Kleffner eds., 2004). For an in-depth analysis of these criteria, see Markus Benzling, *The Complementarity Regime of the International Criminal Court: International Criminal Justice between State Sovereignty and the Fight Against Impunity*; (2003) 7 *Max Planck Yearbook of United Nations Laws* 591 at 606; Holmes, *'Complementarity: National Courts'*, 675; and Daryl Robinson, *'Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court'* (2003) 14 *EJIL* 481 at 500.

98 MA Drumbl, 'Rights, Culture, and Crime: The Role of Rule of Law for the Women of Afghanistan' (2004) 42 *CJTL* 349, 363. MA Drumbl, 'Collective Violence and Individual Punishment: The Criminality of Mass Atrocity' (2005) 99 *NWULR* 539, 602 in Lorna Mcgregor id at 51.

99 Meernik also notes that there is 'little evidence to support the notion that the International Criminal Tribunal for the Former Yugoslavia (ICTY) had a positive impact on societal peace in Bosnia.' See Meernik, J. *Justice and peace? How the International Criminal Tribunal affects societal peace in Bosnia.* (2005) 42(3), *JIPR* 271, 247) See also Dejan Guzina and Branka Marijani 'Local Uses of International Criminal Justice in Bosnia-Herzegovina: Transcending Divisions or Building Parallel Worlds?' (2013) *Studies in Social Justice* Volume 7, Issue 2, 245-263. See also Crocker, David A. 'Transitional Justice and International Civil Society,' in Jokic Aleksandar (ed), *War Crimes and Collective Wrongdoing* (Maldan, MA: Blackwell 2001) 270-300.

100 It has been argued that the Court's 'deterrence capabilities are an essential element of its legitimization....an important factor leading to its foundation and is "the central utilitarian argument in support" of it that "gives [it] its distinctive rationale." Georgios M. Pikiis, *The Rome Statute for the International Criminal Court. Analysis of the Statute, the Rules of Procedure and Evidence, the Regulations of the Court and Supplementary Instruments* (Leiden: Martinus Nijhoff, 2010)13 cited in Tom Buitelaar, 'The ICC and the Prevention of Atrocities: Criminological Perspectives' The Hague Institute for Global Justice, Working Paper 8, April 2015.

101 Additionally, Drumbl notes that Article 53 of the Rome Statute gives the OTP subjective discretion to decide whether or not to initiate an investigation by considering the gravity of crime, the interests of victims as well as whether the said investigation would serve the '*interests of justice.*' Article 53, The Rome Statute of the ICC.

102 Bogoeva also argues that the 'majority of contributors to a recent CILRAP debate agree that ICL has a role to play. See Julija Bogoeva, 'Prosecuting War Criminals as the Basis for Reconciliation Policy,' FICHL Policy Brief Series No. 42 (2015)

whether there is genuine unwillingness to investigate or prosecute.<sup>103</sup> This is because while a state might purport to carry out investigations and prosecutions, the quality of its judicial system might either be wanting or such state might easily try political enemies but not members of its own government..<sup>104</sup>

In societies like Northern Uganda where crime is often attributed to the community and not necessarily to the individual who specifically committed the said crime(s), the individualisation of guilt falls short of such community's conception of justice.<sup>105</sup> Clearly, non-prosecutorial interventions like some TJMs prescribed in the Juba peace process would not be considered as fitting the ICL conception of accountability since they seek to mainly promote reconciliation<sup>106</sup> between warring communities rather than punish specific individuals.<sup>107</sup> In such cases, sustainable post conflict reconstruction will require that interventions which help address the community's diverse version of justice be adopted. According to the empirical studies reviewed, both the prosecutorial and non prosecutorial interventions are needed to help address the root causes as well as the aftermath of the conflict so as to have a sustainable post-conflict reconstruction. Despite its weaknesses,<sup>108</sup>

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103 Drumbl (2007),<sup>142</sup>

104 The state might also have a bad governance or criminal record which would not give credence to its purported trials. Ibid.

105 See Refugee Law Project, Whose Justice? Perceptions of Uganda's Amnesty Act 2000 9, 23 (Working Paper No. 15, 2005), <<http://www.refugeelawproject.org/resources/papers/workingpapers/RLP.WP15.pdf>>, accessed 20 April 2011., Erin Baines, Alice's Story: Cultural and Spiritual Dimensions of Reconciliation in Northern Uganda 4 (Liu Institute for Global Issues, Field Notes No. 1, Feb. 2006), <<http://www.ligi.ubc.ca/?p2=/module/liu/publications/view.jsp&id=20>> accessed 20 April 2011., International Centre for Transitional Justice and Human Rights Centre, *Forgotten Voices: A population-based survey on attitudes about peace and justice in northern Uganda* (New York and Berkeley: ICTJ and HRC, UC Berkeley, July 2005) cited in Quinn, J. 'Spoiled Rotten? Outsiders and the Use of Traditional Mechanisms in Uganda' *Paper presented at the annual meeting of the Theory vs. Policy? Connecting Scholars and Practitioners, New Orleans Hilton Riverside Hotel, The Loews New Orleans Hotel, New Orleans, LA, Feb 17, 2010* 2010-11-15 available at <[http://www.allacademic.com/meta/p417012\\_index.html](http://www.allacademic.com/meta/p417012_index.html)> accessed 9 April 2011. See also Lucy Hovel and Joanna R. Quinn, 'Peace First. Justice Later: Traditional Justice in Northern Uganda,' (*Refugee Law Project Working Paper Series*, Working Paper No. 17, 8 July 2005).

106 *Gomo Tong* (Bending of Spears)– a 'symbolic ritual as a vow between two clans or tribes engaged in violent conflict to end hostilities. See Liu Institute for Global Issues, Gulu District NGO Forum., Roco Wat I Acoli Restoring Relations I Acholi-Land: Traditional Approaches to Reintegration and Justice', September 2005, <[http://www.ligi.ubc.ca/sites/liu/files/Publications/JRP/15\\_Sept2005\\_Roco\\_Wat\\_I\\_Acoli.pdf](http://www.ligi.ubc.ca/sites/liu/files/Publications/JRP/15_Sept2005_Roco_Wat_I_Acoli.pdf)> accessed 2 July 2009., See also Sverker Finnstrom, *Living with Bad Surroundings: War, History, Everyday Moments in Northern Uganda*, (Duke University Press, Durham and London 2008)43.

107 For example, the prosecution and punishment of Lubanga has not put a stop to the conflict in Eastern DRC as seen by the rise of other leaders like Laurent Nkunda, Bishop Jean-Marie Runiga Lugerero, Bosco Ntaganda, Sultani Makenga and the M23 rebels.

108 Even when the ICC charged two members of the Lendu ethnic group Germain Katanga and Mathieu Ngudjolo Chui with murder and sexual slavery, the Lendu argued that their people had been charged with more serious offences compared to Thomas Lubanga. See Steps Towards Justice, Frustrated Hopes: Some Reflections on the Experience of The International Criminal Court in Ituri', Just Justice? Civil Society, International Justice and the Search for Accountability in Africa, International Refugee Rights Initiative Discussion Paper No. 2 January 2012., Alison Cole, 'The ICC's First Trial: Milestones Mixed with Near-Disasters', The Lubanga Trial, 19 Aug 2011, <<http://www.lubangatrial.org/2011/08/19/the-icc%E2%80%99s-first-trial-milestones-mixed-with-near-disasters/>> and Alpha Sesay, 'Daily report: Long proceeding in Trial of Thomas Lubanga finally reach an end', The Lubanga Trial, 26 August 2011, <<http://www.lubangatrial.org/2011/08/26/long-proceedings-in-trial-of-thomas-lubanga-finally-reach-end/>>. Whereas rebel leader Bosco Ntaganda surrendered to the ICC, and the M23 were defeated and they later surrendered to the GoU, the conflict in Eastern DRC is far from over as most of the rebel

we cannot wish away the ICC or retributive justice because ‘the achievements of the international criminal courts demonstrate that they were necessary and that, despite all manner of adversity, they, as well as restorative justice practices, can both contribute to peace and reconciliation.’<sup>109</sup>

However, in spite of this criticism, it has been argued, especially by the proponents of the ICC, that the contribution of the ICC is limited and it is incorrect to allege that the ICC pretends to be able to resolve all the judicial and non judicial needs of a post conflict society. The ICC can only make a modest contribution as part of the greater TJ process. It can also be argued that the facts show that the LRA/M allegedly responded to the ICC indictments by opting, once again, to engage in peace talks with the GoU, under the mediation of the government of South Sudan.<sup>110</sup> The ICC can therefore be credited for helping to end the conflict in the North by using its ‘soft power’ to cause the rebels to come back to the negotiating table.

While the ICC has the ability to try suspects who are charged with committing international crimes as well as assisting States to try middle cadre officers like Kwoyelo in Uganda, it is unable to adequately deal with those victim perpetrators who were forcefully recruited into the rebellion. The object and purpose of the Rome Statute also makes it inadequate as a singular in intervention to situations like Uganda which require multipronged interventions due to the complexities of the conflict as elucidated in Chapter 2. Similarly, those ‘rebels’ or reporters who are granted unconditional amnesties and are returned to their homes without any form of accountability and yet some of them committed atrocities in those areas – whether wilfully or not. It is also envisaged that when those who are tried and sentenced by International crimes Division of the High Court have served their sentences, they still would have to return to the communities in which they committed these atrocities. The normative orders in these communities – be they traditional, ontological or religious, would still expect all these categories of persons affected by the conflict to undergo a variety of healing, reconciliatory, and other procedures before they are finally allowed to start rebuilding their homes. Failure to do so would mean that the seeds

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leaders are still at large and continue to warn of fresh conflict. See <<http://i.dailymail.co.uk/wires/afp/article-2825228/DR-Congos.M23-rebels-warn-new-conflict-risk.html>>. See also Ignatius Ssuuna and John Doldo IV, ‘M23 General: Evolution of rebel leader at centre of Congo conflict.’ The East African Joint Report, November 12, 2013 <<http://www.theeastafrican.co.ke/news/IGNATIUS-SSUUNA-and-JOHN-DOLDO-IV/-/2558/2070510/-/item/1/-/13j9of2z/-/index.html>> accessed December 26, 2014. See also Mark A. Drumbl, ‘Atrocity, Punishment and International Law, (CUP 2007)169.,

109 See **Julija Bogoeva**, ‘Prosecuting War Criminals as the Basis for Reconciliation Policy,’ **FICHL Policy Brief Series No. 42 (2015)**

110 id

of discord which ignited and sustained the conflict will continue to fester and that frustrates any sustainable post-conflict transition.<sup>111</sup>

While the above criticisms do not necessarily make ICL unnecessary, they ought to help us appreciate the limited jurisdiction of international criminal law as expounded by the nuanced understanding today of what it can and cannot do. The criticisms also call for a re-evaluation of the OTP/ICC's shift from the purposive meaning of proactive complementarity to the literal interpretation which focuses on only trial justice as shall be discussed in the next section. Such interpretation will make it possible for the ICC to view that non-prosecutorial interventions in Uganda are not promoting impunity but are actually aimed at pursuing sustainable post conflict transition.

### 4.3 THE CASE FOR A PURPOSIVE INTERPRETATION OF THE LAW

International law has three basic approaches to treaty interpretation:<sup>112</sup> These are: the literal approach, the subjective approach and the purposive approach. The literal approach concentrates on analysing the words used in the text.<sup>113</sup> The Appeals Chamber in the *Situation in the Democratic Republic of Congo* has held that the interpretation of the Rome Statute should be guided by Article 21 of the Rome Statute, the Rules of Procedure and Evidence,<sup>114</sup> and the Elements of Crimes as well as Articles 31 and 32 of the Vienna Convention.<sup>115</sup> Under Article 31, a treaty shall be interpreted in good faith in accordance with the *ordinary meaning* to be given to the terms of the treaty in their *context* and in the light of its *object* and *purpose*. In *Competence of the General Assembly for the Admission of a State to the United Nations*,<sup>116</sup> it was held that 'the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty is to endeavour to give effect to them in their

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111 See also P. Fitzpatrick, 'Law, Plurality and Underdevelopment' in D. Sugarman, (ed.), *Legality, Ideology and the State* (London: Academic, 1983) 159, 175. See MacIntyre. A, *After Virtue: A Study in Moral Theory* (Notre Dame: University of Notre Dame Press, 1984) 220., MacIntyre states '... I inherit from the past of my family, my city, my tribe, my nation, a variety of debts, inheritances, rightful expectations and obligations These constitute the given of my life, my moral starting point.' Ben Jones 'Beyond the State in Rural Uganda.' International African Library 39 (Edinburgh University Press London 2009) 7.

112 I. Sinclair, *The Vienna Convention on the Law of Treaties*, 2nd edn., Manchester, 1984 at 114-15.

113 Fitzmaurice, 'The Law and Procedure of the International Court of Justice, 1951-4', 33 BYIL, 1957, pp. 204-7.

114 U.N. Doc. PCNICC/2000/1/Add. 1(2000).

115 (ICC -01/04), Judgement on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, para. 5. See also Lubanga (ICC-01/04-01/06 OA8), Separate Opinion of Judge Georgios M. Pikis, 13 June 2007, para. 12; Katanga et al. (ICC-01/04-01/07 OA 7), Judgement on Appeal of the Prosecutor Against the 'Decision on Evidentiary Scope of the Confirmation Hearing, Prevention Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules' of Pre-Trial Chamber I, 26 November 2008, para. 82.

116 ICJ Reports, 1950, pp. 4, 8; 17 ILR, pp. 326, 328.

natural and ordinary meaning in the context in which they occur.<sup>117</sup> Under Article 31(4), a special meaning shall be given to a term if it is established that the parties so intended. An example is the special meaning given to the word ‘complementarity’ in the Rome Statute. This approach to the interpretation of the Rome Statute has generally been the preferred choice of the OTP and the Court as discussed above. The Chamber stated that the

‘Context ... is defined by the particular sub-section of the law read as a whole in conjunction with the section of an enactment in its entirety. Its *object* maybe gathered from the chapter of the law in which the particular section is included and its *purpose* from the wider aims of the law as maybe gathered from its preamble and general tenor of the treaty.’<sup>118</sup>

Schabas notes that the above definition means that with regard to the Rome Statute, the Preamble as well as the final Act adopted on 17 July 1998 makes up the context. This also includes the Rules of Procedure and Evidence and the elements of crime as well as the agreements/ understandings reached at the 2010 Review Conference concerning the interpretation of the amendments to Article 8 and the new Article 8bis.<sup>119</sup> The subjective approach concentrates on looking at the intention of the parties to a treaty as a way of interpreting ambiguous provisions.<sup>120</sup> Under Article 32, supplementary means of interpretation, including the preparatory work of the treaty (*travaux préparatoires*) and the circumstances of its conclusion may be used where the meaning is ambiguous or obscure, or leads to a manifestly absurd or unreasonable result. The *travaux préparatoires* were relied upon by the Appeals Chamber in the *Situation in the Democratic Republic of Congo*<sup>121</sup> when it dismissed the argument by the OTP that there was a lacuna in the Rome statute. This position was reiterated in the *Eritrea-Ethiopia Boundary*<sup>122</sup> case which ‘emphasised that the elements in article 31 (1) were guides to establishing what the parties *actually intended* or (what was) their ‘common will’.<sup>123</sup> Shaw notes the ‘implication here is that the Tribunal would have to investigate the circumstances prevailing when the treaty was concluded.’<sup>124</sup>

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117 Ibid.

118 *Situation in the Democratic Republic of Congo* para. 33.

119 Schabas 2012 at 214

120 Shaw (2003) 839.

121 Judgement on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 Mar 2006, Decision Denying Leave to Appeal, (ICC-01/04), paras. 40-1.

122 See para. 3.4 Decision of 13 April 2002, <<http://pca-cpa.org/PDF/EEBC/EEBC%20-%20Text%20of%20Decision.htm>> accessed March 27, 2014.

123 Ibid.

124 Malcom N. Shaw, *International Law* (5th edn. CUP, 2003) 840

In using this subjective approach, the court may also consider ‘present day state of scientific knowledge, as reflected in the documentary material submitted to it by the parties.’<sup>125</sup>

The third approach ‘adopts a wider perspective than the other two and emphasises the object and purpose of the treaty as the most important backcloth against which the meaning of any particular treaty provision should be measured.’<sup>126</sup> This purpose oriented approach of interpretation views the treaty as ‘a living instrument that should be interpreted in the light of present day conditions.’<sup>127</sup> Further, Article 33 provides that when a comparison of the authentic text discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts shall be adopted having regard to the object and purpose of the treaty. Shaw notes that ‘any true interpretation of a treaty in international law will have to take into account all aspects of the agreement, from the words employed to the intention of the parties and the aims (object and purpose) of the particular document.’<sup>128</sup> Excluding any one of these components completely is not possible. Nouwen argues – and rightly so- that the object and purpose of the Rome Statute is to create a permanent international Court which is complementary to national criminal jurisdictions but not to end impunity at any cost. It would mean that there will be situations – and Uganda presents one such situation – whereby the State’s interventions to post conflict violence are not necessarily focused on ending impunity as interpreted by the Court. Nouwen also argues that if the Court’s anti-impunity stand persists, it would mean that even where a State has genuinely investigated and prosecuted a person for a different conduct which may be more serious, the Court would still insist on ‘investigating and prosecuting the same person for different conduct or the same conduct but different incidents.’<sup>129</sup> In so doing, the Court would have diverted from the principle of complementarity as envisaged by the drafters of the Rome Statute, to another form of complementarity in the fight against impunity.<sup>130</sup> Nouwen further states that ‘the object and purpose of some of the provisions of the Statute are not necessarily the same as those of the Statute generally. For example, while the Statute is focused on ICL as pursued by the ICC, the specific object and purpose of the provisions on complementarity are aimed at

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125 *Botswana/Namibia*, ICJ Reports, (1999)1045, 1060.

126 Fitzmaurice, ‘The Law and Procedure of the International Court of Justice, 1951-4’, 33 BYIL, 1957, pp. 7-8

127 Shaw (2012), *ibid.*

128 *Ibid.*, 839.

129 *Ibid.*

130 Sarah H. Nouwen, ‘Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan. Cambridge Studies in Law and Society CUP 2013 at 57

protecting sovereign interests in the pursuit of justice for crimes within the Court's jurisdiction.'<sup>131</sup>

#### 4.4 COMPLEMENTARITY UNDER THE ICC

In the pursuit of its obligations, the ICC carries out its role mainly through the principle of complementarity.<sup>132</sup> Complementarity is ordinarily understood to mean a situation in which two or more different things enhance each other or form a balanced whole.<sup>133</sup> The Rome Statute does not give a concrete definition<sup>134</sup> though it is a term of art used to denote the 'manifestation of the relationship between national justice systems and the first permanent International Criminal Court ... providing national courts priority to exercise jurisdiction with respect to the core crimes defined in the Rome Statute.'<sup>135</sup> Complementarity has been criticised as being 'somewhat of a misnomer, because what is established is a relationship between international justice and national justice that is far from (the word) *complementary* (in its ordinary English meaning).'<sup>136</sup> Rather, complementarity under the Rome Statute refers to the relationship between the ICC and domestic criminal jurisdictions.<sup>137</sup> This is laid down in paragraph 10 of the Preamble as well as in Article 1, 15, 17,<sup>138</sup> 18 and 19 of the Rome Statute.<sup>139</sup> Paragraph 10 states:

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131 Ibid

132 The Fourth Preamble states that 'Affirming that the most serious crimes of international concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation.' See also Article 1 which states that An International Criminal Court ('the Court') is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions.

Text of the Rome Statute circulated as document A/CONF.183/9 of 17 July 1998 and corrected by procès-verbaux of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002. The Statute entered into force on 1 July 2002

133 Oxford Concise Dictionary Tenth Edition, Revised (Judy Pearsall Editor) BCA London New York Sydney Toronto 2001

134 The Rome Statute Article 1, 15, 17, 18 and 19. See also W.A. Schabas, *An Introduction to The International Criminal Court* (4th edn, 2011) 191.

135 See Stahn and M.El Zeidy, '*The International Criminal Court and Complementarity: From Theory to Practice*, (CUP, 2011) (1) 73 in Ndagire, (2012) supra.

136 Schabas, 2011 at 191.

137 Volker Nerlich, ICC (Complementarity) in 'The Oxford Companion to International Criminal Justice (Antonio Cassese ed.)OUP 2009 at 347.

138 Under Article 17, the International Criminal Court is estopped from exercising its jurisdiction over a crime whenever a national court asserts its jurisdiction over the same crime and – (a) under its national law, the State has jurisdiction; (b) the case is being duly investigated or prosecuted by its authorities or these authorities have decided, in a proper manner, not to prosecute the person concerned; and (c) the case is not of sufficient gravity to justify action by the Court; (d) the court may not prosecute or try a person who has already been convicted of or acquitted for the same crimes, if the trial was fair and proper. The Court may exercise its jurisdiction with respect to a crime referred to in Article 5 in accordance with the provisions of this Statute if: (a) a situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14; or (b) a situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or (c) the Prosecutor has initiated

Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions,<sup>140</sup>

Article 1 states -

An International Criminal Court ('the Court') is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions. (*Emphasis mine*) The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute.<sup>141</sup>

Schabas argues that when compared to *ad hoc* tribunals which assume jurisdiction as of right, 'the requirement for complementarity in the Rome Statute is similar to the approach taken by international human rights bodies, which require a petitioner to demonstrate that domestic remedies have been exhausted before their cause can be heard.'<sup>142</sup> The OTP/ICC has defined complementarity as that which 'involves an examination of the existence of relevant national proceedings in relation to the potential cases being considered for investigation by the office (OTP) taking into consideration the office's policy to focus on those who appear to bear the greatest responsibility for the most devious crimes.'<sup>143</sup> Ocampo is quoted as stating -

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an investigation *pro prio motu* (Latin for 'on his own impulse') in respect of such a crime in accordance with article 15. See, Rome Statute of the International Criminal Court, Adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 17 July 1998, UN Doc. A/CONF.183/9, Articles 17 (c), 20, 13 (a) and (c), 14, 15, 52 (c) of the Rome Statute. See also Schabas 2011 at 188, Cryer et al 2010, 154 to 155; See also Cassese 2003 at 352. Article 93 (10) Rome Statute also provides for some situations where the ICC may grant the State some assistance.

139 For a complete citation of the provisions, See Annexure One: Rome Statute of the International Criminal Court, Adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 17 July 1998, UN Doc. A/CONF.183/9.

140 Jurisdiction 'refers to the legal parameters of the Court's operations, in terms of subject matter (jurisdiction *ratione materiae*), time (jurisdiction *ratione temporis*) and space (jurisdiction *ratione loci*) as well as over individuals (jurisdiction *ratione personae*).' Schabas 2011 at 188. Paragraph 4 of the Preamble to the Rome Statute acknowledges the right to try perpetrators of the most serious international crimes as being primarily with the national Courts. It states 'Affirming that the most serious crimes of international concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation.' Rome Statute of the International Criminal Court, Adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 17 July 1998, UN Doc. A/CONF.183/9

141 Rome Statute of the International Criminal Court, Adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 17 July 1998, UN Doc. A/CONF.183/9, Art. 1.

142 Schabas also argues that the record so far has shown that the two systems 'function in opposition and to some extent in hostility *vis-a-vis* each other.' Schabas, 2011 at 191..

143 ICC/OTP 'Report on Preliminary Examination Activities, December 13, 2011, par. 61-166 <<http://www.icc-cpi.int/NR/rdonlyres/63682F4E-49C8-445D-8C13-F310A4F3AEC2/284116/OTPREportonPreliminaryExaminations13December2011.pdf>> 3, April 2014.

The principle of complementarity represents the express will of States Parties to create an institution that is global in scope while recognising the primary responsibility of States themselves to exercise criminal jurisdiction. (*Emphasis mine*) The Principles is also based on considerations of efficiency and effectiveness since States will generally have the best access to evidence and witnesses.<sup>144</sup>

#### 4.4.1 A Brief Historical Account of Complementarity

The term complementarity was first introduced by the 1992 Working Group of the International Law Commission.<sup>145</sup> The verb ‘complement’ had also been used earlier by Mr. Graefrath who was the Special Rapporteur of the 1990 ILC meetings in 1990.<sup>146</sup> This means that both the verb and its adjective – ‘complementarity-’ were used at the same time to describe the possible relationship between domestic courts and the future International Criminal Court in which the latter would not proceed with a case if it is being addressed by the domestic jurisdiction.<sup>147</sup> The current phraseology of the concept of complementarity in the Rome Statute was first drafted in the preamble of the 1994 International Law Commission (ILC) Draft Statute for the International Criminal Court stipulating that the Court was ‘intended to be complementary to national criminal justice systems in cases where such trial (national) procedures may not be available or may be ineffective.’<sup>148</sup> This language was later adapted to the Rome Statute’s Preamble in Paragraph 10.<sup>149</sup> The Special Rapporteur of the 1994 Working Group, Mr. James Crawford, also argued that ‘the ICC was intended to ‘supplement, rather than replace, existing national criminal jurisdictions’ as well as reduce the possibility of being used as a political tool.’<sup>150</sup> The 1994 ILC draft is not

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144 See ‘Paper on some policy issues before the Office of the Prosecutor’, September 2003, at 2 available <[http://www.icc-cpi.int/NR/rdonlyres/1FA7C4C6-DE5F-42B7-8B25-60AA962ED8B6/143594/030905\\_Policy\\_Paper.pdf](http://www.icc-cpi.int/NR/rdonlyres/1FA7C4C6-DE5F-42B7-8B25-60AA962ED8B6/143594/030905_Policy_Paper.pdf)> (OTP Policy Issues Paper 2003.) accessed June 12, 2012.

145 Report of the International Law Commission on the Work of its Forty-Fourth Session (4 May – 24 July 1992), Annex Report of the Working Group on the Question of an International Criminal Jurisdiction, (U.N. Doc. A/47/10, YILC, Vol. II, Part Two, 1992) 60.

146 1990 YILC Vol. 1, p. 32.

147 Schabas 2011 at 190.

148 See U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, Italy, June 15-July 17, 1988. The draft statute for the international criminal court was adopted by the commission at its Forty Sixth Session 1994 and submitted to the general assembly as a part of the commission’s report covering the work of that session. The report which also contains commentaries on the draft articles appears in Yearbook of the International Law Commission, 1994 Vol. II Part 21994 ILC Draft). See Cryer *et al.* (2010)153.

149 This preamble reads (in part) that ‘... the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions’. Article 17 (1) of the Rome Statute also makes reference paragraph 10 of the Preamble and Article 1 of the Statute in determination of the admissibility of a case before the Court. See, ‘Rome Statute UN Doc. A/CONF.183/9.

150 See ‘Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. I’ Proceedings of the Preparatory Committee during March-April and August 1996 at 155. See also 1994 YILC Vol. I, pp. 9, 191. As might be inferred from the report of the 1994 Working Group, the ‘clear requirements of acceptance of jurisdiction’ and ‘principled controls on the exercise of that jurisdiction’ explained the exact purpose of having an international criminal court that would be *complementary* to national criminal jurisdictions as reflected in the preamble. See 1994 ILC Report, *supra*, p.37.

the origin of the concept of complementarity.<sup>151</sup> Rather, the concept was developed over a long period of time in different guises before it was inserted in its current state into the 1998 Rome Statute in its current state.

The real innovation of the 1994 ILC draft was the introduction of the term ‘complementary’ to paragraph 3 of the preamble of the draft Statute for an ICC for the first time since the ILC began its work on the subject.<sup>152</sup> The 1994 Draft provided that the Court would have jurisdiction when there was ‘no prospect’ that the accused would be tried by the national courts.<sup>153</sup> This term was reportedly used ‘by New Zealand while commenting on the report of the ILC 1993 Working Group report.’<sup>154</sup> It is upon this basis that the term ‘complementarity’ was added to the draft.<sup>155</sup> The 1994 International Law Commission’s Draft Statute proposals on complementarity were also retained by the *Ad hoc* Committee on the Establishment of an International Criminal Court to study and develop the 1994 International Law Commission’s Draft Statute.<sup>156</sup> In an effort to maintain state sovereignty while at the same time ensuring that the proposed court is not ‘merely residual to national jurisdiction’, it was stressed that the principle of complementarity should have a ‘strong

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151 Lattanzi, ‘The Complementarity Character of the Jurisdiction of the Court with Respect to National Jurisdictions’, in Flavia Lattanzi (ed.), *The International Criminal Court: Comments on the Draft Statute* (Naples: Editoriale Scientifica, 1998), 9; See also Immi Tallgren, ‘Completing the ‘International Criminal Order’: The Rhetoric of International Repression and the Notion of Complementarity in the Draft Statute for an International Criminal Court’ 67 NJIL 107, 120 (1998) in Zeidy (2008) 6.

152 Preamble paragraph 3 *emphasized* that the international criminal court ‘is intended to be complementary to national criminal justice systems in cases where such trial procedures may not be available or may be ineffective.’ See *Report of the International Law Commission on the Work of its Forty-Sixth Session* (2 May – 22 July 1994), with Annex Draft Statute for an International Criminal Court, UN Doc. A/49/10, 1994 YILC Vol. II. *Observations of Governments on the Report of the Working Group on a Draft Statute for an International Criminal Court*, UN Doc. A/cn.4/458 and Add. 1-8, 1994 YILC Vol. II Part One, 24 – 96 in Zeidy (2008) 122.

153 1994 ILC Report, p. 27.

154 Zeidy 2008, 124. The delegate from New Zealand proposed that a suitable reference be made in the preamble to the Statute to recognise the relationship between the two bodies as well as indicate their respective roles. The term ‘complementary’ was also used by Japan in its written observations received later on 13 May 1994 when it said: ‘[t]he court should be a realistic and flexible organ complementary to the existing system’: See *Observations of Governments on the Report of the Working Group on a Draft Statute for an International Criminal Court*, UN Doc. A/CN.4/458 and Add. 1 – 8, 1994 YILC Vol. II Part One, pp. 61. See contributions by delegates at Rome Conference (A/CONF.183/2/AddlandCorr.1) 5th plenary meeting A/CONF.183/SR.5 at p. 92 <[http://untreaty.un.org/cod/icc/rome/proceedings/E/Rome%20Proceedings\\_v2\\_e.pdf](http://untreaty.un.org/cod/icc/rome/proceedings/E/Rome%20Proceedings_v2_e.pdf)> accessed October 2, 2013.

155 Article 35 of the 1994 Draft Statute read: The Court may, on application by the accused or at the request of an interested State at any time prior to the commencement of the trial, or of its own motion, decide, having regard to the purposes of this Statute set out in the preamble, that a case before it is inadmissible on the ground that the crime in question: (1) has been duly investigated by a State with jurisdiction over it, and the decision of that State not to proceed to a prosecution is apparently well-founded; (2) is under investigation by a State which has or may have jurisdiction over it, and there is no reason for the Court to take any further action for the time being with respect to the crime; or (3) is not of such gravity to justify further action by the Court. See Jann K. Kleffner, ‘The Context and Emergence of Complementarity’ in Jann Kleffner (ed) *‘Complementarity in The Rome Statute And National Criminal Jurisdictions’* (Oxford University Press 2008) 57.

156 See ‘Report of the Ad Hoc Committee on the Establishment of an International Criminal Court’ (1995) UN Doc A/50/22 in Jann K. Kleffner, (2008) 57., Zeidy (2008) 126. See also Report of the International Law Commission on the Work of Its Forty –Sixth Session, 2 May – 22 July 1994., UN Doc. A/49/10, Art. 35. Schabas 2011 at 191-2. See ‘Report of the Ad Hoc Committee on the Establishment of an International Criminal Court’ (1995) UN Doc A/50/22 in Jann K. Kleffner, 2008 at 57

presumption in favour of national jurisdiction.<sup>157</sup> The work of the Ad hoc committee was continued by the Preparatory Committee on the Establishment of an International Criminal Court which was tasked by the General Assembly to prepare a ‘consolidated draft text for submission to a diplomatic conference.’<sup>158</sup> The report was considered at the Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, in Rome, Italy, from 15 June to 17 July 1998. This resulted in the adoption of the Rome Statute of the ICC on 17 July 1998.<sup>159</sup>

The above events showed that the concept of complementarity – as understood under the Rome Statute today – had evolved from a situation of complete resistance by the states to one where states were willing to compromise and balance the demands of the State with those of the ICC.<sup>160</sup>

#### 4.4.2 Complementarity Today

The complementarity principle was originally meant to balance sovereignty with international criminal justice.<sup>161</sup> Since states view themselves as being the ultimate authority in their jurisdictions, it should not be surprising that they should contest any other foreign power which seeks to challenge this power. However, Nouwen suggests that the Court’s case law suggests that it perceives complementarity as a principle that subordinates the protection of state sovereignty to the goal of ending impunity.<sup>162</sup> For example, in the *Admissibility Challenge by the Government of Kenya*, the Court held

It should be borne in mind that a core rationale underlying the concept of complementarity aims at ‘striking a balance between safeguarding the primacy of domestic proceedings [...] on the one hand, and the goal of the Rome Statute to ‘put an end to impunity’ on the other hand. If States do not... investigate [...], the [...] Court must be able to step in.’ Therefore, in the context of the Statute, [...] the exercise of national criminal jurisdiction by States is not without limitations. These

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157 *Report of the Ad hoc Committee on the Establishment of an International Criminal Court*, UN GAOR, 50th Sess., Supp. No. 22, UN Doc. A/50/22 (1995), paras. 29 – 51.

158 Ibid.

159 Text of the Rome Statute was circulated as document UN Doc A/CONF 183/9 (17 July 1998) and corrected by *procès-verbaux* of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002. The Statute entered into force on 1 July 2002. See also Kleffner, (2008) 57.

160 For a detailed discussion, see J. T. Holmes, ‘The Principle of Complementarity’, in R. S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute, Issues. Negotiations. Results* (The Hague. London. Boston: Kluwer Law International, 1999), pp. 52 – 53.

161 OTP Policy Issues Paper 2003.

162 Ratan, A. 2012. ‘Complementarity in the Emerging Admissibility Jurisprudence of the International Criminal Court: Balancing the Sovereign Rights of States against the Goal of Ending Impunity?’ (unpublished thesis, University of Cambridge) cited in Sarah H. Nouwen *Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan*. Cambridge Studies in Law and Society CUP 2013 at 57

limitations are encapsulated in the provisions regulating the inadmissibility of a case, namely articles 17-20 of the Statute.<sup>163</sup>

This decision has been criticised by Nouwen who rightly argues that articles 17-20 do not contain any limitations on states since they are merely rules on how cases are admissible before the Court.<sup>164</sup> She disagrees that the Statute obliges states ‘to stop domestic proceedings when a case becomes admissible before the ICC.’<sup>165</sup> States are only required to cooperate with the Court when a case becomes admissible but the complementarity is about the primacy of domestic proceedings. This means that the ICC is not meant to ‘replace domestic criminal jurisdictions regarding the investigation and prosecution of crimes under international law.’<sup>166</sup> The ICC ‘only provides an additional concurrent jurisdictional layer that can intervene if and when domestic jurisdictions fail to genuinely bring to justice, those suspected of having committed genocide crimes against humanity, war crimes and- once the ICC may exercise its jurisdiction in this respect- the crime of aggression.’<sup>167</sup>

The primary duty to intervene remains with the State under whose jurisdiction such a situation occurs. It is only when the said State Party is found to be *unable, unwilling* or *inactive*, that the OTP/ICC is vested with the authority to intervene unless required to do so by the United Nations Security Council (UNSC).<sup>168</sup> We explore these terms below –

#### ***4.4.2.1 The Concept of Unwillingness to investigate a Situation***

Under the Rome Statute, three (3) factors are used to determine ‘unwillingness’ of a state to investigate or prosecute a situation under its jurisdiction: (i) the proceedings or the decision not to prosecute were made to shield the person concerned from criminal responsibility for crimes within the jurisdiction of the court;<sup>169</sup> (ii) unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;<sup>170</sup> and (iii) the proceedings were not or are not being conducted independently or

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163 Admissibility Challenge Government of Kenya: Application on Behalf of the Government of the Republic of Kenya Pursuant to Article 19 of the ICC Statute, ICC-01/09-01/1-19, the Applicant, the Government of Kenya, 31 March 2011.

164 Nouwen 2013, *ibid.*

165 *Ibid.*

166 *Ibid.*

167 *Ibid.*

168 See Article 17, The Rome Statute.

169 See for example *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, 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 at 77 (15-07-2009).

170 *Ibid.*

impartially and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person to justice.<sup>171</sup> In addition to the above, the Court in *Katanga* added another category of ‘inactivity.’<sup>172</sup>

#### 4.4.2.2 *The Concept Of Genuineness in carrying out Proceedings*

The concept of genuineness was added by the framers of the Rome Statute, to help in reviewing whether a situation would still be admissible to the ICC even when the national investigation and prosecution have occurred.<sup>173</sup> This additional yardstick for determining ‘inability’ or ‘unwillingness’ was meant to counter what they considered as a high degree of subjectivity in draft Article 35.<sup>174</sup>

Since the word “genuinely” does not have a “predetermined or set way of interpretation when used in a legal context,”<sup>175</sup> it has been left to the Court to try to set up criteria on how to grade a state’s efforts at investigation and prosecuting a situation before finding that such situation should be brought before the Court.<sup>176</sup> An expert report commissioned by the OTP also notes that determining the term “genuine” does require ‘a certain basic level of objective quality.’<sup>177</sup> Nonetheless, objectivity is not without its shortcomings. This is because the law and the courts do not operate in a vacuum but are affected by experiences, background and prior information.<sup>178</sup> Justice Sotomayor for example has argued that

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171 Articles 17 (2) and (3), Rome Statute

172 This is where a State may not want to protect an individual, but for a variety of reasons, may not wish to exercise its jurisdiction over him or her. See *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, 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 at 77 (15-07-2009). <<http://www.icc-cpi.int/iccdocs/doc/doc711214.pdf>> accessed October 3, 2013.

173 Candidate number 7 *The Principle of Complementarity...* (n. 27).

174 Sharon Williams, ‘Issues of Admissibility’, in Otto Triffterer (ed.), *Commentary on the Rome Statute: Observers’ Notes, Article by Article*, (Normos Verlagsgesellschaft: Baden –Baden, 1999), 393; John T. Holmes, ‘The Principle of Complementarity’ in Roy S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute, Issues, Negotiations, Results*, (The Hague. London. Boston: Kluwer Law International, 1999), 56. in Jann K. Kleffner (2008) 85.

175 Ibid.

176 Ibid.

177 ‘Informal expert paper: The Principle of Complementarity in Practice’ ICC-OTP 2003. ICC-01/04-01/07-1008-AnxA 30-03-2009 1/37 CB T <<http://www.iccklamberg.com/Caselaw/OTP/Informal%20Expert%20paper%20The%20principle%20of%20complementarity%20in%20practice.pdf>> accessed June 16, 2012 at p. 8.

178 David Crane, the former Prosecutor of the Special Court for Sierra Leone also criticised the approach taken by the Special Court for Sierra Leone. He argued that “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” See Crane, David M., 2006 White man’s justice: applying international justice after regional third world conflicts. *Cardozo Law Review* 27 (4): 1683-8 at 1685. See also Tim, Kelsall *Culture under cross-examination: international justice and the Special Court for Sierra Leone*, (Cambridge University Press, 2009) 11.

experiences affect the decisions we make.<sup>179</sup> She acknowledges that “personal experiences affect the facts that judges choose to see”.<sup>180</sup> Sotomayor’s argument is supported by Minnow, who states that “there is no objective stance but only a series of perspectives – no neutrality, no escape from choice in judging.”<sup>181</sup> For Sotomayor, the “aspiration to impartiality is just that—[...] an aspiration because it denies the fact that we are by our experiences making different choices than others”.<sup>182</sup> The Court ought to advise itself as to both the law and the facts prevailing in the State under investigation by reviewing both the state’s efforts in criminal prosecution as well as the non-prosecutorial attempts to combat the root causes of international crime coupled with the promoting social reconciliation.<sup>183</sup>

#### ***4.4.2.3 The Criterion of Inability to Investigate or Prosecute***

A state is deemed unable to carry out the *investigation* or *prosecution*, when there is a total or partial collapse of its judicial system and; (i) it cannot detain the accused nor have the accused surrendered to the authorities or bodies that hold him in custody; (ii) cannot collect the necessary evidence, or (iii) cannot carry out criminal proceedings.<sup>184</sup> In such cases, States may opt to ‘self-refer’ the matter to the OTP although it is difficult for the Court to ascertain the exact reasons for doing so.<sup>185</sup> The Court shall have to satisfy itself about the status of proceedings in the State before it proceeds to assume jurisdiction to hear it.<sup>186</sup> For example, the Pre-Trial Chamber in *Katanga* disagreed with the assertion by the OTP that

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179 Sonia Sotomayor, "A Latina Judge's Voice" New York Times, May 14, 2009 <<http://www.nytimes.com/2009/05/15/us/politics/15judge.text.html?pagewanted=all>> accessed October 3, 2013.

180 Ibid.

181 Ibid.

182 Ibid.

183 For example the Eleventh Preamble to the Declaration of Principles on Freedom of Expression in Africa, recognises that there is ‘an evolving human rights and human development environment in Africa, especially in light of the adoption of the *Protocol to the African Charter on Human and Peoples’ Rights on the establishment of an African Court on Human and Peoples’ Rights*, the principles of the *Constitutive Act of the African Union*, 2000, as well as the significance of the human rights and good governance provisions in the New Partnership for Africa’s Development (NEPAD). The Ninth Preamble states that ‘oral traditions, which are rooted in African cultures, lend themselves particularly well to radio broadcasting; Declaration of Principles on Freedom of Expression in Africa, African Commission on Human and Peoples’ Rights, 32nd Session, 17 - 23 October, 2002: Banjul, The Gambia. <<http://www1.umn.edu/humanrts/achpr/expressionfreedomdec.html>> accessed October 4, 2013.

184 See Article 17(3) Rome Statute. See also Cassese (2003) 352.

185 Stahn and Zedy argue that “In Uganda for instance, although the judiciary is among the best in Africa, any trials of the LRA leaders before national courts may be perceived as biased in view of a deep suspicion of the government held by elements of the Acholi population in the North [...] Considering the risk that any potential domestic tribunal could be tainted as an extension of the conflict by other means, resort to the ICC as a disinterested third party may prove opportune”. C. Stahn and M.El Zeidy, *The International Criminal Court and Complementarity: From Theory to Practice*, (2011) (1)(73)299. in Ndagire (2012) 42.

186 See for example, the OTP had to carry out investigations into the first self-referral by Uganda. See M.M. El Zeidy, ‘The Uganda Government Triggers the First Test of the Complementarity Principle: An Assessment of the First State’s Party Referral to the ICC, (2005)5 ICLR 83-119.

the national justice system of the Democratic Republic of Congo (DRC) continues to be unable to carry out investigations in the sense of Article 17 (1) (a) to (c) and (3), of the Rome Statute.<sup>187</sup> The Court noted that the judicial system in the DRC had improved with the reopening of *The Tribunal de grande instance*- in Bunia, in the Ituri region.<sup>188</sup> The Court instead used the criteria of ‘inactivity’ to rule that the case was admissible.<sup>189</sup> Nonetheless, the acknowledgement of the revival of the judicial system in Ituri in 2005 has helped make the case that underdeveloped countries can have both effective and able judicial systems.<sup>190</sup>

In the *Situation in Central African Republic (CAR)*, which was commenced by a self referral, the court agreed with the OTP that the state was unable to carry out the complex proceedings necessary to investigate and prosecute the alleged crimes.<sup>191</sup> Similarly, in the case of *The Prosecutor Vs. Saif Al-Islam Gaddafi*,<sup>192</sup> the Pre-Trial Chamber 1 rejected Libya’s challenge to the admissibility of the case on the grounds that Libya had failed to fully demonstrate that it was ‘taking concrete and progressive steps to ascertain’ that it was genuinely able to carry out the investigation or prosecution against Mr Gaddafi.<sup>193</sup> It was further held that whereas Libya had made strides to restore the rule of law in its territory, it was still faced with many challenges like exercising its judicial powers across the whole territory. Libya had also failed to secure the release of Mr. Gaddafi from the Zintan militia

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187 See *Lubanga* (ICC-01/04-01/06-8), Decision on the Prosecutor’s Application for a Warrant of Arrest, 10 February 2006, para. 36. See W.A. Schabas, *The International Criminal Court: A commentary on the Rome Statute*, (2010) at 346. See also *Situation in the Democratic Republic of Congo* ICC-01/04-01/06-32-Anx A1, 21 March 2004 in Schabas 2011: 194-5. See also Paola Gaeta, ‘Is the Practice of ‘Self-Referrals’ a Sound Start for the ICC? *Journal of International Criminal Justice* 2 (2004), 949 -952; Andreas Muller, ‘Self Referrals on Trial., *Journal of International Criminal Justice* 2010, 8(5), 1267 -1294; Darryl Robinson ‘ *The Controversy over territorial state referrals and reflections on ICL discourse.*, 2011, 9(2), 355-384.

188 The Court however used other criteria of ‘inactivity’ to rule that the case was admissible. This is discussed under ‘Inactivity’ in Section 2.1.5.

189 This criteria is analysed further in Section 3.3.5.

190 *Lubanga* (ICC-01/04-01/06-8), Decision on the Prosecutor’s Application for a Warrant of Arrest, 10 February 2006, para. 36.

191 Prosecutor Opens Investigations in the Central African Republic, ICC-OTP-20070522-220, 22 May 2007 [http://www.iccpi.int/en\\_menus/icc/situations%20and%20cases/situations/situati on%20icc%200105/press%20releases/Pages/prosecutor%20opens%20investigation%20in%20the%20central%20african%20orepublic.aspx](http://www.iccpi.int/en_menus/icc/situations%20and%20cases/situations/situati on%20icc%200105/press%20releases/Pages/prosecutor%20opens%20investigation%20in%20the%20central%20african%20orepublic.aspx) accessed October 3, 2013. See also *Situation in Central African Republic* (ICC-01/05), Prosecution’s Report Pursuant to Pre-Trial Chamber III’s 30 November 2006 Decision Requesting Information on the Status of the Preliminary Examination of the Situation in the Central African Republic, 15 December 2006, paras. 9, 12 -20. in Schabas 2011 at 195. See Bemba (ICC -01/05-01/08), Decision Pursuant to Article 61(7) (a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009. <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Situations/Situation+ICC+0105/Related+Cases/ICC+0105+0108/Cas e+The+Prosecutor+v+Jean-Pierre+Bemba+Gombo.htm> accessed June 17, 2012. See proceedings in the trial of Jean Pierre Bemba <<http://www.bembatrial.org/trial-background/>> accessed June 17, 2012

192 The Prosecutor Vs. Saif Al-Islam Gaddafi and Abdullah Al-Senusi Case No. ICC- 01/11-01/11 Decision on the admissibility of the case against Saif Al-Islam Gaddafi (Gaddafi Admissibility Decision), < <http://www.icc-cpi.int/iccdocs/doc/doc1599307.pdf> > See also Judgment on the Appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 < <http://www.icc-cpi.int/iccdocs/doc/doc1779877.pdf>> accessed January 7, 2015.

193 See Gaddafi Admissibility Decision Par.216 at 89 <<http://www.icc-cpi.int/iccdocs/doc/doc1599307.pdf>> accessed January 7, 2014.

where he was being held or even provide him with legal representation. The country was also faulted for lacking the capacity to obtain the necessary testimonies as well as provide adequate witness protection.<sup>194</sup> This decision was confirmed by the ICC Appeals Chamber on 21 May 2014.<sup>195</sup> However, in the case of *The Prosecutor v. Abdullah al-Senussi*, the ICC ruled that the Libyan government was able and willing to genuinely carry out investigations into Al-Senussi.<sup>196</sup> The Chamber concluded that the case before the Court was the same case against Mr. Al-Senussi in Libya.<sup>197</sup> It also found that Libya was not ‘unwilling or unable to genuinely carry out its proceedings’ against Al-Senussi. The Court therefore found that the case against Al Senussi was inadmissible before it pursuant to article 17(1)(a) of the Statute.<sup>198</sup> This decision was later upheld by the Appeals Chamber on 24 July 2014 which effectively concluded the proceedings before Al-Senussi before the ICC. In the case of the *Prosecutor v. Omar Hassan Ahmad Al Bashir*, the Court indicted Sudan President Al Bashir for war crimes (intentionally directing attacks against a civilian population and pillaging), as well as five counts of crimes against humanity (murder; extermination; forcible transfer; torture; and rape) and the crime of genocide.<sup>199</sup> The Court held that the case remained admissible before it because the efforts of the Sudan in establishing a Special Court for Darfur, Genein and Nyala, were insufficient since they remained ‘relatively inaccessible.’<sup>200</sup>

It can be argued that the court in *Darfur* and *Saif-Al-Islam* should have adapted a positive attitude to complementarity by either encouraging the States concerned to address what was lacking or by ‘providing advice and certain forms of assistance to facilitate national

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194 See ‘Summary of the Decision on the admissibility of the case against Mr Gaddafi’ <[http://www.icc-cpi.int/en\\_menus/icc/situations%20and%20cases/situations/icc0111/related%20cases/icc01110111/Documents/Su\\_mmary-of-the-Decision-on-the-admissibility-of-the-case-against-Mr-Gaddafi.pdf](http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/icc0111/related%20cases/icc01110111/Documents/Su_mmary-of-the-Decision-on-the-admissibility-of-the-case-against-Mr-Gaddafi.pdf)>

195 See *The Prosecutor V. Saif Al-Islam Gaddafi and Abdullah Al-Senussi* ICC-01/11-01/11. See also Vivienne Walt, ‘Libya’s Disaster of Justice: The Case of Saif al-Islam Gaddafi Reveals a Country in Chaos’ June 28, 2013 <http://world.time.com/2013/06/28/libyas-disaster-of-justice-the-case-of-saif-al-islam-gaddafi-reveals-a-country-in-chaos/> accessed September 10, 2013., See Gaddafi Admissibility Decision, para. 213 See also Esam Mohamed, ‘Saif-al-Islam Gadhafi to be tried in Libya in September,’ Associated Press September 9, 2013

196 See ‘ICC Pre-Trial Chamber I decides that the Al-Senussi case is to proceed in Libya and is inadmissible before the ICC’ ICC-CPI-20131011-PR953 <[http://www.icc-cpi.int/en\\_menus/icc/press%20and%20media/press%20releases/Pages/pr953.aspx](http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr953.aspx)> accessed March 18, 2014. This ruling was criticised by Senussi’s lawyer Ben Emmerson who views the Libyan justice system as being in ‘a state of collapse and incapable of conducting fair trials for any Gaddafi-era officials.’ See ‘Gaddafi-era spy chief al-Senussi to be tried in Libya’ BBC News October 11 2013 <<http://m/bbc.com/news/world-africa-24493885>> accessed March 18, 2014.

197 Ibid.

198 Par 311

199 *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09 [http://www.icc-cpi.int/en\\_menus/icc/situations%20and%20cases/situations/situation%20icc%200205/related%20cases/icc02050109/Pages/icc02050109.aspx](http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200205/related%20cases/icc02050109/Pages/icc02050109.aspx) accessed October 9, 2013.

200 See also United Nations Security Council, 5589th meeting 14 December 2006 UN Doc. S/PV. 5589, available at <http://daccess-ods.un.org/TMP/3768134.11712646.html> accessed March 18 2014 at p. 2; See UN Doc. S/PV. 5450, at pp. 3-4 ; Schabas 2011 at 195.

efforts.<sup>201</sup> For example, in the case of Al-Senussi, Court recognised that the international community was engaged in transitional justice efforts in Libya.<sup>202</sup> These were and continue to be helpful in enabling a State like Libya to perform its role. When the Court insisted on having jurisdiction in a case where neither Libya nor the ICC had access to the indictee, this was an effort in futility. It would be more helpful that the State is assisted to develop its own post conflict mechanisms so as to apprehend and effectively try him before it can be assessed as to whether or not it is able and willing to carry out national proceedings against him.<sup>203</sup>

In conclusion, jurisdiction is bestowed primarily upon national courts over situations in their territory unless the above mentioned special circumstances which give the OTP/ICC the right to assert its own jurisdiction over the same.<sup>204</sup> This means that the ICC plays an ancillary role where it 'may only exercise jurisdiction (in the investigation and prosecution of the crimes mentioned in article 5), where national legal systems fail to do so, including where they purport to act but in reality are unwilling or unable to genuinely carry out proceedings.'<sup>205</sup> This is a tall order because the court lacks adequate resources and capacity to achieve this purpose. The drafters of the Rome Statute thought it best to limit the Court's intervention to situations of extreme practical and political difficulty due to the Court's limited number of judges, infrastructure and financial resources.<sup>206</sup> Since the Rome Statute does not create a supranational criminal law enforcement regime or a self-contained police force to investigate international crimes or to enforce its arrest warrants, the Court needs the cooperation of states parties in order to achieve its mandate.<sup>207</sup> The contribution

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201 'Informal expert paper: The Principle of Complementarity in Practice' <http://www.iclklamberg.com/Caselaw/OTP/Informal%20Expert%20paper%20The%20principle%20of%20complementarity%20in%20practice.pdf> accessed June 16, 2012 at p. 4.

202 See The Prosecutor V. Saif Al-Islam Gaddafi and Abdullah Al-Senussi ICC-01/11-01/11 Para. 216 Where Court noted that Libya was receiving international assistance from the UN, UNSMIL, and other countries.

203 Libya had indeed argued for a 'purposive or flexible interpretation' instead of a literal interpretation when the Court was considering whether the same case was being investigated by both the domestic proceedings as well as the OTP. It further argued that "the state is to be accorded a margin of appreciation as to the contours of the case to be investigated, and the ongoing exercise of the national authorities' prosecutorial discretion as to the focus and formulation of the case." The Prosecutor V. Saif Al-Islam Gaddafi and Abdullah Al-Senussi ICC-01/11-01/11 Para. 33 at 19

204 Cassese (2003) 351.

205 'Informal expert paper: The Principle of Complementarity in Practice' <http://www.iclklamberg.com/Caselaw/OTP/Informal%20Expert%20paper%20The%20principle%20of%20complementarity%20in%20practice.pdf> accessed June 16, 2012. See also Kirsch, Phillippe; 'Keynote Address,' Cornell International Law Journal (1999) 438 in Candidate number 7 *The Principle of Complementarity...* (n. 27) 1.

206 Mohamed M. El Zeidy, 'The gravity threshold under the Statute of the International Criminal Court, Crim.L.F.2008, 19(1) 35-57 Paper on Some Policy Issues Before the Office of the Prosecutor, September 2003, p.1-2. in Cryer, et al 'An Introduction to International Criminal Law and Procedure' Cambridge University Press; (2010) 2 edn at 580.

207 See Burke-White, (2008) *ibid.* See also Max du Plessis 'Complementarity: A Working Relationship Between African States and the International Criminal Court' In 'African Guide to International Criminal Justice' Institute for Security Studies (2008) 123-142, 127. See also Cryer, et al (2010), 580.

of the Court in the any post-conflict intervention is limited.<sup>208</sup> The Rome Statute requires that State Parties should adopt domestic legislation to implement its provisions.<sup>209</sup> In so doing, when States parties such as Uganda ratify the Rome Statute, they have the right and responsibility to investigate offences committed within their territories.<sup>210</sup>

#### **4.4.2.4 Determining the Gravity of the Offence**

In its Policy paper on Some Policy Issues before the Office of the Prosecutor,<sup>211</sup> the OTP argued that:

One of the most important elements of the OTP's strategy is to focus investigative and prosecutorial efforts ... on those who bear the greatest responsibility for the most serious crimes. It is simply not feasible to bring charges against all apparent perpetrators.<sup>212</sup>

With regard to the situation in Uganda, the Prosecutor stated that:

In Uganda, the criterion for selection of the first case was gravity. We analyzed the gravity of all crimes in Northern Uganda committed by all groups — the LRA, the UPDF and other forces. Our investigations indicated that the crimes committed by the LRA were of dramatically higher gravity. We therefore started an investigation of the LRA.

At the same time, we have continued to collect information on allegations concerning all other groups, to determine whether other crimes meet the stringent thresholds of the Statute and our policy are met.<sup>213</sup>

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208 Ibid.

209 Cassese 2003 at 351. The vast majority of cases were left to the national courts which were supposed to have more means available to collect the necessary evidence and to lay their hands on the accused.

210 Rome Statute of the International Criminal Court, Article 17 and 18, U.N. Doc. A/CONF.183/9(July 17,1998) Text of the Rome Statute circulated as document A/CONF.183/9 of 17 July 1998 and corrected by procès-verbaux of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002. The Statute entered into force on 1 July 2002. As noted by Anne-Marie Slaughter, the ICC 'will be a backstop and trigger for domestic forces for justice and democracy. So long as the state is willing and able to conduct the investigation and subsequent prosecution itself, its decision will thereby deny the ICC jurisdiction over the offences and the perpetrators. See du Plessis 2008:129. See also Slaughter 2003

211 ICC-OTP, Paper on Some Policy Issues before the Office of the Prosecutor (Policy Paper, September 2003) 6 <[http://www.icc-cpi.int/library/organs/otp/030905\\_Policy\\_Paper.pdf](http://www.icc-cpi.int/library/organs/otp/030905_Policy_Paper.pdf)> at 18 May 2007 ('Paper on Some Policy Issues').

212 Luis Moreno-Ocampo, Chief Prosecutor of the ICC, 'Statement by Luis Moreno-Ocampo, Prosecutor of the International Criminal Court' (Statement, Informal Meeting of Legal Advisors of Ministries of Foreign Affairs, 24 October 2005) 5-6 < [http://www.icc-cpi.int/NR/rdonlyres/9D70039E-4BEC-4F32-9D4A-EA8B6799E37/143836/LMO\\_20051024\\_English.pdf](http://www.icc-cpi.int/NR/rdonlyres/9D70039E-4BEC-4F32-9D4A-EA8B6799E37/143836/LMO_20051024_English.pdf)> at 18 May 2012 ('Statement from 24 October 2005'). See also Luis Moreno-Ocampo, Chief Prosecutor of the ICC, 'Statement by Luis Moreno-Ocampo, Prosecutor of the International Criminal Court' (Statement, Fourth Session of the Assembly of States Parties, 28 November 2005 – 3 December 2005) 2 < [http://www.icc-cpi.int/NR/rdonlyres/169D124D-A2C3-444B-B498-A3FFD8CF177C/277382/LMO\\_20051128\\_English1.pdf](http://www.icc-cpi.int/NR/rdonlyres/169D124D-A2C3-444B-B498-A3FFD8CF177C/277382/LMO_20051128_English1.pdf)> at 18 May 2012.

213 Ibid.

The principle of gravity is provided for by Article 17 (1) (d) of the Rome Statute. It states that:

Having regarded to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where: (d) the case is not of sufficient gravity to justify further action by the Court.<sup>214</sup>

The phraseology on gravity in the Rome Statute is 'similar to the 1994 draft of the International Law Commission with the only change being the replacement of the word 'such' with 'sufficient'.<sup>215</sup> The concept of gravity was aimed at deterring situations where the acts alleged were not of sufficient gravity to warrant trial at the international level. Crawford, the Special Rapporteur of the ILC argued that this would avoid what was termed as 'peripheral complaints' from bogging down the Court's limited resources.<sup>216</sup> In Crawford's view, the Court would have power to 'stay prosecution on the grounds that there was an adequate national tribunal with jurisdiction over the offence or that the acts alleged were not of sufficient gravity to warrant trial at the international level.'<sup>217</sup>

In determining the gravity of a situation, the OTP has considered the 'scale of the crimes, the severity of the crimes, (and) the systematic nature of the crimes, the manner in which they were committed, and the impact on victims.'<sup>218</sup> It is upon this basis that the OTP chose to indict the top leadership of the LRA/M instead of the Uganda People's Defence Forces

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<sup>214</sup> Rome Statute of the International Criminal Court, Adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 17 July 1998, UN Doc. A/CONF.183/9, Article 17(1)(d).

<sup>215</sup> Schabas 2011 at 200. See, Ray Murphy, 'Gravity Issues and the International Criminal Court', (2006) 17 *Criminal Law Forum* 281.

<sup>216</sup> James Crawford noted that the idea was to prevent 'Court ...from being)... swamped by peripheral complainants involving minor offenders, possibly in situations where the major offenders were going free.' See UN Doc. A/CN.4/SR.2330, para. 9. See also 1994 *YILC* Vol. I, p. 9. '[T]his criterion seem to be an extra safeguard to avoid flooding the court with cases that otherwise would be admissible to the court, and it gives the court an extended possibility to control which cases will be admitted.' See Candidate number 7 *The Principle of Complementarity...* (n. 27). See also Summary Records of the Meetings of the Forty-Sixth Session, [1994] 1 Y.B. Int'l L. Comm'n 25-27, 191 p. 60, U.N. Doc. A/CN.4/SER.A/1994. This catered for the concerns raised by some countries like the USA over the 'budgetary and administrative requirements of the tribunal' Observations by Governments on the Draft Convention for the Prevention and punishment of Terrorism and Draft Convention for the Creation of an International Criminal Court, Series I, League of Nations document A. 24.1936. v., p. 80. See also 1994 *YILC* Vol. I, p. 9. See also UN Doc. A/CN.4/SR.2330, para. 9.

<sup>217</sup> Robert Rosenstock, the U.S.A representative to the ILC suggested that the Court be given the discretion to decline exercising its jurisdiction on grounds of insufficient gravity. It was upon this basis that this gravity threshold was included 'in Article 35 of the ILC Draft Statute delivered to the United Nations General Assembly in 1994. See views by Robert Rosenstock in Summary Records of the Meetings of the Forty-Sixth Session, [1994] 1 Y.B. Int'l L. Comm'n 25-27, 25 p. 41, U.N. Doc. A/CN.4/SER.A/1994. See Draft Statute of the ICC produced by the United Nations International Law Commission ('ILC') in 1994. See Report on the Commission to the General Assembly on the Work of its Forty-Sixth Session, 49 U.N. GAOR Supp. (No. 10), U.N. Doc. A/49/10, reprinted in [1994] 2 Y.B. Int'l L. Comm'n 52, U.N. Doc. A/CN.4/SER.A/1994/Add.1. in SaCouto, Susana and Katherine Cleary, 'The Gravity Threshold of the International Criminal Court' *American University International Law Review* 23, no.5 (2007): 807-854 at 812.

<sup>218</sup> SaCouto, Susana and Katherine Cleary, 'The Gravity Threshold of the International Criminal Court' *American University International Law Review* 23, no.5 (2007)p. 807-854 at 811.

(UPDF).<sup>219</sup> Despite identifying certain cases as being sufficiently grave to satisfy Article 17(1) (d), the Prosecutor stressed that he ultimately selected his first case in the DRC situation based on practical considerations involving, among other things, the likelihood of apprehending his suspect.<sup>220</sup>

The Pre Trial Chamber 1 (PTC1) in the case of *Katanga* set out the standards that had to be fulfilled for the gravity threshold to apply: First, ‘the relevant conduct must be either systematic or large-scale,’ and secondly, ‘due consideration must be given to the social alarm such conduct may have caused in the international community.’<sup>221</sup> The PTC 1 also held that the perpetrators of the alleged crimes must be among ‘the most senior leaders suspected of being the most responsible for the crimes within the jurisdiction of the Court.’<sup>222</sup> The PTC1 also insisted that the aforementioned factors were compulsory when considering the requirements of gravity.<sup>223</sup> The Appeals Chamber ruled otherwise. In its opinion, there was no need to consider the ‘subjective criterion of social alarm’<sup>224</sup> in determining gravity. The Appeals Chamber further noted that it was already enough that the crimes alleged are the ‘most serious crimes of international concern.’<sup>225</sup> In the opinion of the Court, relying on gravity was not necessary. This finding by the Appeals Chamber is applauded in so far as it removed the restrictive requirement to satisfy the conditions set out by PTC1. First of all, the Rome Statute only mentions trying persons responsible for the most serious crimes of international concern. The fifth preamble makes reference to ‘perpetrators’ and not individual citizens who bear the greatest responsibility for the alleged crimes.<sup>226</sup> It can be argued that the PTC1’s interpretation would have been discriminatory against senior leaders if it had been left unchallenged. Secondly, when the OTP privileges the criterion of gravity above other considerations, it runs the risk of drawing unnecessary criticism to its

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<sup>219</sup> Ibid, 810.

See Report of the International Criminal Court to the United Nations for 2010/2011, A/66/309, 19 August 2011 <[http://www.icc-cpi.int/en\\_menus/icc/reports%20on%20activities/court%20reports%20and%20statements/Pages/seventhreport.aspx](http://www.icc-cpi.int/en_menus/icc/reports%20on%20activities/court%20reports%20and%20statements/Pages/seventhreport.aspx)> accessed October 2, 2013.

<sup>220</sup> Ibid.

<sup>221</sup> See *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, 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 at 77 (15-07-2009). <<http://www.icc-cpi.int/iccdocs/doc/doc711214.pdf>> accessed October 3, 2013. See also SaCouto, Susana and Katherine Cleary, ‘The Gravity Threshold of the International Criminal Court’ (2007) 23 (5) American University International Law Review 807, 811.

<sup>222</sup> Ibid.

<sup>223</sup> Ibid.

<sup>224</sup> See *Katanga et al.* (ICC-01/04-01/07 OA 8), Judgement on the Appeal of Mr Germain Katanga against the Oral Decision of Trial by Chamber II of 12 June 2009 on the Admissibility of the Case, 25 September 2009, para. 72.

<sup>225</sup> Articles 1 and 5 of the Rome Statute. See also ICC Takes Decisive Step for Justice in Uganda, Human Rights Watch, October 15th 2005, <<http://www.hrw.org/pt/node/70189>> accessed October 2, 2013.

<sup>226</sup> SaCouto, Susana and Katherine Cleary, *The Gravity Threshold of the International Criminal Court* 812.

work. This is indeed what happened when the OTP/ICC refused to investigate the UPDF for crimes allegedly committed in northern Uganda. Even so, the Appeals Chamber has been criticised ‘for overturning a PTC definition of gravity under article 17(1) (d) 99 without providing sufficient guidance for proper interpretation.’<sup>227</sup>

The aforementioned discussion shows that discussions on Article 17 during the Rome Conference acknowledged that the States have primacy of jurisdiction in fighting impunity. When determining whether a situation is admissible before the court, the OTP/ICC should be cognisant of the fact that the states will jealously guard their sovereignty. The OTP should always be cognisant of the fact that it only provides a complementary role to national institutions except for cases of a Security Council referral. Where States show willingness to carry out national proceedings in their territories, the Court should take a proactive approach to complementarity in which it encourages and advises national institutions on how to best carry out these national proceedings.

#### **4.4.3 The Challenge of Positive Complementarity**

Positive complementarity, also known as *proactive complementarity*,<sup>228</sup> has been defined as the act in which the ICC and other State Parties provide technical assistance to a State in which national proceedings are taking place.<sup>229</sup> The Assembly of States Parties to the ICC has defined it as one that “refers to all activities whereby national jurisdictions are strengthened and enabled to conduct genuine national investigations and trials of crimes included in the Rome Statute.”<sup>230</sup> The history of complementarity shows that States had always been reluctant to surrender their right to conduct national proceedings against perpetrators of international crimes in their territory.<sup>231</sup> In his 2006 Prosecution Strategy, Mr. Ocampo noted that ‘the Office has adopted a positive approach to complementarity, meaning that it encourages

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<sup>227</sup> Stegmiller noted ‘Certainly, the Appeals Chamber was under no obligation to develop a gravity test, but it left the Court with a legal vacuum.’ Ignaz Stegmiller, *Interpretative Gravity under the Rome Statute*, in *The International Criminal Court And Complementarity: From Theory To Practice* Vol. 1, 603, 611 (Carsten Stahn & Mohamed M. El Zeidy, eds., 2011). in Linda M. Keller ‘Comparing the ‘Interests of Justice’: What the International Criminal Court Can Learn From New York Law 12 Washington University Global Studies Law Review, No. 1 2012 <<http://ssrn.com/abstract=2033514>> accessed August 6, 2013.

<sup>228</sup> See Luis Moreno-Ocampo, Prosecutor of the ICC, Building a Future on Peace and Justice, Address at the International Conference in Nuremberg (June 24–25, 2007), <http://www.peace-justice-conference.info/download/speech%20moreno.pdf> accessed September 10, 2013

<sup>229</sup> Assembly of States Parties to the Rome Statute of the International Criminal Court, Resumed Eighth Session, New York, 22–25 March 2010, Official Records, paras. 35–6 in Schabas 2011: 190.

<sup>230</sup> See generally United Nations Development Program, ‘New Opportunities Arising from the Principle of Complementarity and Support for National Capacities to Investigate and Prosecute Serious Crimes of International Concern’, 16 November 2012

<sup>231</sup> See W. A. Schabas, ‘Complementarity in Practice: Creative Solutions or trap for the Court?’, in Mauro Politi and Federica Gioca (eds.), ‘The International Criminal Court and National Jurisdictions’, Ashgate: 2008 at 25.

genuine national proceedings where possible; relies on national and international networks; and participates in a system of international cooperation.’<sup>232</sup> The commitment by Ocampo was to support the national governments to fulfil their obligations under the Rome Statute.<sup>233</sup> For the OTP/ICC therefore, it is a “proactive policy of cooperation aimed at promoting national proceedings.”<sup>234</sup> As an example of this approach, the OTP/ICC gave technical assistance to the Directorate of Public Prosecution in the case of *Uganda vs. Thomas Kwoyelo*.<sup>235</sup> Based on this understanding, Ocampo noted that the efficacy of the ICC would not be assessed on the basis of the number of cases that are brought before it but rather on the number of situations which have been resolved by State national institutions either singularly or with the support of the OTP.<sup>236</sup> This means that the ICC would *ideally* view as a major success, supporting genuine proceedings by national institutions in situations where international crimes have or are being committed.<sup>237</sup>

Nonetheless, the OTP/ICC has, largely, missed the opportunity to do as pledged. The OTP has in some instances, tended to opt for direct intervention instead of supporting States to fulfil their primary obligation to have national proceedings handling the situations in their jurisdictions.<sup>238</sup> The result of this approach has often pitted the OTP against those States which have jealously guarded their sovereignty.<sup>239</sup> An example is the Situation in *Darfur* which was referred to the OTP by UNSC Resolution 1593 on the 31 March 2005 pursuant

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<sup>232</sup> Luis Moreno-Ocampo, ‘Prosecutor of the ICC, Statement of the Prosecutor to the Diplomatic Corps (Feb. 12, 2004), <<http://www.iccnw.org/documents/OTPStatementDiploBriefing12Feb04.pdf>> accessed October 3, 2013.

<sup>233</sup> See Christopher Keith Hall, ‘The Powers and Role of the Prosecutor of the International Criminal Court in the Global Fight Against Impunity, 17 *Leiden J. INT’L L.* 121, 135-36 (2004). in W. W. Burke-White, ‘Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice’ (2008) 49 *Harvard International Law Journal* 54.

<sup>234</sup> United Nations Development Program, 2012 *ibid*

<sup>235</sup> Transitional Justice Team-JLOS Secretariat, Justice At Cross Roads? A Special Report on the Thomas Kwoyelo Trial, 1 (2011) <[http://www.jlos.go.ug/index.php/document-centre/document-centre/doc\\_download/199-special-report-on-the-thomas-kwoyelo-trial](http://www.jlos.go.ug/index.php/document-centre/document-centre/doc_download/199-special-report-on-the-thomas-kwoyelo-trial)> accessed October 3, 2013. See also OTP Weekly Briefing 8-14 March 2011, Issue #78, OTP meets with Ugandan Prosecutors in preparation of first domestic war crimes case against an LRA commander, <[http://www.icc-cpi.int/NR/rdonlyres/7E0F85AF-4A0E-4227-A8BB-0CA758ED96BE/283129/OTPWeeklyBriefing\\_814March2011.pdf](http://www.icc-cpi.int/NR/rdonlyres/7E0F85AF-4A0E-4227-A8BB-0CA758ED96BE/283129/OTPWeeklyBriefing_814March2011.pdf)> accessed October 3, 2013.

<sup>236</sup> Luis Moreno-Ocampo, Prosecutor of the ICC, Statement Made at the Ceremony for the Solemn Undertaking of the Chief Prosecutor of the International Criminal Court (June 16, 2003), <<http://www.iccnw.org/documents/MorenoOcampo16June03.pdf>> accessed October 3, 2013. See also W. W. Burke-White, 2008, 54.

<sup>237</sup> Luis Moreno-Ocampo, *ibid*.

<sup>238</sup> See examples the situations in Kenya and Libya

<sup>239</sup> He considered this opposition to be political in nature as he confirmed in a policy address in June 2007- ‘I was given a clear judicial mandate. My duty is to apply the law without political considerations. I will present evidence to the Judges and they will decide on the merits of such evidence.’ Ocampo noted that he would ‘neither attempt to adjust his approach based on political considerations nor respond to or alter the policies of national governments. See also OTP Weekly Briefing 8-14 March 2011, Issue #78, OTP meets with Ugandan Prosecutors in preparation of first domestic war crimes case against an LRA commander, <[http://www.icc-cpi.int/NR/rdonlyres/7E0F85AF-4A0E-4227-A8BB-0CA758ED96BE/283129/OTPWeeklyBriefing\\_814March2011.pdf](http://www.icc-cpi.int/NR/rdonlyres/7E0F85AF-4A0E-4227-A8BB-0CA758ED96BE/283129/OTPWeeklyBriefing_814March2011.pdf)> accessed October 3, 2013.

to Article 13 of the Rome Statute.<sup>240</sup> The UNSC acted upon a recommendation by the International Commission of Inquiry on Darfur which had concluded that the Sudanese justice system was unable and unwilling to address the situation in Darfur.<sup>241</sup> It is important to note that Sudan had shown willingness to prosecute the alleged crimes in pursuance of its own 'Judicial Investigation Commission for Investigation and Inquiry into Crimes Violating Human Rights and International Humanitarian Law in Darfur.'<sup>242</sup> In his report to the UNSC, the OTP revealed that the Sudanese government had arrested 14 individuals suspected of international humanitarian law violations and other human rights abuses.<sup>243</sup> The OTP/ICC also mentioned that Sudan had established a Special Court, appointed a Special Prosecutor and tried and sentenced some of the suspects.<sup>244</sup> The OTP also reported that the situation in Darfur had given it an opportunity to have a better appreciation of how best to deal with tribal problems and disputes.<sup>245</sup> Nonetheless, the OTP argued that although the Sudanese special court had carried out some trials, it was riddled with challenges. Instead of supporting Sudan in addressing these shortcomings, the OTP opted to directly intervene by seeking to arrest and try the Sudanese president Al-Bashir and others like his defence minister Abdel-Rahim Mohamed Hussein, North Kordofan governor Ahmed Haroun and militia leader Ali Kushayb.<sup>246</sup> In response to the above, the AU called upon the UNSC to defer the case against Al Bashir pursuant to Article 16.<sup>247</sup> The

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240 The decision of the UNSC was probably influenced by reports from organisations such as Human Rights Watch and the Enough project which accused the Sudanese government of participating in atrocities in the Darfur region. See Human Rights Watch Report, 'Abuses by the Government – JanjaWeed in West Darfur' <<http://www.hrw.org/reports/2004/sudan0504/5.htm>> accessed October 7, 2013. See contrary arguments in Mamdani M. *Saviors and Survivors: Darfur, Politics and the War of Terror*, New York: Pantheon Books, 2009

241 Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General pursuant to Pursuant to Security Council Resolution 1564 of 18 September 2004 [http://www.un.org/News/dh/sudan/com\\_inq\\_darfur.pdf](http://www.un.org/News/dh/sudan/com_inq_darfur.pdf) accessed October 3, 2013. See also Du Plessis 2008 at 130. Resolution 1593 stated that 'the Government of Sudan and the other parties to the conflict are under an international obligation to 'cooperate fully with and provide any necessary assistance to the Court and the Prosecutor.' The USA, Algeria, Brazil and China all abstained in the vote on UN Doc. S/RES/1593 (2005), para. 2. See Robert Cryer, 'Sudan, Resolution 1593 and International Criminal Justice', (2006) 19 *Leiden Journal of International Law* 195.

242 See UN Doc. S/PV.5589 p.2, <http://www.undemocracy.com/S-PV-5589.pdf> accessed Oct 3, 2013.

243 The Special Court is established by the Sudanese authorities by decree on 7 June 2005, the Special Criminal Court on the Events in Darfur (SCCED) has jurisdiction over Darfur in relation to crimes under Sudanese law and any charges as determined by the chief justice or related to international humanitarian law. <http://www.justiceinperspective.org.za/africa/sudan/special-criminal-court-on-the-events-in-darfur.html> 'Sudan to establish Special Court for Darfur Crimes and appoints new Special Prosecutor' Sudan Tribune January 11, 2012 [http://www.sudantribune.com/spip.php?ifra me&page=imprimable&id\\_article=41255](http://www.sudantribune.com/spip.php?ifra me&page=imprimable&id_article=41255) accessed October 3, 2013.

244 Ibid.

245 See Du Pleiss 2008 at 131. See UN Doc. S/PV.5589 p.2, UN. Docks/PV. 5450, pp.3-4; UN Docks/PV.5321,p.3; UN Doc. S/PV.5589, P.2, UN Doc. S/P. 5450, PP. 5-6. in Schabas 2008 at 10.

246 See 'Former UN rights chief says UNSC referral of Darfur case to ICC a 'very bad idea' Monday 22 July 2013 <http://www.sudantribune.com/spip.php?article47363> accessed March 18, 2014. See Coalition for the International Criminal Court > Cases & Situations > Darfur <http://www.iccnw.org?mod=darfur> accessed March 18, 2014.

247 See African Union Peace and Security Council Decision (PSC/MIN/Comm.(CXLII)), 21 July 2008, PARAS. 3, 5, 9, 11(i). Also African Union Assembly Decision on the Application By The International Criminal Court Prosecutor the Indictment of the President of the Republic of Sudan (Dec. 221 (XII)), 3 February 2009, paras. 2, 3; and Peace and Security Council Decision (PSC/PR/Comm. (CLXXV)), 5 March 2009, PARAS. 4-6. See A. Ciampi, 'The

AU argued that the pending arrest of Al Bashir would prevent him from signing the Darfur Peace Agreement as well as performing other mechanisms which were necessary for the wider judicial issues in Sudan and the Darfur region and that this would not be in the best interests of the victims.<sup>248</sup> When the AU request to the UNSC was not acted upon, it resolved not to cooperate with the ICC regarding the arrest of President Al- Bashir.<sup>249</sup> This resolution was adopted in subsequent AU summits, which also included non cooperation in the arrest of any other African leader as this would undermine the search for lasting peace.<sup>250</sup>

In May 2013, the AU also criticised the ICC for being a political tool which sought to destabilise reconciliation and peace building efforts in some African countries like Kenya.<sup>251</sup> It argued that the Kenyan state had jurisdiction to investigate and prosecute the crimes that were committed in 2007 and its efforts to do so should not be deterred by the ICC's insistence on trying the President and Vice President of Kenya.<sup>252</sup> In an eccentric move, on the 5<sup>th</sup> of September 2013, the Kenyan parliament approved a motion to withdraw its membership from the ICC. The trial of Vice President William Ruto and Joshua Arap Sang

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Proceedings Against President Al Bashir and the Prospects of Their Suspension under Article 16 ICC Statute', (2008) 6 Journal of International Criminal Justice 885.

- 248 See Peace and Security Council, 142nd meeting, 21 July 2008, Addis Ababa, Ethiopia, PSC/MIN/Comm(CXLII) [http://www.iccnw.org/documents/AU\\_142-communicue-eng.pdf](http://www.iccnw.org/documents/AU_142-communicue-eng.pdf) accessed October 9, 2013. See also OTP Report on Sudan UN Doc. S/PV.5589 <http://www.undemocracy.com/S-PV-5589.pdf> accessed June 12, 2012. See African Union Peace and Security Council Decision (PSC/MIN/Comm(CXLII)), 21 July 2008, PARAS. 3, 5, 9, 11(i). Also African Union Assembly Decision on the APPLICATION BY THE International Criminal Court Prosecutor the Indictment of the President of the Republic of Sudan (Dec. 221 (XII)), 3 February 2009, paras. 2, 3; and Peace and Security Council Decision (PSC/PR/Comm. (CLXXV)), 5 March 2009, PARAS. 4-6. See A. Ciampi, 'The Proceedings Against President Al Bashir and the Prospects of Their Suspension under Article 16 ICC Statute', (2008) 6 Journal of International Criminal Justice 885.
- 249 The UNSC merely noted the concerns of the AU. See UN Doc. S/RES/1828 (2008). See Decision on the Meeting of the African States Parties to the Rome Statute of the International Criminal Court (ICC), Doc. Assembly / AU/133 (XVIII), para. 9. See Assembly of the Africa Union, 13th Ordinary Session 1-3 July 2009, Sirte, great Socialist People's Libyan Arab Jamahiriya, Assembly/AU/Dec.243-267(XIII), [http://www.au.int/en/sites/default/files/ASSEMBLY\\_EN\\_1\\_3\\_JULY\\_2009\\_AUC\\_THIRTEENTH\\_ORDINARY\\_SESSION\\_DECISIONS\\_DECLARATIONS\\_%20MESSAGE\\_CONGRATULATIONS\\_MOTION\\_0.pdf](http://www.au.int/en/sites/default/files/ASSEMBLY_EN_1_3_JULY_2009_AUC_THIRTEENTH_ORDINARY_SESSION_DECISIONS_DECLARATIONS_%20MESSAGE_CONGRATULATIONS_MOTION_0.pdf) accessed October 9, 2013.
- 250 See Fifteenth Ordinary Session of the AU, 25 - 27 July 2010., Kampala, Uganda Assembly/AU/Dec.296 (XV) [http://www.au.int/en/sites/default/files/ASSEMBLY\\_EN\\_25\\_27\\_July\\_2010\\_BCP\\_ASSEMBLY\\_OF\\_THE\\_AFRICAN\\_UNION\\_Fifteenth\\_Ordinary\\_Session.pdf](http://www.au.int/en/sites/default/files/ASSEMBLY_EN_25_27_July_2010_BCP_ASSEMBLY_OF_THE_AFRICAN_UNION_Fifteenth_Ordinary_Session.pdf), accessed October 9, 2013); See also Sixteenth Ordinary Session of the AU, 30 - 31 January 2011, Addis Ababa, Ethiopia Assembly/AU/Dec.334 (XVI) [http://www.au.int/en/sites/default/files/ASSEMBLY\\_EN\\_30\\_31\\_JANUARY\\_2011\\_AU\\_C\\_ASSEMBLY\\_AFRICA.pdf](http://www.au.int/en/sites/default/files/ASSEMBLY_EN_30_31_JANUARY_2011_AU_C_ASSEMBLY_AFRICA.pdf), accessed October 9, 2013. See also Nineteenth Ordinary Session of the AU, 15 - 16 July 2012 Addis Ababa, Ethiopia Assembly/AU/Dec.419 (XIX) [http://www.au.int/en/sites/default/files/Assembly%20AU%20Dec%20416-449%20\(XIX\)%20\\_E\\_Final.pdf](http://www.au.int/en/sites/default/files/Assembly%20AU%20Dec%20416-449%20(XIX)%20_E_Final.pdf), accessed on October 9, 2013.
- 251 Kevin J. Kelley, 'AU criticises ICC over Kenya cases at UN meeting', The Daily Nation Thursday September 26, 2013 <http://mobile.nation.co.ke/News/-AU-criticises-ICC-over-Kenya-cases-at-UN-meeting/-/1950946/2008210/-/format/xhtml/-/f3l0dmz/-/index.html> accessed October 7, 2013.
- 252 See Nineteenth Ordinary Session of the AU, 15 - 16 July 2012 Addis Ababa, Ethiopia Assembly/AU/Draft/Dec.9 (XXI) Rev.1 <[http://www.african-court.org/en/images/documents/Press\\_Docs/DECISIONS,%20DECLARATIONS,%20RESOLUTION%20of%20the%20AU%2019th%20Assembly.pdf](http://www.african-court.org/en/images/documents/Press_Docs/DECISIONS,%20DECLARATIONS,%20RESOLUTION%20of%20the%20AU%2019th%20Assembly.pdf)> accessed October 9, 2013.

were recently dropped<sup>253</sup> while the charges against President Uhuru Kenyatta had been withdrawn much earlier.<sup>254</sup> The OTP has continued to accuse the Kenyan state for having failed to cooperate with it.

The reaction of the AU leaders coupled with the insistence of the OTP on trying Presidents like Bashir and Kenyatta has injured the credibility of the ICC. Additionally, the incapacity of the ICC to carry out its arrest warrants and the reluctance of the members of the UNSC to enforce these arrests warrants has left the ICC in a weaker position.<sup>255</sup> Mr. Ocampo responded to this stalemate by arguing that opposition to his office was merely political. He states that 'I apply the law without political considerations. But the other actors have to adjust to the law.'<sup>256</sup> He went ahead to assert that he would only apply the law and leave the rest to the judges.<sup>257</sup> To an extent, Mr. Ocampo is right because, as argued earlier, the OTP can only operate within the ambit of the law and cannot delve into political machinations. However, it can be argued that by accepting the existence of political dimensions to the stalemate, the OTP ought to take a purposive interpretation of the law in its fight against impunity.<sup>258</sup> The OTP/ICC should remain awake to the fact that its role is –primarily complementary to the work of the states which have jurisdiction over the situations concerned. However, this in does not mean that the ICC should no longer implement its *pro prio motu* powers or investigate the referrals from the UNSC. The OTP should rather revisit its commitment to positive complementarity which requires that it supports the efforts of the States in developing their national systems. It should also actively support the non-prosecutorial proceedings that are proposed as part of a wider/comprehensive fight against impunity. Nouwen and Werner warn that 'as long as it (OTP) defines its success by

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253 See William Ayaga, 'ICC ends case against DP William Ruto and Joshua Sang after 7 years of anguish April 6, 2016 available at <<http://www.standardmedia.co.ke/mobile/article/2000197265/icc-ends-case-against-dp-william-ruto-and-joshua-sang-after-seven-years-of-anguish>> Mr. Ruto's application for a flexible application of Article 63 of the Rome Statute which required him to attend trial in person had at some point been rejected. His application had been supported by Tanzania, Burundi, Rwanda, Uganda and Eritrea. See 'African leaders support Kenyan leaders standing trial in The Hague' Political Analysis, South Africa, September 25, 2013 <<http://www.politicalanalysis.co.za/2013/09/25/kenya-african-leaders-support-kenyan-leaders-standing-trial-in-the-hague/>> accessed Oct 9, 2013.

254 ICC drops Uhuru Kenyatta charges for Kenya ethnic violence, BBC News December 5 2014 <<http://www.bbc.com/news/world-africa-30347019>> accessed December 5 2014.

255 The UNSC Resolution had pitted the United States against France. 'Former UN rights chief says UNSC referral of Darfur case to ICC a 'very bad idea' Monday 22 July 2013 <<http://www.sudantribune.com/spip.php?article47363>> accessed March 18, 2014.

256 'Keynote address Mr. Luis Moreno-Ocampo, Prosecutor of the International Criminal Court, Council on Foreign Relations', Washington DC, 4 February 2010.

257 Ibid.

258 See generally, Philippe Kirsch and Robinson Darryl., 'Reaching Agreement at the Rome Conference', Antonio Cassese et al. (eds.), *The Rome Statute of the International Criminal Court*, Vol. I (Oxford: University Press, 2002). See also M. Cherif Bassiouni, 'The Times Has Come for an International Criminal Court', 1 *Indiana International & Comparative Law Review* 1, 5 (1991). See also Schabas 2011:192.

pointing to completed cases before the Court, the OTP needs cooperative relations with the government of the state on the territory or by the nationals of which crimes were committed. Prosecuting government officials will usually not be beneficial to such relations.<sup>259</sup>

While it is admitted that the OTP/ICC is a legal and not political body, it needs the cooperation of states to carry out its functions since it is 'endowed with no more powers than any tourist in a foreign State.'<sup>260</sup> It can be argued that the cooperation of states is political even if it achieves a legal end. It is for this reason that Nouwen and Werner argue that 'law and politics should not be regarded as categories which oppose and mutually exclude each other.'<sup>261</sup> Rather, law and politics can work together. This does not mean that the OTP/ICC does not run the risk of being used for political purposes like the defeat of enemies.<sup>262</sup> The ICC can be used as a 'powerful weapon in political struggles...which seeks to protect the 'common bonds' that 'unite all peoples' by prosecuting the most serious international crimes that 'deeply shock the conscience of humanity.'<sup>263</sup> This is what happened in the case of Uganda as discussed earlier. The reverse is also true in case the Court is viewed to be one-sided in the way it selects its cases.

In light of the above, the Court ought to take heed of the political and non-legal aspects of conflicts so that it does not end up in a situation like the one with the AU. This means that where the court receives a State referral, a thorough investigation into the legal and non legal interventions by the state ought to be carried out. This would be in line with the spirit of positive complementarity – where the OTP would review a State's legal and non legal interventions before determining that a state is unwilling or unable to intervene into a situation under its jurisdiction. Such an approach would also limit situations where the OTP is seen as being biased either towards the state (for example UPDF) or to the humanitarian organisations working in the conflict area (for example in Darfur, Sudan).

Equally important, some authors have argued that the OTP ought to be cognisant of the likelihood of oversimplifying complicated patterns and legacies of violence and in the

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<sup>259</sup> M. H. Nouwen and Wouter G. Werner, 'Doing Justice to the Political: The International Criminal Court in Uganda and Sudan' *EJIL* (2010), Vol. 21 No. 4, 941–965 at 964.

<sup>260</sup> Swart and Sluiter, 'The International Criminal Court and International Criminal Co-operation', in H.A.M. von Hebel, J.G. Lammers, and J. Schukking (eds), *Reflections on the International Criminal Court* (1999) 91, at 115 in M. H. Nouwen and Wouter G. Werner, 'Doing Justice to the Political: The International Criminal Court in Uganda and Sudan' *EJIL* (2010), Vol. 21 No. 4, 941–965 at 948.

<sup>261</sup> *Ibid.*

<sup>262</sup> G.J. Simpson, *Law, War & Crime: War Crimes Trials and the Re-invention of International Law* (2007), at 116.

<sup>263</sup> M. H. Nouwen and Wouter G. Werner, 'Doing Justice to the Political: The International Criminal Court in Uganda and Sudan' *EJIL* (2010), Vol. 21 No. 4, 941–965 at 962.

process, replace them with ‘absolutist norms’ of right and wrong.<sup>264</sup> The sum effect of such oversimplification is the failure to address the root causes of violent conflicts which leads to their re-occurrence.<sup>265</sup> For example, the Ituri conflict in Eastern DRC is partly a conflict for land between the pastoralist Hema and the agriculturalist Lendu. It is also an ethnically charged extension of the conflict between the pastoralist Tutsi and agriculturalist Hutu of Rwanda.<sup>266</sup> The conflict is also about the acquisition of mineral wealth in one of the richest regions in Africa and the world.<sup>267</sup> The control of this region has a ripple effect in having political influence at the national level. Various armed groups have fought for control of this region and the conflict has continued despite the presence of the United Nations Organisation Stabilization Mission in the Democratic Republic of the Congo (MONUSCO).<sup>268</sup> This is an indicator that the root causes of the decade’s long armed conflict have not been addressed. The GoU is now involved in mediating peace talks between the rebel leaders and the government of the DRC. In support of this position, Mr. Alexis Lamek, France’s deputy permanent representative to the United Nations and a member of the UN Security Council delegation visiting the DRC has recently advised that ‘only a political solution is a way out of this situation’.<sup>269</sup>

In light of the above, it is proposed that the Court and the OTP adopt a purposive interpretation of the concept of complementarity. In so doing, it will be possible to view that non prosecutorial interventions to post conflict violence remain within the ambit of the Statute.<sup>270</sup> Alvarez also argues that using a purposive interpretation of the Statute, it is

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264 Harry Verhoeven, Lydiah Kemunto Bosire and Sharath Srinivasan, ‘Darfur in the crossfire between humanitarian fundamentalism and Khartoum’s divide and rule’ Sudan Tribune: Plural news and views on Sudan > Comment & Analysis > Understanding Darfur’s Saviours and Survivors, Monday 3 August 2009.

265 See ‘Uganda ‘must arrest’ rebel leader’, *BBC News Online*, 18 May 2006 <<http://news.bbc.co.uk/2/hi/africa/4992896.stm>> accessed September 10, 2013.

266 Patrick Wegner, ‘What went wrong During the Lubanga Trial?’ <<http://justiceinconflict.org/2012/03/14/what-went-wrong-during-the-lubanga-trial/>> accessed October 8, 2013.

267 See ‘Steps Towards Justice, Frustrated Hopes: Some Reflections on the Experience of The International Criminal Court in Ituri’, Just Justice? Civil Society, International Justice and the Search for Accountability in Africa, International Refugee Rights Initiative, Discussion Paper No. 2, January 2012.

268 These include the Rassemblement Congolais pour la Démocratie (RCD) supported by allies in Kampala and Kigali; the Rassemblement Congolais pour la Démocratie-Mouvement de Liberation (RCD-ML); the Front de Nationalistes Intégrationnistes (FNI), the Forces de Resistance Patriotique de l’Ituri (FRPI), the Forces Démocratiques pour la Libération du Rwanda (FDLR) a Human Rights Watch, ‘Who is Bosco Ntaganda?’ <http://www.hrw.org/topic/international-justice/bosco-ntaganda> accessed October 7, 2013.

269 See AFP ‘DR Congo’s M23 rebels cannot be defeated militarily,’ Global Post Online, October 5, 2013 <http://www.globalpost.com/dispatch/news/afp/131005/dr-congos-m23-rebels-cannot-be-defeated-militarily> accessed October 7, 2013.

270 It is argued that the in ‘Article 17(1)(b), where the terms are more clearly sepa-rated (‘unwillingness or inability of the State genuinely to prosecute’ ....’ restricts the class of national proceedings that require deference from the ICC.’ ‘Informal expert paper: p. 8.

possible to construe how non-prosecutorial options are in accordance with the law.<sup>271</sup> He cites examples like (i) political actions (including amnesties) taken by the UNSC acting via an Article 16 request; (ii) prosecutorial discretion via an article 53 determination that the interests of justice will not be served, (iii) through a decision that complementarity has been satisfied via article 17 that an investigation was satisfactory.,<sup>272</sup> (iv) Where an ICC State party pardons a perpetrator and can still rely on the principle of *ne bis in idem* (double jeopardy) after a trial whose proceedings were not merely intended to avoid accountability.<sup>273</sup> The test of such non-prosecutorial intervention would then be that it is primarily focused on ‘addressing and resolving conflicts rather than shielding a perpetrator from criminal responsibility.’<sup>274</sup> Organisations like AI and HRW have continued to be sceptical about this view – arguing that the OTP would be making political judgements which would then open the court to potential manipulation.<sup>275</sup>

It can be argued that the criticism ignores the fact that the OTP already makes political decisions on which situation to investigate or whether national proceedings have been genuinely carried out by a State Party. Drumbl also argues that the ICC ‘was not established to overturn and contradict the decisions of democratic states where, for instance, victims may decide to set up credible non-prosecutorial processes, or, as in South Africa, pursue prosecutions only against those who do not receive amnesty.’<sup>276</sup> The AU has also cautioned about the ramifications of insisting on a purely legal approach to a

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271 These interventions were supported by some delegates during the deliberations on the Rome Statute. Archbishop Martino of the Holy See argued that while the ‘principle of *sum cuique*, (to each person his due), remained pertinent, the Court should be seen as way of finding reconciliation and not just as an avenue for seeking revenge.’<sup>271</sup> See Consideration of the question concerning the finalization and adoption of a convention on the establishment of an international criminal court in accordance with General Assembly resolutions 51/207 of 17 December 1996 and 52/160 of 15 December 1997 (A/CONF. 183/2/Add. 1 and Coir. 1) A/CONF.183/SR.3 Par. 8 p. 73 [http://untreaty.un.org/cod/icc/rome/proceedings/E/Rome%20Proceedings\\_v2\\_e.pdf](http://untreaty.un.org/cod/icc/rome/proceedings/E/Rome%20Proceedings_v2_e.pdf) accessed October 3, 2013. Martino’s comments suggest that at least some of the delegates at Rome looked to the Court to go beyond punishing perpetrators but also look for ways to address the root causes of conflict.<sup>271</sup>

272 Scharf also argues that since the wording in Article 17 refers to merely ‘an investigation’ but does not specify that it should be a criminal investigation, it should be possible for a state to argue that truth commissions like the one in South Africa constitute genuine investigation.’ See Scharf, M.P. ‘The Amnesty Exception to the jurisdiction of the International Criminal Court.’ (1999) 32 CILJ 507, 525. See also Bosire Lydia Kemunto, ‘Misconception I- The ICC and The Truth Justice and Reconciliation Commission’, <<http://africanarguments.org/2009/08/21/misconceptions-i-%E2%80%93-the-icc-and-the-truth-justice-and-reconciliation-commission-tjrc/>> accessed October 2, 2013.

273 Jose E Alvarez ‘ Alternatives to International Criminal Justice’ in Cassesse (ed) *The Oxford Companion to International Criminal Justice* (oup 2010) 37.

274 H. Abigail Moy, ‘The International Criminal Court’s Arrest Warrants and Uganda’s LRA: Renewing the Debate over Amnesty and Complimentarity.’ (2006) 19 HHrtsJ 267, 270; See also Anja Seibert-Fohr, ‘The Relevance of the Rome Statute of the International Criminal Court for Amnesties and Truth Commissions; (2003) 7 *Max Planck Yearbook of United Nations Law* 553., Darryl Robinson, ‘Serving the Interests of Justice: Amnesties, truth Commissions and the International Criminal Court’ (2003) 14 EJIL 481.

275 Bosire Lydia Kemunto, *supra*

276 Drumbl (2008) *ibid*.

complicated conflict.<sup>277</sup> To date, the AU has resolved not to cooperate with the Court which it accuses of failing to promote ‘justice and reconciliation and ... to the advancement of peace and stability.’<sup>278</sup> It can be argued that the aforementioned situation might have been avoided if a positive/proactive approach to complementarity had been adopted by the OTP.<sup>279</sup> This would mean that after a particular non-prosecutorial phase has been undertaken by a State, the ICC would only determine whether its intervention would serve the broader interests of victims and justice.<sup>280</sup>

#### 4.5 THE ICC AND THE JUBA PEACE PROCESS

In this section, we now analyse whether the ICC’s approach to settlement of post-conflict violence responds to the needs and goals of Uganda as expounded in the Juba Peace process. ICL, as represented by the ICC, takes a legal/literal interpretation of the Rome Statute. It should also be remembered that the theory behind ICL is one of legal centralism which does not view any other law as being in *pari passu* with it. Any other legal orders are often viewed as inferior unless there is a relationship between the international and the domestic

277 At its extraordinary meeting held in Ethiopia, the AU resolved that no sitting African head of State should appear before an international court. See ‘African Union urges ICC to defer Uhuru Kenyatta case’ BBC News Online, 12 October 2013 <<http://www.bbc.co.uk/news/world-africa-24506006>> accessed October 14, 2013. See also Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General pursuant to Pursuant to Security Council Resolution 1564 of 18 September 2004 <[http://www.un.org/News/dh/sudan/com\\_inq\\_darfur.pdf](http://www.un.org/News/dh/sudan/com_inq_darfur.pdf)> accessed October 3, 2013. See also Du Plessis 2008 at 130. Resolution 1593 stated that ‘the Government of Sudan and the other parties to the conflict are under an international obligation to ‘cooperate fully with and provide any necessary assistance to the Court and the Prosecutor.’ The USA, Algeria, Brazil and China all abstained in the vote on UN Doc. S/RES/1593 (2005), para. 2. See Robert Cryer, ‘Sudan, Resolution 1593 and International Criminal Justice’, (2006) 19 *Leiden Journal of International Law* 195.

278 See Fifteenth Ordinary Session of the AU, 25 – 27 July 2010 Kampala, Uganda Assembly/AU/Dec.296 (XV) <[http://www.au.int/en/sites/default/files/ASSEMBLY\\_EN\\_25\\_27\\_July\\_2010\\_BCP\\_ASSEMBLY\\_OF\\_THE\\_AFRICAN\\_UNION\\_Fifteenth\\_Ordinary\\_Session.pdf](http://www.au.int/en/sites/default/files/ASSEMBLY_EN_25_27_July_2010_BCP_ASSEMBLY_OF_THE_AFRICAN_UNION_Fifteenth_Ordinary_Session.pdf)> , accessed October 9, 2013); See also Sixteenth Ordinary Session of the AU, 30 – 31 January 2011, Addis Ababa, Ethiopia Assembly/AU/Dec.334 (XVI) <[http://www.au.int/en/sites/default/files/ASSEMBLY\\_EN\\_30\\_31\\_JANUARY\\_2011\\_AUC\\_ASSEMBLY\\_AFRICA.pdf](http://www.au.int/en/sites/default/files/ASSEMBLY_EN_30_31_JANUARY_2011_AUC_ASSEMBLY_AFRICA.pdf)> , accessed October 9, 2013. See also Nineteenth Ordinary Session of the AU, 15 – 16 July 2012 Addis Ababa, Ethiopia Assembly/AU/Dec.419 (XIX) <[http://www.au.int/en/sites/default/files/Assembly%20AU%20Dec%20416-449%20\(XIX\)%20E\\_Final.pdf](http://www.au.int/en/sites/default/files/Assembly%20AU%20Dec%20416-449%20(XIX)%20E_Final.pdf)>, accessed October 9, 2013. H.E. Dr. Tedros Adhanom Ghebreyesus Minister for Foreign Affairs of the Federal Democratic Republic of Ethiopia and Chairperson of the Executive Council of the African Union at The 15th Extraordinary Session of the Executive Council of the African Union, 11 October 2013, Addis Ababa., stated ‘In our continent, the Court has transformed itself into a political instrument targeting Africa and Africans.’ See <http://summits.au.int/en/speeches/remarks-he-dr-tedros-adhanom-ghebreyesus-minister-foreign-affairs-federal-democratic-republic-of-ethiopia> accessed October 13, 2013.

279 See W. W. Burke-White, ‘Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice’ (2008) 49 *Harvard International Law Journal* 54.

280 Stahn argues that Article 53 which deals with the initiation of a prosecution does not give the Prosecutor the scope to weigh interests of national reconciliation against interests of individual accountability. The outgoing Prosecutor himself has in his Policy Paper on the Interests of Justice stated that ‘the broader matter of international peace and security is not the responsibility of the Prosecutor; it falls within the mandate of other institutions.’ (September 2007) 8, <<http://www.icc-cpi.int/nr/rdonlyres/772c95c9-f54d-4321-bf09-73422bb23528/143640/iccotpinterestsofjustice.pdf>> accessed October 3, 2013. in Cryer et. al (2010) 159.

law normally through domestication of the international law.<sup>281</sup> This makes it extremely difficult for those other normative orderings to argue their place in an environment where they are not treated as 'equals'. As a result some international criminal lawyers do not consider non prosecutorial interventions as promoters of justice but rather, as promoters of impunity.<sup>282</sup> This means that ICL, through the ICC, focuses centrally on criminal prosecutions as the main way of dealing with post conflict violence. However, nuanced views now agree that both prosecutorial and non-prosecutorial interventions do contribute to the fight against impunity. For example, Sachs also states that '...it would be loading too much on the ICC to see it as the sole mechanism for delivering justice (in the full sense of the word).'<sup>283</sup> Clark also argues that 'international criminal justice and traditional justice are not alternatives but rather complementary forms of justice that should be concurrently pursued.'<sup>284</sup> Agenda Item III of the AAR takes a multi-pronged approach to post conflict sustainable transition. They include, but are not limited to, memorialisation, apologies, psychosocial support, truth telling, reconciliation, reparations, compensation, peace building, retribution, reintegration, truth and reconciliation, and the use of traditional justice mechanisms. Due to its unique mandate, the ICC is largely unable to address most of these needs because they are largely non prosecutorial in nature. These needs have been largely left unattended to by the Court because its emphasis is mainly to do with prosecuting only those who held the highest responsibility for the crimes committed.<sup>285</sup> Whereas the Court is not expected to undertake all these non-prosecutorial approaches because they are not part of its core mandate, acknowledging and sanctioning them as constitutive of the willingness and ability of the State to deal with conflict situations especially in the purposive lenses of interpretation is the least that is it could do.

To its credit however, the ICC has created a Trust Fund for Victims.<sup>286</sup> This Fund provides reparations as well as material support for the victims including the funding of

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281 See the ICC Act, No. 11 of 2010.

282 See generally writings of ( Allen T, 'Trial Justice: The International Criminal Court and the Lord's Resistance Army' African Arguments (2006)., Cassesse. A (ed) *The Rome Statute of the International Criminal Court: A Commentary* (New York, Oxford Press 2002).Mark A., Drumbl , 'Atrocity, Punishment and International Law, (CUP 2007)., Huyse & Salter, 'Traditional Justice and Reconciliation after Violent Conflict: Learning from African Experiences,' IDEA 2008., Tim Allen, 2008 at 47.

283 Justice A. Sachs, 'Foreword', in Waddell and Clark (eds) *Courting Conflict? Justice, Peace and the ICC in Africa* (London: Royal Africa Society, 2008) at 6.

284 See generally Janine Natalya Clark, 'Peace, Justice and the International Criminal Court: Limitations and Possibilities' *Journal of International Criminal Justice* 9 (2011), 521 -545.

285 The Rome Statute of the International Criminal Court, Adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 17 July 1998, UN Doc. A/CONF.183/9.

286 Trust Fund for Victims (the first of its kind) See Establishment of a Fund for the Benefit of Victims of Crimes Within the Jurisdiction of the Court, and of the Families of Such Victims, ASP/1/Res.6; Procedure for the Nomination and Election of Members of the Board of Directors of the Trust Fund for the Benefit of Victims, ASP/1/Res.7. The Court

reconstructive surgery for some victims.<sup>287</sup> The Court also has created a Victims' and Witnesses Unit as well as the Office of the Public Counsel for Victims. This is a first time that a court of this nature has made specific provisions for victims to be assisted in this way. It is fitting to say that the Court has been adaptable to unique demands of the current times and made requisite changes. The ICC has also been applauded by some for creating the environment which forced the LRA/M to return to the negotiating table with the GoU. While some argue that the interference of the ICC finally led to the failure, by LRA/M leader Joseph Kony to sign the comprehensive peace Agreement, it should be recalled that various agreements including the Agreement on Reconciliation and Accountability were signed, partly because of the insistence, by the ICC, on accountability for international crimes.<sup>288</sup>

The failure by the GoU to arrest and hand over the top leadership of the LRA/M to the Court (save for Ongwen who voluntarily surrendered probably due to the heightened manhunt of the joint UPDF/USA/CAR armies) has meant that the ICC has limitations when it comes to retributive justice. However, using a purposive interpretation of the principle of complementarity makes it possible to credit the ICC for using its soft power to cajole the GoU to pass the International Criminal Court Act as well as create the International Crimes Division of the Ugandan High Court. While these acts, by themselves, have not made any contribution to sustainable post conflict transition, they can be viewed as a step towards the right direction.

#### 4.6 CONCLUSION

This Chapter has analysed the role of the ICC in complementing the role of States as they address international crimes – namely; war crimes, crimes against humanity, genocide and the crime of aggression.<sup>289</sup> While States enjoy the *primary* obligation to fight international crimes, the Rome Statute has made provision for ways in which the ICC can intervene. This chapter has also revealed that the history of the principle of complementarity shows that the

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also has a Victims and Witnesses Unit and the Office of the Public Counsel for Victims. The phrase 'benefit of Victims' has been interpreted to consist of reparations and material support.

287 See Regulations of the Trust Fund for Victims, ASP/4/Res.3, Regulation 50 (a) (i). Similar views were expressed at the National War Victims' Conference 28-30 May 2014 organised by African Youth Initiative Network (AYINET) – Uganda <http://www.africanyouthinitiative.org/phone/national-war-victims-conference.html> accessed December 12, 2014.

288 See Preamble to the Agreement on Accountability and Reconciliation <[http://www.beyondjuba.org/BJP1/peace\\_agreements/Agreement\\_on\\_Accountability\\_And\\_Reconciliation.pdf](http://www.beyondjuba.org/BJP1/peace_agreements/Agreement_on_Accountability_And_Reconciliation.pdf)> accessed April 2012

289 Volker Nerlich ICC (Complementarity) in Cassesse (ed) *The Oxford Companion to International Criminal Justice*, (OUP 2009) 346.

drafters of the Rome Statute were keen to maintain state sovereignty. A purposive interpretation of the principle of complementarity would therefore enable the ICC to comfortably embrace as positive/proactive approach to complementarity. It would also enable it to have a holistic understanding of how other non-prosecutorial interventions (like the Juba Peace Agreement) are part and parcel of the State's willingness and ability to carry out national proceedings of situations under its jurisdiction. Finally the chapter has shown that ICL as represented by the ICC is unable to deal wholesomely with the various goals and needs of a post conflict settlement.

## CHAPTER FIVE: HOW THEORIES IN LEGAL PLURALISM ATTEMPT TO ADDRESS THE SHORTCOMINGS IN MAINSTREAM ICL

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### 5.0 INTRODUCTION

This chapter now explores how the legal pluralism interpretive framework<sup>1</sup> of Juba's Agenda Item III attempts to address to redress the shortcomings identified in the dominant interpretive framework of mainstream international criminal law. It argues that the legal pluralism interpretive framework recognizes that there is a plurality of norms operating in the same time and space as the ICL and that this should guide the way in which Juba's Agenda Item III is interpreted.<sup>2</sup> However, the chapter notes that Agenda Item III of Juba dealt with more than just identifying the plurality of legal regimes, which are capable of contributing towards post-conflict reconstruction in Northern Uganda. The Chapter scrutinizes how LP would interpret the TJMs provisions in the Juba Agenda Item III.

### 5.1 DEFINING LEGAL PLURALISM

Legal pluralism (hereinafter referred to as 'LP') 'refers to the situation where two or more laws interact.'<sup>3</sup> Melissaris defines it as 'that state of affairs, for any social field, in which behaviour pursuant to more than one legal order occurs.'<sup>4</sup> Benda-Beckmann, in the same vein, defines LP as a situation in which two or more legal systems coexist in the *same social field*.<sup>5</sup> In its traditional sense, LP was conceived as an 'interaction of neatly defined official and unofficial normative orders in one social field.'<sup>6</sup> It was aimed at recognising the different

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1 See 'Special Issue: Pluralizing Discourses of Law and Governance' [2006] 57 *NILQ* 577. See also E. Melissaris, 'The More the Merrier? A New Take on Legal Pluralism' [2004], 13, *SLS* 57 in Macdonald, R., & McMorrow, T. (2007). *Wedding a Critical Legal Pluralism to the Laws of Close Personal Adult Relationships*. *EJLS*, 1, 1 <<http://www.ejls.eu/1/15UK.pdf>> accessed on November 26, 2009.

2 Emmanuel Melissaris, 2004 supra. Griffiths writes that legal pluralism... [is] the presence in a social field of more than one legal order.' John Griffiths, (1986),1.

3 Hooker, MB *Legal Pluralism: An Introduction to Colonial and Neo-Colonial Laws*, Oxford: Clarendon Press (1975) 6.

4 Emmanuel Melissaris (2004 ) 60.

5 Von Benda-Beckmann F. 'Who is Afraid of Legal Pluralism?' *J. Legal Pluralism* (2002) (47) 37., Woodman GR 'Ideological Combat and Social Observation: Recent Debate About Legal Pluralism, (1998) 40 *J. Legal Pluralism* 21-60; Merry, 'Legal Pluralism', (1988) ( 22), (5) *Law & Soc. Rev.* 869-896.

6 Roderick A. Macdonald, 'Critical Legal Pluralism as a Construction of Normatively and the Emergence of Law', in A. Lajoie, et. al.(eds.) *Theories et emergence du droit: Pluralime surdetermination, effective*, (Montreal: Editions Themis, 1998) 12-13.

individual legal system in the subgroups of society.<sup>7</sup> These legal systems were also considered to be 'hierarchically ranked and essentially similar in rules and procedure.'<sup>8</sup>

This traditional description of LP was borrowed from sociologists and was only recently introduced to legal studies.<sup>9</sup> It was primarily used to refer to the incorporation or recognition of customary law norms or institutions within State Law.<sup>10</sup> It was also used to refer to the independent co-existence of indigenous norms and institutions alongside state law (whether or not officially recognised by the state).<sup>11</sup> Pospisil, also states that no society is without multiple legal levels. He notes that each society has got subgroups with their own legal systems.<sup>12</sup> Further still, the legal systems of these subgroups might be 'necessarily different in some respects from those of other subgroups.'<sup>13</sup> It is for this reason that it is important to recount how LP has developed.

## 5.2 CLASSIFICATION OF LEGAL PLURALISM

LP has been classified in terms of traditional or new; weak or strong; new and old; traditional and new among others. Merry distinguishes two phases of LP namely:<sup>14</sup> **traditional legal pluralism (TLP)** and **New LP**. TLP had two main aims; in the first place, it was concerned with the interplay of what it considers as 'Western' laws as contrasted

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7 A. P. Singh, 'Legal Pluralism : The Essence of India's Classical Legal ordering' in Christoph Eberhard & Nidhi Gupta (eds.), *Legal Pluralism in India*, Special Issue of the *Indian Socio-Legal Journal*, Vol. XXXI, 2005)95-106

8 Pospisil quoted in A. P. Singh, 'Legal Pluralism ... 2005 ibid.

9 This traditional concept of legal pluralism, developed in legal anthropology and sociology to analyse overlapping normative orders within societies, became popular in the 1970's and 1980's. See Richard Jones, 'The Internet, Legal Regulation and Legal Pluralism' paper presented at 13th Annual BILETA Conference: The Changing Jurisdiction Friday March 27th & Saturday March 28, 1998, Trinity College Dublin, <<http://www.bileta.ac.uk/98papers/jones.html>> accessed on November 26, 2009., McLennan, G. (1995) *Pluralism*, University of Minnesota Press, Minneapolis. See Michaels, Ralf, 'Global Legal Pluralism' Duke Law School Public Law & Legal Theory Research Paper No. 259 (2009) 5 Annual Review of Law & Social Science, <[http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2679&context=faculty\\_scholarship](http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2679&context=faculty_scholarship)> accessed on November 26, 2009.

10 See M.B.Hooker, *Legal Pluralism: An Introduction to Colonial and Neo-Colonial Laws* (Oxford: Clarendon Press 1979). in Tamanaha (2007)8., Hendrik Spruyt, *The Sovereign State and Its Competitors* (Princeton: PUP 1994) 191 in Tamanaha (2007)8., Martin Van Creveld, *The Rise and Decline of the State* (Cambridge University Press,1999) 68 cited in Tamanaha supra 26.

11 See Leopold Pospisil, *The Anthropology of Law: A Comparative Theory of Law* (New York: Harper and Row 1971). Legal pluralism has also been seen as both a social reality as well as a normative concept The latter having had its roots in the early twentieth century anthropology and anti-positivist legal philosophy (see Wilson 2007 for a good historical overview of the concept Wilson, R (2007), 'Tyrannosaurus Lex: The Anthropology of Human Rights and Transnational Law' in Merry, S, and Goodale, M (eds) *The Practice of Human Rights: Tracking Law between the Global and the Local*, (Cambridge University Press, year).

12 See Pospisil, supra 107 in Kevin Walby, 'Contributions To A Post-Sovereignist Understanding Of Law: Foucault, Law As Governance, And Legal Pluralism, (2007) 16(4) Social and Legal Studies 551, 560.

13 Ibid.

14 Sally Engle Merry, 'Legal Pluralism', (1988) 22 (5) Law & Society Review 872,874.

from ‘non-Western’ or indigenous laws in colonial and post-colonial settings.<sup>15</sup> The emphasis here was the identification of the sources and peculiarities of different legal orders operating in the same time and space.<sup>16</sup> This was mainly done by early anthropologists who sought to merely identify the different legal regimes that they discovered during their explorations of new lands. The second aspect of TLP was concerned with conceptually treating the non-western/ indigenous law as subordinate to the western/ official law of the state/ colonizing power.<sup>17</sup> It was also focused on identifying the specific yardsticks for defining its subjects and creating criteria for ‘normative trajectories between legal orders’.<sup>18</sup> This meant that law was viewed as ‘objective data that is to be apprehended and interpreted by experts’<sup>19</sup> before being transplanted into ‘other’ foreign settings like colonies. It was on this basis that most colonial laws were made and ‘transplanted’ from one colony to another. For example, the section 15(2) of the 1902 Order –in- Council contained a ‘reception’ clause, which empowered the Commissioner to apply any law of the United Kingdom (or any other protectorate/colony of the UK) in Uganda. It was on that basis that laws from India such as the Evidence Act, the Contract Act, Companies Act; Penal Code Act became applicable in Uganda as at the 11<sup>th</sup> day of August 1902. In the same vein, section 20(a) of the Order in Council contained a ‘repugnancy clause’ which only recognised those laws and customs in

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15 Griffith argues that colonialism brought two forms of LP – one is pluralism tolerated by the State and then pluralism ‘which escapes the control of (or unifying goals of) the state.’ It is this second form of pluralism that the state seeks either to eliminate or regulate ‘by prescribing certain practices or recognising certain manifestations’ of it. See Norbert Rouland, by Singh, ‘Legal Pluralism : The Essence of India’s Classical Legal ordering’ in Christoph Eberhard & Nidhi Gupta (eds.), *Legal Pluralism in India*, Special Issue of the *Indian Socio-Legal Journal*, Vol. XXXI, 148 p (95-106) . The regulation is done when the State seeks to classify ‘the core issues of LP’ in itself ‘either as delegations of state authority (or the passing of specific laws) or by less formal practices of recognition. See Carol J. Greenhouse, ‘Legal Pluralism and Cultural Difference: What is the Difference? A Response to Professor Woodman,’ *Journal of Legal Pluralism* 1998 No. 42 61 at 64 <<http://www.jlp.bham.ac.uk/volumes/42/greenhouse-art.pdf>> accessed March 2, 2013. The latter include, applying cultural reasoning to court decisions, seeking the opinion of elders in domestic cases, etcetera. See *Nemesio Ayiyya Pet Vs Sabina Onzia Ayiyya Divorce Petition No. 8 of 1973* on marriage under Lugbara Customary Law where the courts’ holding was to the effect that before all dowry is paid, a man and a woman cohabiting can be regarded as husband and wife but marriage is not valid until the all dowry is paid. (Per the late Justice Prof. Joseph MN Kakooza (as he was then) in *Mifumi (U) Ltd & 12 Others v Attorney General Constitutional Petition No.12 Of 2007* <<http://www.ulii.org/ug/judgment/constitutional-court/2010/2>> accessed March 3 2013. Singh also identifies the way the State tries to treat flexible rules of resolving disputes as binding. Singh, ‘Legal Pluralism : The Essence of India’s Classical Legal ordering’ in Christoph Eberhard & Nidhi Gupta (eds.), *Legal Pluralism in India*, Special Issue of the *Indian Socio-Legal Journal*, Vol. XXXI, 148 p (95-106)., See Martin Chanock, *Law, Custom and Social Order* (Cambridge Univeristy Press1985) 62 in Tamanaha at 15. The result is that some parts of the customary law became ‘inventions or selective interpretations by colonial powers or sophisticated indigenous elites to advance their own interests or agendas.’ Martin Francis Snyder, ‘Colonialism and Legal Form: The Creating of ‘Customary Law’ and Senegal,’ 19 *Journal of Legal Pluralism* 49 (1981); See also Chanock ‘The Law Market: The Legal Encounter in British East and Central Asia,’ in *European Expansion and Law*, supra in Tamanaha 16.

16 Kleinhans & Macdonald., (1997) 38.

17 There were still some who even doubted the existence of this indigenous / customary law. They alleged that it was ‘largely invented or re-invented by colonialists to entrench the positions of co-opted chiefs acting as agents at the local level. However, others challenged this position and instead argued that ‘relationship between ‘colonial’ and ‘indigenous’ law was dynamic and not static. See Moore SF. 1992.’ Treating law as knowledge: telling colonial officers what to say to Africans about running ‘their own’ native countries. *Law Soc. Rev.* 26 p. 11–46.

18 Ibid.

19 Ibid.

Uganda that were not ‘repugnant to justice and morality or inconsistent with any order-in-council or any regulation or rule made under any order-in-council or ordinance.’<sup>20</sup> Such ventures often resulted into a conflict of laws clashing for legitimacy and acceptance.<sup>21</sup> It is this clash of laws that can be equated to the battle for relevance between ICL and other normative orders in Uganda as they seek to intervene in addressing sustainable transition in post conflict Northern Uganda. The ICL can be viewed as the colonial laws that seek to dispense a form of justice whose form, purpose and procedures are largely different from the TJM paradigm that is proposed in the AAR.

The ‘*New*’ LP on the other hand was concerned with identifying plurality in all legal systems, be they western or non-western, state or non- state laws, or otherwise identified. *New* LP viewed LP as a global phenomenon.<sup>22</sup> This insurmountable plurality of laws was viewed as a global phenomenon. It was what Santos referred to as deep/external pluralism as opposed to internal LP as that administered by one legal order (which does not have to be the State).<sup>23</sup> Griffiths on the other hand, uses a different classification of ‘**weak**’ and ‘**strong**’ LP. Griffith’s classification coincides with Merry’s two stages of pluralism.<sup>24</sup> Griffiths considers *weak* LP to be based on the fact that non-state law, though hierarchically superior, still depends on the recognition by the state. Strong LP on the other hand is about the ‘state of affairs, for any social field, in which the behaviour pursuant to more than one legal order occurs.’<sup>25</sup> Griffiths conceives of this strong pluralism as being evidenced in ‘an irreducible set of legal orders that can be partly in harmony, partly in contact with each other.’<sup>26</sup> Griffiths also conceptualises these ‘stronger versions’ of LP in both colonial lands (between the colonial law and the indigenous laws) as well as in the plurality of laws

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20 See Section 20 of the 1902 Order –In-Council . See also Section 8 of the Buganda Agreement provided that all cases, where natives and non natives were involved, the British Courts of Justice only would apply. <<http://www.buganda.com/buga1900.htm>> accessed 8 April 2011.

21 This TLP was therefore concerned about ‘a hypothesized plurality of empirically discoverable normative orders and is transfixed upon assessing their status as legal or non legal objects of inquiry.’ See Moore SF ‘Treating law as knowledge: telling colonial officers what to say to Africans about running ‘their own’ native countries. (1992) 26 Law Society Review 11, 46.

22 Sally Engle Merry, ‘Legal Pluralism’, (1988), (22) 5 *Law & Society Review*, 869, 873 in Ralf Michaels, ‘Global Legal Pluralism’ ( 5) Annual Review of Law and Social Science 5 <<http://ssrn.com/abstract=1430395>> accessed February 22, 2013. See also Kevin Walby, ‘Contributions To A Post-Sovereignist Understanding Of Law: Foucault, Law As Governance, And Legal Pluralism’, *Social and Legal Studies* (2007) 16(4), 551-571, 560., See also Woodman GR 2007. Social and Religious Diversity, Legal Pluralism: Can State Law Survive? IIUM Law J. 15: 154-70

23 Boaventura de Sousa ‘*Toward a New Legal Common Sense: Law, Globalization and Emancipation* (Cambridge University Press, 2002) 95.

24 Sally Engle Merry, id.872,874.

25 Griffiths, John (1986) ‘What is Legal Pluralism?’ *Journal of Legal Pluralism* 24: 2 in Kevin Walby, ‘Contributions To A Post-Sovereignist Understanding Of Law: Foucault, Law As Governance, And Legal Pluralism’, *Social and Legal Studies* 2007 Vol 16(4), 551-571 at 560.

26 Ralf Michaels, ‘Global Legal Pluralism’ Annual Review of Law and Social Science Volume 5 <http://www.annualreviews.org> <http://ssrn.com/abstract=1430395> accessed Feb 22, 2013 at p.5

evidenced in advanced capitalist societies. It can be argued that it is this deep/external/strong pluralism that best interprets the TJMs provisions in Juba's Agenda Item III as shall be analysed in the next Chapter.

A review of the literature on TLP reveals two important threads;

1. That Legal centralism is an error (Law includes but is not limited to state law);<sup>27</sup>
2. That state law in itself is plural.

### 5.2.1 The Error of Legal Centralism

Whereas the dominant approach to law has been through legal centralism,<sup>28</sup> which views the law of the state as the only legitimate legal order, legal pluralists generally agree that the law is not limited to the law of the State. For the legal centralist, law is viewed in a way which is 'abstracted from the social context in which it exists – and (it) is spoken of as if it were an entity capable of controlling that context.'<sup>29</sup> Habermas viewed the law as an *autopoietic* system, which is separate from (and unable to perceive or deal with) the problems that burden society as a whole.<sup>30</sup> The result is a law that is no longer community-based, but rather, one which has weak social embeddedness.<sup>31</sup> For example, in Uganda, laws prohibiting female genital mutilation, monogamy, witchcraft, wife inheritance, bride wealth,

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27 Ralf Michaels, 'Global Legal Pluralism' Annual Review of Law and Social Science Volume 5 [http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2679&context=faculty\\_scholarship](http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2679&context=faculty_scholarship) accessed September 13, 2013 at 14.

28 While legal pluralism relates to equitable treatment, legal monism correlates with identical treatment. See Dr. A. P. Singh, 'Legal Pluralism : The Essence of India's Classical Legal ordering' in Christoph Eberhard & Nidhi Gupta (eds.), *Legal Pluralism in India*, Special Issue of the *Indian Socio-Legal Journal*, Vol. XXXI, 148 p (95-106) in Christoph Eberhard & Nidhi Gupta (eds.), James Tully and Alain G-Gagnon (eds.) *Multinational Democracies* (Cambridge: Cambridge University Press 2001), p. 329. See also Alemayehu 2004 at 6.

29 Griffiths, (n.25)3.

30 Habermas, Jürgen *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (William Rehg, trans.). (The MIT Press.1998) in Kevin Walby, 'Contributions To A Post-Sovereignist Understanding Of Law: Foucault, Law As Governance, And Legal Pluralism,' *Social and Legal Studies* 2007 Vol 16(4), 551-571 at 56.

The original definition of the word autopoiesis (which means auto-production was coined by Maturana and Varela to denote that living beings are seen as systems that produce themselves in a ceaseless way. It can be said that an autopoietic system is at the same time the producer and the product. See H.R. Maturana , F.J. Varela 'Autopoiesis and Cognition: The Realization of the Living' (Boston Studies in the Philosophy of Science, Vol. 42) D. Reidel Publishing Company (1980) p. 78. See also Mariotti, Humberto 'Autopoiesis, Culture and Society' <<http://www.oikos.org/mariotti.htm>> accessed September 12, 2013. The state is sometimes viewed as a monolithic entity sharply distinct from society (Gilissen 1971, Woodman 1998, p. 23; Moore 2001, p. 107; Griffiths 2002, pp. 296-97).

31 For authors who have focused on how local communities have invoked and creation of global law, See (von Benda-Beckmann K. 2001. Transnational dimensions of legal pluralism. In *Begegnung und Konflikt--eine kulturanthropologische Bestandsaufnahme*, edn. W Fikentscher, pp. 33-49. Munich: Verlag der Bayerischen Akademie der Wissenschaften & CH Beck; See also Gessner V. 2002. Rechtspluralismus und soziale Bewegungen. *Z. Rechtssoziologie* 20:277-305 in Michaels *ibid*, 17). See also Teubner G. 1992 The Two Faces of Janus: Rethinking Legal Pluralism. *Cardozo Law Review* 5: 1443-62 in Ralf Michaels, 'Global Legal Pluralism' ( ) *Annual Review of Law and Social Science* 5 <<http://ssrn.com/abstract=1430395>> accessed February 22, 2013.

among others, have had lacklustre support from the targeted communities.<sup>32</sup> Teubner supports this autopoietic view of the law<sup>33</sup> when he writes about global LP. He argues that law making is actually conducted by transnational actors and is no longer the preserve of the State.<sup>34</sup> He also envisages an expansion towards numerous autonomous global functional subsystems of world society, with which different legal orders are coupled.<sup>35</sup> Teubner's views are reflected in how the International Criminal Court Act 2010 was passed by the Parliament of Uganda. In so doing, the members of Parliament hardly carried out any systematic country wide consultations with the people of Uganda. It has been argued that this ICC Act was actually passed under international pressure as a condition for Uganda to host the Kampala Review Conference of the ICC.<sup>36</sup>

Legal centralists have also criticised the way the word 'law' is used to refer to non state law.<sup>37</sup> They see no meaning in merging what they consider to be legal with the non-legal.<sup>38</sup> It is important to the legal centralist that a distinction is made between 'the formal state law, which is drafted and enacted by state apparatus and backed by enforcement powers in the military and criminal justice system' on the one hand, and the 'norms such as social

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32 Human rights studies have concerned themselves with looking at the vernacularization, creation, and invocation of these rights. See Merry SE. 'Human rights and global legal pluralism: reciprocity and disjuncture' In *'Mobile People, Mobile Law. Expanding Legal Relations in a Contracting World,* (F von Benda-Beckmann, K von Benda-Beckmann, A Griffiths, eds.) Aldershot: Ashgate.2005 pp. 215–32. See also Merry SE. *'Human Rights and Gender Violence: Translating International Law into Local Justice.* 2006. Chicago/London: Chicago Univ. Press., See also Goodale M, Merry SE, eds. *The Practice of Human Rights.* Cambridge, 2007. UK/New York: Cambridge Univ. Press., See also Sarfaty GA. 'International norm diffusion in the Pimicikamak Cree nation: a model of legal mediation. 2007. *Harvard J. Int. Law* 48 at 441–82; See also Szablowaski D. *Transnational Law and Local Struggles: Mining, Communities and the World Bank.* 2007.Oxford/Portland, OR: Hart

33 Teubner G. 1996. Global Bukovina: Legal Pluralism in the World Society. In *Global Law Without a State*, edn. G. Teubner, Aldershot. Ashgate. pp. 3-17 in Ralf Michaels, 'Global Legal Pluralism' Annual Review of Law and Social Science Volume 5 [www.annualreviews.org](http://www.annualreviews.org) see <http://ssrn.com/abstract=1430395> accessed February 22, 2013 at p. 5.

34 Kevin Walby, 'Contributions To A Post-Sovereignist Understanding Of Law: Foucault, Law As Governance, And Legal Pluralism,' *Social and Legal Studies* 2007 Vol 16(4), 551-571 at 562. Evidence of this is seen by the way organisations like the International Committee of the Red Cross have successfully campaigned for the passing of international humanitarian laws like the Geneva Treaties.

35 Teubner G. 2004 Global Private Regimes: Neo-Spontaneous Law and Dual Constitution of Autonomous Sectors in World Society? In *Globalization and Public Governance*, edn. KH Lauder, pp. 71-887. Aldershot: Ashgate in Ralf Michaels, 'Global Legal Pluralism' Annual Review of Law and Social Science Volume 5 [www.annualreviews.org](http://www.annualreviews.org) see <http://ssrn.com/abstract=1430395> accessed February 22, 2013 at p. 5.

36 See C. Murungu & J. Biegon, 'Prosecuting International Crimes in Africa,' PULP, 206 (2011) at 216.

37 Merry argued that referring to non state law as law 'confounds the analysis (of law):' See Merry SE. 1988. Legal Pluralism. *Law Soc. Rev.* 22:869–96 in Ralf Michaels, 'Global Legal Pluralism' Annual Review of Law and Social Science Volume 5 [http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2679&context=faculty\\_scholarship](http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2679&context=faculty_scholarship) accessed September 13, 2013

38 See Merry argued that referring to non state law as law 'confounds the analysis (of law):' See Merry SE. 'Legal pluralism' 1988 *Law Soc. Rev.* 22 at 869–96 in Ralf Michaels, 'Global Legal Pluralism' Annual Review of Law and Social Science Volume 5 [http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2679&context=faculty\\_scholarship](http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2679&context=faculty_scholarship) accessed September 13, 2013

See also Tim Allen and Anna MacDonald, 'Post Conflict Traditional Justice: A Critical Review Justice and Security Research Program, 2013 Justice and Security Research Programme Paper 3, London [http://www.lse.ac.uk/internationalDevelopment/research/JSRP/downloads/JSRP3.Allen\\_Macdonald.pdf](http://www.lse.ac.uk/internationalDevelopment/research/JSRP/downloads/JSRP3.Allen_Macdonald.pdf) accessed October 9, 2013.

etiquette' on the other.<sup>39</sup> The legal centralist views the bid to call the latter 'law' as making the 'law' lose its 'analytical (and possibly also its normative) force.'<sup>40</sup> Malinowski disagrees with this view and supports the idea of raising the status of 'non-codified social rules' as 'law'.<sup>41</sup> He considers social norms in non-state societies as performing the 'same regulatory function as legal norms.'<sup>42</sup> Additionally, legal pluralists disagree that the law is limited to official state legal institutions. They consider law to be a 'non-taxonomic conception or continuous variable.'<sup>43</sup> Although it is admitted that the autopoietic view of the law is helpful in pointing to law beyond the state, such a view risks 'overstating the internal coherence of the law as well as the external autonomy of the transnational legal orders depicted.'<sup>44</sup> This is because 'plurality of laws exists everywhere'<sup>45</sup> since there are 'different rules for different situations.'<sup>46</sup>

Vincent has criticised the essentialist view of the effect of State law arguing that legal institutions and 'their whole panoply of courts and law enforcement agencies,' have a sporadic effect on society – 'greater at some time, (and) less at others.'<sup>47</sup> To this end, Griffiths<sup>48</sup> has even suggested that using the words 'law' and 'LP' should be abandoned

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39 Ibid.

40 Koskenniemi M. 2005. Global legal pluralism: multiple regimes and multiple modes of thought. pp. 16–17 Harvard, 5 March 2005 [http://www.helsinki.fi/eci/Publications/Koskenniemi/MKPluralism-Harvard-05d\[1\].pdf](http://www.helsinki.fi/eci/Publications/Koskenniemi/MKPluralism-Harvard-05d[1].pdf) accessed September 13, 2013.; Ralf Michaels, 'Global Legal Pluralism' Annual Review of Law and Social Science Volume 5 [http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2679&context=faculty\\_scholarship](http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2679&context=faculty_scholarship) accessed September 13, 2013, pp. 1250–59; See also Teubner, Gunther and Korth, Peter, 'Two Kinds of Legal Pluralism: Collision of Transnational Regimes in the Double Fragmentation of World Society (June 8, 2009). In 'Regime Interaction In International Law: Facing Fragmentation' (Margaret Young, edn.), Oxford University Press, 2010. SSRN: <http://ssrn.com/abstract=1416041> accessed September 13, 2013

41 Wilson, R, 'Tyrannosaurus Lex: The Anthropology of Human Rights and Transnational Law' in Merry, S, and Goodale, M (eds) *The Practice of Human Rights: Tracking Law between the Global and the Local*, (Cambridge University Press, 2007) 346.

42 Ibid.

43 Woodman sees legal pluralism as a non-taxonomic conception, a continuous variable, just as, (according to Griffiths' well-founded and helpful observation), 'law' is.' See John Griffiths 1986, in Woodman 1998 at 54

44 See Teubner, Gunther (1998) *Autopoietic Law: A New Approach to Law and Society*. New York: Walter de Gruyter. For a critique law as an autopoietic self-structuring closed circuit, see Cotterrell, Roger (1995) *Law's Community: Legal Theory in Sociological Perspective*. New York: Clarendon Press in Ralf Michaels, 'Global Legal Pluralism' Annual Review of Law and Social Science Volume 5 [www.annualreviews.org](http://www.annualreviews.org) see <http://ssrn.com/abstract=1430395> accessed February 22, 2013 at p. 5

45 See Geertz 1983 at 225. This is what has been referred to as 'informal' legal pluralism, or what Woodman calls 'deep legal pluralism.' See Gordon R. Woodman, 'Legal Pluralism and Search for Justice,' 40 *Journal of African Law* (1996) p. 44

46 Gordon R. Woodman, 1996 *ibid*.

47 Joan Vincent; Trading Places: Recognising and recreating legal pluralism in colonial Uganda, *Journal of Legal Pluralism* No. 33 1993 at 147 Describes societies in which multiple means of redress or retribution exist, either outside formal legal procedures or in the overlapping sets of legal jurisdictions. Legal pluralism is often the norm in colonial and postcolonial societies. The countervailing tendency is *legal centralism*. <<http://social.jrank.org/pages/2319/legal-pluralism.html#ixzz0iAnE1ZSZ>> accessed March 2, 2013

48 See Griffiths J. 2005. The idea of sociology of law and its relation to law and to sociology. *Curr. Legal Issues* 8:49, pp. 63–64) in Ralf Michaels, 'Global Legal Pluralism' 5 (12) Annual Review of Law and Social Science <[http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2679&context=faculty\\_scholarship](http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2679&context=faculty_scholarship)> accessed 13 September 2013.

because of the tendency to show disparities between what law is and what other normative systems are.<sup>49</sup> His suggestion is premised on the fact that the focus is on definitional matters and looking for universal concepts instead of focusing on specific analysis. Michaels agrees by arguing that it is better to ‘focus on what people treat as law instead of trying to have an analytical definition of law in an abstract way.’<sup>50</sup> Kleinhans and MacDonald also argue that the individual citizen subject should be recognised as part of those who generate normatively (create law) and not merely as an innocent bystander who simply abides by the law so created.<sup>51</sup> The individual citizen subject does ‘possess a transformative capacity that enables them to produce legal knowledge and to fashion the very structures of law that contribute to constituting their legal subjectivity.’<sup>52</sup> In other words, the citizen-subjects are not merely ‘law abiding’ but also ‘law creating.’<sup>53</sup> Kleinhans and MacDonald further argue that legal centralists erroneously ignore the crucial role which legal subjects play in the creation and contestation of the law, when they extract the law from its social context.<sup>54</sup> This is a very crucial point to this research which seeks to highlight the agency of ordinary individuals - whether individually or as a group - in the way the law is framed, contested and obeyed. Nevertheless, this crucial role of the citizen subject cannot be exercised in a vacuum but with the competing interests of religion, tribe, gender, which also have a huge bearing on the outcome of this justice model.

### **5.3.2 The Inherent Plurality of the State Law**

Whereas TLP acknowledges the ‘predominant power of the state in order to transcend it or resist it,’<sup>55</sup> it disagrees with the notion that state law is ‘a single monolithic united set of rules flowing from the State’s hierarchy.’<sup>56</sup> Woodman argues that contrary to what the legal centralists might presume, ‘even law, in the strictest sense of the term, is a *dynamic order in its own right*, also improvising, selecting, appropriating, denying, and contesting normative

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49 Michaels, *ibid.*

50 Michaels, *ibid.*

51 Kleinhans and MacDonald 38.

52 *Ibid.*

53 See Santos, ‘*Three Metaphors ...supra.*

54 Kleinhans and MacDonald 1997 at 38.

55 Kleinhans and MacDonald 1997 at 39.

56 Since the 1930’s, pluralists have acknowledged that the State or official Law itself is plural. See Jones 1998 at 1., Tsuk Mitchell D. 2007. *Architect of Justice: Felix S. Cohen and the Founding of American Legal Pluralism.* Ithaca, NY: Cornell Univ. Press pp. 55–58, 75–77).

ideas from a host of sources.<sup>57</sup> For Woodman, there are no distinctions between plural or unitary legal situations.<sup>58</sup> Japanese jurist Chiba is also critical of the way centralists view as ethnocentric and monistic.<sup>59</sup> He argues that State cannot control the whole of the law because the 'cultural and social aspects of legal principles cannot be controlled.'<sup>60</sup> In Chiba's view 'cultural practices continue to evolve and develop separate from the state.'<sup>61</sup> He further states that 'the totality of the law is plural, consisting of different systems of laws interacting with one another harmoniously as well as creating conflict.'<sup>62</sup> Chiba's views are critical for an in-depth understanding of the way TJMs function. It is crucial that all the various normative orders that can make a contribution to a sustainable transition be acknowledged and allowed to operate.

Linden<sup>63</sup> also acknowledges that there are instances of LP within state law.<sup>64</sup> This state of affairs is what Andre Hoekema refers to as 'formal pluralism – 'a legal concept referring to the inclusion within the legal order of a principle of recognizing 'other' law.'<sup>65</sup> Woodman calls such a scenario 'state LP'<sup>66</sup>; this might be in a situation like in the case of a multinational federal set-up like in Nigeria or Ethiopia, or it might be like in the context of a constitutional decentralization of legislative and adjudicatory authority (like in Uganda), which allows both state and non-state actors to carry out their traditional functions of legislation and adjudication with respect to certain matters be they civil or criminal.<sup>67</sup> This kind of pluralism is necessary where the formal legal system fails to penetrate the country's

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57 Greenhouse also quotes Assier-Andrieu as saying 'in order to exist, the law must constantly reinvent itself' Assier-Andrieu 1987 at 228. (Greenhouse 1998 at 61) (J, 1998). Merry(1988 at 1992)

58 See Griffiths, J (1986) 'What is Legal Pluralism?', *Journal of Legal Pluralism and Unofficial Law*, pp. 1-56.

59 Chiba, M edn. (1986) *Asian Indigenous Law: An Interaction with Received Law*, KPI: London and New York. P. 6 See also Diamond, S (1973) 'The Rule of Law Versus the Order of Customs', in Varga, C ed, *Comparative Legal Cultures*, New York University Press: New York, pp. 193-223., See also Chiba, M. (1998) 'Other Phases of Legal Pluralism in the Contemporary World', *Ratio Juris* 11: at 228-45 in Emmanuel Melissaris., 'The More the Merrier? A New Take on Legal Pluralism' *Social Legal Studies* 2004; (13)(1) <<http://sls.sagepub.com/content/13/1/57.full.pdf+html>> accessed September 16, 2013.

60 *ibid.*

61 *ibid.*

62 Chiba, M edn. (1986) *Asian Indigenous Law: An Interaction with Received Law*, KPI: London and New York. P. 6 See also Diamond, S (1973) 'The Rule of Law Versus the Order of Customs', in Varga, C ed, *Comparative Legal Cultures*, New York University Press: New York, pp. 193-223.

See also Chiba, M. (1998) 'Other Phases of Legal Pluralism in the Contemporary World', *Ratio Juris* 11: at 228-45 in Emmanuel Melissaris., 'The More the Merrier? A New Take on Legal Pluralism' *Social Legal Studies* 2004; (13)(1) <<http://sls.sagepub.com/content/13/1/57.full.pdf+html>> accessed September 16, 2013.

63 Vander linden 1971 at 19.

64 *Ibid.* See also Griffiths 1986 at 12.

65 Donovan, *supra* 542.

66 Gordon R. Woodman, 'Legal Pluralism and Search for Justice,' 40 *Journal of African Law* (1996) p. 44

67 Alemayehu Fentaw *Legal Pluralism: Its Promises and Pitfalls for Ethiopia* Jimma University Journal of Law Vol.1 No. 1 Vol. 1 No. 1

indigenous legal cultures.<sup>68</sup> As a result, embracing LP is a way of ‘improving the effectiveness of the formal legal system’ by ‘adopting a flexible system of legislative federalism.’<sup>69</sup> In the same vein, Pospisil, while maintaining that the State law is the only legitimate order, has justified its plurality by arguing that the law should be ‘analysed as an autonomous logically consistent legal system in which *various rules are derived* from more abstract norms.’<sup>70</sup> Pospisil goes on to note that the ‘individual norms gain validity from their logical relationship to the more abstract legal principles implied ultimately in the sovereign’s will or in a basic norm.’<sup>71</sup> This means that there are a lot of internal contradictions within the erstwhile ‘consistent’ legal system which makes this State or official law.<sup>72</sup> The evidence of this plurality can be identified in the way in which the State identifies different sources of its law, be it formal or informal. The formal sources are often those that are codified either through enactments-*loi etatique*, treaties, statutes, judicial practice or constitutions, while the informal sources are usually what are classified as unwritten codes, trade usages, customs and other norms. In a further show of plurality, this classification subjugates some sources of law under others. Gurvitch sees no need to classify or *hierarchise*<sup>73</sup> sources of law since history has shown that there is ‘no scientific validity’ to do so and this ‘could only be (explained as) pure dogmatism.’<sup>74</sup>

The concern of early legal pluralists was geographically limited to the interplay of what was considered ‘western’ and ‘non-western’ laws in colonial and post-colonial settings.<sup>75</sup> On the

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68 Alemayehu 2004 at 1.

69 ‘[t]he federal constitution is the first legislative recognition of legal federalism. ‘Even more flexibility to allow for local variations in the law, is required when a federal government embraces, the principle of the preservation of its multiple customary law systems.’ Dolores A. Donovan et al, ‘Homicide in Ethiopia: Human Rights, Federalism and Legal Pluralism,’ (2003)51 AJCL 510.

70 As quoted in Norbert Rouland, (1994) See also Snyder 1996: 138; Griffiths 1986: 16-18; Rouland 1994: 53 in Mark Ryan Goodale ‘Leopold Pospisil: A Critical Reappraisal’ <<http://www.jlp.bham.ac.uk/volumes/40/goodale-art.pdf>> accessed March 3, 2013.

71 ‘A reference to legal pluralism in contrast to law is thus an acknowledgement (in theory) of multiple modalities of order both ‘inside’ and ‘outside’ of official law.’ Mark Ryan Goodale ‘Leopold Pospisil: A Critical Reappraisal’ <<http://www.jlp.bham.ac.uk/volumes/40/goodale-art.pdf>> accessed March 3, 2013.

72 Carol J. Greenhouse, ‘Legal Pluralism and Cultural Difference: What is the Difference? A Response to Professor Woodman,’ <<http://www.jlp.bham.ac.uk/volumes/42/greenhouse-art.pdf>> accessed March 2, 2013.

73 Merry, Sally Engle, ‘Anthropology, Law and Transnational Processes’, (1992) 21 *Annual Review of Anthropology* 357-379: ‘These normative orders are characterised as ‘mutually constitutive’ and hierarchised according to shifting power inequalities.’

74 Gurvitch objects to the way in which formal sources of law are limited to specific types and argues that they should instead be seen as secondary sources.’ For him, the ‘primary or material’ (sources of law) should be the normative facts which are sufficient as of themselves to confer both ‘authority and effectiveness’ on the hitherto ‘formal’ sources of law. See Woodman 1998 at 28

75 Michaels argues that ‘If legal pluralism has traditionally been defined as the coexistence of several legal orders within one social field, that social field was usually geographically confined. Traditional studies of legal pluralism, whether in the colonial or postcolonial context or in Western countries, were interested in the local instances, whether in Bukowina, among the Cheyenne, or in American courthouses. See Michaels 2005 at 16. See also Sally Engle Merry, *ibid.*; See also Emmanuel Melissaris ‘The More the Merrier? A New Take on Legal Pluralism’ *Social Legal Studies*

one hand, these pluralists upheld the notion that the state or official laws are monolithic and dominant in any society.<sup>76</sup> On the other hand, they purposed to ‘identify real sites of law (in which) legal regimes are assumed to possess a positivity that is grounded’ in ‘semi-autonomous social fields.’<sup>77</sup> In essence, they purposed to see establish a monism within each social field that they identified and to ensure that each legal order had a specific field in which it could claim supremacy.<sup>78</sup> In essence, the early pluralists sought to define law in the same way that the state views its own law - as superior to other ‘normative orders.’<sup>79</sup> The early pluralists treated non-western/indigenous/non- state law as subordinate to the official law of the State.<sup>80</sup> Similarly, some proponents of ICL view other normative orders like TJMs as subordinate or incapable of making any legitimate response after violent conflict. However, others argue that ‘the achievements of the international criminal courts demonstrate that they were necessary and that, despite all manner of adversity, they, as well as restorative justice practices, can both contribute to peace and reconciliation.’<sup>81</sup>

Nevertheless, in strictly imagining legal orders as being ‘hermeneutically closed’ when they clash with State Law, these pluralists err.<sup>82</sup> This is because ‘complex societies consist of multiple, intersecting social bodies capable of generating and enforcing norms.’<sup>83</sup> The early pluralists did not envisage that there exists plurality in both the western as well as non-

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2004 Vol (13) (1) at 58. See also Berman PS. 2007b. Global legal pluralism. *South. Calif. Law Rev.* 80 page 155–237 in Michaels 2005 *ibid.*.

76 See Barry Hooker’s *Legal Pluralism* (1975) <<http://www.jlp.bham.ac.uk/volumes/42/woodman-art.htm>>. See also John Gilissen edited a volume of essays published under the title *Le pluralisme juridique* in 1971. See also Singh, ‘Legal Pluralism : The Essence of India’s Classical Legal ordering’ in Christoph Eberhard & Nidhi Gupta (eds.), *Legal Pluralism in India*, Special Issue of the *Indian Socio-Legal Journal*, Vol. XXXI, 148 p (95-106).

77 This field might be ‘religious, social, ethnic, virtual etc. An example of this desire to have exclusivity of jurisdiction was seen in post-apartheid South Africa where the Ministry of Justice sought to submerge the imbizo (neighbourhood courts). Wilson, Richard A. (2001) *The Politics of Truth and Reconciliation in South Africa: Legitimizing the Post-Apartheid State*. (Cambridge University Press 2001). See also Kleinhans and Macdonald 1997, 39.

78 See M. King, ‘The Truth About Autopoiesis’ (1993) 20 *Journal of Law and Society* 218 in Kleinhans and Macdonald ‘What is Critical Legal Pluralism?’ (1997) 12 *Can. LL & Soc.* 25 at 39

79 Michaels argues that pluralists define law as social control, which is a ‘definitional concept (...) borrowed from the state.’ See Strathern M. 1985. Discovering social control. *J. Law Soc.* 12:111–34 in Ralf Michaels, ‘Global Legal Pluralism’ Annual Review of Law and Social Science Volume 5 [http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2679&context=faculty\\_scholarship](http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2679&context=faculty_scholarship) accessed September 13, 2013 at p. 12-13. See also Tamanaha BZ. 1993. The folly of the social scientific concept of legal pluralism. *J. Law Soc.* 20 p 192–217 at p. 201.

80 In so doing, traditional pluralists inadvertently reduced legal pluralism discourse to ‘either a legal theory that views the law from well within a legal system or just a sociological, external recording of legal phenomena.’ See Sally Engle Merry, *ibid.*

81 See Julija Bogoeva ‘Prosecuting War Criminals as the Basis for Reconciliation Policy,’ FICHL Policy Brief Series No. 42 (2015).

82 Emmanuel Melissaris 2004, 60; Michaels 2005, 18.

83 Greenhouse 1998 at 64. See also Gilissen *Le Pluralisme juridique* 23. See Woodman Gordon R. Ideological Combat and Social Observation: Recent Debate about Legal Pluralism *Journal of Legal Pluralism* 1998 No. 42 at 23. See generally S.C. McGuire, ‘Critical Legal Pluralism: A Thought –piece on a Direction for Socio-Legal Studies’ [Doctoral dissertation, Faculty of Law, McGill University, 1996] in Kleinhans and Macdonald ‘What is Critical Legal Pluralism?’ (1997) 12 *Can. LL & Soc.* 25 at 39 .

western legal systems.<sup>84</sup> They ignored the fact that normative orders are neither neatly defined nor are they monolithic.<sup>85</sup> Rather, these normative orders are ‘concurrent and diverse.’<sup>86</sup> This is based on the idea in sociology that no society is completely homogenous.<sup>87</sup> Early LP therefore erred in trying to identify real sites of these ‘other’ laws using a model of state/official law which requires these other laws to define their own field and claim supremacy to it. They ignored the fact that these laws are complementary, non-hierarchical and in some cases they interact with divergent results.<sup>88</sup> More importantly they ignored the important role played by legal subjects who are not merely ‘law abiding’ but are also ‘law inventing.’<sup>89</sup>

As noted in Chapter 3, the official/State law regime has actually been developed over time by a mixture of various foreign and local legal concepts.<sup>90</sup> Modern pluralists now recognize the on-going co-existence of two or more legal orders in a long time and space context.<sup>91</sup> The plurality of these official laws is evident in both *form* and *practice*. To Merry, this is similar to the way in which the English language is taking its own ‘vernacularised’ forms in Africa, India and the USA, so has western law.<sup>92</sup> She recognises that as local dialects are derived from the colonizers, so do local manifestations of legality get shaped by imperial legacy.<sup>93</sup> Similarly in Uganda, when the 1900 Buganda Agreement introduced the measurement of land in terms of miles, a new form of ‘*mailo*’ tenure of land ownership (derived from the English world ‘mile’) was formed to replace the freehold system of land ownership in mainly the Kingdom of Buganda and its environs.<sup>94</sup> It can be argued that

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84 Emmanuel Melissaris ‘The More the Merrier? A New Take on Legal Pluralism’ *Social Legal Studies* 2004 (Vol.13)(1) at 57

85 *ibid.*

86 Emmanuel Melissaris (n) 60; Michaels (n) 18

87 See Dr. A. P. Singh, ‘Legal Pluralism : The Essence of India’s Classical Legal ordering’ in Christoph Eberhard & Nidhi Gupta (eds.), *Legal Pluralism in India*, Special Issue of the *Indian Socio-Legal Journal*, Vol. XXXI, 148 p (95-106).

88 M. King, ‘The Truth About Autopoiesis’(1993) 20 *Journal of Law and Society* 218 in Kleinhans & Macdonald 1997 at 39

89 See B.de Sousa Santos, (1995) 573.

90 Adelman Sammy, ‘Review of Fitzpatrick P ‘The Mythology of Modern Law (London and New York: Routledge), 1992, in 59 *Review of African Political Economy* (1994) 137-142 <<http://www.roape.org/pdf/5920.pdf>> accessed October 31, 2013.

91 Pospisil, 1971; Van den Bergh, 1992 at: 451, Merry 1988 at 7, Griffiths 1986 at 1. Examples of Jurisdictions with legal pluralism include situations where legal pluralism has been brought to the fore include Rwanda, Sierra Leone, Uganda, United Kingdom, Canada, United States of America (especially the Native American territories), Canada, Australia and others.

92 Or the law of most Western European nations generally but the law of England and the USA in particular as influenced by the Civil and Roman Codes of Central Europe

93 She further notes that as the global becomes more localized and the local more globalised, the plurality of law is re-invigorated. Sally Engle Merry, ‘Legal Pluralism’, *Law & Society Review*, Vol. 22, No. 5 (1988), pp. 869-896

94 See generally T.V. Sathyamurthy, *The Political Development of Uganda, 1900-1986* (London: Gower, 1986) T.V. Sathyamurthy, *The Political Development of Uganda, 1900-1986* (London: Gower, 1986)

beneath the apparent uniformity of western legality, there is clearly vibrant and creative diversity – reflecting how much we all now live in a global world of LP.<sup>95</sup> This is a situation which Geertz has described as a ‘confusion of legal tongues’.<sup>96</sup> To this extent, it can be said that there is a plurality in ICL which is evidenced by its background in civil law, common law, humanitarian law, as well as influences from Latin, French and English languages and practices.<sup>97</sup> ICL continues to be influenced by developments in human rights, globalisation, and other forms of human interaction and innovation.

Equally important, ICL’s interface with various NGOs has led to the creation of the position of the Counsel for Victims, as well as the creation of a Trust Fund for Victims at the ICC – the last two being newly introduced concepts in international criminal law practice. This dispels the claim that unlike TJMs which are criticised for being uncertain and a mere creation of self-serving elders or NGO’s,<sup>98</sup> ICL has been and may continue to be equally amenable to changes as envisaged in its Statute.<sup>99</sup>

Conclusively, any attempt by the state law or the proponents of LP to be monistic in their conception of law should be avoided since most societies exude ‘cultural heterogeneity and normative dissensus (dissent)’.<sup>100</sup> LP ought to avoid falling into the same ditch that state law has fallen – that of being monistic within each of the orders it has identified.<sup>101</sup>

### **5.3.3 Applying a Legal Pluralism Framework to the Juba Peace Agreement**

In this section, we evaluate how LP would interpret the provisions in the Juba Agenda Item II. We highlight what similarities and differences this interpretation would have with the one proffered by ICL.

As noted above, a literal interpretation of Article 17 of the Rome Statute prevents the OTP/ICC from considering the way the Juba Agreements adhere to the concept of complementarity. In essence, such an interpretation, which was also supported by early

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95 Roberts, Richard, Kristin Mann 1991 at 8.

96 Geertz Clifford. 1983. 'Local Knowledge: Fact and Law in Comparative Perspective', in *Local Knowledge*. New York: Basic Books.

97 See Cryer, R, Friman H, Robinson D, Wilmshurst E, ‘*An Introduction to International Criminal Law and Procedure*’ (CUP, 2nd Edn, 2010)15

98 Tim Allen, War and Justice in Northern Uganda (draft) (London: Crisis States Research Centre, February 2005), 58–59; <<http://www.isn.ethz.ch/Digital-Library/Publications/Detail/?ots783=0c54e3b3-1e9c-be1e-2c24-a6a8c7060233&lng=en&id=56421>> accessed November 2, 2011.

99 See Articles 121, 122, and 123 of the Rome Statute which provide for amendments and reviews of the Statute.

100 Geertz 1983 at 225.

101 See generally S.C. McGuire, ‘Critical Legal Pluralism: A Thought –piece on a Direction for Socio-Legal Studies’ [Doctoral dissertation, Faculty of Law, McGill University, 1996] in Kleinhaus and Macdonald ‘What is Critical Legal Pluralism?’ (1997) 12 Can. L.L & Soc... 25 at 39 .

legal pluralists, fronts ICL as the only legitimate order to address post conflict violence through trial justice. It also prevents the OTP/ICC from engaging with the argument that ICL, like all other laws, is plural in nature and a product of various influences – which would mean that it is susceptible to being influenced further by other normative orders. This literal interpretation means that the ICL is not able to provide a sustainable transition to post conflict reconstruction. However, modern TLP challenges the idea that the State law is uniform, monolithic and the only legitimate legal order in any particular time and space.<sup>102</sup> As Chiba notes, the ‘jurisprudence of any contemporary society cannot be identified as a unified system.’<sup>103</sup> Using this analogy, it is noted that ICL is part of public international law (PIL) and derives its sources from the same sources as PIL.<sup>104</sup> ICL shares the same space of international law with other different regimes like the law of the sea, customary international law,<sup>105</sup> humanitarian law, treaty law, human rights, *jus cogens*, and obligations *erga omnes*, among others.<sup>106</sup> As other authors have argued, it is therefore not sustainable to argue that ICL is the only legitimate order that could address post conflict violence. Therefore, ‘by understanding justice as a more textured and multi-dimensional term than just criminal trials, our conceptual starting point can progress beyond narrow peace versus justice debates towards a more sophisticated ‘peace and justice continuum in which diverse accountability mechanisms can contribute to peace-building efforts, rather than compromise them.’<sup>107</sup>

A reading of Juba Agenda Item III notes that the drafters acknowledged their obligations to customary international law, but also to their obligations under treaty law (the Rome Statute). The Preambular 5 to the Annexure to the Agreement on Reconciliation and Accountability provided that the parties were committed to preventing impunity in accordance with their international obligations (customary international law), the requirements of the Rome Statute of the International Criminal Court (ICC) and in

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102 Gilissen J. *Le Pluralisme juridique*, Volume 11 of *Études d'Histoire et d'Ethnologie Juridique*, Université de Bruxelles, 1971.

103 Chiba also argues that the ‘State cannot control the whole of the law as cultural and social aspects of legal principles are not capable of outside control.’ See Chiba, M ed. *Asian Indigenous Law: An Interaction with Received Law*, (KPI: London and New York. 1986)6.

104 Article 21 Rome Statute of the International Criminal Court and the Rules of Procedure and Evidence.

105 In the *North Sea Continental Shelf* cases, the ICJ held that ‘... for a new customary rule to be formed, acts concerned (must) ‘amount to a settled practice’, See ICJ Reports, 1986, pp. 108-9

106 See Article 53 & 54 of the Vienna Convention on the Law of Treaties.

107 See G. Simpson, ‘One Amount Many: The ICC as a Tool of Justice During Transition’, in Weddell and Clark (eds), *supra*, 73-80 at 75 cited in Clark, 2011 at 544

particular the principle of complementarity, as well as the Constitution (of Uganda).<sup>108</sup> Additionally, the Preambular 4 of the Principle Agreement also provided that the parties sought to adopt ‘appropriate justice mechanisms, including customary processes of accountability that would resolve the conflict while promoting reconciliation.’<sup>109</sup> While the GoU was not able to arrest and prosecute the indicted LRA leaders, it supported all other interventions that have been carried out either directly by its agents or by proxy through donors and other agencies like non-government organisations.<sup>110</sup> These include the joint military operations to arrest the LRA leaders, previous peace talks conducted by the Hon. Betty Bigombe, the TJMs carried out by the local communities, as well as the passing of the ICC and Amnesty Acts.

Since the TLP interpretive framework envisages plurality of legitimate legal orders operating in the same time and space as the state law (or ICL), it is possible to view the diverse national processes in which the State is engaged as legitimate post conflict interventions: When the GoU committed to ‘promote national legal arrangements, consisting of formal and non formal institutions and measures for ensuring justice and reconciliation,’<sup>111</sup> that can be viewed as an acknowledgement that there are diverse legal orders whose interventions are necessary for sustainable transition from conflict.<sup>112</sup> These institutions as seen in the Preamble to the Annexure to the AAR- include the ICC, formal Courts which have jurisdiction over individuals alleged to bear particular responsibility for the most serious crimes,<sup>113</sup> the work of Uganda Human rights commission, the role of reparations, and the Uganda Amnesty Commission. Additionally, through the Justice Law and Order Sector, the GoU has drafted the National Transitional Justice Framework Policy (NTJF).<sup>114</sup> In the policy, the GoU proposes to protect witnesses who participate in formal

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108 See Preamble to the Agreement on Accountability and Reconciliation <[http://www.beyondjuba.org/BJP1/peace\\_agreements/Agreement\\_on\\_Accountability\\_And\\_Reconciliation.pdf](http://www.beyondjuba.org/BJP1/peace_agreements/Agreement_on_Accountability_And_Reconciliation.pdf)> accessed April 2012.

109 Ibid.

110 In the same way therefore, it can be argued that obligations *erga omnes* do not need to be part of a State’s law before they are binding on States or individuals.

111 See Preambular 5 to the Annex *Annexure to the Agreement on Accountability and Reconciliation signed between the Government of the Republic of Uganda (the Government) and the Lord's Resistance Army/Movement (LRA/M) (the Parties) on 29th June 2007* reads, ‘Recalling their commitment to preventing impunity and promoting redress in accordance with the Constitution and international obligations, and recalling, in this connection, the requirements of the Rome Statute of the International Criminal Court (ICC) and in particular the principle of complementarity’ <[http://www.beyondjuba.org/BJP1/peace\\_agreements/Agreement\\_on\\_Accountability\\_And\\_Reconciliation.pdf](http://www.beyondjuba.org/BJP1/peace_agreements/Agreement_on_Accountability_And_Reconciliation.pdf)> accessed April 2012.

112 Ibid.

113 Anthony Dworkin, ‘The Uganda-LRA War Crimes Agreement’ <<http://www.globalpolicy.org/component/content/article/164/28655.html>> accessed 25, February 2008.

114 Paul Bradfield, ‘Uganda Announces Transitional Justice Policy’ August 9, 2013 <<http://beyondthehague.com/2013/08/09/the-lapse-of-amnesty-in-uganda-stimulating-accountability-or-prolonging-conflict/>> accessed March 29, 2014

justice proceedings as well as ensure that victims can participate in the same. It also committed to using TJMs as part of conflict resolution. The GoU also proposed to establish and resource a national truth-telling process; establish and implement a reparations programme for victims affected by conflict; and also stated that there would no longer be blanket amnesty.

Nonetheless, there are shortcomings with the use of the TLP interpretive framework: In the first place, TLP first acknowledges the superiority of the State law before challenging it. This challenge may come *inter alia*, in the form of a positivist identification of the legal regimes which operate in the same time and space.<sup>115</sup> The preamble to the Agreement on Accountability and Reconciliation provides that the parties are 'committed to preventing impunity and promoting redress in accordance with the Constitution and international obligations and ... the requirements of the Rome Statute of the International Criminal Court (ICC) ....',<sup>116</sup> and that they are driven by the need to adopt appropriate mechanisms to resolve the conflict as well as promote reconciliation in affected communities,<sup>117</sup> while also finding 'just, peaceful and lasting solutions to the long-running conflict' so as to 'restore harmony and tranquillity within the affected communities and in Uganda generally.'*(Emphasis mine)*<sup>118</sup>

Accordingly, it can be argued that the parties at Juba contemplated that there were differing needs to be addressed.<sup>119</sup> Some of these needs are strictly legal while others are political, social and economic.<sup>120</sup> They all are part and parcel of the varying judicial needs of the

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115 Tamanaha (2008) *ibid*.

116 The Third Preamble to the Agreement on Accountability and Reconciliation, states that 'Committed to preventing impunity and promoting redress in accordance with the Constitution and international obligations and recalling, in this connection, the requirements of the Rome Statute of the International Criminal Court (ICC) and in particular the principle of complementarity.'  
<[http://www.beyondjuba.org/BJP1/peace\\_agreements/Agreement\\_on\\_Accountability\\_And\\_Reconciliation.pdf](http://www.beyondjuba.org/BJP1/peace_agreements/Agreement_on_Accountability_And_Reconciliation.pdf)>  
accessed April 2012.

117 The Fourth Preamble to the Agreement on Accountability and Reconciliation, states that 'Driven by the need for adopting appropriate justice mechanisms, including customary processes of accountability, that would resolve the conflict while promoting reconciliation and convinced that this Agreement is a sound basis for achieving that purpose.'  
<[http://www.beyondjuba.org/BJP1/peace\\_agreements/Agreement\\_on\\_Accountability\\_And\\_Reconciliation.pdf](http://www.beyondjuba.org/BJP1/peace_agreements/Agreement_on_Accountability_And_Reconciliation.pdf)>  
accessed April 2012.

118 First Preamble to the Agreement on Accountability and Reconciliation, states that 'Having been engaged in protracted negotiations in Juba, Southern Sudan, in order to find just, peaceful and lasting solutions to the long-running conflict, and to promote reconciliation and restore harmony and tranquillity within the affected communities and in Uganda generally.'  
<[http://www.beyondjuba.org/BJP1/peace\\_agreements/Agreement\\_on\\_Accountability\\_And\\_Reconciliation.pdf](http://www.beyondjuba.org/BJP1/peace_agreements/Agreement_on_Accountability_And_Reconciliation.pdf)>  
accessed April 2012.

119 Liu Institute for Global Issues, Gulu District NGO Forum, '*Roco Wat I Acoli Restoring Relations I Acholi-Land: Traditional Approaches to Reintegration and Justice*', September 2005,  
<[http://www.ligi.ubc.ca/sites/liu/files/Publications/JRP/15Sept2005\\_Roco\\_Wat\\_I\\_Acoli.pdf](http://www.ligi.ubc.ca/sites/liu/files/Publications/JRP/15Sept2005_Roco_Wat_I_Acoli.pdf)> accessed 2 July 2009

120 *Ibid*.

affected community, the country and the international community generally. As to how this can be achieved, both ICL and TLP are silent. We are unable to use either interpretive framework to gauge how the legal regimes -that have been identified by TLP- will actually function in pursuing a sustainable transition. It is also unclear as to how these normative orders will operate – either by complementing one another, clashing with one another or being subsumed in one another. TLP is also unable to able to analyse why these interventions clash in some instances or complement each other in others. By way of example, the GoU challenged the constitutionality of its own law – the Amnesty Act – in the recently decided Thomas Kwoyelo constitution petition.<sup>121</sup> At the same time, the GoU remains in full support of the NTJP.

The legal pluralist framework is also limited by the fact that it assumes a legal monism in each and every normative order. This means that TLP does not consider that the informal or unofficial laws are also characterised by plurality.<sup>122</sup> Instead, TLP assumes that each legal order can lay claim to a specific field and remain hermeneutically closed to the others.<sup>123</sup> This makes it fail to explain why legal orders, just like societies, are in a constant process of change by generating, discarding and enforcing norms.<sup>124</sup> These societies, like a biological nucleus, have multiple organs which are continually evolving and intersecting with each other and with outside influences.<sup>125</sup> There is need to have a deeper engagement of these relationships than what the TLP interpretive framework offers.

This means that the TLP interpretive framework can hardly respond to the needs and goals of a sustainable settlement for Uganda. Apart from identifying that there are various legal regimes operating in the same time and space as ICL, as well as challenging the effectiveness of ICL in pursuing a sustainable post conflict transition, there is not much that the TLP interpretive framework can contribute on how Juba can effectively achieve a sustainable settlement for Northern Uganda. At the very least, we are able to appreciate

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121 See Thomas Kwoyelo alias Latoni Vs. Uganda (Const. Petition No. 036 of 2011) <http://www.monitor.co.ug/blob/view/-/1240878/data/296966/-/2sh8u5/-/kwoyelo.pdf> accessed July 25, 2013.

122 For example, in Timor, de-facto legal pluralism was maintained under Indonesian rule although in this case the coexistence of customary dispute mechanisms with formal procedural law persisted because of a lack of public confidence in the Indonesian judiciary and the prohibitive costs of access for most Timorese households (Fitzpatrick, D. *Land Claims in East Timor*, (Asia Pacific Press, Canberra 2002) 87, 116 in Andrew McWilliams 'Introduction: Restorative Custom: Ethnographic Perspectives on Conflict and Local Justice in Timor', (2007), (8) (1), *Asia Pacific Journal of Anthropology* 1, 3.

123 See M. King, 'The Truth About Autopoiesis' (1993) 20 *Journal of Law and Society* 218 in Kleinhans and Macdonald 'What is Critical Legal Pluralism?' (1997) 12 *Can. LL & Soc.* 25 at 39.

124 Greenhouse 1998 at 64. See Woodman Gordon R. 'Ideological Combat and Social Observation: Recent Debate about Legal Pluralism' (1998) 42 *Journal of Legal Pluralism* 23. S.C. McGuire, 'Critical Legal Pluralism: A Thought -piece on a Direction for Socio-Legal Studies' [Doctoral dissertation, Faculty of Law, McGill University, 1996] in Kleinhans and Macdonald ' (1997) 39.

125 Ibid.

that neither the legal nor the non - legal interventions to the conflict in Northern Uganda can singlehandedly answer the varying needs of those affected by the conflict. For this reason, the parties provided that the GoU will *inter alia* make the necessary amendments to existing laws which are needed to promote the purposes of the Juba Agreements.<sup>126</sup> TLP is unable to suggest how this will be achieved.<sup>127</sup> Additionally, during the Juba negotiations, various lobby groups like women convinced the negotiating parties to provide for the use of TJMs with necessary modifications.<sup>128</sup> This is because some of the proposed TJMs were viewed as archaic, discriminatory, impractical or dehumanizing.<sup>129</sup> As the JLOS sector of the GoU develops the National Transitional Justice policy, TJMs should be carefully studied, amended or even discarded if found wanting.<sup>130</sup> TLP is however unable to help in identifying how this can be done.

Based on the above reasons, it can be argued that TLP interpretive framework offers some insights through which the OTP and the ICC can view how Uganda intends to implement the provisions in the Juba Agreements as being in accordance with the concept of complementarity. The shortcomings of TLP calls for a *new* LP or a *porous* legality– which envisions that different legal spaces are superimposed, interpenetrated, and mixed in our minds as much as in our actions.<sup>131</sup> This kind of pluralism recognizes that our legal life is

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126 See Article 6.3. of the Agreement on Accountability and Reconciliation which provides that ‘Legislation shall introduce a regime of alternative penalties and sanctions which shall apply, and replace existing penalties, with respect to serious crimes and human rights violations committed by non-state actors in the course of the conflict. <[http://www.beyondjuba.org/BJP1/peace\\_agreements/Agreement\\_on\\_Accountability\\_And\\_Reconciliation.pdf](http://www.beyondjuba.org/BJP1/peace_agreements/Agreement_on_Accountability_And_Reconciliation.pdf)> accessed April 2012.

127 These include fines, compensation, caution, apology, restitution and others See Sec. 180 and Part XVII Magistrates Courts Act Cap. 16 Laws of Uganda. See also Sec. 172. States that ‘A magistrate’s court may pass any lawful sentence combining any of the sentences which it is authorised by law to pass.’

128 Clause 19 of the Annexure to the Agreement states: ‘Traditional justice shall form a central part of the alternative justice and reconciliation framework identified in the Principal Agreement.’ See <[http://www.beyondjuba.org/alt\\_justice.aspx](http://www.beyondjuba.org/alt_justice.aspx)> accessed November 6, 2012. See also Waddell Nicholas and Phil Clark (Eds), op. cit. at p. 25

129 See Criticisms by Prof. Tim Allen. See also Barney Afako (2002) *ibid.*, See also Joanna R. Quinn, ‘ Tradition?! Traditional cultural institutions on Customary Practices in Uganda’ A paper prepared for presentation at the Annual Convention of the International Studies Association, 16 Feb. 2009, New York, USA. [http://politicalscience.uwo.ca/docs/Joanna\\_Quinn/Traditionalculturalinstitutions.pdf](http://politicalscience.uwo.ca/docs/Joanna_Quinn/Traditionalculturalinstitutions.pdf) accessed 5 April 2011; See generally Quinn J.R., The politics of acknowledgement : truth commissions in Uganda and Haiti /(Vancouver, UBC Press, 1973) <http://digitalcommons.mcmaster.ca/cgi/viewcontent.cgi?article=1793&context=opendissertations> accessed October 9, 2013.

130 Clause (e) of the Annexure to the Agreement states that – ‘For the proper functioning of the special division of the court in accordance with the agreed principles of accountability and reconciliation, legislation may provide for: ..... (e) The recognition of traditional and community justice processes in proceedings.’ *Report on the work of the Office of the High Commissioner for Human Rights in Uganda*, paragraph 37. In parallel to the formal justice system, traditional and cultural chiefs and elders continue to play a significant role in resolving disputes, notwithstanding the erosion of their authority during the conflict...Traditional justice in Acholi is restorative in nature and includes aspects of trust, the voluntary nature of the process, truth telling, compensation and restoration. The revival of *Ker Kwaro* in the 1995 Ugandan Constitution together with the efforts of its leadership has strengthened this institution. It has modified cleansing rituals for returnees, which has had positive effects on the sensitization of the population and relief for returnees, as well as in bringing about unity and confidence building.

131 Santos, Boaventura de Sousa 'Law: A Map of Misreading. Toward a Postmodern Conception of Law' *Journal of Law and Society*, (1987) (14) (3) 279, 297 -298.

constituted by an intersection of different legal orders. That is to say, by inter-legality.<sup>132</sup> It is the kind of LP which Van den Bergh viewed as ‘a process (not merely a situation) that develops in time – a complex pattern of continuous interactions.’<sup>133</sup> This in essence means that we should not look at any branch of law as an end in itself but rather as being ‘energised’ or complemented by other branches of law. In the next Chapter, this ‘new’ or ‘critical’ LP is analysed.

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132 *ibid.*

133 Jones *supra* at 1 <<http://www.bileta.ac.uk/Document%20Library/1/The%20Internet%20Legal%20Regulation%20and%20Legal%20Pluralism.pdf>>. See also Van den Bergh 1992:451-454.

## CHAPTER SIX: HOW THE CRITICAL LEGAL PLURALISM INTERPRETIVE FRAMEWORK GIVES AN EFFECTIVE UNDERSTANDING OF THE JUBA PEACE AGREEMENT

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### 6.1 INTRODUCTION

This chapter investigates how a critical legal pluralist interpretive framework (CLP) for implementing Juba Agenda Item III, is more responsive to the complexities of Ugandan history, society and politics as compared to the interpretive frameworks of mainstream international criminal law and legal pluralism.<sup>1</sup> The argument in this Chapter is that theories in CLP have posited a normativity of law that is not exclusive, systematic, unified or hierarchical. It is on this basis that it provides a more compelling interpretive framework for sustainable implementation of the AAR and transition to a post-conflict settlement in Uganda.<sup>2</sup> Accordingly, the chapter suggests that if this process of law formation, recognition and enforcement is used to inform the way the principle of complementarity under the Rome Statute is imagined and applied, then the use of alternative justice mechanisms like TJMs can be viewed as forming part or the whole of the criteria of 'national proceedings.' In such circumstances, the OTP/ICC would be able to indicate that such State is able and willing to intervene in a situation under its jurisdiction.

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1 CLP envisages a multitude of different TJMs which means that they are not homogenous but rather calls for mutual reciprocal understanding of these mechanisms which does not preclude disagreement. See Kleinhans, Martha-Marie; Macdonald, Roderick A., 'What Is a Critical Legal Pluralism?' 1997, (12) (1), Canadian Journal Of Law and Society, 25; R.A. Macdonald, 'Metaphors of Multiplicity: Civil Society, Regimes and Legal Pluralism' *Arizona Journal of International and Comparative Law*, 1998, No 15, P. 69; R.A. Macdonald, 'Critical Legal Pluralism as a Construction of Normativity and the Emergence of Law' in *A.Lajoie, et al, eds., Théories et émergence du droit: pluralisme, surdétermination, effectivité*, Montreal, Éditions Thémis, 1998, at 12; R.A. Macdonald, 'Pluralism in Law and Regime Theory' in R. Wolfe, ed., *Transatlantic Identity: Proceedings of the 1996 Canada-U.K. Colloquium*, Kingston, Institute of Intergovernmental Relations, 1997, at 37; R.A. Macdonald 'Here, There ... and Everywhere –Theorizing Legal Pluralism; Theorizing Jacques Vanderlinden' in N. Kasirer, ed., *Étudier et enseigner le droit: hier, aujourd'hui et demain –Études offertes à Jacques Vanderlinden*, Montreal, Éditions Yvon Blais, 206, at 381; R. A. Macdonald and D. Sandomierski, 'Against Nomophiles' *Northern Ireland Legal Quarterly*, 2006, No 57, p. 610; in Macdonald, Roderick, and Thomas Mc Morrow. "Wedding a Critical Legal Pluralism to the Laws of Close Personal Adult Relationships." *European Journal of Legal Studies* 1 (2007): 1. .

2 T. Wilhelmsson, 'Legal Integration as Disintegration of National Law' in H. Peterson & H. Zahle, (eds.), *Legal Polycentricity: Consequences of Pluralism in Law* Aldershot, England: Dartmouth, 1995) 128 in Kleinhans and Macdonald. (1997) 34. See also Griffiths, John' 'What is Legal Pluralism?' (1986) (24) *Journal of Legal Pluralism*, 1-55.

## 6.2 THE CASE FOR CRITICAL LEGAL PLURALISM

### 6.2.1 Introduction

CLP is a 'new' conception of TLP which argues that there is more to what happens to the various sites of normative interaction that were identified by TLP.<sup>3</sup> First of all, these sites operate at several levels in the same time and space: the individual, group or societal levels.<sup>4</sup> Secondly, CLP recognises that 'this interaction takes the form of a broad zone of adjustment, in dynamic evolution and re-definition.'<sup>5</sup> Santos also argues that there is need to move from the TLP way of simply 'understanding of different legal orders as separate entities coexisting in the same political space,' to a:

Conception of different legal spaces superimposed, interpenetrated and mixed in our minds, as much as in our actions.... We live in a time of porous legality or legal porosity, multiple networks of legal orders forcing us to constant transitions and recognise. Our legal life is constituted by an intersection of different legal orders, that is, by inter-legality<sup>6</sup>

CLP is more concerned with perceiving of these very 'different' legal spaces as actually being 'superimposed, interpenetrated, and mixed in the minds' -and actions- of the individual subject. Van den Bergh suggests that CLP is a 'process that develops in time a complex pattern of continuous interactions.'<sup>7</sup> This new look at LP has also been given terms such as porous legality, legal porosity,<sup>8</sup> critical transnational pluralism<sup>9</sup> or fallibilistic pluralism.<sup>10</sup> For example, fallibilistic pluralism is concerned with the willingness to listen to the 'otherness of the other' even when the listener remains true to his or her own thinking.<sup>11</sup> In the instant case, it would mean a deliberate move for more dominant normative orders such as ICL to give room for the 'other' legal regimes like TJMs or alternative justice mechanisms like truth and reconciliation commissions, to express themselves even when their value systems differ from the value system of the 'listener'. As this chapter shows, the

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3 B. De Sousa Santos, 'Law: A Map of Misreading. Towards a Postmodern Conception of Law' (1987) 14 *Journal of Law and Society* 279 at 298 in Kleinhans and Macdonald, 'What is Critical Legal Pluralism?' (1997) 12 *Canada J.L& Soc.* 25 at 32.

4 Emmanuel Melissaris, 'The More the Merrier? A New Take on Legal Pluralism' *Social Legal Studies* 2004; (13) (1) at 58.

5 Kleinhans and MacDonald 1997 at 38.

6 Tamanaha 2008., Santos, (1995) 473.

7 *Bergh, G. C. J. J. 'Legal Pluralism in Roman Law', in C. Verga (ed.), Comparative Legal Cultures, (New York: New York University Press, (1992), 451-4.*

8 *Ibid.*

9 *Ibid.*

10 *Ibid.*

11 See generally Emmanuel Melissaris, (2004) *supra*. Tamanaha (2008), *supra*., Santos, (1995) *supra*., Sousa 'Toward a New Common Sense: Law, Science and Politics in the Paradigmatic Transition (London: Routledge 1995) 473., Santos, Boaventura de Sousa 'Law: A Map of Misreading. Toward a Postmodern Conception of Law' *Journal of Law and Society*, (1987) (14) (3) 279, 297 -298.

AAR is an example of such willingness to listen to what the other normative orders, which are operating in the same time, and space as the State can contribute to a sustainable post conflict settlement.<sup>12</sup> In the next section, we explore the salient features of CLP deeper.

### **6.2.3 Applying a Critical Legal Pluralist Interpretive Framework to the Juba Peace Agreement**

Both CLP and LP would interpret the AAR as having recognised in the first place, that there is a multiplicity of legal regimes or normative orders operating in the same time and space as ‘official law.’ In this case, the official law would be ICL in so far as it claims jurisdiction over international crimes as prescribed by the Rome Statute of the ICC and requires States to intervene in situations happening in their territories.<sup>13</sup> This is because the preamble to the AAR clearly states that the parties to Juba were ‘committed to preventing impunity and promoting redress in accordance with the Constitution (of Uganda) and international obligations (which included) the requirements of the Rome Statute of the ICC and in particular the principle of complementarity.’<sup>14</sup> Guided by the philosophy of legal centralism, ICL would interpret the Agreement as requiring the GoU to follow the provisions of the Rome Statute with regard to complementarity by simply arresting and prosecuting the rebel leaders.<sup>15</sup> Any other form of interpretation would be criticised for promoting impunity and betraying the cause for justice for the victims. A literal interpretation of the Rome Statute by ICL would find that the GoU was trying to avoid its obligations under the Rome Statute when it provided for the use of ‘non-formal institutions and measures.’<sup>16</sup> This view would be further justified by the fact that amnesties were not prohibited by the Agreement or its annexures.<sup>17</sup>

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<sup>12</sup> Ibid.

<sup>13</sup> The Rome Statute of the International Criminal Court, Adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 17 July 1998, UN Doc. A/CONF.183/9.

<sup>14</sup> 3rd Preambular to the Agreement on Accountability and Reconciliation June 2007 <[http://www.beyondjuba.org/BJP1/peace\\_agreements/Agreement\\_on\\_Accountability\\_And\\_Reconciliation.pdf](http://www.beyondjuba.org/BJP1/peace_agreements/Agreement_on_Accountability_And_Reconciliation.pdf)> accessed April 2012.

<sup>15</sup> id

<sup>16</sup> id

<sup>17</sup> To date, more than 20,000 people have been granted amnesty under the Amnesty Act 2000. Clause 3.10 of the Agreement states, ‘Where a person has already been subjected to proceedings or exempted from liability for any crime or civil acts or omissions, or has been subjected to accountability or reconciliation proceedings for any conduct in the course of the conflict, that person shall not be subjected to any other proceedings with respect to that conduct.’ Section 3 of the Amnesty Act states: ‘An Amnesty is declared in respect of any Ugandan who has at any time since the 26th day of January 1986 engaged in or is engaging in war or armed rebellion against the government of the Republic of Uganda by...(c) committing any other crime in the furtherance of the war or armed rebellion.’ Cited in Amnesty International: Uganda: Agreement and Annex on Accountability and Reconciliation falls short of a comprehensive plan to end impunity’, <<http://www.amnesty.org/en/library/asset/AFR59/001/2008/en/5b9ec2da-f1e8-11dc-adcd-cdafd0ab0dfe/afr590012008eng.html>> accessed 4, November 2011.

However, due to the fact that the politics of Uganda, its history and divided society were at the forefront of causing and sustaining the conflict, the parties to the Juba Agreement decided to use a multipronged approach to a sustainable post conflict settlement. The AAR provided for formal justice mechanisms,<sup>18</sup> TJMs,<sup>19</sup> reconciliation,<sup>20</sup> peaceful resolution of the conflict,<sup>21</sup> honour the victims,<sup>22</sup> By using the LP and CLP interpretive frameworks, it is possible to have an understanding that the AAR provided for multiple normative orders should be involved in resolving the different issues related to accountability and reconciliation.<sup>23</sup>

Secondly, both LP and CLP would also similarly interpret the AAR as indicative of the fact that the State law is not monistic but a collection of different legal regimes which together form the official law. The Agreement which indicated that

The Parties affirm that Uganda has institutions and mechanisms, customs and usages as provided for and recognised under national laws, capable of addressing the crimes and human rights violations committed during the conflict...<sup>24</sup>

In confirmation of the fact that the State law is plural, the agreement stated that the parties acknowledged the need for an ‘overarching justice framework that will provide for the exercise of formal criminal jurisdiction, and for the adoption and recognition of complementary alternative justice mechanisms.’<sup>25</sup> This meant that, like TLP, the CLP

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18 Clause 4.1 of the AAR, the parties agreed that ‘Formal criminal and civil justice measures shall be applied to any individual who is alleged to have committed serious crimes or human rights violations in the course of the conflict. Provided that, state actors shall be subjected to existing criminal justice processes and not to special justice processes under this Agreement.’ Section 2.1 stated that the parties agreed to ‘promote national legal arrangements, consisting of formal and non formal institutions and measures for ensuring justice and reconciliation with respect to the conflict. ‘See Agreement on Accountability and Reconciliation <[http://www.beyondjuba.org/BJP1/peace\\_agreements/Agreement\\_on\\_Accountability\\_And\\_Reconciliation.pdf](http://www.beyondjuba.org/BJP1/peace_agreements/Agreement_on_Accountability_And_Reconciliation.pdf)> accessed April 2012.

19 Clause 3.1 of the AAR stated that ‘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 a central part of the framework for accountability and reconciliation.’ See Agreement on Accountability and Reconciliation <[http://www.beyondjuba.org/BJP1/peace\\_agreements/Agreement\\_on\\_Accountability\\_And\\_Reconciliation.pdf](http://www.beyondjuba.org/BJP1/peace_agreements/Agreement_on_Accountability_And_Reconciliation.pdf)> accessed April 2012.

20 The AAR also provided that there was need for ‘adopting appropriate justice mechanisms, (including customary processes of accountability (TJMs) that would, one the one hand, resolve the conflict while promoting reconciliation on the other hand.’ 4th Preambular to the Agreement on Accountability and Reconciliation June 2007

21 Further, the AAR stated that the parties would be ‘guided by the objective principle of the Constitution, which directs that there shall be established and nurtured institutions and procedures for the resolution of conflicts fairly and peacefully. More so, it noted that the courts of Uganda had the constitutional duty to promote reconciliation. See the 5th Preambular of the AAR.

22 Further still, the parties to the AAR acknowledged that they were ‘conscious of the serious crimes, human rights violations and adverse socio-economic and political impacts of the conflict, and the need to honour the suffering of victims by promoting lasting peace with justice.2nd Preambular *ibid*.

23 *Ibid*.

24 Clause 5.1 Agreement on Accountability and Reconciliation June 2007.

25 5.2. Agreement on Accountability and Reconciliation June 2007.

interpretive framework acknowledges that ‘conceptions of justice are infinitely plural, even within relatively organized institutional settings.’<sup>26</sup> The CLP interpretive framework also recognizes that ‘normative heterogeneity exists both between various normative regimes which inhabit the same intellectual space, and within the regimes themselves.’<sup>27</sup>

However, such interpretation is different from that of ICL which largely follows the tradition of legal centralism or legal monism. As indicated in Chapter 4, ICL views the law as the only legitimate legal order created and applied by a monolithic entity called the state or the ‘politically superior sovereign.’<sup>28</sup> Such interpretation ignores the place of other normative orders/ voices that have contributed (and continue to contribute) to the making and unmaking of the state law. In so doing, there emerges – as in the instant case- a conflict between two post conflict interpretative frameworks (ICL and CLP) that are fighting for legitimacy. While the ICL interpretive framework is intolerant of such a clash and views it as a move to promote impunity, the CLP interpretive framework envisions that such clashes are inevitable since varying normative orders are presumed to clash or complement each other as they relate to each other. The end result is that there will be different situations where interventions are complementing each other, amending each other or even subsuming the other. In the instant case, the CLP interpretive framework enables us to see how TJMs can be amended when some of their practices clash with other normative orders like human rights. Similarly, the NTJP proposes that TJMs will sometimes complement the work of national justice systems or in some cases, surrender their legitimacy or be subsumed in other interventions.( for example, a national truth telling process could make the truth telling functions of a TJM unnecessary).

It should be noted, however, that while TLP seeks to establish a hegemony or hierarchy of these laws, by privileging, say state law or ICL over other normative interventions, CLP does not.<sup>29</sup> For CLP, all normative/legal orders are equally ranked parts of a comprehensive post-conflict transition. This is confirmed by Clause 5.2 of the AAR which provides, alternative justice mechanisms complementary to formal criminal jurisdiction- in the sense that they form part and parcel of the sustainable post conflict transition.<sup>30</sup> Instead of

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26 B. De Sousa Santos, ‘Law: A Map of Misreading. Towards a Postmodern Conception of Law’ (1987) 14 *Journal of Law and Society* 279, 298 in Kleinhans and Macdonald, ‘What is Critical Legal Pluralism?’ (1997)12 *Canada J.L& Soc.* 25, 32.

27 Kleinhans and MacDonald *ibid* at 32.

28 Gilissen *Le Pluralisme juridique*

29 B. De Sousa Santaos, ‘Three Metaphors for a New Conception of Law: The Frontier, the Baroque, and the South’ (1995) 29 *Law and Society Rev.* 569, 57 in Kleinhans, M-M., and MacDonald R.A., (1997) 39.

30 *Ibid*.

privileging one legal norm/post conflict intervention over the other, CLP privileges the place of the individual subject as being at the centre of a sustainable post conflict transition. In other words, while ICL focuses mass atrocities and mass victims, CLP seeks to identify who these individual ‘victims’ of mass atrocities are and what their particular and peculiar needs maybe. For example, before naming people together as survivors, perpetrators or victims of a particular conflict, CLP seeks to identify what qualifies them to be perpetrators, victims or survivors and a number of questions come to mind: Do the individuals in these classifications agree with the different categorisations or not? (Do perpetrators view themselves as such or do they consider themselves as victims or even survivors of a conflict?), what are the factors that unite those who consider themselves to be victims? Are these victims a homogenous group that have the same needs or post conflict goals? If not, what are the different needs and goals that the individuals in this group have? How can these different needs and goals be addressed either for specific individuals or for the collective group? What is their understanding of justice and what are they doing in situations where their conceptions of justice differ?

In light of the fact that Articles 3.1<sup>31</sup> and 5.1<sup>32</sup> of the AAR provide for *necessary modifications* to both the national laws as well as TJMs so as to ensure that they are in conformity with the Agreement, the question then becomes – how can this be done? The answer, according to the CLP interpretive framework, is with the individual citizen subject who, (either individually or as a collective), determines the way in which these normative orders interact with each other. Therefore, while ICL is interested in prosecuting an individual for specific crimes committed, the CLP interpretive framework helps us unpack how the specific individual negotiates through the different post conflict options available and what informs the decisions of this individual.

As noted earlier, this individual is not just a subject of the law, but is also involved in its creation. It is possible to envision that the individual may choose and does indeed choose – whether jointly or severally- to use any or all these numerous normative orders in

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31 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, (emphasis mine) as a central part of the framework for accountability and reconciliation. See Clause 3.1. Agreement on Accountability and Reconciliation 2007

32 Clause 5.1 states that ‘The Parties affirm that Uganda has institutions and mechanisms, customs and usages as provided for and recognised under national laws, capable of addressing the crimes and human rights violations committed during the conflict. The Parties also recognise that modifications may be required within the national legal system to ensure a more effective and integrated justice and accountability response.’ Clause 14.4 further obliges the GoU to ‘introduce amendments to the Amnesty Act or the Uganda Human Rights Act in order to bring it into conformity with the principles of this Agreement.’ Clause 5.4 further states that - Insofar as practicable, accountability and reconciliation processes shall be promoted through existing national institutions and mechanisms, with necessary modifications, (emphasis mine) The Parties shall consult on the need to introduce any additional institutions or mechanisms for the implementation of this Agreement.

whichever way serves him or her best. He might choose to enter peace negotiations in order to end hostilities while at the same time pursue reconciliation between the warring factions. He or she may also seek to use both the national courts as well as TJMs as a vessel to address accountability. In order to address situations where individuals have differing preferences of which process should be used, CLP imagines that there are a multitude of continuous and confusing interactions taking place— be they negotiations, complementary proceedings, agreements, disagreements, etc – to determine the way forward. These interactions may be between victims and perpetrators or between the victims themselves or the perpetrators themselves. The CLP interpretative framework enables us to view what is actually happening on the ground rather merely postulate on what ought to happen. The CLP interpretative framework expects that there could be situations (similar to the peace versus justice debate), in which different people select different post conflict intervention methods which also have different purposes. This partly explains why the AAR provides that no one will be compelled to use these TJMs.<sup>33</sup>

Both ICL and TLP are limited in offering interpretations which would be responsive to the implementation of the Agreement. While TLP will only acknowledge that there are various legal regimes operating in the same time and space as the official law, it is unable to provide useful guidelines with regard to amendment of the said TJMs. TLP only imagines these legal regimes as hermeneutically closed to one another. However, CLP recognises that law is not static. It views law as continuously changing depending on the prevailing circumstances. With the CLP interpretive framework, it is possible to envision ‘the porosity of (these) different legal orders and the inter-normative trajectories, patterns and practices of law in contemporary multi-lingual, multi-cultural, multi-religious and multi-ethnic societies.’<sup>34</sup> Contributing (either directly or indirectly) to amending either the existing national laws or TJMs in order to bring them in conformity with the principles of the Agreement is viewed as a true indication of what actually happens in the social field and is indicative of the fact that CLP recognises that legal regimes, though independent, do complement and amend each other. Contributing or influencing the amendment of supranational law is a much more complex and prolonged process. In the maze of diverse and simultaneous interactions envisioned by CLP, some ideas could easily be picked up and later used to influence the amendment of certain provisions of law. Using the CLP

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<sup>33</sup> See Section 22 of the Annex to the AAR which states that ‘A person shall not be compelled to undergo any traditional ritual.’

<sup>34</sup> Ibid.

interpretive framework, it is possible to envision how the citizen subject can negotiate through this Agreement.

### **6.3 How CLP Interpretive Framework Would Respond To the Needs and Goals of a Sustainable Settlement for Uganda**

In Chapter Two, we analysed how the conflict in Uganda has given rise to a multitude of challenges which any sustainable post-conflict transition intervention ought to address. We also noted that the goals of any intervention should not be merely aimed at addressing accountability but also promoting reconciliation as well as dealing with the root causes of the conflict to ensure that the conflict does not rise again. We also reviewed that the ICL and TLP interpretive frameworks were unable to provide interpretive frameworks that are responsive to the complexities of Ugandan history, society and politics. In this section, we now analyse how the CLP interpretive framework is able to respond to the goals and needs of a post conflict settlement like the one of Uganda.

In the first place, CLP recognises that there are various normative orders which are operating in the same time and space.<sup>35</sup> However, it delves further to unveil how these different normative orders engage with each other in all types of ways – sometimes conflicting, other times complementing and sometimes separate from each other. The CLP framework also envisions that not all these various interactions happen in abstract but within the citizen subject – either on a personal or group level. It is therefore possible to have a more effective understanding of how the AAR sought to provide a multitude of solutions due to Uganda’s conflict –riddled history, divisive politics and society. These included finding peaceful and lasting solutions to the long-running conflict, promoting reconciliation, restoring harmony and tranquility within the affected communities, addressing the human rights violations and adverse socio-economic needs, promoting lasting peace with justice, preventing impunity by promoting redress in accordance with the Ugandan constitution and international obligations, among others.

The above meant that not only would there be different interventions happening in the same time and space, but these interventions would sometimes clash with each other, work with each other or be subsumed in one another as presumed by CLP. Currently, the 5<sup>th</sup> draft of the National Transitional Justice Policy (NTJP) has been submitted to cabinet of the

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<sup>35</sup> See generally Santos, Boaventura de Sousa (1995) ‘Toward a New Common Sense: Law, Science and Politics in the Paradigmatic Transition. London: Routledge 473.

GoU for discussion. This NTJP was inspired by the commitments made by the GoU in the AAR. The policy seeks to create linkages between formal justice mechanisms, truth telling, TJMs, reparation programs and amnesty.<sup>36</sup> For example, it is proposed that ‘where a matter merits alternative redress, it will be referred from the Formal Justice mechanism to the Truth telling or the TJMs. Matters that require healing, forgiveness and reconciliation will be referred to the Truth telling and/or the TJMs depending on the need.’<sup>37</sup> The Policy also proposes to involve the ‘formerly amnestied persons ... (in) the Truth telling or the TJMs as a strategy to promote healing and reconciliation in the communities.’<sup>38</sup>

Be that as it may, it is also expected that there will be ( and indeed there are) clashes between two or more mechanisms – for example, not only does the NTJP propose to do away with blanket amnesties, but the formal justice processes have already challenged the constitutionality of the same.<sup>39</sup> The challenge to the amnesty law is expected to greatly affect the work of the Amnesty Commission which has been able to successfully grant amnesty to over 240,000 applicants. The CLP interpretive model envisages that such conflict will lead to a compromise on the way forward. This will likely be in the form of one intervention subsuming another or in the form of modifications being made in the way some interventions like blanket amnesties are currently practiced. It should also be noted that some interventions like TJMs– whether in whole or in part – might address more than just one judicial or post-conflict reconstruction goal.<sup>40</sup> They are also most useful in situations where neither the state nor other formal justice mechanisms were interested holding persons like child soldiers or victim-perpetrators accountable for crimes they were made to commit under duress and often against themselves.<sup>41</sup>

Since CLP is against hermeneutically closing/ring fencing these legal orders to specific categories of jurisdiction, any conflict regarding jurisdiction could be resolved by providing

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36 See Section 82 of Draft 5 of the NTJP as prepared by the NTJP Working group October 2013 (Copy on file with researcher).

37 Section 82(a) id

38 Section 82(b) id

39 See Thomas Kwoyelo alias Latoni Vs. Uganda (Const. Petition No. 036 of 2011) <http://www.monitor.co.ug/blob/view/-/1240878/data/296966/-/2sh8u5/-/kwoyelo.pdf> accessed July 25, 2013.

40 In Northern Uganda, some of these include: Nyono Tong Gweno interpreted to mean, 'the 'Stepping of the Egg' ceremony welcomes home a member of the family that has been away for an extended period of time,' Dwoko Ayoo – which is carried out 'to reconcile a conflict between members of the same family or clan, in the belief that such conflict offends the ancestors and as a result, ushers in 'bad spirits' and brings misfortune', Kwero Merok – performed when 'a foreigner has been killed by returning soldiers; or, alternatively, when a dangerous beast has been killed.', Moyo Remo 'cleansing of the blood'- which is 'completed in order to prevent a reprisal blood feud after a murder takes place between two clans.', Lwoko pig wang 'Washing of tears' which is a 'ceremony conducted when a person had disappeared and was thought to have died, but returns to a family.' Gomo Tong (Bending of Spears) – a 'symbolic ritual as a vow between two clans or tribes engaged in violent conflict to end hostilities. See Finnstrom 2008 at 43.

41 These included killing their family members and especially their parents as a way of preventing them from ever returning home.

options in which both victims and/or perpetrators may seek justice. The interconnectedness of these normative orders indicates that a victim-perpetrator might choose to participate in the formal justice mechanism, the truth telling process or a TJM or both. He or she might privilege memorialisation over an apology or compensation offered by the state or the perpetrator. Alternatively, he or she might prefer to have psychosocial support or reconstructive surgery instead of a trial process.

The Juba Agreement thus focuses on the varying needs of the individual citizen subject as he or she negotiates through the various conceptions of justice or even none at all. Arriaza and Roht-Arriaza have argued that -

national-level initiatives by themselves are insufficient to capture the meaning of the conflict for people living in specific villages, towns, 'hills', or other local spaces, whose experience may vary widely from that of people elsewhere in the country. When it comes to post-conflict interventions aimed at reconstructing a shattered society, international and national policy-makers have treated countries as an undifferentiated whole . . . such efforts ignore existing local dynamics aimed at reinforcing or transforming the power relations that are often most relevant to people's lives . . . in transitional justice as elsewhere, all politics is local.<sup>42</sup>

In light of the above argument, the CLP interpretive framework helps to refocus attention to the central role played by the citizen subject in perceiving and interpreting the law. Like Kihika argues, for transitional justice to be relevant and effective it must be informed by local understandings of justice. This means that the prescribed form of justice should be informed by local priorities as identified by both the victims and the survivors.<sup>43</sup> Unlike the top-down approach, where the dominant normative order determines what should be done or the down-up approach as exemplified by theories in '*Transitional Justice from Below*' literature, the CLP interpretive framework focuses on the citizen subject's role as law-creator, law-reformer and law-abider.<sup>44</sup> The crucial needs of the citizen subject become the lynchpin on which solutions are designed as opposed to the requirements of the state or dominant normative order. Kihika notes that -

In addition to going beyond the retributive and restorative justice paradigms it is necessary to incorporate measures or approaches which address the structural inequalities that triggered human rights abuses. An African transitional justice paradigm should adopt an expansive view of justice that includes restorative,

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<sup>42</sup> See Lorna Mcgregor 'International Law as A 'Tiered Process': Transitional Justice at the Local, National and International Level' In Kieran Mcevoy and Lorna Mcgregor (eds). *Transitional Justice From Below: Grassroots Activism And The Struggle For Change* (Oxford, UK, and Portland, Or: Hart Publishing, 2008)144.

<sup>43</sup> Kasande Sarah Kihika, 'Uganda: Shifting the Discourse From Victimhood to Reconstruction' available at <http://allafrica.com/stories/201412041627.html> accessed May 25, 2015.

<sup>44</sup> See Kleinhans and Macdonald 'What is Critical Legal Pluralism?' (1997) 12 Can. L.L & Soc. 25 at 39

retributive and distributive justice. TJ should go beyond criminal accountability and truth seeking and move to include targeted policy and institutional reforms as well as the enforcement of social economic rights. TJ should lead to the transformation of societies into those grounded on principles of equality rule of law and respect for human rights.<sup>45</sup>

It can be argued that in so doing, it is possible to see how this CLP interpretive framework is more responsive to the ever-changing and diverse needs of the citizen subject. This explains – to an extent- why the Juba Agreements were influenced to provide for a multifaceted approach to a sustainable post conflict transitional and the fight against impunity.

In conclusion, any judicial or non judicial solution to the fight against international crimes should be ready to change in order to adhere to the ever changing demands of the people for whom it is meant to serve.<sup>46</sup> The CLP interpretive framework shows that there is no silver bullet solution to address all post conflict needs. Instead we are urged to dig deeper into the generally accepted practices and find what works and then use it or discard it or amend it when it fails. Accordingly, it becomes possible for us to rethink the application of concepts like complementarity so as to consider more than just trial justice as the yardstick for addressing post-conflict reconstruction. Instead of rigidly applying legal and literal interpretations to the concept of complementarity, it is wiser keenly to listen to the voices of the other mechanisms - which might be a compilation of truth and reconciliation, trials, memorials, compensation, and other non-judicial conflict resolution mechanisms like the use of TJMs with their ‘necessary modifications’. Although what would constitute necessary modifications is beyond the scope of this project, it is a worthwhile venture to investigate. It is these options, created or envisioned by the citizen subject, that help us think of addressing those issues which would otherwise lead to needless conflict.<sup>47</sup> Kihika further notes –

The perspectives of victims should be considered central and indispensable in not only analyzing the conflict, but in developing transitional justice interventions victims and survivors should be supported and empowered to speak for themselves, to articulate their demands for justice in a language and manner that reflects their actual needs even if it may not fit neatly in the TJ paradigm. Part of social reconstruction and healing is recognizing the agency of victims as full citizens capable of determining what justice means to them and how to achieve it. From a TJ perspective, agency is the inherent power of victims to define their own interests and

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45 Kasande Sarah Kihika, Uganda: Shifting the Discourse From Victimhood to Reconstruction’ available at <<http://allafrica.com/stories/201412041627.html>> accessed January 31 2016.

46 id

47 See ‘Epilogue: Towards a Critical Transnational Legal pluralism’ in Kamari Maxine Clarke, *Fictions of Justice: The International Criminal Court and the Challenge of Legal pluralism in Sub-Saharan Africa* (CUP 2009).

preferences for justice. They should participate in national processes aimed at designing policies of transitional justice. It includes defining justice on one's terms based on the contextual realities.<sup>48</sup>

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<sup>48</sup> Kihika, *ibid.*

## CHAPTER SEVEN: CONCLUSION

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### 7.1 INTRODUCTION

*Post conflict justice is terribly and terrifically complex. There are no simple solutions. Chauvinism that views truth commissions as a one-size-fits-all hegemonic remedy succumbs to the same frailties as judicial romanticism. Consequently, one important lesson is the need to avoid methodological parsimoniousness. Instead, consideration should be given to consolidating diverse mechanisms more closely attuned to the social geographies of the afflicted societies.<sup>1</sup>*

This study has revealed that it has been difficult to achieve sustainable post conflict transition in Uganda because the international criminal law framework for responding to the complexities of the conflict have been insufficiently responsive to the complexities of the LRA/M rebellion especially in light of Uganda's history, politics and society. The history of Uganda has been riddled with conflict mainly because the country was created by merging different ethnic groups together which had more differences than similarities. This meant that there would always - and indeed has always been- conflict between the groups as each sought for survival within the State of Uganda. As a result, there has always been mutual suspicion between these ethnic groups and this has often led to conflict over the years. This means that any post conflict settlement for Uganda needs to address both the root causes of the conflict as well as its effects.

The interpretive framework of ICL is therefore lacking particularly when it only seeks to punish those who lead a particular phase of the reoccurring conflict without seeking to investigate and address the root causes of the prolonged conflict or the factors which sustain or rekindle the hostilities. It is for this reason that a literal interpretation of the principle of complementarity is inadequate to address the sort of goals and needs of post conflict Uganda. This is not helped when the ICC criticised other post conflict interventions like the Juba peace talks by insisting on having the only legitimate jurisdiction to address question of accountability in Uganda. The result of such a move was counter effective as the LRA leadership failed to sign the final comprehensive peace Agreement and instead spread the rebellion beyond the borders of Uganda.<sup>2</sup> The ICC has thus been repeatedly criticised-

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<sup>1</sup> Drumbl 2007 at 148.

<sup>2</sup> This expedition was codenamed 'Operation lightning thunder' and was funded by the USA under the Lord's Resistance Army Disarmament and Northern Uganda Recovery Act 2009. See

sometimes erroneously- on grounds of either being oblivious to the needs of the people for which it seeks to do justice or, for frustrating the work of those other normative orders operating in the same time and space, which are aimed at achieving lasting peace and security in the region.<sup>3</sup> We should therefore applaud those international criminal law practitioners and theories who support the view that the ICC is but one of the many players in the TJ framework that are intervening in post conflict situations.

Through a systematic case study of Juba's Agenda Item III's provision on TJMs, the study has demonstrated that critical legal pluralism's interpretive framework for implementing the AAR is more responsive to the complexities of Uganda's situation and more useful for sustainable implementation of the Juba Accord and transition to post conflict settlement in Uganda, than the interpretive frameworks of mainstream ICL or legal pluralism. Adopting a CLP interpretive framework for Juba would enable the ICL/ICC to view that Uganda is not promoting impunity. The reverse would be true if the ICL/ICC does not adopt this CLP interpretive framework. Theories in CLP argue that in any social field, there is a plurality of laws or normative orders – be they national, international or traditional- operating in the same time and space.<sup>4</sup> These numerous legal orders are *conceived*<sup>5</sup> to operate in *pari passu* such that none claims superiority over others. These laws are not hermeneutically closed but intersect in various ways – sometimes supplementing each other, other times clashing or even complementing one another. In the instant case, the ICC and TJMs are viewed by CLP as part of the variety of laws that are available in Northern Uganda. The ICC would benefit from the work of other legal orders just as these orders would also benefit from the ICC in a form of symbiotic relationship. It would also be expected that there would be clashes between these laws as well as situations where they adjust to accommodate each

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<<https://salsa.democracyinaction.org/o/2241/images/S1067%20Final.pdf>> accessed April 5, 2011. See also 'US to send troops to Uganda to help fight LRA rebels' *BBC Online* (15 October 2011) <<http://www.bbc.co.uk/news/world-africa-15317684>> accessed Nov 2, 2013.

2 Spiegel J and Atama N, 'Finishing the Fight Against the LRA' Enough Project, May 12, 2009, <[http://www.enoughproject.org/files/lra\\_strategy\\_paper\\_051209.pdf](http://www.enoughproject.org/files/lra_strategy_paper_051209.pdf)> accessed Nov 2, 2013. See also Tabu Butagira & Risdell Kasasira 'Was Acellam captured or did he surrender?' *The New Vision Newspaper*, Kampala, 14 May 2012) <<http://www.monitor.co.ug/News/National/Was-Acellam-captured-or-did-he-surrender-/-/688334/1405298/-/xftp08p/-/index.html>> accessed 25, July 2013. See Allen, Tim and Vlassenroot, Koen, 'Introduction: The Lord's Resistance Army: Myth and Reality In: Allen, Tim and Vlassenroot, Koen, (eds.) *The Lord's Resistance Army: Myth and Reality* (Zed Books, London, UK 2010). See also Simon Jennings, 'Muted Applause for Ugandan Rebel's Arrest' ACR Issue 320, 16 May 2012 <<http://iwpr.net/report-news/muted-applause-ugandan-rebels-arrest>> accessed July 24, 2013.

3 Emmanuel Melissaris, 2004 *supra*; Tamanaha, 2008 *supra*., Santos, 'Toward a ???(1995) *supra*.

4 Emmanuel Melissaris, 'The More the Merrier? A New Take on Legal Pluralism 2004(13) (1) SLS 58., Tamanaha (2008) *ibid.*, Santos, Boaventura de Sousa (1995) 473., See also Santos, Boaventura de Sousa (1987) 279, 297 -298.

5 The word conceived is deliberately used here to signify what the majority may perceive. This however should not negate the fact that there are instances of superiority amongst these very legal orders.

other by either adopting certain practices and /or discarding others. In essence, just like traditions, these normative orders are dynamic and fallible.

It is for this reason that the ICL- through the ICC- is encouraged to adopt a purposive interpretation of the Rome Statute which will enable it embrace the concept of positive complementarity. Whereas it is true that the ICC does not necessarily need a CLP interpretative framework in order to adopt a positive approach to complementarity, the CLP interpretative framework is very crucial in enabling the ICC (or any other actor interested in post conflict interventions), to have a better understanding of how the people affected by the violence are negotiating through the various normative orders in order to have a sustainable post conflict settlement. The concept of positive complementarity opens the doors for the ICC to support those States (like Uganda) which wish to carry out their primary duty of intervening in a conflict situations happening in their territories through both prosecutorial and non prosecutorial interventions.<sup>6</sup> Instead of insisting that states privilege trial justice over other interventions, the role of the ICC would be to give both technical and other assistance where it is required to do so. Adopting positive complementarity would enable the ICC to measure its success based on the way it supports States to address their post conflict situations instead of the number of cases it prosecutes.<sup>7</sup> It is only then that ICL will be able to consider that these other legal regimes/normative orders which operate in the same time and space as the Rome Statute, are not merely promoting impunity, but are actually legitimate interventions which are being used by the people of Uganda to address their needs. More research can be carried out regarding the feasibility of how these non prosecutorial interventions comply with the concept of complementarity/or to address people's needs.

The failure to embrace positive complementarity will only continue to make the ICC increasingly irrelevant in situations such as Uganda. This is because, insisting on prosecution has not led to the arrest of the LRA/M indicted leaders but only spread the conflict beyond the borders of the country to other nations like DRC, CAR, Chad and the South Sudan. Adopting positive complementarity would also help the ICC to easily negotiate a political settlement with its former backers (and now harshest critics) the AU. This is because the AU views the stand taken by the ICC in insisting on prosecutions in certain situations at the risk of exacerbating conflict as an affront to the sovereignty of their

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6 See Draft 5 of the NTJP as prepared by the NTJP Working group October 2013 (Copy on file with researcher).

7 See Luis Moreno-Ocampo, Prosecutor of the ICC, Building a Future on Peace and Justice, Address at the International Conference in Nuremberg (June 24-25, 2007), <http://www.peace-justice-conference.info/download/speech%20moreno.pdf> accessed September 10, 2013

nations. Seeking to cooperate with the AU instead of fermenting a rift with the very partners who should be helping the OTP/ICC is unwise. It is important that a middle ground be agreed on the way forward. Uganda has continued to implement the provisions of the Juba peace process and the support from the ICC or its backers would go a long way in according legitimacy to this process. However, with or without the support of the ICC, the people of Uganda continue to use their different normative orders to address their various post conflict transition goals and needs. In light of the above, the ICC ought to engage with the political realities in the situations in which it is involved because law does not operate in a vacuum. A strictly legal approach to protracted conflicts which ignores their causes and their political ramifications often does not help the fight against impunity. The ICC should be cognisant of the fact that some of the situations under its jurisdiction require political and not simply legal solutions.<sup>8</sup>

The study has also argued that there is a disconnect between the way people in Uganda (especially the victims) navigate justice on the ground and the way in which ICL – as represented by the OTP/ICC – seeks to address the post conflict needs in the society. By taking a literal interpretation of the Rome Statute’s concept of complementarity, ICL previously only considered criminal prosecutions of those suspected to have had the highest responsibility for international crimes, as the yardstick for accountability. However, there is now a more nuanced understanding both in theory and practice of the limits of ICL and an understanding that acknowledges that the people of Northern Uganda are not promoting impunity when they resort to using different normative orders to help them address their diverse judicial and non-judicial needs. These various normative orders are helping them to achieve sustainable post conflict reconstruction that includes prosecution, reconciliation, rehabilitation, reintegration, peace building, memorialisation, truth telling, among others. There is interconnectedness between these diverse legal orders as they work together (and sometimes conflict with each other) to achieve these goals.

## **7.2 SIGNIFICANCE OF RESEARCH FINDINGS**

This study has made the case that TJMs are a very relevant normative order in transitional justice. This is because they contribute significantly to non-prosecutorial interventions like

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<sup>8</sup> The situation in the Eastern DRC for example, is a question of land, mineral resources and the fight for the right of citizenship. These are not merely issues of lawlessness but are questions of a political nature that require a political solution. Failure to address these grievances shall remain a key cause of future conflict and incidental atrocities. Despite the fact that the ICC has convicted one of the rebel leaders, there is no evidence that the conviction has deterred the fighting in the DRC. This is partly because the atrocities as a result of a multitude of internal as well as external factors which need a comprehensive and sustainable reconstruction intervention.

truth telling, reconciliation, reintegration, forgiveness, healing, truth and reconciliation commissions, reparations, rituals of purification, memorials and others interventions.<sup>9</sup> The study has also confirmed that TJMs form crucial links between formal justice systems like prosecutions and reintegration or amnesties and truth telling. The fact that they were included in Juba Agenda Item III<sup>10</sup> and later on in the draft of the NTJP confirms this position. We should expect to see the continued use of these TJMs not only in Uganda but also in more and more countries which have similar challenges like Uganda. While the role of the ICC and national courts is critical in the fight against international crimes, the operations of these courts are limited.

It is important to take heed of the broad range of justice options that are existent in those societies many of which – like TJMs- are aimed at social reconstruction and a sustainable post conflict transition.<sup>11</sup> Where prosecutions are absent, this *lacuna* can be filled by encouraging the use of TJMs as some NGOs, governments and religious groups have done.<sup>12</sup> It is also important that the ICC is not abused by those States that seek its intervention by way of self-referrals. One way of pursuing positive complementarity is by encouraging and not trumping local autonomous processes like TJMs in which victims or persons affected by conflict can ably participate in addressing their own justice needs.<sup>13</sup> This is because TJMs do enjoy a degree of grass-roots support because they correspond to local notions of justice.<sup>14</sup> However, it is important to ensure that TJMs are not essentialised or glorified.<sup>15</sup> Neither should they be relegated ‘to the realm of the devilish.’<sup>16</sup> Due to their shortcomings, TJMs can be amended to adapt to the diverse needs of the people who seek or need justice. Whether the amended versions of TJMs will be enacted into national law or not, or whether they will still be able to address abuses perpetrated in the course of conflict

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9 id

10 The Third Preamble to the Agreement on Accountability and Reconciliation, states that ‘Committed to preventing impunity and promoting redress in accordance with the Constitution and international obligations and recalling, in this connection, the requirements of the Rome Statute of the International Criminal Court (ICC) and in particular the principle of complementarity.’ See Agreement on Accountability and Reconciliation [http://www.beyondjuba.org/BJP1/peace\\_agreements/Agreement\\_on\\_Accountability\\_And\\_Reconciliation.pdf](http://www.beyondjuba.org/BJP1/peace_agreements/Agreement_on_Accountability_And_Reconciliation.pdf) accessed April 2012.

11 Stover and Weinstein 2004.

12 Latigo supra.

13 Adam Branch, ‘Uganda’s Civil War and the Politics of ICC Intervention’ <<http://grad.sdsu.edu/~abranche/Publications/Ethics%20and%20International%20Affairs%2021.2,%20Summer%202007--Branch.pdf>> accessed April 6, 2014.

14 Beyond Juba Project ‘Tradition in Transition: Drawing on the Old to Develop a New Jurisprudence for Dealing with Uganda’s Legacy of Violence Working Paper No. 1 July 2009.

15 See for example, Barney Afako ‘Reconciliation and justice: ‘Mato oput’ and the Amnesty Act’ (2002), <<http://www.c-r.org/our-work/accord/northern-uganda/reconciliation-justice.php>> accessed 10 April 2011.

16 Latigo, James Ojera. 2008. ‘Northern Uganda: Tradition-based practices in the Acholi Region in (L. Huyse, M.Salter, (eds.) ‘Traditional Justice and Reconciliation after Violent Conflict: Learning from African Experiences,’ IDEA, 108..

remains for the State of Uganda to deliberate and decide. What is clear is that the process is long overdue and the GoU is encouraged to adopt a white paper on the Fifth draft of the National transitional Justice policy (NTJP) which is now reportedly before the Cabinet of Ministers.

Rather, TJMs should continue to be viewed as ‘part of a larger justice project aimed at promoting reconciliation and healing.’<sup>17</sup> This justice project should also include contributions of religious beliefs, TJMs, western psychotherapeutic methods and ‘modern’ courts.<sup>18</sup> The goal should instead be to understand and utilize all different approaches to justice ‘in ways that complement each other synergistically, rather than working against each other.’<sup>19</sup> It is interesting to note that the former Prosecutor has now changed his position arguing for inter alia, truth telling in Uganda.<sup>20</sup> It can be argued that this comment is arguably a result of self-reflection after his tenure in office – a reflection which ought to be given due consideration by the current Prosecutor especially in light of the growing criticisms against the work of the ICC.<sup>21</sup>

This study is therefore crucial for Uganda on several grounds: i) in the first place, it confirms that the Juba peace process generally and Agenda Item III in particular were a move in the right direction of focusing on sustainable post conflict transition by addressing all matters that caused and sustained for over almost three decades; ii) this research also confirms that Uganda should be confident to use its own local traditional justice processes to address the home-grown challenges instead of rushing to use western based international systems which might not adequately respond to the complex conflict issues that are unique to the country. (This however does not mean that all western based international systems are irrelevant to Uganda. It is actually true that there are many aspects of this system which have become part and parcel of the applied law in Uganda); iii) the research further confirms that questions of justice and peace are also political questions. The research shows that the political will to resolve the conflict peacefully since it started in 1986 was lacking and yet the dividends of a peaceful settlement far outweigh any military or legalistic intervention.

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17 id

18 id

19 id

20 Yuday Nangonzi ‘Ocampo backs ‘story- telling’ for LRA victims’ 25, March 2014 *The Observer Uganda*, <[http://www.observer.ug/index.php?option=com\\_content&view=article&id=30893:ocampo-backs-story-telling-for-lra-victims&catid=34:news&Itemid=114](http://www.observer.ug/index.php?option=com_content&view=article&id=30893:ocampo-backs-story-telling-for-lra-victims&catid=34:news&Itemid=114)> accessed March 31, 2014.

21 Kevin Jon Heller, ‘Another Terrible Day for the OTP’ <<http://opiniojuris.org/2014/03/08/another-terrible-day-otp/>> accessed March 31, 2014. Heller criticises the re-characterisation of the ‘A Stick to Hit the Accused With’: The Legal Recharacterisation of Facts under Regulation 55’ <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2370700](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2370700)> accessed March 31, 2014.

Political will to resolve a conflict *peacefully* accelerates the success with which the conflict is resolved; iv), the research shows that Ugandans should not shy away from making personal contributions to resolving any challenges before them. In essence, the individual citizen subject in resolving conflicts should not be ignored or under-estimated. The research reveals that individuals formed organisations like the ARLPI and championed for amnesty laws as well as peace negotiations. Examples of individuals like Hon. Betty Bigombe who confronted her erstwhile lesser role in traditional Acholi society as a woman and insisted on pursuing peaceful negotiations with the LRA/M during the early years of the conflict, and thereby laying a crucial foundation for the Juba peace talks should motivate fellow Ugandans to appreciate their crucial role in society. Conclusively, this research has shown the fight against international crimes has to ‘grow from the culture, history and local aspirations of the local population.’<sup>22</sup> These should be coordinated with ‘economic reforms and other kinds of initiatives as part of a holistic approach to post conflict’ interventions.<sup>23</sup>

### **7.3 AREAS FOR FURTHER RESEARCH**

This study has focused mainly on situating the place for TJMs in a transitional justice intervention like the Juba Peace Accord. However, since the GoU is now in the process of implementing the AAR through the NTJP, further research on how TJMs will actually be amended so as to be in line with fair justice and human rights standards is needed. This research should also encompass investigating how these TJMs can continue to maintain their unique features even after the enabling law. Similarly further research is needed to analyse what yardsticks will be and need to be used by ICL – as represented by the ICC- to gauge whether TJMs- as amended- will fall within the Rome’s statute’s concept of complementarity. This research has also suggested that the ICC ought to adopt a purposive interpretation of the Rome Statute which would enable it to embrace the concept of positive complementarity. It is important for further research to be carried out on how this will actually be done. Additionally, while TJMs continue to be used in societies that have suffered mass atrocities, the literature is silent on which framework the OTP/ICC may use to determine whether the use of such TJMs is sufficient to fulfil the requirements of Article 17 and thus make the case inadmissible before the Court. Finally, the LRA/M has crossed the Uganda border and caused havoc in countries like South Sudan, Central African

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<sup>22</sup> Jane Stromseth ‘Strengthening Demand for the Rule of Law in Post-Conflict Societies’ 18 *Minn. J. Int’l L.* (2009) 415, 420.

<sup>23</sup> *Ibid.*

Republic, DRC and others. It is worth investigating what kinds of TJMs are used there, if any, and how these can be used to bring sustainable post conflict transition in those regions.

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**ANNEXTURES Table A : The Trend In Results Conducted By Various Organisations On Northern Uganda**

<b>Name Of Research</b>	<b>Period Conducted</b>	<b>Main Researcher (S)</b>	<b>Areas Research Conducted</b>	<b>Type of Research Done</b>	<b>Findings on Traditional Justice</b>
<b>Kill Every Living Thing: The Barlonyo Massacre</b>	Nov 2007, June 2008	Justice and Reconciliation Project Gulu District NGO Forum	Barlony, Lira District, Northern Uganda	50 individual semi-structured interviews, 5 focus group discussions. 79 people. 70 eye-witnesses, 11 former abductees consulted	Emphasis on truth telling, reparations, investigations and memorials. Trust Fund for orphans of the massacre, particularly the child and youth heads of household  Accountability for the leaders of the LRA especially Okot Odhiambo and the UPDF for failing to protect citizens.
<b>Transitional Justice in Northern , Eastern Uganda &amp; Some parts of West Nile Region</b>	01/03/08	Justice Law and Order Sector	Acholi land – Gulu,, Kitgum, and Pader; Lango – Dokolo, Lira, Apac, West Nile- Adjumani, Moyo and Nebbi	Secondary data analysis of written published and unpublished work, key informant interviews, Focus Group discussions, Baseline surveys., case studies, analysis and interpretation	Two basis approaches to transitional justice – social economic recovery as well as retribution.  Impact of transitional justice on poverty reduction limited as long as reparation is neglected  Devising measures to address past human rights violations in post-colonial phase maybe contentious given that formulating an effective and legitimate strategy entails balancing a variety of interests and objectives.
<b>Social Torture: The Case of</b>	May 1998 to March	Chris Dolan	Gulu and Kitgum	Fieldwork, interviews, participant observer at local and national	The self limiting nature of the LRA and the Government of Uganda's lack of commitment to peace

<b>Northern Uganda, 1986 - 2006</b>	2000			meetings with Local Council Chairmen, Office of Minister for Northern Uganda Reconstruction, documentation assistance, 1 full time research assistant	are a deeper process for social torture through violation, debilitation, and humiliation, thus hampering the prospects for traditional justice. This is in addition to a multiplicity of other actors like complicit bystanders, victims and perpetrators.
<b>Living with Bad Surroundings: War, History, Everyday Moments in Northern Uganda</b>	1997 to 2006	Sverker Finnstrom		Focus on young people in Acholiland. Mainly participant reflection, discussions,	International agencies have tended to ascribe a form of dangerous subjectivity to the inhabitants of this region which is untrue.  Need to appreciate the context of religious beliefs and practices in order to understand the Acholi cosmology and how it relates to traditional justice.
<b>Making Peace our Own: Victims' Perceptions of Accountability, Reconciliation and Transitional Justice in Northern</b>	January to June 2007	Office of the United Nations High Commissioner for Human Rights	1725 victims of 69 focus groups in Acholiland, Lango, Teso sub-groups	39 key informants, ten clusters based on common experiences of harm (further divided by age and gender), narrative-based approach.	Overwhelming desire for reconciliation at family, community and inter-regional levels.  Widespread scepticism about the potential for current transitional justice mechanisms especially state institutions to facilitate reconciliation.  Principal needs were truth-recovery and compensation.  Perceptions to ICC and traditional justice were mixed  Called for multi-faceted transitional justice response, combining several processes and institutions to address

<b>Uganda</b>					<p>different types of harm caused by different levels of perpetrators.</p> <p>Recommended ICC increases its outreach to address respondents' stated lack of information of its operations, especially truth recovery processes, compensation, and Trust Fund for Victims. Claim that study highlighted widespread view that international community should play a central role in ensuring that Juba Peace process on accountability and reconciliation cohere with population's views</p>
<b>LRA: A Regional Strategy Beyond Killing Kony</b>	April 2010	International Crisis Group	Congo, Central Africa Republic, Sudan	Mainly Desk top	<p>Generally not suited for dealing with crimes committed by the LRA</p> <p>More emphasis on other structures to deal with the after effects of post LRA rebellion</p>
<b>Developing and Managing an effective transitional justice system for Uganda</b>	Aug 2008	Report on the Third National JLOS Forum	Views from various stakeholders in Uganda	Various opinions and papers presented	<p>Recognise the crucial role of the traditional justice mechanisms in an effective transitional justice system as it promotes truth telling, reconciliation and reintegration</p> <p>Engage the cultural leaders and other stakeholders to explore ways of documenting the processes of the different IJM</p>

					<p>Need to fuse IJM with the formal criminal system for war crimes</p> <p>Explore how they make the cultural processes relevant within current legal framework</p>
<p><b>“Where Justice is a Dream”</b></p> <p><b>A Report of a study of formal and informal justice mechanisms in Adjumani;</b></p>	<p>20<sup>th</sup> July to August 5<sup>th</sup> 2009</p>	<p>German Overseas Development Program (DED), Refugee Law Project (RLP)</p>	<p>sub counties of Adropi, Ciforo, Dziapi, Pakelle and Ofua, Adjumani, Northern Uganda</p>	<p>Field Research, interviews of a wide section of people.</p> <p>138 individual interviews,</p> <p>12 focus groups discussions of 90 people,</p> <p>validation meeting with 38 local government and civil society chairpersons</p>	<p>Formal justice mechanisms focus on punitive measures while IJM perceived as reconciliatory while also able to place crimes within the larger context in which they were committed.</p> <p>IJM Cannot operate consistently due to the social disruption instigated by the region’s conflict riddled history. Hence codification is necessary</p>
<p><b>War Affected Children and Youth in Northern Uganda: Toward a Brighter Future. An Assessment</b></p>	<p>July to December 2005</p>	<p>Erin Baines, Eric Stover and Marieke Wierda</p>	<p>Gulu, Lira, Pader, and Soroti</p>	<p>July 2005- Visited six reception centers for LRA returnees, met Amnesty Commission Chairperson Justice P.K.K. Onega, Government Chief Peace Negotiator Betty Bigombe, representatives of NGO's and districts., Sept 2005- Questionnaires to 72 community based organisations oriented</p>	<p>Peace and Justice will only be achieved through an inclusive process that involves both traditional and formal justice mechanisms. 65% of 2585 interviewees wanted amnesty for LRA returnees.</p> <p>Closer collaboration with traditional justice leaders to foster sustainable re-integration, justice and reconciliation.</p> <p>Cleansing ceremonies for returning LRA fairly widely practiced among the Acholi. More elaborate restorative</p>

<p><b>Report May 2006</b></p>				<p>towards children and youth in towns and IDP camps, Oct -Nov 2005- meeting with traditional leaders, district and national officials, representatives of NGO's, reception centres, youth groups, UN Office for Humanitarian Affairs.</p>	<p>justice mechanisms needed to adapt to the circumstances of the war.</p> <p>Need for a cultural revival and for women and youth to become involved.</p> <p>ICC poorly understood in North and need for more outreach</p> <p>Need for national approach to truth and reconciliation is required to redress grievances that have fuelled cycles of violence throughout Uganda's Morden history</p> <p>Integrated approach to transitional justice through national and local institutions.</p> <p>Trust fund for orphans</p>
<p><b>The Cooling of Hearts: Community Truth-Telling in Acholi-Land</b></p>	<p>January – March 2007</p>	<p>Justice and Reconciliation Project (JRP), Gulu District NGO Forum, Liu Institute for Global Issues, July 2007</p>	<p>9 internally displaced peoples' Camps between January and March 2007 (Amuru, Anaka, Kitgum Matidi, Padibe, Pajule and Kalongo)</p>	<p>23 focus group and traditional <i>wang oo</i> (fireplace) discussions, semi structured interviews with 19 persons knowledgeable about traditional justice mechanisms. , NGO and religious leaders, , 64 semi structured interviews with survivors of LRA or NRA massacres and parents of disappeared so as to develop</p>	<p>Need for truth-telling as a process of reconciliation so as to live together socially. Should be voluntary.</p> <p>Cultural rituals where massacres were done like Atiak and Koch Goma, where the perpetrator could not identify his victims, after truth commission has done its work.</p> <p>Economic development alongside psychosocial counselling for victims and perpetrators.</p>

				narrative of the incidents and gather perspectives of truth telling as related to conflict. 5 question quantitative survey, interviews and focus group discussions	Inter-communal reconciliation is needed between the South Sudan, Eastern Uganda and the DRC. Other regions in south Uganda like Luweero will also need a form of community, regional and national truth healing process.
<b>Transitioning to Peace: A Population based Survey on Attitudes about Social reconstruction and Justice in Northern Uganda</b>	April and May 2010	Phuong Pham & Patrick Vinck., Human Rights Center, University of California, Berkeley School of Law, December 2010	Amuru, Gulu, Kitgum and Pader	2498 interviews using anonymous standardized questionnaires	Peace with amnesty 45%, peace with truth seeking 32%, peace with trials 15%, peace with traditional ceremonies 8%. Trials in Uganda 35%, Trials abroad 28%, trials in Uganda by an international court 22%, no trials at all 22%. Results were consistent with the 2007 findings. 53% traditional justice for LRA combatants and ex-combatants, 39% said such ceremonies helped the community reconcile while 25% would forgive the wrongdoer while 31% said they did not help anything. 59% had heard about the ICC and only 6% ranked their knowledge of the Court as good or very good. Truth seeking valued highly. 42% books should be written, 26% children should be educated and monuments built 13% 97% reparations should be granted to victims because they are poor 49%, as a form of acknowledgement of suffering 24% and help them forget 19%. Individually

					<p>46% and 32% said communally, 20% both</p> <p>84% wanted accountability by LRA and UPDF.</p> <p>Persuade LRA out of bush 24%, forgiven and granted amnesty 23%, arrest and trial 16% or captured 13%</p> <p>Formal justice was seen as corrupt 33%. 24% viewed it as working well</p>
<p><b>Tradition in Transition: Drawing on the Old to Develop a New Jurisprudence for dealing with Uganda's Legacy of Violence</b></p>	<p>February 3<sup>rd</sup> - 18<sup>th</sup> 2008</p>	<p>Beyond Juba Process: Transitional Justice project of Faculty of Law, Makerere University, the Refugee Law Project and the Human Rights and Peace Centre</p>	<p>3-18 Feb 2008, Acholi and Lango Region., April 10-28 2008, Teso Region., September 10-27 2008, Acholi Region., November 20-19, 2008 Lango Region.</p>	<p>171 interviews and 34 focus group discussions, Keny informant interviews with cultural leaders, community leaders, government officials, Local Councillors, and members of the Justice Law and Order Sector. Focus group discussions and select interviews with ordinary citizens in villages, towns and IDPs.</p>	<p>Traditional justice practices have both local and national relevance and could contribute immensely in addressing the legacies of major conflict in the region as well as the day to day social infractions</p> <p>Though practices with variable frequency, traditional justice is widely respected in principle highlighting the shortcomings of the formal justice process</p> <p>National mechanisms which have no local roots are unlikely to be sufficiently accessible or responsive to the needs of the affected communities.</p> <p>Multi-tiered approach to transitional justice with national, regional and local mechanisms will be necessary to address the legacy of conflicts in the three regions</p>
<p><b>When the War</b></p>	<p>April to</p>	<p><i>huong Pham,</i></p>	<p>Eight districts of</p>	<p>Interviews with 2,875 people using</p>	<p>49% said local customs and rituals useful to deal with</p>

<p><b>Ends:</b> <b>December 2007</b></p>	<p>June 2007</p>	<p><i>Patrick Vinck,</i> <i>Marieke Wierda,</i> <i>Eric Stover and</i> <i>Adrian di</i> <i>Giovanni</i>  The International Center for Transitional Justice and the Human Rights Center, University of California</p>	<p>Northern Uganda – Kitgum, Gulu, Amuru, Oyam, Pader, Lira, Amuria, Soroti</p>	<p>standardized questionnaires while peace talks were taking place in Juba  <i>A Population – Based Survey on Attitudes about Peace, Justice and Social Reconstruction in Northern Uganda</i></p>	<p>LRA, 57% said LRA who return to communities should participate in traditional ceremonies. <i>Mato Oput</i> received the highest amount of support. 60% knew about the ICC in 2007, only 27% did. 29% said Formal justice mechanisms are good for both the LRA and UPDF. 59% wanted trials for the LRA leaders. 80% chose peace with amnesty probably because they feared trials would jeopardise the peace process. 95% wanted a historical record of what happened in Northern Uganda, 90% supported a truth commission. 52% wanted financial compensation. 9% wanted food, 8% wanted livestock, &amp;7% wanted counselling and education for children.</p>
<p><b>Peace First, Justice Later</b></p>	<p>October 7 November 2004 , March 2005</p>	<p>Refugee Law Project Makerere University</p>	<p>Gulu, Kitgum Pader Districts</p>	<p>Field research. A total of 109 interviews</p>	<p>Individuals still recognise relevance of IJM. Although many IJM have been affected by the displacement of the people,  they will still play a vital role in the post-conflict phase</p>
<p><b>'Listen to the People! Towards an Inclusive</b></p>		<p>Samuel B. Tindifa et al, HURIPEC, Faculty of Law,</p>	<p>Adjumani, Apac, Lira, Kabarole, Kampala, Bundibugyo,</p>	<p>Interview of 292 from 11 Districts from all over Uganda.  Interviews were conducted with several actors in and outside the</p>	<p>A multi-pronged political approach to the conflict is more desirable because it will be able to address the political issues responsible for the outbreak of the conflict. Such a political approach must be inclusive of</p>

<p><b>Approach to the Peace Process in Northern Uganda', HURIPPEC Working Paper No.3 of 2006</b></p>		<p>Makerere University United Nations Development Program (UNDP) and the Ministry of Finance, Planning and Economic Development</p>	<p>Gulu, Kitgum, Pader, Katakwi, Nairobi, Kasese</p>	<p>areas of conflict. They consisted of at least two focus group discussions (FGD) and one to one interviews in every district that had been sampled. reviewed of policy documents, government reports, speeches of political leaders,</p>	<p>all actors, and should avoid the mentality of winner takes it all.</p>
<p><b>Roco Wat I Acoli: Restoring Relations in Acholi-Land: Traditional Approaches to Reintegration and Justice</b></p>	<p>February – August 2005</p>	<p>Liu Institute for Global Issues, Gulu District NGO Forum, <i>Ker Kwaro</i> Acholi</p>	<p>Gulu, Kitgum Pader Districts</p>	<p>16 IDP's, over 120 interviews with Elders, rwoodi and <i>Mego</i>, 506 formerly abducted persons; 2 former LRA commanders; 80 displaced persons; and an array of religious groups and NGOs. Used observational techniques and or semi-structured questions with participants. Case studies of Mato Oput ceremony in Pajule, Moyo Piny ceremony in Corner Kilak, a cleansing ritual in Lacor and half a</p>	<p>Majority of Acholi continue to hold sophisticated cultural beliefs in the spirit world which greatly shape their perceptions of justice and reconciliation.</p> <p>Traditional Justice is restorative and voluntary since one needs to avoid <i>cen(vengeance of the spirit world)</i></p> <p>Traditional Justice is a collective and transparent process used to take place in open courts with specific roles for elders and representatives for royal clans.</p> <p>Traditional values have been greatly affected by the on-going conflict, diminishing the role and status of cultural leaders.</p>

				<p>dozen communal cleansing ceremonies in all three districts. Preliminary findings were discussed at a participatory workshop with 32 elders, <i>Rwodi</i>, <i>Mego</i> and other supporters of Ker Kwaro on August 12-13, 2005.</p>	<p>Cultural leaders and Women have adapted rituals to welcome returnees home and in some cases help to remove <i>cen</i></p> <p>Intermixed with religion, the LRA practice the same rituals and beliefs of the Acholi culture which suggests that these could help returning rebels and the abductees themselves.</p> <p><i>Mato Oput</i> continues to be practised in the camp settings throughout the three districts of Acholi land.</p> <p><i>Mato Oput</i> could not be adapted because reconciliation cannot be fostered until conflict ends and the specific requirements of <i>Mato Oput</i> do not immediately translate to the scope and scale of the present conflict.</p> <p>Reintegration of Formerly abducted persons is complicated as returnees encounter stigmatization, resentment, insecurities and lack of economic stability.</p>
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**Table B: Various IJM Practices Reported**

Practice	Tribe	Source	Type of practice	Organisation	Process(es)	Results
<i>Mato Oput</i>	Acholi	Rwot of Acholi represented by Bishop Phillip Ocholla II	spiritual	Communal	Public confession, repentance, drinking bitter herbs symbolising violence and death.  Carried out at 'the end of a long process of confession, mediation and payment of compensation to reconcile two clans after a murder has occurred between them'.	Collective responsibility,
<i>Ebuk</i>	Itesot	Emorimor of Teso represented by Mr. Irige, Ekirigi Prime Minister of Teso	Spiritual	Hierarchical starting from family units, communal,	Traditional courts , <i>ailuk</i> conflict resolving process	Conflicting parties united, ceremonial cleansing
<i>Kai Cuk</i> 'biting the charcoal'	Lango	Rwot Olwit Ongol	Spiritual	Originally eye for an eye; biting the charcoal	Confession, mediation	reconciliation
<i>Similar to Mato Oput</i>	Alur	Rwoth Ubimu Phillip Olarker Rauni, III	Spiritual	<i>Similar to Mato Oput and that of fellow Luo</i>	Truth telling, forgiveness	Reconciliation, accountability community togetherness
	Karamoja	Phillip Ichumar	spiritual	<i>Eye for an eye like Turkana of Kenya, Iteso</i>	Originally it was Clan arbitration by Elders; process of 'accepting defeat' to resolve the conflict and bury the of weapons of war	Compensation of 60 cows for murder, marry daughter of the deceased family, slaughtering cows to sway misfortune

Source: Third JLOS National Report Page 15

### ***Others include:***

**Nyono Tong Gweno** interpreted to mean, 'the 'Stepping of the Egg' ceremony welcomes home a member of the family that has been away for an extended period of time'

**Riyo-tal** which is '(M)ediation conducted by the Elders and Rwodi in times of conflict to approve the waging of wars by symbolically handing over *oboke olwedo* leaves. According to Roco Wat I Acoli, it is speculated that 'some Elders had given their blessings to Kony and this is why the war is not ending. Elders cannot undo a blessing once it has been given.'

**Moyo Piny / Tumu Piny** which 'loosely translated means 'sacrifice' and 'cleansing' of an area',

**Dwoko Ayoo** – which is carried out ' *to reconcile a conflict between members of the same family or clan, in the belief that such conflict offends the ancestors and as a result, ushers in 'bad spirits' and brings misfortune'*,

**Kwero Merok** – performed when '*a foreigner has been killed by returning soldiers; or, alternatively, when a dangerous beast has been killed'*

**Moyo Remo** 'cleansing of the blood'- *which is 'completed in order to prevent a reprisal blood feud after a murder takes place between two clans'*,

**Lwoko pig wang** 'Washing of tears' which is a '*ceremony conducted when a person had disappeared and was thought to have died, but returns to a family'*

**Gomo Tong** (Bending of Spears)– a 'symbolic ritual as a vow between two clans or tribes engaged in violent conflict to end hostilities.(Finnstrom 2008:43.

**Source:** Liu Institute for Global Issues & Gulu District NGO Forum, *Roco Wat 1 Acoli: Restoring Relations in Acholi-Land: Traditional Approaches to Reintegration and Justice* (2005).