

**UNIVERSITY OF NAIROBI**

**INSTITUTE OF DIPLOMACY AND INTERNATIONAL STUDIES**

AN ASSESSMENT OF THE TRANSITIONAL JUSTICE MECHANISMS IN POST  
CONFLICT SOCIETY: A CASE STUDY OF THE EAST AFRICA COMMUNITY

**DAMARIS WERE OGAMA**

**R50/68979/2011**

**Supervisor**

Dr. Ochieng Kamudhayi

A Research Project submitted in partial fulfillment of the requirement for the award of the  
Degree Of Master Of Arts In International Conflict Management

**SEPTEMBER, 2013**

**DECLARATION**

This Research Project is my original work and has not been presented for the award of a degree in any other university.

Signed

Date

.....

.....

**Damaris Were Ogama**

**R50/68979/2011**

This research project has been submitted for examination with my approval as the University Supervisor.

Signed.

Date

.....

.....

**Dr. Ochieng Kamudhayi**

## ACKNOWLEDGEMENTS

This thesis was only possible with the assistance and support of many people in university staff, family members and friends. First, I thank my supervisor Dr. Ochieng' Kamudhayi for his guidance and thorough advice on the topic and for helping me to focus the direction of this thesis, many excellent suggestions, and his ruthless insistence on cutting excessive detail.

Secondly, to my family members for their relentless moral support. Their endurance and hard work are inspiring

To my friends who generously gave their time and shared their experiences and expertise with me. In particular, I am grateful Elizabeth who facilitated my research in local villages, and to the Transitional Justice Working Group who welcomed me to the team and allowed me to participate in, and observe their work.

For proof reading and helpful comments, I am also very grateful to my son Nigel Alukwe, my parents Mathias and Rebecca Ogama.

To my friends and fellow post graduate students, thank you for your camaraderie, helpful discussions, and comic relief.

## **ABSTRACT**

The main objective of this study was to Assess the Transitional Justice Mechanisms In Post Conflict Societies, the case study of the East Africa Community. The research investigated the transitional justice sources from stakeholders and organizations such as the African Union, the Government, civil society organizations and the media and this was adequate to give the information required for the study in hand with highlighted literature on the Evolution of Transitional Justice Mechanisms in Post Conflict Societies. The study relied on secondary and primary data which was collected using questionnaires, focus groups, observations of some of the sample population and interview guide developed in line with the objectives of the study and analyzed to draw the conclusion of the study finding where qualitative techniques were applied in data analysis. Sample was selected using a systematic random sampling. The sample of 30% and above is considered representative for a population less than 500. The results were presented in discussion content delivery to highlight the major findings. They were also presented sequentially according to the research interview guide of the study. Descriptive analyses were used to analyse the data collected. The raw data was coded, evaluated and tabulated to depict clearly the Transitional Justice Mechanisms in Post Conflict Societies. The research recommended that the Transitional Justice Mechanisms In Post Conflict Societies is extremely important given the all regimes coming out of a devastating conflict are confronted with a formidable transition agenda. It must be noted that International NGOs such as Amnesty International and Human Rights Watch are not absent in the debate on transitional justice policies.

## **LIST OF ABBREVIATIONS**

<b>UN</b>	United Nations
<b>UNSC</b>	United Nations Security Council
<b>ICTY</b>	International Criminal Tribunal for Yugoslavia
<b>SCSL</b>	Special Court for Sierra Leone
<b>ICTR</b>	International Criminal Tribunal for Rwanda
<b>ICC</b>	International Criminal Court
<b>CIPEV</b>	Commission of Inquiry into Post Election Violence.
<b>KNHRC</b>	Kenya National Human Rights Commission
<b>PEV</b>	Post Election Violence
<b>WCD</b>	War Crimes Division
<b>ICD</b>	International Criminal Divisions
<b>DRC</b>	Democratic Republic of Congo
<b>LRA</b>	Lord's Resistance Army
<b>EAC</b>	East Africa Community
<b>ICA</b>	International Crimes Act
<b>PCS</b>	Post-Conflict Society
<b>LCC</b>	Local Council Courts
<b>STSL</b>	Special Tribunal for Sierra Leone
<b>ODM</b>	Orange Democratic Movement
<b>PNU</b>	Party of National Unity
<b>IDP</b>	Internally Displaced Person

## TABLE OF CONTENTS

<b>DECLARATION</b> .....	ii
<b>ACKNOWLEDGEMENTS</b> .....	iii
<b>ABSTRACT</b> .....	iv
<b>LIST OF ABBREVIATIONS</b> .....	v
<b>TABLE OF CONTENTS</b> .....	vi
<b>LIST OF FIGURES</b> .....	ix

### CHAPTER ONE

#### TRANSITIONAL JUSTICE MECHANISMS IN POST CONFLICT SOCIETIES

1.1 Introduction .....	1
1.2 Statement of the Research Problem .....	2
1.3 Objectives.....	3
1.4 Literature Review .....	3
1.4.1 Criminal Trials as Transitional Justice Mechanisms .....	7
1.4.2 Lustration Mechanisms in Transitional Justice .....	8
1.4.3 Reparations as Transitional Justice Mechanisms .....	9
1.4.4 Amnesty Transitional Justice Mechanisms in Post Conflict Socities.....	10
1.5 Theoretical Framework .....	11
1.6 Justification of the Study.....	13
1.7 Hypothesis.....	14
1.8 Methodology .....	14
1.9 Chapter Summary.....	16

### CHAPTER TWO

#### EVOLUTION OF TRANSITIONAL JUSTICE MECHANISMS IN POST CONFLICT SOCIETIES

2.1 Introduction .....	18
2.2 Post-Cold War and the development of <i>ad hoc</i> tribunals.....	20
2.3 The Development of International Criminal Tribunal of Rwanda.....	21
2.4 The Development of International Criminal Tribunal for the Former Yugoslavia.....	25
2.5 The Transitional Justice Promise of The ICTY and ICTR.....	26

2.6 The Development Hybrid Tribunals for Transitional Justice.....	28
2.7 Deterrence Effects of the Tribunals. ....	29
2.8 Shortcomings of the Criminal Tribunal’s Deterrence Effects.....	30
2.8 Conclusion.....	31

### **CHAPTER THREE**

#### **EAST AFRICA COMMUNITY TRANSITIONAL JUSTICE MECHANISMS**

3.1 Introduction to EAC Transitional Justice.....	33
3.2 Local Trials in East Africa Community for Transitional Justice Mechanisms .....	38
3.3 Traditional Methods of Transitional Justice Mechanisms in East Africa Community .....	39
3.3.1 International Criminal Tribunal for Rwanda .....	40
3.4 Criminal Prosecution in EAC in Transitional Justice Mechanisms .....	42
3.5 Amnesty in EAC in Transitional Justice Mechanisms .....	44
3.5.1 Amnesty in Uganda in Transitional Justice Mechanisms.....	46
3.5.2 The Contours of the Amnesty Act.....	46
3.6 Conclusion.....	49

### **CHAPTER FOUR**

#### **ANALYSIS OF TRANSITIONAL JUSTICE MECHANISMS IN EAST AFRICA COMMUNITY**

4.1 Introduction .....	50
4.2 International Criminal Tribunal .....	50
4.3 Legality of Amnesty in International law .....	53
4.4 Knowledge on the criminal Justice System in the EAC.....	54
4.5 Knowledge of Truth Commissions in EAC .....	58
4.5.1 Truth versus Justice in EAC.....	62
4.6 The impact of local trials in EAC.....	63
4.7 Contribution of Amnesty in Transitional Justice in EAC .....	68
4.8 Reparations in Transitional Justice in EAC .....	72
4.9 Conclusion.....	73

**CHAPTER FIVE**

**CONCLUSIONS AND RECOMMENDATIONS**

5.1 Introduction..... 76

5.2 Summary of the Research Findings and Conclusions..... 77

5.3 Key Findings and Conclusions..... 77

    5.3.1 Objective I: Analytical situation of Transitional Justice in the East Africa Community  
    ..... 78

    5.3.2 Objective II: Systematic situation of Transitional Justice in Post Conflict Society..... 79

5.4 Conclusion..... 83

5.5 Recommendations ..... 87

**BIBLIOGRAPHY.....90**

**APPENDICES.....100**

Appendix 1: Questionnaire on the Assessment of the Transitional Justice Mechanisms in Post  
Conflict Society: A case Study of the East Africa Society.....100

Appendix 2: Questionnaire Forwarding Note.....104



## LIST OF FIGURES

Figure 4.1: Illustrates the General Perceptions of the International Criminal Processes.....	51
Figure 4.2: Illustrates the Respondents support International criminal Justice .....	56
Figure 4.3: Illustration on Respondents who support Truth Commissions .....	59
Figure 4.4 : Illustration on Respondents who support local tribunals .....	64
Figure 4.5: Illustration on Respondents who support criminal Justice in the EAC.....	66
Figure 4.6:Illustration on Respondents who have the willingness to pardon crime perpetrators .	70

## CHAPTER ONE

### TRANSITIONAL JUSTICE MECHANISMS IN POST CONFLICT SOCIETIES

#### 1.1 Introduction

In a post conflict society issues arise on how to deal with war crimes and crimes against humanity committed in a conflict torn society<sup>1</sup>. The International Criminal Court, Pre –Trial Chamber I, on the March 4, 2009 issued an arrest warrant against Sudanese President Omar Al Bashir, accusing him of war crimes and crimes against humanity committed in Darfur Region.<sup>2</sup> The same has caused unending debate. Some quarters perceived the arrest warrant as a sign that top and influential persons could actually be held accountable for mass murder, rape and torture.<sup>3</sup> Others argued that the court’s decision would undermine the prospects of a lasting peace since it elucidates how international outfits ignore African views.<sup>4</sup>

In the traditional and classical sense, transitional justice refers to the set of judicial and non-judicial measures that have been implemented by different countries in order to redress the legacies of massive human rights abuses. These measures include criminal prosecution, truth commissions, reparations programs, and various kinds of institutional reforms.

Transitional Justice as a term was coined by American Scholars in the early 1990’s which was used to describe a range of initiatives such as the nascent truth commissions in Chile, El Salvador and South Africa, the purging or lustration of former officials in Eastern European states. It was seen as a field with a component of the wave of democratization that seemed to

---

<sup>1</sup>Thomas Obel Hansen, ‘Facing the Challenges of Transitional Justice; Reflections from Post Genocide Rwanda and Beyond’, PhD Thesis, School of Law, Aarhus University, 2010 , p.1.

<sup>2</sup>ICC Pre- Trial Chamber I, Warrant of Arrest for Omar Hassan Ahmed Al Bashir, in the Case of Prosecutor v. Omar Hassan Ahmad Al Bashir, ICC-02/05/-01/09, March 4, 2009.

<sup>3</sup>Human Rights Watch , ICC Arrest Warrant is Warning to Abusive Leaders, 2009

<sup>4</sup>Assembly of the African Union, Decision of the Meeting of African States Parties to the Rome Statute of the International Criminal Court ( ICC), July 3, 2009.

affect many regions of the world at the time and other expressions like ‘ rule of law and post conflict justice’ were also used in similar context.

## **1.2 Statement of the Research Problem**

Given the volatility of an immediate post-conflict context, timing and sequencing in particular represent an extremely important but difficult dimension. Policies must not come too soon or too late. Questions and challenges abound. When to develop justice and reconciliation activities? The tasks of promoting justice, compensation, and reconciliation after conflict are challenging and can take many years to achieve. But systematic abuses of human rights that are not adequately addressed are a source of social unrest and often contribute to renewed violence. It is therefore important to re-establish the rule of law after periods of conflict or authoritarianism to build sustainable peace and well-functioning states.

It is important to acknowledge that each post-conflict situation is unique, and requires different measures to address past wrongs. Comparative information about how other countries have approached similar post-conflict justice problems can, however, help to design and implement an effective transitional justice strategy. No matter what violence has occurred, similar questions arise in the wake of past atrocities: How can an emerging democracy peacefully integrate both the supporters and the victims of a former regime. How should it approach justice and reconciliation, war crimes, and the search for truth. Many countries face these difficult questions, and the answers can often have profound political, legal, psychological and economic consequences. Past experience demonstrates that transitional justice mechanisms work best if they are combined in a comprehensive strategy: Judicial measures like trials and legal reforms, and non-judicial measures like truth commissions and compensation schemes can and should complement each other some of the difficult choices that societies must make in their

struggle to rebuild their society and their state while confronting the legacy of the past: The study investigates transition justice evolution, on whom to hold accountable, how victims have been satisfied, and how security and justice sector institutions have been helpful to transitional justice.

### **1.3 Objectives**

The objectives of the study is to:

To give analytical situation of Transitional Justice Mechanism in East Africa Community and to give a systematic situation evolution of Transitional Justice Mechanism in Post Conflict Society.

### **1.4 Literature Review**

The discourse on transitional justice in a post conflict society has grown in the last decade. It is perceived that with any intervention transitional justice usually is incorporated, especially during peace operations and reconstruction of a conflict affected society, the international community tends to support transitional justice and is thought to be vital to stability and sustainable peace.<sup>5</sup> The literature on the field of transitional justice and post conflict peace building has lead to the path of understanding and implementing by applying foresight and hindsight to the process.<sup>6</sup> It is vital to acknowledge the antagonism between peace and justice, where it is believed that justice must be delayed in order to end hostilities.<sup>7</sup>Zyl states nevertheless, justice claims should not be deferred indefinitely, not just because of the likely corrosive effect on efforts to build a sustainable peace, but because to do so would be to compound a grave injustice that victims have already suffered”.<sup>8</sup> Transitional justice should

---

<sup>5</sup>Mobekk, E, 2005, Transitional Justice in Post Conflict Societies – Approaches to Reconciliation. P. 261

<sup>6</sup>Paul Van Zyl, ‘ Promoting Transitional Justice in Post Conflict Societies’, Security Governance in Post Conflict Peace Building, Geneva Centre for Democratic Control of Armed Forces (DCAF), Geneva, Switzerland, 2005.p.215

<sup>7</sup>Ibid.p.215

<sup>8</sup>Paul Van Zyl, ‘ Promoting Transitional Justice in Post Conflict Societies’, Security Governance in Post Conflict Peace Building, Geneva Centre for Democratic Control of Armed Forces (DCAF), Geneva, Switzerland, 2005.p.215

work hand in hand with any effort of building sustainable peace. There are transitional justice strategies that can enhance peace building efforts outlined as follows: Problem Identification; State Building and Institutional Reform; Removing Rights Abusers from Political Office; Dealing with Individual Victim Grievances and Forging Reconciliation; Dealing with Group Dominance; Security Sector Reform; implementing DDR programmes; Restoring the Rule of Law and Confronting a Culture of Impunity; Restoring Trust in State Institutions; Consolidating Democracy.<sup>9</sup>

One of the most pronounced debates that emerge in the transitional justice discourse in post conflict peace building is moving ‘From Peace versus Justice to Peace and Justice’<sup>10</sup>. The question that has been asked by transitional justice scholars is whether in pursuit of justice for past atrocities it can jeopardize peace efforts. The antagonism witnessed has mainly been between the principles and practice. While principles will provide an ethical guide but no solution to it, the government actors have got to grapple with the reality as against their convictions.<sup>11</sup>

In pointing out that criminal prosecutions and punishment are superior to other mechanisms of transitional justice, Carlos Nino also acknowledges that controlling and reducing interest in trials was vital in the Argentine case since the army was still a cardinal stakeholder in state cohesion.<sup>12</sup> Some early scholars who argued against criminal justice held that the same

---

<sup>9</sup> Paul Van Zyl, ‘Promoting Transitional Justice in Post Conflict Societies’, Security Governance in Post Conflict Peace Building, Geneva Centre for Democratic Control of Armed Forces (DCAF), Geneva, Switzerland, 2005.pp. 215-223.

<sup>10</sup>Thomas Obel Hansen, “Facing the Challenges of Transitional Justice; Reflections from Post Genocide Rwanda and Beyond”, PhD Thesis, School of Law, Aarhus University, 2010, p. 69.

<sup>11</sup>Ibid. P. 69

<sup>12</sup>Nino, ‘Response: The Duty to punish Past Abuses of Human Rights into Context: The Case of Argentine’, 1995, p. 421

interfered with the society's stability and peace.<sup>13</sup> Today, commentators find that pursuit of justice is a requirement for peace. They advance for peace and justice as one and the same scholarship and are against peace verses justice debate as a false premise.<sup>14</sup> The intention of justice is to act as a deterrent, an agent of rehabilitation and reconciliation which should be used to prevent future conflict.<sup>15</sup> Lutz states "how a society deals with its past has a major determining influence on whether that society will achieve long- term peace and stability".<sup>16</sup>

The transitional justice issues are cardinal in trying to understand the aims of peace and justice in different environments. Scholarship on 'peace versus justice' and 'truth versus justice' has concluded that there can be no lasting peace without the aspect of accounting.<sup>17</sup> Empirical evidence suggests that there exists a gap in trying to establish the relationship between peace and justice and this mainly by determining a 'fixed point of time' where a practitioner will pursue accountability.<sup>18</sup> Thus literature that posits that the peace versus justice divide is non-existent fails to acknowledge that gist of transitional justice is to be all inclusive and holistic in a society.<sup>19</sup>

---

<sup>13</sup>Thomas Obel Hansen, "Facing the Challenges of Transitional Justice; Reflections from Post Genocide Rwanda and Beyond", PhD Thesis, School of Law, Aarhus University, 2010 , p.70.

<sup>14</sup>Ellis, "Combating Impunity and Enforcing Accountability as a way to Promote Peace and Stability- the Role of International War Crimes Tribunals", 2006, p. 113.

<sup>15</sup>Bassiouni, "Accountability for Violations of International Humanitarian Law and Other Serious Violations of Human Rights", 2002, p. 9

<sup>16</sup>Lutz, "TransitionalJustice: Lessons Learned and the Road Ahead", 2006, p. 327.

<sup>17</sup> Nagy, "Transitional Justice as Global Project: Critical Reflections", 2008, p. 276.

<sup>18</sup>Thomas Obel Hansen, "Facing the Challenges of Transitional Justice; Reflections from Post Genocide Rwanda and Beyond", PhD Thesis, School of Law, Aarhus University, 2010, p.71.

<sup>19</sup>Ibid. P. 71

Finally, an increasing argument that peace is only achievable only to the extent of the practise of transitional justice. As Hansen asserts “the most radical change is that trial and punishment are frequently seen as compatible and supportive of peace”.<sup>20</sup>

In the 1980s, Latin America or Central and Eastern Europe in 1990s did not view international criminal prosecution as a realistic option which was clearly parallel to the transitional justice phenomenon. Since the military tribunals at Nuremberg and Tokyo of the 1940s, international criminal prosecution lay dormant. International Justice was embraced in 1993 by the Security Council when it created an *ad hoc* tribunal for former Yugoslavia and later Rwanda. This creation was plausible yet viewed as an attainment in the future.<sup>21</sup>

The terms ‘transitional justice and criminal prosecution’ were viewed as one and the same thing under other rubrics, ‘accountability and impunity’. These concepts owe their growth to international human rights law. These manifestations are propagated by experts like Louis Joinet and Theo Van Boven<sup>22</sup> of the United Nations Sub –Commission on Prevention of Discrimination and Protection of Minorities.

The Secretary General in 2004 presented a report to the Security Council entitled ‘The Rule of Law and Transitional Justice in Post Conflict Societies’<sup>23</sup>. He described ‘the notion of transitional justice ...Comprises the full range of processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and

---

<sup>20</sup>Thomas Obel Hansen, “Facing the Challenges of Transitional Justice; Reflections from Post Genocide Rwanda and Beyond”, PhD Thesis, School of Law, Aarhus University, 2010, p.71.

<sup>21</sup>Ibid p.71

<sup>22</sup>,William Schabas , ‘Transitional Justice and the Norms of International Law’, presentation to the annual meeting of the Japanese Society of International Law, Kwansai Gakuin University, (2011)

<sup>23</sup>UN Doc S/2004/616.

individual prosecutions, reparations, truth seeking, institutional reform, vetting and dismissals or combination thereof<sup>24</sup>.

The Secretary General considered in his report the issue of rule of law as a principle of governance in which all persons, institutions and entities, public and private, including the state itself, are compliant to laws enacted, enforced and autonomously applied, this in tandem with international human rights, norms and standards.<sup>25</sup> At the end of post cold war era transitional justice was developing without the insinuations of international criminal justice and thus the contemporary period transitional justice was championed through the expansion of international humanitarian law to times of peace.<sup>26</sup>

#### **1.4.1 Criminal Trials as Transitional Justice Mechanisms**

Criminal trials have been the cardinal approach in transitional justice as noted by Ruti Teitel, “In the public imagination, transitional justice is commonly linked with punishment and trials of ancient regimes”.<sup>27</sup> These prosecutions occur at different levels such as domestic and international levels.<sup>28</sup> The field of transitional justice has extensively focused on criminal justice with pursuit of accountability. For instance, the Rwanda genocide was conducted at the International level which was mainly European courts exercising universal jurisdiction but also at the national level which was mainly domestic courts. At the local or grassroots level Gacaca courts were used to impose the criminal jurisdiction.

---

<sup>24</sup>UN Doc S/2004/616.

<sup>25</sup> UN Doc ,The Rule of Law and Transitional Justice in Post Conflict Societies.,S/2004/616, para 6

<sup>26</sup>Anne Kirstine Iversen , Transitional Justice in Northern Uganda: A report on the pursuit of justice in ongoing conflict. October 2009

<sup>27</sup>Teitel, Transitional Justice, 2000, p.27.

<sup>28</sup>Thomas Obel Hansen, ‘Facing the Challenges of Transitional Justice; Reflections from Post Genocide Rwanda and Beyond’, PhD Thesis, School of Law, Aarhus University, 2010, p.27.



The main features of criminal justice is firstly the creation of special tribunals, tendencies towards collective guilt, a non adversarial system, absence of appeal chances, the use of statutes of limitations and the use of retroactive laws.

One of the main concerns of this field is the political nature of transitional criminal justice. The principle of judicial impartiality is greatly interfered with by political figures as they tend to apply pressure with intend of interfering with the trial process.<sup>29</sup>The intention being to prosecute according to the wishes and interest of the new regime.<sup>30</sup> It is important for criminal justice to proceed without interference of the incumbent government and the main objective should be justice for both the defendant and victim.<sup>31</sup>

#### **1.4.2 Lustration Mechanism in Transitional Justice**

Lustration is also known as vetting or purges but this mechanism has not been given the attention as criminal trial has received.<sup>32</sup> Lustration is the processes for assessing the integrity of individuals to determine their suitability for continued or prospective public employment.<sup>33</sup> Integrity is the yard stick in this mechanism and it refers to a person's adherence to relevant standards of human rights and professional conduct, including his or her financial propriety".<sup>34</sup> From the definition vetting only deals with individuals and does not deal with the institutions that could have been used to carry out the atrocities.<sup>35</sup> Vetting is also applicable to those in

---

<sup>29</sup>Thomas Obel Hansen, 'Facing the Challenges of Transitional Justice; Reflections from Post Genocide Rwanda and Beyond', 2010, p.28.

<sup>30</sup>Ibid. P. 28

<sup>31</sup>See comments on the Eichmann trial by Hannah Arendt in Arendt, Eichmann in Jerusalem: A Report on the Banality of Evil, 1963, p. 298.

<sup>32</sup>Thomas Obel Hansen, 'Facing the Challenges of Transitional Justice; Reflections from Post Genocide Rwanda and Beyond', PhD Thesis, School of Law, Aarhus University, 2010, p.39.

<sup>33</sup>Duthie, 'Introduction', 2007, pp. 17-18

<sup>34</sup>International Center for Transitional Justice, ' Vetting Public Employees in Post Conflict Settings: Operational Guidelines', 2007, p. 548

<sup>35</sup>Thomas Obel Hansen, 'Facing the Challenges of Transitional Justice; Reflections from Post Genocide Rwanda and Beyond', PhD Thesis, School of Law, Aarhus University, 2010 , p.39.

service as well as prospective employees highlighting a positive and negative dimension.<sup>36</sup>The vetting process entails review where an official can be retained in office unless the review says otherwise. Reappointment is done after officials have been removed from an institution and they reapply for their positions.<sup>37</sup>

In post conflict contexts, purges have been used to screen human rights abusers. One of the most discussed purges as recorded by the empirical evidence on transitional justice as observed by Hansen the de – nazification programmes initiated by the allies in post – World War II occupied Germany<sup>38</sup>. Vetting is important as it serves as a measure to deter continuation of the abuse by the officials serving in the institution<sup>39</sup> and also the institutional reform itself with the intent of restoring public confidence in state institutions.<sup>40</sup>

### **1.4.3 Reparations as a Transitional Justice Mechanism**

Reparations as a mechanism has been greatly appreciated in the fields of transitional justice and has taken the form of financial compensation,<sup>41</sup> restitution of property;<sup>42</sup> reparations through symbolism such as seeking public forgiveness or memorialisation<sup>43</sup>. Hansen looks at the contemporary measures in the UN where he states “ medical and psychological care, public

---

<sup>36</sup>Thomas Obel Hansen, ‘Facing the Challenges of Transitional Justice; Reflections from Post Genocide Rwanda and Beyond’, PhD Thesis, School of Law, Aarhus University, 2010, p.39.

<sup>37</sup>Ibid, p.40.

<sup>38</sup>Ibidem., p. 40 see Hansen’s analysis of the vetting legislation in Central and Eastern Europe and the process it took.

<sup>39</sup>Thomas Obel Hansen, ‘Facing the Challenges of Transitional Justice; Reflections from Post Genocide Rwanda and Beyond’, PhD Thesis, School of Law, Aarhus University, 2010, p.43.

<sup>40</sup>Duthie, ‘ Introduction’, 2007, pp. 52-53

<sup>41</sup>See Roht – Arriaza, ‘Reparations in the Aftermath of Repression and Mass Violence’, 2004, pp. 121-161.

<sup>42</sup>Minow, *Between Vengeance and Forgiveness : Facing History after Genocide and Mass Violence*, 1998, pp. 107-112

<sup>43</sup>Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence*, 1998, pp. 107-112 and *Transitional Justice in Kenya: A Toolkit for Training and Engagement 2010*(The same was developed by Kenya Human Rights Commission (KHRC), The Kenyan Section of the International Commission of Jurists (ICJ-K), and International Centre for Policy and Conflict (ICPC) P. 58. I noted that the former looks at memorialization as an item within reparations while the latter looks at it as an independent transitional justice mechanism.

disclosure of the truth, assistance in the recovery, identification and reburial of victims, effective civilian control of military and security forces, strengthening the independence of the judiciary, providing human rights and international humanitarian law education to all sectors of society.

#### **1.4.4 Amnesty Mechanisms in Post Conflict Societies**

Amnesty transitional justice mechanism has been seen as an element in promoting peaceful transition.<sup>44</sup> There are jurisdictions that have combined amnesty with other transitional justice institutions which is usually not common and not recommended.<sup>45</sup> According to Hansen he states that as if reflecting a decision to ‘close the books’ and not look back, blanket amnesties are sometimes granted and no other measure of transitional justice is put in place.<sup>46</sup>

The Spanish Parliament in 1977 supported an amnesty law which sought among other things a democratic cry to put an end to criminal trials against persons in the previous regime. This was packaged in a broader transitional pact” which included the release of prisoners, sealing of police archives, retention of jobs and pensions in the civil service, legalization of the communist party and adoption of a new constitution.<sup>47</sup> Some scholars argue that rejection of the amnesty institution is rejection of democracy<sup>48</sup> while others note that without doing anything should not be perceived as being in agreement with the ‘Looking forward’ notion.<sup>49</sup> Other scholars point out that the uncertainties of peace explains the interest and

---

<sup>44</sup>Teitel, *Transitional Justice*, 2000, p. 53

<sup>45</sup><sup>45</sup>Thomas Obel Hansen, ‘Facing the Challenges of Transitional Justice; Reflections from Post Genocide Rwanda and Beyond’, PhD Thesis, School of Law, Aarhus University, 2010 , p. 55.

<sup>46</sup>Ibid.

<sup>47</sup>Ibidem., p. 55

<sup>48</sup>Huntington, *The Third Wave: Democratization in the Late Twentieth Century*, 1991, p. 217

<sup>49</sup>Thomas Obel Hansen, ‘Facing the Challenges of Transitional Justice; Reflections from Post Genocide Rwanda and Beyond’, PhD Thesis, School of Law, Aarhus University, 2010, p. 56.

attitudes of some actors involved in the transition process and the structure involved during this period.<sup>50</sup>

One thing that has come out in this literature is that transitional justice is taken up during the transition from one regime to the other. The next section will interrogate and attempt to comprehend transitional justice discourse in Post conflict society.

### **1.5 Theoretical Framework**

Based on the assumption that Transitional Justice mechanisms have an impact in post conflict society this study will base its theoretical framework around two variables. Transitional Justice will be the independent variable and post conflict will be the dependent variable. In other words, putting across an argument that TJ mechanisms have an influence in determining conflict transformation in a society. To understand this argument it is vital to look at conflict transformation theory and contributors to the theory.

Conflict transformation must actively envision, include, respect, and promote the human and cultural resources from within a given setting. This involves a new set of lenses through which we do not primarily, see the setting and the people in it as the, problem and the outsider as the, answer'. Rather, we understand the longterm goal of transformation as validating and building on people and resources within the setting.<sup>51</sup>

---

<sup>50</sup>Aguilar, 'Justice, Politics, and Memory in the Spanish Transition', 2001, p.94 and See also Thomas Obel Hansen, 'Facing the Challenges of Transitional Justice; Reflections from Post Genocide Rwanda and Beyond', 2010 , p. 56.( Hansen gives a situation analysis of how Mozambique falls in the example of having consensus to implement Amnesty as a transitional justice mechanism.

<sup>51</sup> Lederach J.P., *Preparing for Peace: Conflict Transformation Across Cultures*, New York: Syracuse University Press, 1995

Galtung points out that conflicts have aspects that form contradictions in the society which become manifest in attitudes and behaviour. According to him there is transformation in the conflict cycle.<sup>52</sup> But Curle who draws insights from Galtung identifies how relationships in a society are transformed from imbalance to balance which is achieved through a process of “conscientisation, confrontation, negotiation and development”<sup>53</sup>. This will be seen in this study when truth seeking as a transitional justice mechanism must capture the perceptions, attitudes and feelings of the people who have undergone grave atrocities towards their persons and properties. Rupensinghe argues for a holistic approach to conflict transformation that appreciates multitrack approach that looks at conflict transformation as an approach that has conflict resolution and Track 1 diplomacy.<sup>54</sup>

On the other hand Lederach looks at peace building as a process with different facets in the conflict and the changes encompass moving from war to peace and being guided by values of peace and justice, truth and mercy.<sup>55</sup> This justifies the implementation of transitional justice system that has the different mechanisms that have the interest of moving from the conflict to peace by dealing with sourcing for the truth, applying justice, giving amnesty and reparations.

The practice of conflict transformation mostly by states and international organisations seem to have a lot of influence on the conflicting parties. Boutrous- Ghali’s Agenda for Peace paper, which captured peacemaking and later culminated in peace building efforts in areas that entered into peace settlements such as Mozambique, Namibia and Angola.<sup>56</sup>

---

<sup>52</sup> Galtung J, *Peace by Peaceful Means*, London: Sage, 1996, P. 90

<sup>53</sup> Curle A, *Making Peace*, London; Tavistock, 1971,

<sup>54</sup> Rupensinghe K, *Conflict Transformation*, London: Macmillan (ed), 1995

<sup>55</sup> Lederach J.P., *Building Peace: Sustainable Reconciliation in Divided Societies*, Washington, D.C.: United States Institute of Peace Press, 1997

<sup>56</sup> Miall H, *Conflict Transformation: A Multi – Dimensional Task*, Research Center for Constructive Conflict Management [www.berghof-handbook.net](http://www.berghof-handbook.net)

The UN peace building model provides for ‘demobilisation, disarmament and cantonment’ of opposers, elections and establishment of government structure; civilian participation; changes to police; human rights embracement; dealing with refugees and internally displaced; reconstruction of infrastructure.<sup>57</sup>

These theories have a direct bearing on the Post conflict society, where as it is now, institutions of transitional justice have been put in place with an aim of addressing the structural and functionalist failures of a society that has undergone conflict but it boils down to whether the same institutions can revamp the society to a peaceful society.

## **1.6 Justification of the Study**

This study intends to bridge the gap between mechanisms of transitional justice and its influence on post conflict society. The relationship between the two requires this analysis, not least because the same can complement or undermine each other depending on how they are structured. Another critical aspect this study will analyze is the approaches to both transitional justice and post conflict peace building as holistic and integrated process in such a way as an overemphasis on, or neglect of, anyone aspect of either of the strategies will render the overall effort less effective.

The significance of transitional justice is first, the transitioning societies have created instruments that expose and punish perpetrators of human rights abuse for instance the establishment of International Tribunals for the former Yugoslavia and for Rwanda, the

---

<sup>57</sup>Miall H, Conflict Transformation: A Multi – Dimensional Task, Research Center for Constructive Conflict Management [www.berghof-handbook.net](http://www.berghof-handbook.net)

formation of truth commissions, hybrid courts have been witnessed and the application of universal jurisdiction to former heads of states.<sup>58</sup>

Secondly, the created instruments have had enormous impact on state sovereignty and the worldwide pursuit for justice. Some decades ago, heads of state power was tantamount to a license to butcher and torture within their territories. Currently, leaders such as Slobodan Milosevic, Saddam Hussein, Hosni Mubarak, and Charles Taylor experienced criminal prosecution and humiliation<sup>59</sup>

### **1.7 Hypothesis**

- a) That an increase in the Transitional justice system in a post conflict society decreases chances for sustainable peace.
- b) That a decrease in the Transitional justice system in a post conflict society increases chances of sustainable peace.
- c) That there is no relationship between transitional justice and Sustainable peace in a post conflict society.

### **1.8 Methodology**

This study employed both qualitative researches as it aimed at understanding the experiences and attitudes of the society towards the transitional justice institutions that are in place.

The collection of data was mainly done through primary and secondary methods. The primary data was obtained using questionnaires, interviews, focus groups and observations of

---

<sup>58</sup> Look at Charles T. Call, “ Is Transitional Justice Really Just?”, Summer/Fall 2004 Volume XI, ISSUE 1, Watson Institute for International Studies

some of the sample population. Secondary data was largely on the basis of existing written material, including both selected academic sources and documents prepared by relevant transitional justice stakeholders and organizations such as the African Union, the Government, civil society organizations and the media. In reviewing the material, pragmatism was applied whilst keeping the cardinal goal of the study in focus allowing the researcher to obtain diverse perspectives on the implementation of various aspects of the research. The researcher limited herself only in the area of concern and that is transitional justice in the East Africa Community and post conflict.

The research samples in this study were purposive as the targeted persons who had access to the victims of perceived historical injustices in the East Africa Community, internally displaced persons, human rights and civil society groups, members of the truth justice and reconciliation commission, the officials from Government ministries such as the ministry of internal security all of whom generated useful data for the project.

The population study involved respondents from the aforementioned group and the study applied purposive sampling techniques where from the above mentioned groups ranged from the East Africa Community.

The instruments employed were individual interviews, group discussions and questionnaires which were the cardinal data collection instrument. The researcher ensured that the design captured all areas and gist of the research by ensuring that it carried questions capable of providing answers to all research questions. The individual interviews were in-depth or unstructured interviews. The group interviews were in the form of focus groups which the researcher believed to have captured the attitudes and thoughts of the persons and how different



people from different ethnic groups were talking to each other about the transitional justice institutions in the society.

Using the techniques of collection above mentioned the data collected was organized, coded and analyzed using the content analysis technique. The researcher's intention here was to employ the attribution, designation and pragmatic analysis to engage the sample population so as to capture the emphasis on adjectives, verbs and descriptive phrases that the population assisted the researcher to assess the transitional justice mechanisms and their probable causes and effects on post conflict society.

## **1.9 Chapter Summary**

Chapter One discusses transitional justice mechanisms in post conflict societies, it covers the introduction, statement of the problem, objectives, Literature Review, Theoretical Framework, Justification of the Study, Hypothesis and the research Methodology for the study.

Chapter Two covers the Post-Cold War and the development of ad hoc tribunals, the development of International Criminal Tribunal of Rwanda. The development of International Criminal Tribunal for the Former Yugoslavia, The Development Hybrid Tribunals for Transitional Justice The Transitional Justice Promise of The ICTY and ICTR, Deterrence Effects of the Tribunals and Shortcomings of the Criminal Tribunal's Deterrence Effects.

Chapter Three involves the case study of the research which is the East Africa Community Transitional Justice Mechanisms; it covers the Introduction, Local Trials, Traditional Methods of Transitional Justice, Criminal Prosecution and Amnesty in EAC in Transitional Justice Mechanisms.

Chapter four covers the data analysis and the discussion around the data collected therefore it interpretes and explains the findings with regard to the study objectives.This chapter links the research questions, theoretical framework and the case study in presenting the research findings and discussing these findings obtained from the respondents. The results are presented according to the objectives of the study which reflect the research questions that the researcher set out to answer

While Chapter Five covers a summary of the study and implication of the main findings given. It also captures the researcher's conclusions and recommendations. Areas of further research will equally be suggested which will be dependent on the findings of the research

## CHAPTER TWO

### EVOLUTION OF TRANSITIONAL JUSTICE MECHANISMS IN POST CONFLICT SOCIETIES

#### 2.1 Introduction

This chapter will take a journey into the evolution of transitional justice. It will attempt to look at the different definitions of the terms 'transitional justice', and how the term has been used to mean different things to different jurisdictions. Further this section will look at the evolution of International Criminal Justice.

Transitional justice is a contested and evolving process which emerged in the 1990s. It is defined as 'that set of practices, mechanisms and concerns that arise following a period of conflict, civil strife or repression, and that are aimed directly at confronting and dealing with past violations of human rights and humanitarian law'<sup>60</sup>. Transitional justice, therefore, concerns the whole range of mechanisms or approaches applied by states or societies that seek to reform, heal and transit from illegitimate and repressive rule or situations of conflict to national reconstruction and good governance<sup>61</sup>.

The main aim of transitional justice, through its various mechanisms, is to end the culture of impunity and establish the rule of law in a context of democratic governance. Transitional justice processes should also reconcile people and communities, provide them with a sense that justice is being done and will continue to be done, as well as renew the citizens' trust in the institutions of governance and public service. In the aftermath of conflict or authoritarian rule, people who

---

<sup>60</sup> W.A.Schabas, 'An Introduction to the International Criminal Court,' (Cambridge, Cambridge University Press, 2001) pp 21-22

<sup>61</sup> Kritz, Neil J, ed. *Transitional Justice: How Emerging Democracies Reckon with Former Regimes. 3 Vols.* Washington, DC: United States Institute of Peace (1995).

have been victimised often demand justice<sup>62</sup>. The notion that there cannot be peace without justice emerges forcefully in many communities. But justice can be based on *retribution* (punishment and corrective action for wrongdoings) or on *restoration* (emphasising the construction of relationships between the individuals and communities). *Retributive justice* is based on the principle that people who have committed human rights violations, or ordered others to do so, should be punished in courts of law or, at a minimum, must publicly confess and ask forgiveness. On the other hand, *restorative justice*, is a process through which all those affected by an offence victims, perpetrators and by-standing communities – collectively deal with the consequences.

The twentieth century has witnessed the development of many norms in the field of international humanitarian law and human rights law. The wellbeing of the individual has become a central issue in international law and has influenced many other parts of the law.<sup>63</sup> States have become liable for the treatment of individuals, be it foreigners or own nationals, and concepts like national sovereignty and non-interventions have undergone a considerable adaptation. At the same time, the twentieth century has been the most violent and brutal in human history.<sup>64</sup> Not only did the first and the second world wars witness the death of millions of people, but also did this century witness innumerable internal armed conflicts, which were normally as barbaric as international conflicts. The recent conflicts in Rwanda Burundi, DRC, Sierra Leone, Bosnia and Kosovo are just but a few examples<sup>65</sup>. War criminals have been prosecuted at least since the time of the ancient Greeks, and probably well before that.<sup>66</sup> This

---

<sup>62</sup> Roht, A M & Javier. *Transitional Justice in the Twenty- First Century*, Cambridge, UK: Cambridge University Press. (2006)

<sup>63</sup> M. Lippman, "Nuremberg:Fourty-Five Years Later", *Connecticut Journal of International Law*, Vol 7 (1991) p 1

<sup>64</sup> M.C Bassiouni, *The Statute of the International Criminal Court: A Documentary History*,(Adsley, New York, Transnational Publishers,1998) pp13-15

<sup>65</sup> H.A.M von Hebel, J.G Larmers and J Schukking, *Reflections on the International criminal Court*, The Hague, Kluwer, Law International,1999) pp31-33

<sup>66</sup>W.A.Schabas, 'An Introduction to the International Criminal Court,'(Cambridge, Cambridge University Press,2001) pp 21-22

may come as startling revelation to those who consider the pursuit of war criminals to be a modern phenomenon, if not particular to the twentieth century and on. Yes, if one considers human nature and especially the conduct of humans during times of violent conflicts, this may not seem so outlandish. The major change which has occurred in more recent times has been the attempt to create the conditions for the international prosecution of war criminals and those who have committed genocide and crimes against humanity<sup>67</sup>.

The major drawback of the international tribunals was that they imposed 'victors' justice over the defeated. They were composed of judges appointed by each of the victor powers; the prosecutor too were appointed by each of those powers and acted under instructions of each appointing state, but at Tokyo there was a chief prosecutor or Chief of Counsel as he was called namely the American Joseph B. Keenan and ten associate prosecutors. Thus the view must be shared that the two tribunals were not independent international courts proper but judicial bodies acting as organs common to the appointing states<sup>68</sup>.

## **2.2 The Development of International Courts:**

Although domestic Courts remain the most preferred forum to bring lasting change, most of such trials have been rare and repugnant to justice due to lack of political goodwill and weak institutional frameworks<sup>69</sup>. In such instances, recourse to international systems of justice is sometimes necessary. The international justice systems include the International Criminal Court (ICC), improvised or ad-hoc international criminal tribunals, hybrid courts and the application of universal jurisdiction. These are Courts designed to deal with specific problems and crimes and

---

<sup>67</sup>Syros Economides, 'The International Criminal Court: Reforming the Politics of International Justice' *Governance and Opposition* (2003) pp 30-51

<sup>68</sup>M. Lippman, "Nuremberg: Forty-Five Years Later", *Connecticut Journal of International Law*, Vol 7 (1991) p 1

<sup>69</sup>Sriram, C. 'The International Criminal Court Africa experiment: the Central African Republic, Darfur, Northern Uganda and the Democratic Republic of Congo', in C. Sriram and S. Pillay (eds). (2009)

cannot be generalized and adapted for other purposes. The Nuremberg Tribunal in Germany between 1945 and 1946 was the first trial for the major war criminals before the International Military Tribunal. It tried 22 of the most important captured leaders of the Nazi Germany. There are currently two major trials under *ad hoc* international criminal tribunals taking place. The first is the International Criminal Tribunal for the former Yugoslavia (ICTY); and the second is the International Criminal Tribunal for Rwanda (ICTR)<sup>70</sup>. The ICTR is an international Court established in November 1994 by the United Nations Security Council in order to try those with the greatest responsibility for the Rwandan genocide and other serious violations of the international law performed in the territory of Rwanda between 1 January and 31 December 1994. This tribunal is based in Arusha, Tanzania since 1995. *Ad hoc* Tribunals have been criticized in some quarters for inefficiency, and for the length of trials<sup>71</sup>.

### **2.3 The Development of International Criminal Tribunal of Rwanda.**

The end of the cold war which paralyzed the United Nations from its inception was a cause for celebration and hope. Following the historic security council summit meeting of January 1992, the Secretary General of United Nations Boutros Boutros Ghali spoke of a growing conviction among large and small, that an opportunity has been regained to achieve great objectives of the UN Charter-a UN capable of maintaining international peace and security, of securing justice and human rights and promoting, in the words of the charter, 'social progress and better standards of life in the larger freedom.'<sup>72</sup> He warned however that this opportunity must not be squandered and that the UN must never again be crippled as it was at the era that has now passed.

---

<sup>70</sup> M.C Bassiouni, *The Statute of the International Criminal Court: A Documentary History*, (Adsley, New York, Transnational Publishers, 1998) pp13-15

<sup>71</sup> R.Cesare, A. Nollkaemper, J. Kleffner, *International Criminal Courts and Tribunals* op cit

<sup>72</sup> Report of the Secretary General on the work of the Organization, UN.GAOR, 46<sup>th</sup> Sess, para, 3, UN Doc A/47/277, S/24111 (1992)

The commission of experts established by the Secretary General confirmed in its final reports the existence of overwhelming evidence that acts of genocide within the meaning of Article II of the genocide convention had been committed against the Tutsi ethnic group by the Hutu elements in a concerted, planned, systematic and methodical way. It also concluded that although crimes against humanity and other serious violations of international humanitarian law had been committed by individuals on both sides of the conflict, there was no evidence to suggest that acts committed by Tutsi were perpetrated with an intention to destroy the Hutu ethnic group, as such, and therefore were not within the meaning of the Genocide convention.<sup>73</sup>

Furthermore the commission recommended that the security council takes necessary steps and effective action to ensure that the individuals responsible are brought before an independent and impartial international criminal tribunal, and suggested that the statute of the Yugoslav tribunal be amended to ensure that its jurisdiction covers crimes under international law committed during the armed conflict in Rwanda on April 6 1994. On November 8 1994, having determined that the genocide and other systematic and widespread and flagrant violations of international humanitarian law committed in Rwanda constituted a threat to international peace and security within the scope of chapter VII of the UN Charter, the security council adopted resolution 955 whereby it established as an enforcement measure, the international tribunal for the prosecution of persons responsible for genocide and other serious violations of humanitarian law committed in the territory of Rwanda on Rwandan citizens responsible for genocide and other such violations committed in the territory of neighboring states between 1 January 1994 and 31 December 1994 (Rwanda Tribunal).<sup>74</sup>

---

<sup>73</sup>D. Shraga and R. Zacklin, 'Symposium towards an International Criminal Court, The international Criminal Tribunal for Rwanda', *European Journal of International Law*, (1996) pp 501-518

<sup>74</sup>P. Akhavan, 'The International Criminal Tribunal for Rwanda: The Politics and Pragmatics of the Punishment', *The American Journal of International Law*, Vol 90 No.3 (July 1996) pp 501-510

In establishing the Rwandan tribunal, however the Security Council decided that drawing upon the experience gained in the Yugoslav tribunal, a one step process and a single resolution would suffice. Consonant with the recommendations commission of experts, a draft document circulated by the US had initially proposed amending the Yugoslav tribunal's mandate to extend its jurisdiction to Rwanda. The proposal was rejected because of the misgivings of some council members who feared that the expansion of an existing ad hoc jurisdiction would lead to a single tribunal that would gradually take on the characteristics of a permanent judicial institution.

Although the Security Council eventually opted to establish a separate tribunal for Rwanda, it recognized that its coexistence with the Yugoslav tribunal dictated similar legal approaches well as certain organizational and institutional links so as to ensure a unity of legal approach as well as economy and efficiency of resources. Accordingly, Article 12 (2) of the Rwanda statute provides that the member of the appeals chamber of the Yugoslav tribunals shall also serve as the members of the members of the appeals chambers of the international tribunal for Rwanda. Similarly Article 15 (3) provides that the prosecutor of the Yugoslav tribunal shall also serve as the prosecutor for the Rwandan tribunal, although he/she shall have additional staff, including an addition deputy prosecutor to assist with the prosecutions before the ICTR.<sup>75</sup>

The government of Rwanda expressed the hope that the trial of the perpetrators of genocide and their grave violations of international humanitarian law by an external body in the short-term would contribute to peace and reconciliation among the parties to the conflict<sup>76</sup>. It was also its expectations that, however unrealistic, that the international tribunal would undertake the investigation and prosecution of most, if not all the detainees held in Rwandan prisons. The

---

<sup>75</sup>Davis, L 'Transitional justice and security system reform'. *Initiative for Peacebuilding Paper*. New York, NY: International Centre for Transitional Justice. (2009).

<sup>76</sup> Sriram, C 'The International Criminal Court Africa experiment: the Central African Republic, Darfur, Northern Uganda and the Democratic Republic of Congo', in C. Sriram and S. Pillay (eds) . (2009).



realization that an international tribunal is not equipped to undertake a prosecution of thousands of detainees was probably one of the reasons why the government of Rwanda eventually withdrew its support for the international tribunal.<sup>77</sup> At the same time the government of Rwanda continued to express its support and willingness to cooperate with the tribunal which as a Chapter VII based tribunal, was the only body endowed with the power to compel states to surrender former leaders who had sought refuge in their territories. Rwanda felt that the temporal jurisdiction of the tribunal was inadequate, the composition and structure of the tribunal inappropriate and ineffective, its subject-matter included in crimes which ought to be tried in the local courts and the tribunal's seat should be in Kigali. Rwanda opposed the possibility of convicted persons serving their sentence outside its territory and the reality that convicted persons could not be sentenced to capital punishment.<sup>78</sup>

The ICTY and ICTR were convened, in part to portray the potential effectiveness of modern international law in action. A permanent international criminal court was considered at the end of the First World War and again after Nuremberg, but was shelved until 1998. Modern international criminal law has established beyond any doubt that crimes as serious as genocide are the concern of the international community. The issue yet to be determined is whether the international community must act collectively to bring serious violators of genocide and other serious crimes to justice through development of temporary or permanent international criminal courts.<sup>79</sup> The establishment of the ICTY was an important event because it showed that an international tribunal could in fact work. The statute of the ICTY which was subsidiary organ of the Security Council acting under Chapter VII, gave it legitimacy and credibility while the

---

<sup>77</sup>D.Shraga and R.Zacklin ,' Symposium towards an International Criminal Court, The international Criminal Tribunal for Rwanda ' op cit

<sup>78</sup>E.Mose, 'Main Achievements of the ICTR', *Journal of International Criminal Justice* Vol 3 (2005),pp 920-943

<sup>79</sup>A.Case, 'On the Current Trends Towards Criminal Prosecution and Punishment of Breaches International Humanitarian Law' *European Journal of International Law* Vol 9 (1998),pp 2-17

financing of the tribunal was through assessed contributions provided it with the necessary administrative and financial stability.<sup>80</sup>

## **2.4 The Development of International Criminal Tribunal for the Former Yugoslavia.**

The conflict which erupted in amongst other places, the former Yugoslavia and Rwanda served to rekindle the sense of outrage felt at the closing stage of the second world war<sup>81</sup>. Thus the UN security council set up an ad hoc tribunals pursuant to its power to decide on measures necessary to maintain or restore international peace and security. In 1993, the ICTY was established with powers to exercise jurisdiction over grave breaches of the Geneva conventions, violations of the laws and customs of war, genocide and crimes against humanity allegedly perpetrated in the former Yugoslavia since 1 January 1991. The response of the international community to the conflict in Yugoslavia had been conflicting due to impotence at the military and political levels. The establishment of the tribunal was thus seized upon during the conflict not only as a belated face saving measure but also in the pious hope that it would serve as deterrence to further crimes. As the UN Security Council itself noted, the ICTY was formed in the belief that an international tribunal will contribute to ensuring that such violations are halted and effectively redressed.<sup>82</sup> In the terms of ICTY's establishment, the idea that an international court should be set up to try those responsible for war crimes and crimes against humanity committed in the former Yugoslavia was spontaneously mooted in various quarters: in the European community, notably at the instigation of Germany, France and the US. The proposal for the establishment of the ad hoc tribunals was preceded by a number of UN statements

---

<sup>80</sup>R.Zacklin, 'The Failing of *ad hoc* International Tribunals', *Journal of International Criminal Justice*, Vol 2 (2004) 541-545

<sup>81</sup> See for example the letters to A. Casese of Lawrence Eagleburger of 8 May 1996 and Elie Wiesel of 28 June 1996 reprinted in *the Path to the Hague: Selected Documents on the Origins of the ICTY* (UN:ICTY, 1996) at 89 and 91 respectively

<sup>82</sup> G. Robertson, *Crimes against Humanity-The Struggle for Global Justice* (London, Penguin, 2000) p 300

proclaiming the principle that the authors of grave breaches of the Geneva Convention and other crimes were individually responsible and would be called to account. The security council established the ICTY in its resolution 827 of 25 of May 1993. A striking feature of this resolution was that the security council determined the situation in the former Yugoslavia and in particular in Bosnia and Herzegovina where there were reports of mass killings, massive, organized and systematic detention and rape of women and the practice of ethnic cleansing constituted a threat to international peace and security.<sup>83</sup>

## **2.5 The Transitional Justice Promise of The ICTY and ICTR**

Since the establishment of the International Criminal Tribunal of the former Yugoslavia in 1993, tribunals and the judiciary have become increasingly essential to reconstruction and reconciliation in post-conflict situations.<sup>84</sup> The ICTY and the International Criminal Tribunal of Rwanda created a year later were seen by the Security Council and the international community as imperative to preventing a cycle of violence that would occur in the absence of an independent judiciary in societies that were fractured and in which a culture of impunity existed.

In order to prevent a culture of impunity and support the return of the rule of law, the ICTY and the ICTR were framed not only as tribunals in which perpetrators would be prosecuted but also as a key component of United Nations peacekeeping operations and reconciliation.<sup>85</sup> Thus there was an expectation that both tribunals would promote and enhance justice and peace as Humphrey explains:

---

<sup>83</sup> D. P. Forsythe, 'Politics and the International Tribunal for the Former Yugoslavia, *Criminal Law Forum* Vol 5(1994) pp 401-422.

<sup>84</sup> Security Council, 'The Establishment of an International Tribunal for Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Such Violations Committed in the Territory of Neighboring States', 3435rd meeting, 8<sup>th</sup> Nov. 1994, S/PV.3453, <http://www.un.org/ictt/english/Resolutions/955e.htm> (accessed 30 October 2010)

<sup>85</sup> Moghalu, K.C, 'Reconciling fractured societies: An African Perspective on the role of judicial prosecutions', in Thakur, R and Malcontent, P ed., *From Sovereign impunity to international accountability: The search for justice in a world of states*, United Nations Press, Tokyo, 2004, pg 202

‘These international legal interventions then are designed not only to make perpetrators accountable but also to promote peace by restoring the rule of law, justice and individual rights after mass atrocity.’<sup>86</sup>

Tribunals are crucial for limiting renewed violence and prosecutions can be seen as deterrence against future abuses of human rights. Thus the creation of these courts was seen as sending a message that those who commit mass atrocities will not go unpunished.

The promise of justice that accompanied the creation of ad hoc international tribunals was met with some skepticism as many believed that the Security Council’s reasons for setting up the tribunals were to relieve the collective guilt that the international community had for idly standing by whilst people were slaughtered.<sup>87</sup> Kamalati points out that many viewed, the ICTR as an ‘international instrument of relief for the benefit of spectators of the 1994 genocide whose conscience needed to be eased.’<sup>88</sup> These doubts and skepticisms however were overshadowed by the belief that retributive justice was essential for the rebuilding of societies and addressing victims’ needs<sup>89</sup> There was great hope that both the ICTY and ICTR would hold those accountable for mass crimes, however, it can be argued that in reality the application of international law and the use of international tribunals as mechanisms of justice is a complex one that depends on political and social factors. Both the ICTY and ICTR have been faced with and political challenges that have hampered efforts to effectively prosecute perpetrators and contribute to reconciliation and it from this that we shall turn to next.

---

<sup>86</sup>Humphrey, M, ‘International Intervention, Justice and National Reconciliation: The Role of the ICTY and the ICTR in Bosnia and Rwanda’, *Journal of Human Rights*, Vol.2, No.4, 2003, pg 496

<sup>87</sup>See Hazan, P, *Justice in a Time of War: The True Story behind the international tribunal for the former Yugoslavia*, Texas A&M University Press, Texas, 2004, pg 41

<sup>88</sup> Kritz, Neil J, *Transitional Justice: How Emerging Democracies Reckon with Former Regimes. 3 Vols.* Washington, DC: United States Institute of Peace ed (1995).

<sup>89</sup> Davis, L. ‘Transitional justice and security system reform’. *Initiative for Peacebuilding Paper*. New York, NY: International Centre for Transitional Justice(2009).

## 2.6 The Development Hybrid Tribunals for Transitional Justice

Hybrid Tribunals derive their existence on the need to deal with crimes and render justice so as to restore the victims and further reconciliation. Each of the tribunals has its unique features but all have been established by states emerging from conflicts. They work hand in hand with the domestic judicial systems. The tribunal works best in where national jurisdictions are seen to be viable as this will ease the working of the tribunal. Government's involvement is also paramount as this will give confidence to the people of a state to trust in the tribunal's work.

The tribunals are normally located in the countries where the crimes have occurred. This in turn ensures the proximity of the tribunal to the witnesses and easy access to evidence that it requires in the prosecution of its cases.<sup>90</sup>

Understanding the local laws, customs, and language of the local people can prove an enormous challenge to international judicial officers but since the tribunals incorporate local judicial officers, it makes its work easier.<sup>91</sup> The local judicial officers assist their international counterparts in their integration to the judicial system of that state.<sup>92</sup> Local institutions stand to benefit a lot from the expertise of the international judicial officers as they provide the necessary training therefore improving their capacity.<sup>93</sup> The Hybrid Tribunals therefore tend to leave a lasting impact on the local judicial institutions as compared to the International Criminal Court

---

<sup>90</sup> Kritz, Neil J. *Transitional Justice: How Emerging Democracies Reckon with Former Regimes. 3 Vols.* Washington, DC: United States Institute of Peace. ed (1995) p.25

<sup>91</sup> Ibid p.25

<sup>92</sup> Ibidem 25 .

<sup>93</sup> Ibid <sup>90</sup> Kritz, Neil J. *Transitional Justice: How Emerging Democracies Reckon with Former Regimes. 3 Vols.* Washington, DC: United States Institute of Peace. ed (1995)

and the ad hoc tribunals which are normally located far away from where the crimes were committed.<sup>94</sup>

## **2.7 Deterrence Effects of the Tribunals.**

At the corner stone of the criminal justice systems in the world is the need to punish those responsible for crimes and in the process deterring the occurrence of similar crimes in the future. It is a system where those who have already committed crimes are held accountable, those that are already committing atrocities are urged to stop, and those planning to commit similar crimes in the future are forewarned.<sup>95</sup> United Nations Security Council has elucidated the deterrence factor of criminal tribunals. In its resolution for the establishment of the ICTY, the Council made it clear that it was “determined to put an end to such crimes and to take effective measures to bring to justice the persons who are responsible for them”.<sup>96</sup> Similar affirmation was given by the Security Council in its Resolution to establish the ICTR.<sup>97</sup> By punishing the perpetrators of heinous crimes, the tribunals not only deter but also give the victims the satisfaction that those responsible for their conditions have been punished. This lessens the chances of such victims taking the law into their own hands and revenging their attacks therefore more crimes being committed. The former ICTY Judge Antonio Cassese have tried to demystify the notion of revenge by the victims of crimes where he argues that where such victims are denied justice, they will seek revenge as their last recourse.<sup>98</sup> He goes on to illustrate how the genocide in Armenia resulted in revenge by the victims noting that;

---

<sup>94</sup> Kritz, Neil J. *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*. 3 Vols. Washington, DC: United States Institute of Peace. ed (1995)

<sup>95</sup>. William A. Schabas, *Sentencing by International Tribunals: A Human Rights Approach*, 7 Duke J. Comp. & Int'l L.498 (1997).

<sup>96</sup>. S.C. Res.827, U.N.Doc.S/RES/827 (1993).

<sup>97</sup>. William A. Schabas, *Sentencing by International Tribunals: A Human Rights Approach*, 7 Duke J. Comp. & Int'l L.498 (1997).

<sup>98</sup>. Antonio Cassese, *Reflections on International Criminal Justice*, 61 Mod. L. Rev. 1 (1998).

Where there is no justice in response to the extermination of a people, the result is that victims are led to take the law into their own hands, both to exact retribution and to draw attention to the denied historical fact”.<sup>99</sup>

## **2.8 Shortcomings of the Criminal Tribunal’s Deterrence Effects.**

Critics of the deterrent effects of the tribunals have pointed to the fact that the said tribunals only impose leaner sentences as the maximum sentence they can render is life imprisonment as compared to the majority of national jurisdictions that recognizes the death penalty.<sup>100</sup> Both the Statutes of ICTY and ICTR limits the sentence of those convicted of international crimes to imprisonment.<sup>101</sup> Others have also argued that the deterrence effects of the criminal tribunals is put into question where perpetrators of crimes in failed states continue to do so not because of lack of fear of prosecutions by the tribunals but because they have avenues to do so as a result of weak institutions. Prosecutions by criminal tribunals can also reduce the chances of bringing stability in countries where the conflicts have occurred. This is because in many weak states, atrocities are committed by leaders and it is the same leaders who are needed for peace negotiations so as to bring the country back to normalcy.<sup>102</sup> Prosecution of such individuals may therefore aggravate the situation resulting in more crimes being committed and chances of reconciliation thwarted.<sup>103</sup>

The existence of criminal tribunals particularly the ad hoc tribunals have been viewed by others as not contributing to the deterrence theory unlike a permanent system like the

---

<sup>99</sup>.Antonio Cassese, *Reflections on International Criminal Justice*, 61 Mod. L. Rev. 1 (1998).

<sup>100</sup>. William A. Schabas, *Sentencing by International Tribunals: A Human Rights Approach*, 7 Duke J. Comp. & Int’l L.498 (1997).

<sup>101</sup>. ICTY Statute *Supra* note 78, Art 24. & ICTR Statue *Supra* note 83, Art 23.

<sup>102</sup>. Julian Ku & JideNzelibe, *Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities?*, 84 Wash. U. L. Rev.781 (2006).

<sup>103</sup>. D.Shraga and R.Zacklin ,’ Symposium towards an International Criminal Court, The international Criminal Tribunal for Rwanda ‘, *European Journal of International Law*,(1996) pp 501-518

International Criminal Court.<sup>104</sup> This has been given credence by the fact that ad hoc tribunals are only established for a specific function and they are disbanded once their work is complete. They therefore grant retribution to the victims but fail to deter future crimes as their existence is limited unlike a permanent international court that gives retribution and deter future crimes as a result of its continual existence.<sup>105</sup>

## **2.8 Conclusion.**

In a nutshell, international criminal tribunals have emerged in the context of political crisis in nation-states in which political violence has taken the form of mass atrocity. They are part of strategies of international intervention to stop violence and help restore peace and achieve national reconciliation through justice. However, the project of justice they have set themselves is in contexts where states have failed and societies have divided. They are part of larger political projects to reverse the polarizing effects of war and to construct a new political community and national identity.

Although international human rights law is used to recover the universality of law, the effect of international criminal tribunals is inevitably selective. The prosecution of mass atrocity through criminal law imposes the logic of individualizing responsibility for crimes. This occurs both as a consequence of establishing the truth about specific crimes and also through the ritual structure of trials, which makes selectivity a method of dividing the innocent and guilty.

The inevitably selective and symbolic character of international trials becomes burdened by the need to gain judicial acceptance for their prosecutions and verdicts among antagonistic communities. They face the problem of addressing the rights, grievances and fears of

---

<sup>104</sup>. Julian et al *Supra* note 138 at 789.

<sup>105</sup>. *Ibid* p.789.



communities divided and displaced by war with no political community yet to embrace them. The international criminal tribunals represent forums of transitional justice whose revelations and verdicts need to be consolidated through national prosecutions. International tribunals can never be anything but the focus for justice after mass atrocity that establishes the 'truth' about past violence. The restoration of law and justice must be then founded and affirmed in national communities through their laws, courts and constitutions.

## CHAPTER THREE

### EAST AFRICA COMMUNITY TRANSITIONAL JUSTICE MECHANISMS

#### 3.1 Introduction

This chapter will discuss the various transitional justice mechanisms as practiced and implemented in the East Africa Community member states such as Kenya, Uganda, and Rwanda. The local trials in the East Africa Community, the international criminal court in Rwanda will also be discussed herein.

There are a variety of transitional justices mechanisms which can help affected societies start afresh. These are based on international human rights and humanitarian law in demanding that states halt, investigate, punish, repair, and prevent human rights abuses<sup>11</sup>. Most of these approaches are interlinked, and are most effective when they are applied together. These approaches include prosecutions, informal and traditional justice mechanisms, lustration measures, legal policy and constitutional reforms, truth commissions, amnesty, reparations, memorialization and reconciliation.

#### 3.2 EAC Transitional Justice

For more than the one hundred years of its existence, EAC has gone through different forms of violations, including colonization, the liberation struggle and post-conflict violations. Anthony Reeler summarizes this experience<sup>106</sup>. Freddy Mutanguha captures the Rwandan experience with the genocide in which more than a million people were consumed in one

---

<sup>106</sup> Rome Statute of the International Criminal Court. Jurisdiction, Admissibility and Applicable Law Art. 5 to 21, available at: <http://www.un.org/law/icc/statute/romefra.htm> (last accessed on May 18, 2003); Art. 5 enumerates crimes within the jurisdiction of the Court: The crime of genocide; Crimes against humanity; War crimes; The crime of aggression (once defined since no agreement has yet been found)

<sup>72</sup> Which came into force on July 1st 2002

hundred days of meaningless tribal anger. In Uganda the government, the Lord's Resistance Army and a number of armed militants have caused undue suffering to citizens since independence, and Lyandro Komakech presents a strong case in this regard. Joachim Forster notes the extent of state terror in the former communist East Germany, where the state ruled through an effective secret police, the Stasi<sup>107</sup>. Rwanda is a country where the elites and their families were united in stripping the state of its assets in a violent manner, and Justice Cleto Vilacorta demonstrates the extent of damage and the difficulty in recovering lost assets. Kenya presents a case of violent post-colony where the elites use violent means to capture or retain power; in his presentation, Davis Malombe shows how violence can devour society rapidly in short time. Blanche Satta Gaie notes the extent to which gender-based violence, particularly rape, was used during the Liberian conflict.

Transitional justice mechanisms in EAC according to Roht-Arriaza, includes 'that set of practices, mechanisms and concerns that arise following a period of conflict, civil strife or repression, and that are aimed directly at confronting and dealing with past violations of human rights and humanitarian law. For many years, state and non-state actors have been involved in truth, justice and reconciliation-related interventions without necessarily framing them as transitional justice<sup>108</sup>. The key transitional justice mechanisms applied in EAC are constitutional reforms; truth commissions; criminal accountability via public interest litigations; reparations and memorialization; and others such as research and documentation, vetting and lustrating, peace-building and conflict management. Below we explore the application of these mechanisms in Kenya.

---

<sup>107</sup> Uvin Peter, *Aiding Violence: The Development Enterprise in Rwanda*, West Hartford, CT: Kumarian Press:1998

<sup>108</sup> D. Gairdner, *Truth in Transition: the Role of Truth Commissions in Political Transition in Chile and El Salvador*, Chr. Michelsen Institute Development Studies and Human Rights, 1999.

Different transitional justice approaches have been and are still being applied to deal with those gross human rights violations, with the ultimate aim of achieving reconciliation and sustainable peace. The case studies show that the history of each country, its culture, and tradition, the level of human rights awareness within each society, political will and the involvement of civil society are decisive in determining the kind of approach and mechanism(s) to be applied to ensure main transitional justice mechanisms<sup>109</sup>.

### **3.2.1 Transitional Justice in Uganda**

In Uganda the history of different conflicts and failed peace agreements has left multiple legacies of violence in Uganda. Uganda chose a comprehensive transitional justice approach inclusive of formal and informal justice mechanisms. In Democratic Republic, the German government promoted disclosure of formerly classified documents belonging to the secret police of the former German Democratic Republic as a truth-recovery mechanism<sup>110</sup>. These documents are now being used for vetting, criminal prosecutions, rehabilitation of survivors, research and political education. It is important to note that accountability, abolish the culture of impunity, provide remedies to victims, bring perpetrators to justice and promote healing: preventing the recurrence of crises and future violations of human rights, to ensure social cohesion, nation-building, ownership and inclusiveness at the national and local levels and to promote reconciliation.

---

<sup>109</sup> Edkins Jenny, 'Legality with a Vengeance: Humanitarian Relief in Complex Emergencies', *Millennium Journal of International Studies*, 1996, Vol. 25, No. 3, pp.547-75; and Sen Amartya, *Poverty and Famines: An Essay on Entitlement and Deprivation*, Oxford: Clarendon Press 1981 (Reprinted 1984)

<sup>110</sup> Keen, David War and peace: what is the difference? in. *Managing Armed Conflicts in the XXI Century*, Ed. Adekeye Adebajo and Chandra Lekha Sriram, International Peace Academy, New York, Franck Cass 2001, p. 11

<sup>110</sup> *ibid*

### 3.2.2 Transitional Justice in Rwanda

Rwanda adopted both national and international mechanisms for addressing the gross human rights violations that obtained in the country between 1990 and 1994 (the Rwanda genocide). At the international level, the prosecution of perpetrators was carried out through the International Criminal Tribunal for Rwanda. At the local level, addressing the specific socio-cultural fabric and character of the conflict (genocide), traditional justice (Gacaca courts) and preventative measures – for example, social integration projects, memorialization have been implemented as the main transitional justice mechanisms<sup>111</sup>.

### 3.2.3 Transitional Justice in Kenya

Kenya suffers from a legacy of different colonial and post-colonial governance systems, under which gross human rights violations and economic crimes were committed with no recourse for effective redress<sup>112</sup>. For many years, a culture of impunity prevailed, which only deepened the conflicts within the society. As a result of this, key transitional justice mechanisms have been put in place: constitutional reforms, truth commissions, criminal accountability via public interest litigation, reparation and memorialization, research and documentation, vetting and lustration, peace-building and conflict management<sup>113</sup>.

The Kenya Human Rights Commission (KHRC) is a national NGO established in 1992 to entrench human rights and democratic values in the society. Moreover, partnerships with like-minded state and non-state actors, including survivor, and among human rights networks are equally important towards this goal at the national, regional and global level. With the Ford

---

<sup>111</sup> D. Gairdner, *Truth in Transition: the Role of Truth Commissions in Political Transition in Chile and El Salvador*, Chr. Michelsen Institute Development Studies and Human Rights, 1999.

<sup>112</sup> United Nations, *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*. 8 February 2005, E/CN.4/2005/102/Add.1, <<http://www.derechos.org/nizkor/impu/principles.html>>, accessed 24 Apr. 2013.

<sup>113</sup> *A Toolkit for Training and Engagement in Kenya* (Nairobi: KHRC, ICJ-Kenya, and ICPC, 2009),

Global funding and other opportunities, the KHRC is moving towards being a ‘domestic transnational’ organization in global governance. This means that the Commission will be able, directly and in partnership with likeminded partners, to set the regional and global human rights agenda, which includes transitional justice. The KHRC believes that transitional justice and the development and implementation of pro-people constitutional, legal and policy reforms are critical in the realization of this vision. Currently, the KHRC works with twenty-seven community/victim-based networks; is a member of twenty national, twenty regional and twenty-five international human rights networks; most of these are transitional justice driven<sup>114</sup>.

In response to its long history of violence, Kenya implemented a number of measures which included the Independent Review Commission on general elections, the Truth, Justice and Reconciliation Commission, and the Constitutional Commission which was tasked with working on constitutional reforms. It is important to note that, after the 2007 post-election violence, there was political will within the government to deal with past and present human rights violations, and this led to the development of the constitutional reforms and the inclusion of transitional justice mechanisms therein.

In general, what is prevalent in most post-conflict situations is a culture of impunity and general amnesty that prevents the implementation of transitional justice mechanisms. It usually takes a very long time before societies develop and adopt adequate reconciliation and redress policies. In most instances, it has been made possible only after a change of government, a reform of institutions and/or the persistent claim for justice by civil society. The most typical and

---

<sup>114</sup> United Nations, *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*. 8 February 2005, E/CN.4/2005/102/Add.1, <<http://www.derechos.org/nizkor/impu/principles.html>>, accessed 24 Apr. 2013.

promising transitional justice approaches or mechanisms derived from the country case studies presented at the conference<sup>115</sup>.

### **3.2 Local Trials in East Africa Community for Transitional Justice Mechanisms**

Holding local trials in post-conflict societies have been instrumental transitional justice mechanism in EAC to deal with past crimes and human rights abuses. This type of trials has been conducted in EAC with or without the direct assistance of the international community. They can include the participation of international judges, for example, judging panels where two out of three judges are local, and one is international, or they can consist entirely of local judges and prosecutors. They apply local law only or they can apply a transitional form of law, which may include international human rights law or UN laws and treaties<sup>116</sup>. In a transitional period, if local trials are chosen as a vehicle for justice for past abuses, a multitude of combinations may be employed during this period in a court of law. There are numerous positive and negative outcomes and effects of applying local trials to deal with the past in a transitional period. However, the key issue which needs to be addressed prior to even contemplating the potential of local trials to deal with human rights abuses is the state of the judiciary and the judicial system in post-conflict societies.<sup>117</sup>

---

<sup>115</sup> Xanana Gusmao's Views on Justice", [http://www.easttimor-reconciliation.org/Gusmao\\_Justice\\_E.htm](http://www.easttimor-reconciliation.org/Gusmao_Justice_E.htm), V.Hearman, "Leaders Reject International Tribunal", *Green Left Weekly*, 25 June 2003.

<sup>116</sup> United Nations, *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*. 8 February 2005, E/CN.4/2005/102/Add.1, <<http://www.derechos.org/nizkor/impu/principles.html>>, accessed 24 Apr. 2013.

<sup>117</sup> Xanana Gusmao's Views on Justice", [http://www.easttimor-reconciliation.org/Gusmao\\_Justice\\_E.htm](http://www.easttimor-reconciliation.org/Gusmao_Justice_E.htm), V.Hearman, "Leaders Reject International Tribunal", *Green Left Weekly*, 25 June 2003.

### **3.3 Traditional Methods of Transitional Justice Mechanisms in East Africa Community**

Traditional methods of justice have found practice in EAC that took many different forms, and vary extensively from community to community. They are generally considered restorative justice, but they can also have punitive functions. However, on a broad and general level they are mechanisms for solving disputes, conflicts and crime at the community level. It is where a village or tribal council, community meeting or council of elders is held to deal with crimes perpetrated towards the community or individuals, or it can focus on resolving conflicts such as marital disputes and domestic violence. The council, elders or group then decide on the punishment for the perpetrator<sup>118</sup>. The punishment can vary extensively depending upon not only the seriousness of the crime or transgression, but also on the culture of the country and community. It can include public humiliation of the perpetrator, paying fines, community labour, physical punishment or what the community or council determines to be the best solution for the transgression. It is often focused on the fact that the perpetrator is part of the community and although he/she can be punished for the crimes committed, it is not in the sense of incarceration. The perpetrator may serve the community and repay for his/her crimes. This serves the greater good of the community rather than separating the perpetrator from the community. Different variations of traditional justice mechanisms are used all over the world in developing countries. Where there have been long periods of conflict, authoritarian regimes or where the judicial system is perceived to be unfair and corrupt, they are sometimes used more extensively, because of a lack of trust in the system Unlike truth commissions and the type of ad hoc/hybrid local trials discussed above these mechanisms are in constant use for present crimes and conflict resolution, they are not a mechanism created or developed to deal particularly with past crimes of

---

<sup>118</sup> Akhavan Payam, "Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?" *American Journal of International Law* 95(1), 2001 p.12



human rights abuse in a post conflict setting. They can, because of their focus on reconciliation and their both restorative and retributive nature, be a valuable mechanism to use in the context of post-conflict transitional justice. However, several cautionary notes must be struck before unequivocally embracing all traditional mechanisms in all their forms as ways of dealing with past crimes<sup>119</sup>.

### 3.3.1 International Criminal Tribunal for Rwanda

Rwanda provides a far-reaching example of experiments in justice and reconciliation. It also reveals how the combination of international, national, and traditional criminal prosecutions can both facilitate and limit justice and reconciliation<sup>120</sup>. The United Nations created the International Criminal Tribunal for Rwanda (ICTR) in November 1994 to prosecute the masterminds of the genocide and other serious violations of international humanitarian law. The ICTR has been plagued by charges of inefficiency. Since its inception and with 800 staff, the ICTR has indicted ninety-two persons and managed to arrest international response to mass violence in post-conflict societies. The tribunal's jurisprudence has contributed to the development of international criminal law by setting various legal precedents<sup>121</sup>.

When it came to power in 1994, the Rwandan Patriotic Front (RPF) government announced that it would not extend amnesty to the perpetrators of the genocide. Consequently, the government arrested and detained suspects of the genocide and other serious violations of international human rights and humanitarian law. In 1996, the Rwandan National Assembly

---

<sup>119</sup> United Nations, *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*. 8 February 2005, E/CN.4/2005/102/Add.1, <<http://www.derechos.org/nizkor/impu/principles.html>>, accessed 24 Apr. 2013.

<sup>120</sup> Bacic, "Truth Commissions: One option when Dealing with the Recent Past in Countries that Have Endured War or Dictatorships", *Committee for Conflict Transformation Support*, Newsletter 18, <http://www.c-r.org/ccts/ccts18/trucomm.htm>

<sup>121</sup> Akhavan Payam, "Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?" *American Journal of International Law* 95(1), 2001 p.12

adopted the Organic Law creating four categories of crime and associated punishments, ranging from particularly cruel behavior to simple property offences. These were later reduced to three categories. This law was created because, although the country was party to the 1948 Genocide Convention, its penal code was never extended to genocide<sup>122</sup>.

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.’ This paragraph is article 3.1 of a preliminary pact on accountability and reconciliation, signed in late June 2007 by the government of Uganda and the rebel Lord’s Resistance Army (LRA). It could be a major step towards success in the Juba peace talks that must bring an end to the long and cruel civil war in the northern part of Uganda. The explicit reference to traditional justice instruments in the context of peacemaking and justice is innovative. It is one of the strongest signs of the rapidly increasing interest in the role such mechanisms can play in times of transition<sup>123</sup>. Almost ten years earlier, Rwandans, battling the heavy legacy of the genocide, began scouting the possibility of mobilizing an informal dispute resolution tool, called Gacaca, for their transitional justice policy. Since then, thousands of such lay tribunals have been set up. They have identified and tried numerous men and women who were suspected of participating in the events of April–June 1994. The Gacaca justice and reconciliation activities have attracted worldwide attention. Academics have written countless articles and books. International non-governmental organizations (NGOs) and donor countries

---

<sup>122</sup> Basic, “Truth Commissions: One option when Dealing with the Recent Past in Countries that Have Endured War or Dictatorships”, *Committee for Conflict Transformation Support*, Newsletter 18, <http://www.c-r.org/ccts/ccts18/trucomm.htm>

<sup>123</sup> M. Freeman & P. Hayner, “Truth-Telling” in D. Bloomfield, T. Barnes, L. Huyse (eds.), *Reconciliation after Violent Conflict. A Handbook*, IDEA, Stockholm, 2003, p. 129.

have provided generous funding. Examples of the ritual reintegration of ex-combatants in Mozambique and Sierra Leone were given a similar welcome<sup>124</sup>.

As the alternative judicial process, the *gacaca* had two primary objectives: to alleviate prison overcrowding and to address a range of problems at the community level, such as rebuilding group relationships and reconstructing Rwandan society. The *gacaca* was a dispute-resolution mechanism used in precolonial Rwanda to adjudicate communal disputes often linked to property issues, personal injury, or inheritance problems<sup>125</sup>. During the proceedings, respected community figures served as “judges” who involved the entire community in the process. Sanctions usually took the form of compensation and not imprisonment, allowing the accused to appreciate the gravity of the damage caused before his or her reintegration into the community. The main aims of the proceedings were restitution and reconciliation. In October 2000, the Transitional National Assembly of Rwanda adopted the *Gacaca* Law (modified in June 2001), which established *gacaca* jurisdictions to adjudicate genocide suspects. Elections for approximately 255,000 *gacaca* judges took place

### **3.4 Criminal Prosecution in EAC in Transitional Justice Mechanisms**

EAC have embraced Criminal Prosecution in Transitional Justice Mechanisms, Criminal prosecutions are directed at individuals who bear personal responsibility for criminal offences committed during a period of conflict or abuse. Prosecuting perpetrators of mass crimes is an international legal obligation, and is often seen as a moral good as well as sending a strong social

---

<sup>124</sup> Basic, “Truth Commissions: One option when Dealing with the Recent Past in Countries that Have Endured War or Dictatorships”, *Committee for Conflict Transformation Support*, Newsletter 18, <http://www.c-r.org/cts/cts18/trucomm.htm>

<sup>125</sup> M. Freeman & P. Hayner, “Truth-Telling” in D. Bloomfield, T. Barnes, L. Huyse (eds.), *Reconciliation after Violent Conflict. A Handbook*, IDEA, Stockholm, 2003, p. 129.

message that criminal act will not be tolerated in the future. Prosecutions also help to avoid lawless revenge and retaliation, and to maintain or restore the rule of law<sup>126</sup>.

Prosecuting individuals who have committed past crimes is the most direct form of accountability possible. Prosecutions help to reaffirm legal order and encourage trust in public institutions. However, prosecutions are often expensive, time consuming, and divisive, and no state will have adequate resources to prosecute all of the hundreds if not thousands of perpetrators who have committed crimes during a period of conflict. To overcome these obstacles, prosecutions in the transitional justice context are often only conducted for the individuals most responsible for the most serious crimes. Not only are they considered more deserving of punishment than others, punishing the principal perpetrators can act as a deterrent for future abusers and signals an acknowledgment of the wrongdoing that occurred as an indication that impunity will not be tolerated in a new regime<sup>127</sup>.

Mass crimes such as crimes against humanity or genocide are difficult to investigate and more difficult to prove in a court of law. Prosecutors must investigate large patterns of abuse, which may involve many witnesses and forensic analyses, as well as establishing complex links between commanders who ordered crimes and the soldiers who carried them out. In many countries recovering from conflict, local court systems are not well equipped to handle the size and complexity of prosecutions for mass crimes. Moreover, many domestic courts are seen as politically biased after periods of authoritarian rule and even if they have the technical capacity to take on complex cases, they are not seen as credible by one or more parties to the conflict<sup>128</sup>.

---

<sup>126</sup> Akhavan Payam, "Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?" *American Journal of International Law* 95(1), 2001 p.12

<sup>127</sup> M. Freeman & P. Hayner, "Truth-Telling" in D. Bloomfield, T. Barnes, L. Huyse (eds.), *Reconciliation after Violent Conflict. A Handbook*, IDEA, Stockholm, 2003, p. 129.

<sup>128</sup> R. Mosier, "Impunity, Truth Commissions: Peddling Impunity?", *Human Rights Features, Voice of the Asia*

In such cases, some countries have pursued a “hybrid” model of prosecution, whereby local courts, lawyers, and judges are assisted by international counterparts to assist with trials. International experts can bring both professional experiences, knowledge of the evolving international jurisprudence on the subject and, as important, independence to legal proceedings.

### **3.5 Amnesty in EAC in Transitional Justice Mechanisms**

Amnesty offers the least expensive mechanism for dealing with past state violence. The amnesty option avoids the investigation, salary, infrastructure training, and security costs associated with trials and truth commissions. Amnesties normally require no enforcement mechanism, implementation, staffing, or outlay of funds, and they consume very few government resources<sup>129</sup>.

Compared with trials and truth commissions, amnesties provide the cheapest option at the disposal of transitional democracies. Most advocates of transitional justice do not consider amnesties an acceptable mechanism for dealing with the past, however. They do not hold individuals accountable for their crimes in either a restorative or retributive way. Nevertheless, defenders of amnesty contend that amnesties offer acknowledgment of past crimes; to grant an amnesty requires recognition that wrongdoing occurred. They also contend that the strength and stability of the new democratic system hinges on putting the past in the past, without recriminations that might catalyze spoilers. In addition, the trend toward accountability has not eroded the use of amnesties throughout the world.

Amnesties may persist in part due to their cost-effectiveness. New and fragile democracies may consider other transitional justice mechanisms out of reach, and opt instead for the cheapest acknowledgment-without-justice, or the amnesty mechanism. Amnesty is an act by

---

<sup>129</sup>*Pacific Human Rights Network*, Special Weekly Edition for the Duration of the 59<sup>th</sup> Session of the Commission on Human Rights, Vol. 6, no. 5, 14-20 April 2003, P.2

which an individual or a group of people is granted immunity from criminal prosecution, and in some cases civil liability, for a crime committed in the past. An amnesty is to be distinguished from a pardon, which “forgives” the perpetrator and reduces or removes their punishment, although the conviction for the crime remains intact<sup>130</sup>.

The grant of amnesty in response to gross human rights violations is a highly controversial issue. Both general amnesties and individual or conditional amnesties continue to be adopted in a large number of post-conflict situations as a response to the transitional justice question. 184 The UN has a mixed record with regard to amnesties, and while some have been supported by the international community, others have been opposed, and/or overturned or reviewed by domestic courts and human rights bodies<sup>131</sup>. The legality of a domestic amnesty may be assessed partly in relation to the state’s duty to prosecute certain categories of international crimes. The exact scope of this obligation remains unclear, and there have been lengthy debates as to whether amnesty for certain international crimes is prohibited by customary international law.<sup>186</sup> Nevertheless, in many cases amnesty provisions are evidently in breach of a state’s treaty obligations. In addition, the validity of a domestic amnesty also relates to the state’s obligations to provide an effective remedy to victims of human rights violations under international human rights law. Amnesties must therefore be considered together with the transitional justice measures that accompany it, such as accountability or reparative measures<sup>132</sup>.

---

<sup>130</sup> Bacic, “Truth Commissions: One option when Dealing with the Recent Past in Countries that Have Endured War or Dictatorships”, *Committee for Conflict Transformation Support*, Newsletter 18, <http://www.c-r.org/ccts/ccts18/trucomm.htm>

<sup>131</sup> R. Mosier, “Impunity, Truth Commissions: Peddling Impunity?”, *Human Rights Features, Voice of the Asia Pacific Human Rights Network*, Special Weekly Edition for the Duration of the 59<sup>th</sup> Session of the Commission on Human Rights, Vol. 6, no. 5, 14-20 April 2003, p. 2.

<sup>132</sup> Bacic, “Truth Commissions: One option when Dealing with the Recent Past in Countries that Have Endured War or Dictatorships”, *Committee for Conflict Transformation Support*, Newsletter 18, <http://www.c-r.org/ccts/ccts18/trucomm.htm>

### 3.5.1 Amnesty in Uganda in Transitional Justice Mechanisms

Even before the conflict in northern Uganda had no clear end in sight, literature on the subject had already begun to address issues of reintegration and reconciliation. This discussion merits attention because even though the LRA and the government of Uganda have not yet successfully negotiated a peace deal, thousands of former members of the LRA have sought amnesty and returned to their communities.<sup>133</sup> Even when the conflict was ongoing, communities in northern Uganda had begun reintegrating former LRA rebels and had begun to work towards reconciliation through traditional conflict resolution mechanisms. Parts of the features of Uganda's Amnesty Act and the Acholis' traditional ceremonies and examine how these two mechanisms alone may fall short of achieving reintegration and reconciliation both during and post-conflict.

### 3.5.2 The Contours of the Amnesty Act

Religious and cultural leaders in northern Uganda have led the movement towards ending the conflict through amnesty.<sup>134</sup> Accordingly, the objective of the Amnesty Act of 2000 is to break the cycle of violence in northern Uganda by encouraging the combatants of various rebel groups to leave their insurgencies without fear of prosecution.<sup>135</sup> The Act thereby declares amnesty with respect to any Ugandan who has engaged in war or armed rebellion against the government of Uganda since January 20, 1986. Those granted amnesty under the act receive “a pardon, forgiveness, exemption or discharge from criminal prosecution or any other form of

---

<sup>133</sup> At the end of January 2005, there were 14,695 reporters, according to the Ministry of Internal Affairs. Refugee Law Project, *Whose Justice? Perceptions of Uganda's Amnesty Act 2000: The Potential for Conflict Resolution and Long Term Reconciliation*, 7, February 2005.

<sup>134</sup> Amnesty International. *Monitoring and Reporting Human Rights Violations in Africa: A Handbook for Community Activists*, Great Britain and; Kate Thompson and Camille Giffard: *Reporting Killings as Human Rights Violations*, Human Rights Centre: UK University of Essex (2002).

<sup>135</sup> Amnesty Act 2000, Preamble; International Center for Transitional Justice, *supra* note 8, at 46.

punishment by the State.”<sup>136</sup> The following outlines the Act’s provisions for granting amnesty as well as the institutions which it establishes for that purpose.

To qualify for amnesty, the applicant must have actually participated in combat, collaborated with the perpetrators of the war or armed rebellion, committed a crime in the furtherance of the war or armed rebellion, or assisted or aided the conduct or prosecution of the war or armed rebellion. The government will not prosecute or punish such persons if he or she reports to the nearest local or central government authority, renounces and abandons involvement in the war or armed rebellion, and surrenders any weapons in his or her possession. In renouncing involvement, the rebels’ declarations need not be onerous or specify the crimes for which he or she seeks amnesty.<sup>137</sup> After a rebel has completed the above steps, he or she becomes a “reporter,” whose file the Amnesty Commission reviews before a Certificate of Amnesty is issued and the process is complete.<sup>138</sup>

In addition, the Amnesty Act establishes the Amnesty Commission which consists of a Chairperson, who is a judge of the High Court (or a person qualified to be a judge of the High Court), and six other persons of high moral integrity.<sup>139</sup> The Commission’s objectives are “to persuade reporters to take advantage of the amnesty and to encourage communities to reconcile with those who have committed the offenses.”<sup>140</sup> The Commission’s functions specifically require it to monitor programs of demobilization, reintegration, and resettlement of reporters and to coordinate a program to sensitize the general public regarding the Amnesty Act.<sup>141</sup> According to the *International Center for Transitional Justice*, the Commission appears to be efficient and

---

<sup>136</sup> Amnesty Act 2000, art.

<sup>137</sup> International Center for Transitional Justice

<sup>138</sup> Basic, “Truth Commissions: One option when Dealing with the Recent Past in Countries that Have Endured War or Dictatorships”, *Committee for Conflict Transformation Support*, Newsletter 18, <http://www.c-r.org/ccts/ccts18/trucomm.htm>

<sup>139</sup> Amnesty Act 2000, arts. 7-8.

<sup>140</sup> Refugee Law Project, *supra* note 17, at 7, quoting Amnesty Commission Handbook, Section 3.11.

<sup>141</sup> Amnesty Act 2000, art. 9(a), (b).



well functioning despite challenging circumstances such as inadequate funding.<sup>142</sup> It also seems to maintain good relationships with northern Uganda's civil society.<sup>143</sup> Finally, the Act further institutes a seven member Demobilization and Resettlement Team (DRT) which functions at a regional level to implement the amnesty by establishing programs for decommissioning arms, demobilization, resettlement, and reintegration of reporters.<sup>144</sup>

In 2005 the Commission began to run a disarmament, demobilization, and reintegration (DDR) program to support former combatants as they start new lives.<sup>145</sup> The program provides the reporters with resettlement packages which include 263,000 Uganda shillings (US \$150) and a home kit with items such as a mattress, a blanket, saucepans, plates, cups, a hoe, maize flour, and seeds.<sup>146</sup> Funding of the resettlement packages has only been selective, leaving approximately 10,000 former rebels still without packages (out of a total of 15,000 reporters). However, the Multi-Country Demobilization and Reintegration Program (MDRP) of the World Bank released US \$450,000 at the beginning of 2005 and the Commission anticipates that the MDRP will release more funds, as is needed, out of the \$4.1 million budgeted for the purpose.<sup>147</sup> Lastly, while the DRT supposedly monitors reporters for up to two years, there are in fact few long term programs and reintegration is generally uncoordinated and poorly funded.

---

<sup>142</sup> International Center for Transitional Justice, *supra* note 8, at 47.

<sup>143</sup> Bacic, "Truth Commissions: One option when Dealing with the Recent Past in Countries that Have Endured War or Dictatorships", *Committee for Conflict Transformation Support*, Newsletter 18, <http://www.c-r.org/ccts/ccts18/trucomm.htm>.

<sup>144</sup> Amnesty Act 2000, arts. 11-13.

<sup>145</sup> International Crisis Group, Policy Briefing, *Building a Comprehensive Peace Strategy for Northern Uganda*, 8, 23 June 2005.

<sup>146</sup> Bacic, "Truth Commissions: One option when Dealing with the Recent Past in Countries that Have Endured War or Dictatorships", *Committee for Conflict Transformation Support*, Newsletter 18, <http://www.c-r.org/ccts/ccts18/trucomm.htm>

<sup>147</sup> Human Rights Watch, *supra* note 5, at 38; International Crisis Group, *supra* note 31, at 8.

### **3.6 Conclusion**

Criminal justice is part of the response to massive human rights violations and works best if combined with other mechanisms of transitional justice. If domestic prosecutions are possible, they can signal a break with the past, foster renewed public trust in institutions and restore the dignity of victims. At the same time, prosecutions generally face many hurdles and require significant resources and a high commitment to fairness, transparency and public consultations. A clear prosecutorial strategy helps to make the best use of limited resources. The next chapter addresses how domestic capacity can be combined and complemented with international efforts.

Truth commissions can foster a common understanding and acknowledgement of an abusive past, and if they are effectively embedded in a comprehensive justice perspective, they can provide a foundation for building a strong and lasting peace. Carefully structuring and implementing a truth commission process is crucial to its having this positive impact.

## CHAPTER FOUR

### ANALYSIS OF TRANSITIONAL JUSTICE MECHANISMS IN EAST AFRICA

#### COMMUNITY

##### 4.1 Introduction

This chapter aims to link the research questions, theoretical framework and the case study in presenting the research findings and discussing these findings obtained from the respondents. The results are presented according to the objectives of the study which reflect the research questions that the researcher set out to answer. In addition, this chapter presents characteristic of the study subjects displayed by the qualitative findings. Qualitative data is presented based on the themes that emerged during the analysis. The section also demonstrates how some of the identified factors determined the situation and evolution of transitional justice mechanisms in East Africa Community

##### 4.2 International Criminal Tribunal

The ICTR is an international Court established in November 1994 by the United Nations Security Council in order to try those with the greatest responsibility for the Rwandan genocide and other serious violations of the international law performed in the territory of Rwanda between 1 January and 31 December 1994. This tribunal is based in Arusha, Tanzania since 1995. *Ad hoc* Tribunals have been criticized in some quarters for inefficiency, and for the length of trials<sup>148</sup>.

The ICC is a permanent international tribunal that came into being on July 2002 the date its founding treaty, the Rome Statute of the International Criminal Court, entered

---

<sup>148</sup> Amnesty International. *Monitoring and Reporting Human Rights Violations in Africa: A Handbook for Community Activists, Great Britain (2002)* and; Kate Thompson and Camille Giffard: *Reporting Killings as Human Rights Violations*, Human Rights Centre: UK University of Essex.

into force. The ICC was set up to prosecute individuals for genocide, crimes against humanity, war crimes, and the crime of aggression (although it cannot currently exercise jurisdiction over the crime of aggression as the crime itself is yet to be defined under the Rome Statute). It is important to note that the ICC is not mandated to prosecute any crimes other than those stated above. Furthermore, the court is designed to complement existing national judicial systems: it can exercise its jurisdiction only when national courts are unwilling or unable to investigate or prosecute such crimes. Therefore, the primary responsibility to investigate and punish crimes is therefore left to individual states. The ICC can generally exercise jurisdiction only in cases where the accused is a national of a state party, the alleged crime took place on the territory of a state party, or a situation is referred to the court by the United Nations Security Council<sup>149</sup>.

**Table 4.1: Illustrates the general Perceptions of the International Criminal Processes**

perception	frequency	Percentage
Very good knowledge	4	10
Good knowledge	3	7.5
Fair knowledge	24	60
Know nothing at all	9	22.5

This response was a clear indicator of how the international criminal justice mechanisms are removed from the people affected by the conflict. A majority of the respondents confessed not knowing what was going on at the ICC or the ICTR. This shows that majority of the people are not even aware of the existence of the international criminal process, let alone understanding the operations of the international criminal court and tribunals.

<sup>149</sup> Report based on *the International Conference Memorialization and Democracy: State Policy and Civic Action* held on June 20- 22, 2007 in Santiago, Chile.

This finding confirms the assertion by Laundy, according to Patricia Laundy.<sup>150</sup> In her study on “*Rethinking Transitional Justice*” she argues that international criminal trials are both physically and procedurally removed from the community. While undertaking a study of Bosnians and Serbians view of International Criminal Tribunal for Former Yugoslavia, she opined that majority of the people did not have an idea of what the process was all about. Laundy’s view is supported by Meron Theodor,<sup>151</sup> who argues that the fact that the international criminal trials do not take place within the context of post-conflict society compromises its legitimacy leading to the process being perceived by the locals as “Imported Justice”. In Rwanda, although the International Criminal Tribunal for Rwanda seats in Arusha, a few miles from the Republic of Rwanda the court was never accessible by the community which was at the time recovering from the genocide. The situation in Kenya and Uganda was no different. On the issue of procedure, Barria, Lilian, argues that the international criminal court is the strictest judicial organ on matters of procedure and the rules of evidence. This means that, a common citizen who does not understand the basics of criminal law may not be able to comprehend the proceedings even though he/ she may be present in court during the proceedings. Lillian further note assuming the seat of the court is transferred to the community or the state where the crime was committed, the common and majorly illiterate people cannot comprehend such procedures.

One of the objective of this study is to establish the extent of community participation in international and domestic criminal justice, from the response on general perceptions of international criminal justice mechanism, it is evident that majority of the East Africa people are not conversant with the international criminal justice. That being the case, it therefore follows that in relation to international criminal justice the level of participation by the community is low, despite the fact that they are the people affected by the conflict.

---

<sup>150</sup> See Chapter One p. 18

<sup>151</sup> See Chapter One p. 6, p. 15

### 4.3 Legality of Amnesty in International law

A discussion on the legality of Amnesty in International law requires us to analyze the rule of law at individual level and state level. International Criminal Court (ICC) and the International Special Criminal Trials for countries deal with individual accountability while the International and Regional System of Human Rights work as watch-dog to see how states violate the right for victim for Justice. Many countries are part of those International and Regional Conventions and Treaties for Human Rights (such as the African Human and People Rights, the European Court of Human Rights and the Inter-American Court of Human Rights) but when it comes to resolve conflict they forget their obligation to protect civilians against the repetition of the crimes against Humanity, war crimes and crime of genocide in proclaiming Amnesties. And, most of the time, they ignore even that those Amnesties can only be applied on national level. But, even it is applied at national level; it is very hard to convince a government that has granted Amnesties to a certain group of people to allow, for instant, the International Criminal Court to arrest on its territory even when ICC has issued a warrant of arrest for them. Because it has to make sure that country is incompetent and unable to determine the case and judge it<sup>152</sup>.

Nowadays, there is a tendency to talk about complementarities between trials and truth commissions. Trials will prosecute those who are responsible and accused of the most international crimes. In the case of juvenile offenders or lesser crimes then to include them in truth commission mechanisms.

A special attention has been paid to the juvenile case by the United Nations to avoid them detention. In the Secretary General Report on Rule of Law and Transitional Justice (2004) Paragraph 64 states that: ‘Alternatives to detention for children have been a priority. A detailed toolkit on diversion from judicial proceedings and alternatives to detention has been finalized,

---

<sup>152</sup> Kenyans for Peace with Truth and Justice, *Submissions to the National Dialogue and Reconciliation Team* (2009).

and a global study on the administrative detention of children is in its final stages“.

#### **4.4 Knowledge on International criminal Justice System in EAC**

Transitional justice processes and mechanisms do not operate in a political vacuum, but are often designed and implemented in fragile post-conflict and transitional environments. The UN must be fully aware of the political context and the potential implications of International criminal Justice mechanisms. In line with the Charter, the UN supports accountability, justice and reconciliation at all times. Peace and justice should be promoted as mutually reinforcing imperatives and the perception that they are at odds should be countered. The question for the UN is never whether to pursue accountability and justice, but rather when and how. The nature and timing of such measures should be framed first of all in the context of international legal obligations and taking due account of the national context and the views of the national stakeholders, particularly victims. In situations in which national conditions do not allow for or limit the effectiveness of transitional justice measures, the UN supports activities that encourage and lay the foundation for effective mechanisms and processes<sup>153</sup>. These could include dialogue to assist national stakeholders to promote interest in and understanding of transitional justice measures. The UN cannot endorse provisions in peace agreements that preclude accountability for genocide, war crimes, crimes against humanity, and gross violations of human rights, and should seek to promote peace agreements that safeguard room for accountability and transitional justice measures in the postconflict and transitional periods<sup>154</sup>.

---

<sup>153</sup> International Covenant on Civil and Political Rights, article 2, International Convention for the Protection of All Persons from Enforced Disappearance, article 24. See also E/CN.4/2005/102/Add.1, Principles 2-5.

<sup>154</sup> Universal Declaration of Human Rights, article 8, International Covenant on Civil and Political Rights, article 2, International Convention on the Elimination of All Forms of Racial Discrimination, article 6, Convention against Torture and Other Cruel, Inhuman, Degrading Treatment or Punishment, article 6, International Convention for the Protection of All Persons from Enforced Disappearance, article 24, the Convention on the Rights of the Child, article 39. See also A/RES/60/147.

The East Africa region is lagging behind in the mainstreaming of the TJ discourse in the region. This is mainly attributed to the fact that no clear legal framework exists to foster this discourse. Secondly, as a region the pursuit of this discourse is perceived to be tantamount to invasion of another state. This study has postulated how there is a lack of interest and will to embrace this discourse as a sub- regional entity and as individual states. The embracing of this scholarship has been done in the EAC at only individual states such as Kenya. But then again it is done selectively without proper structures and system<sup>155</sup>.

Some of the party states in the region have partly or wholly practised TJ such as Rwanda, Kenya, and Uganda. In Rwanda, after the 1994 Genocide, human rights were restricted by the leadership for purposes of ensuring that the society was not divided. In this case transitional justice was used to facilitate and organise elections in realisation of democracy. This was to avert the extremists who had earlier on organised the genocide.<sup>156</sup> The system in Rwanda was found wanting as the leadership in as much as it embraced TJ, the implications of the governments restrictions on the freedom of expression, the use of TJ to show government muscle ( seen through detentions and trials), using TJ to suppress pluralism through endorsing and acknowledging a specific aspect of Rwandese history and ignoring all others. This activities point to the leadership in Rwanda being oblivious to the upholding of the rule of law.<sup>157</sup>

---

<sup>155</sup> Report based on *the International Conference Memorialization and Democracy: State Policy and Civic Action* held on June 20- 22, 2007 in Santiago, Chile.

<sup>156</sup> Kenyans for Peace with Truth and Justice, *Submissions to the National Dialogue and Reconciliation Team* (2009).

<sup>157</sup> Ibid. P. 18



**Table 4.2: Illustrates the respondents who agree that International criminal Justice Transitional have an impact on reconciliation in EAC**

<b>Country</b>	<b>frequency</b>	<b>percentage</b>
Kenya	<b>18</b>	<b>45</b>
Tanzania	<b>14</b>	<b>35</b>
Uganda	<b>8</b>	<b>20</b>

From the study More Kenyans of 45% said that International criminal Justice has an impact in EAC transition justice. In Tanzanians 35% said that International criminal Justice has an impact in EAC transition justice While in Ugandans 20% said that International criminal Justice has an impact in EAC transition justice

On the issue of the impact of international criminal justice on reconciliation, various debates have been put forth by international scholars, according to Meron Theodor, <sup>158</sup>he argues that although international criminal justice is required to play the role of ensuring reconciliation by virtue of punishing the offenders and ensuring the new leaders co-operation with all the ethnic communities as a means to reconciling all the communities, it seems difficult under the circumstances, first and foremost he argues that the international courts are composed of judges who are not familiar with the historical context of the country in which crimes were committed, they are aware of the legal culture of the particular society. According to Theodor, <sup>159</sup> the judgements of the courts do not therefore reflect the wishes of the people and is far much

---

<sup>158</sup> See Chapter One page 15

<sup>159</sup> Ibid p.15

removed hence diminishing chances of the community accepting the outcome of the court and embracing each other.

In Kenya, the reaction to the ICC process drew mixed reactions. The indictees dismissed the charges against them as being more of political than criminal. Of the respondents that the researcher interviewed, opinion was evenly split between those in support of the ICC cases and those opposed to the process. 53% out of the 40 respondents agreed that the prosecutions would act as an important deterrent in future for anyone who may want to take the country back to such conflict. 45% think that with the current political situation where the president and his deputy are indicted by the ICC, the prosecutions will not do much in reconciling the communities more than the perceived unification by the elections.

Relatives of the perpetrators and majority of the members of the community where the perpetrators who were being prosecuted hailed from, in all the East African countries who were interviewed felt that their people were being victimized by the government of the day. In Kenya for example majority of the Kalenjin and the Kikuyu communities were very indifferent to the international criminal court trials as at the time of the interview; and they felt that it amounts to neo-colonialism; they still insist that Uhuru Kenyatta and William Ruto are innocent of the crimes they face at the ICC. According to media reports of January 2008<sup>160</sup> the two communities have been of the view that they have been politically reconciled and that the ICC process is not relevant. These political sentiments essentially amount to undermining the court process and its outcome. The ICC prosecution of the three indictees is still on-going, with the hearing of the case slated to start in September 2013. However opinion still remains divided on whether the prosecutions will have much impact on the reconciliation and peace of the communities that

---

<sup>160</sup> Statements by politicians made from early January, 2008, published by the Kenyan Media including the Daily Nation at <http://www.nation.co.ke>.

were worst hit by the conflict. From the statistics in Chapter 3, the opinion is split evenly for those opposed and those I support of the ICC prosecutions.

In relation to Rwanda, the respondents were of the view that perpetrators of violence ought to have come from both sides of the warring groups i.e. from Hutus and Tutsi communities however, the Hutus felt that they were being victimised by the Tutsis who are running the government. This lends credence to the feeling of ‘victor’s justice’ by those facing trials, as they feel they are being victimized for ‘losing the war’. It is therefore correct to conclude based on this finding that, international criminal justice process in post-conflict societies has very minimal contribution on the process of transitional justice

#### **4.5 Knowledge of Truth Commissions in EAC**

In the East African TJ has been practised by piecemeal. One common perception among those interviewed during this study was that the pursuit of criminal justice did not come from the region but rather from the international community who are mostly civil society and international actors. The sub regional structure, EAC is yet to develop a policy to spearhead the principles of human rights and transitional justice in the long run. The region is yet to come up with a transitional justice framework since the priority is the reintegration of the partner states and establishment of the sub – regional organization as a successful block that meets the needs of the members’ states at the tail end and ultimately the various citizens of the states.<sup>161</sup> It is rather obvious that the perceptions of what transitional justice is understood to be, is greatly informed by how the individual state governments which have been able to engage or apply the truth seeking mechanism

One of the observations made in the above dialogue was the realization that transitional justice practice is seen in the region but not as a sub-regional organization with a policy

---

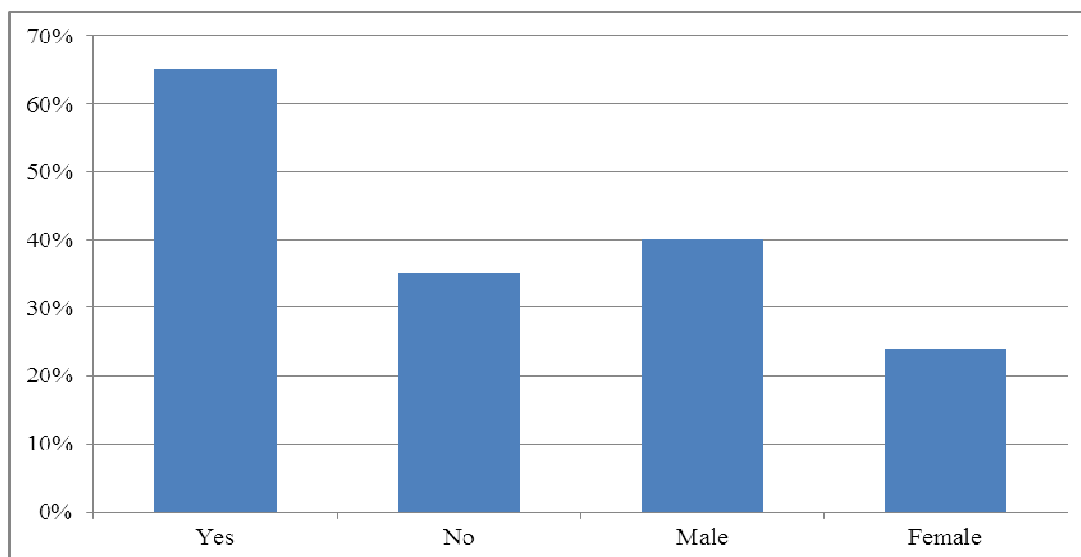
<sup>161</sup>These anecdotes drawn from my notes and are not the exact recorded quotes.

framework but rather it is centered on individual states appreciating the mechanisms of transitional justice differently from each other<sup>162</sup>. Politics in the EAC is defined and shaped by ethnic identities which were creations of the colonial government. In the pursuit of Justice an inter play between the individual trial and the community trial is seen. For some reason, the ethnic identity and in turn ethnic group of the perpetrator is seen to be on trial causing even more divisions within the society. For example the Kenyan case before the ICC is seen as one ethnic community against the other.

**Table 4.2 interviewees response on public supports to truth commissions**

Response	Frequency	Percentage
Yes	65	26
No	35	14

**Figure 4.3: Illustration on public support for truth commissions**



<sup>162</sup> Thoms, Ron & Paris, “ The Effects of Transitional Justice Mechanisms: A Summary of Empirical Research Findings and Implications for Analysts and Practitioners, April 2008.p. 21

**Table 4.2 The response of both male and female to the affirmative**

<b>Gender</b>	<b>percentage</b>
<b>Male</b>	<b>40</b>
<b>Female</b>	<b>22</b>

In the last two decades, establishing a truth commission in a post- conflict society has become increasingly popular. The demand for truth and truth-telling after conflict has grown and the international community has sought to strengthen the emphasis on truth commissions. Hence, since 1974, at least 25 such commissions have been established around the world, and often the first thing that newly elected politicians in a transitional democracy cry out for is the establishment of a commission. Truth commissions, as are currently perceived, stem from the numerous Latin American commissions held in the 1980s, however, they have changed somewhat, particularly in the context of a post- conflict society, which has experienced international intervention. However, it is significant that a large proportion of this literature focuses on a few key cases only, in particular the South African Truth and Reconciliation Commission (TRC) and the various Latin American commissions, and advice on how to design and operate a truth commission. There is an underlying assumption that truth commissions are a path to reconciliation and peace for all post-conflict societies, and that they are to be preferred to other transitional justice mechanisms. However, as with all transitional justice mechanisms, a truth commission's aim, mandate and what it can achieve is

context dependent<sup>163</sup>.

Its very name establishes that what a truth commission seeks is the ‘truth’; however, the truth is a very complex concept that must be treated with caution. Truth, in the form of narratives, is never simply uncovered, but is partially constructed and affected by numerous processes and actors. At best it is subjective. Not all truth commissions acknowledge the complexities of ‘truth’, which is exacerbated even more in the aftermath of conflict. The TRC was one commission which recognised this problem and, consequently, outlined four different types of truths that could exist, namely, factual, personal, social and healing. Although this acknowledged the complexity of ‘truth’, it may not have made it less problematic when applying it in the TRC’s process. Unfortunately, numerous commissions have not even acknowledged the problematic nature of ‘truth’, but assumed that one truth could be established, and must be established so that reconciliation could ensue. Defining the truth as merely factual may be one method of circumventing the complexities of truth. However, ‘shared facts do not necessarily conduce to shared truths. Interviews agreed that TJ can ensure sustainable peace. They gave a case in point of Rwanda which has been able to live peacefully despite the ethnic war and genocide that was witnessed there. Rwanda as a country has been able to rise up from the conflict and now it’s developing FGD Participant.

Interviewees agreed that Truth Commissions in EAC are suitable for analyzing widespread and longstanding patterns of abuse or for cases in which atrocities whether committed in secret by the State or in remote areas are relatively unknown. The aim of a truth commission is to ascertain the facts and causes of systemic abuse in the most objective way possible, and not necessarily to directly punish individuals involved. As official investigative bodies, Truth Commissions require significant political will to implement, and generally are not

---

<sup>163</sup> Kritz, Neil J, ed (1995). *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*. 3 Vols. Washington, DC: United States Institute of Peace.

effective unless the commissioners are truly independent of the parties to the conflict or abuse. Interview truth commissions are not simply closed academic inquiries, but serve as a way for all of society to explore exactly what kind of abuses occurred and why, and how to prevent their recurrence in the future, but in a non-criminal context. They should therefore be formed on the basis of extensive public consultations and often work best when their activities include significant public outreach and engagement.

#### **4.5.1 Truth versus Justice in EAC**

This debate is quite live within the East Africa region especially in Kenya. Some proponents of TJ argue that truth seeking is a form of justice and some see criminal accountability as truth seeking.<sup>164</sup> Others view truth as an alternative to trials especially in deeply conflicted society. Society embrace truth seeking and this is attributed to the people seeking closure on past historical injustices. Again truth seeking has been seen as superior to criminal trials as it seems to heal victims of atrocities.

Most scholars and proponents of TJ perceive truth seeking as second best to other mechanism and sought after when all else has failed. But others think it's a way for the government to be seen as proactive towards fulfilment of human rights principles with intention of winning favour with international actors. One important aspect of truth commissions is the propensity of then building a case for future criminal trials which actually supports justice after truth seeking.<sup>165</sup>

Those who are against this debate provide that attempts to get a true record of abuse may create resentment and in turn violence. It is imagined that truths may spark tension which is

---

<sup>164</sup> Kritz, Neil J, ed (1995). *Transitional Justice: How Emerging Democracies Reckon with Former Regimes. 3 Vols.* Washington, DC: United States Institute of Peace..p.20

<sup>165</sup>Ibid, P 20

mainly done by the elites in a society.<sup>166</sup> When Respondents in this study were asked if they supported truth commissions. The answer was Yes 65% and No 35% meaning they were in favour of truth commissions. One thing this study was unable to measure was the psychological benefits for the victims.

#### **4.6 The impact of local trials in EAC**

The impacts of Local trials according to interviewees result to truth, deterrence, punishment, reconciliation, and promotion of the rule of law.<sup>167</sup> This takes us back to the debates on retributive justice and restorative justice. Proponents of this mechanism believe that criminal punishment serves the needs of victims, restores human and social dignity, safe guards the new regime from political threats and deters future perpetrators.<sup>168</sup> According to the proponents deterrence is at different levels, the removal of abusers and elites implicated is special deterrence while general deterrence is achieved through massive approach of looking at the outcome to be gained by dealing with potential perpetrators.<sup>169</sup> Other advocates for this mechanism believe that threats of punishment foster stability in society and encourage a certain way of behaviour for the potential perpetrators.<sup>170</sup> On the other hand for this institute Kritz states that a sense of that their grievance have been addressed and can hopefully be put to rest, rather than smouldering in anticipation of the next round of conflict. He thinks that trails provide that psychological and psychosocial therapy to victims and giving an impression of justice. Further empirical evidence shows that criminal accountability is a way of upholding the rule of law by the governments in

---

<sup>166</sup> Thoms, Ron & Paris, “ The Effects of Transitional Justice Mechanisms: A Summary of Empirical Research Findings and Implications for Analysts and Practitioners, April 2008.p. 21

<sup>167</sup> Thoms, Ron & Paris, “ The Effects of Transitional Justice Mechanisms: A Summary of Empirical Research Findings and Implications for Analysts and Practitioners, April 2008.p. 21

<sup>168</sup> Ibid p. 21

<sup>169</sup> Akhavan Payam, “Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?” American Journal of International Law 95(1), 2001 p.12

<sup>170</sup> Ibid p. 12

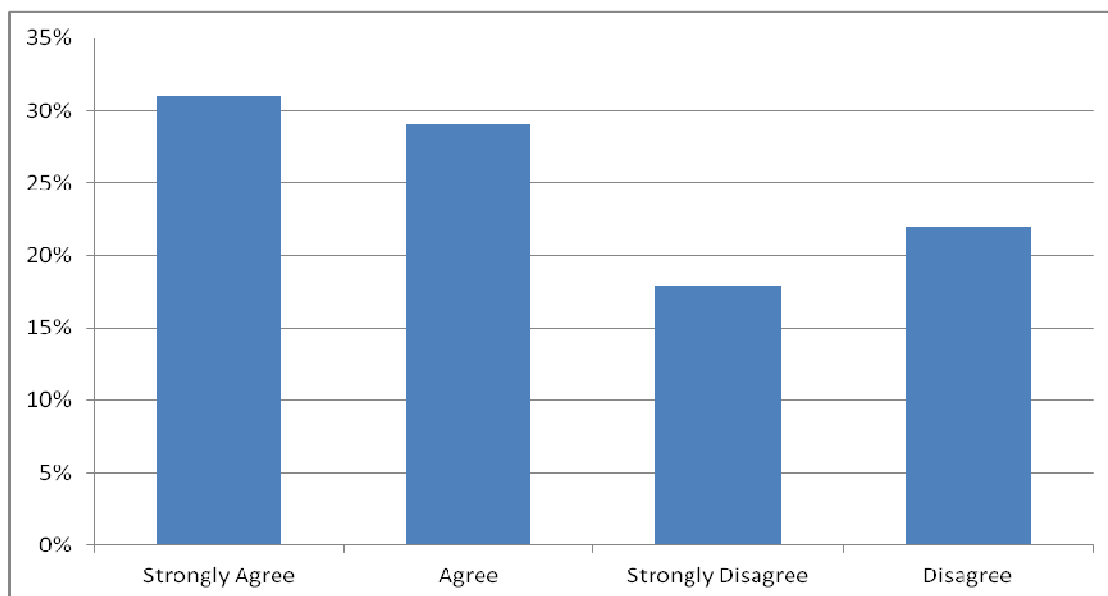


place. But it also signifies the end of regime and beginning of a new one. They state that the trials stand as pedagogical symbols indicating the degree to which the rule of law has taken hold<sup>171</sup>. The East Africa region craves national trial processes above the international courts. The problem with this assertion is the influence of tribe and ethnic identity that plagues a lot of decisions towards politics and governance in the region.

**Frequency table 4.5: Response to Perpetrators to be tried by local tribunals**

Response	Frequency	Percentage
Strongly Agree	19	31
Agree	5	29
Strongly Disagree	8	17
disagree	8	23

**Figure 4.4 : Illustration on Perpetrators be Tried by local tribunals**



<sup>171</sup> Thoms, Ron & Paris, “ The Effects of Transitional Justice Mechanisms: A Summary of Empirical Research Findings and Implications for Analysts and Practitioners, April 2008.p. 22

In domestic criminal justice, it is appreciated that there are various models of domestic criminal justice being the national courts and the traditional mechanisms, among East Africa states, every state has adopted its own traditional mechanisms as the circumstances may require. Rwanda for example, after the genocide, the government established the Gacaca courts under the Organic Law, in Uganda various traditional mechanisms have been adopted depending on the community, for example the Acholi community adopted the Mato Oput, in Kenya among the Karamajong community the Akiriket Council of elders is commonly used. In regard to national courts, majority of the East Africa states inherited the common law system of litigation and all of them share similar court system. This paper analyzes domestic criminal justice in post-conflict East Africa. Note that this analysis is in no systematic manner.

From the study, 31% strongly agreed strongly that perpetrators be tried by local tribunals, 29% agreed that perpetrators be tried by local tribunals, 18% strongly disagree that perpetrators be tried by local tribunals while 22% disagree that perpetrators be tried by local tribunals.

Gahima<sup>172</sup> argues in support of prosecution through national courts, he argues that these local prosecutions ‘provide an important focus for rebuilding the domestic judiciary and criminal justice system, establishing the courts as a credible forum for the redress of grievances in a non-violent manner’. Kritz<sup>173</sup> posits that domestic courts can be more sensitive to the nuances of local culture, and resulting decisions ‘could be of greater and more immediate symbolic force because verdicts would be rendered by courts familiar to the local community’. Teitel<sup>174</sup> adds, these prosecutions are more likely to change values among the people because they are conducted closer to the people than the remote international prosecutions.

---

<sup>172</sup> Gahima G. *Transitional Justice in Rwanda: Accountability for Atrocity*, Rutledge 2013 pg 124

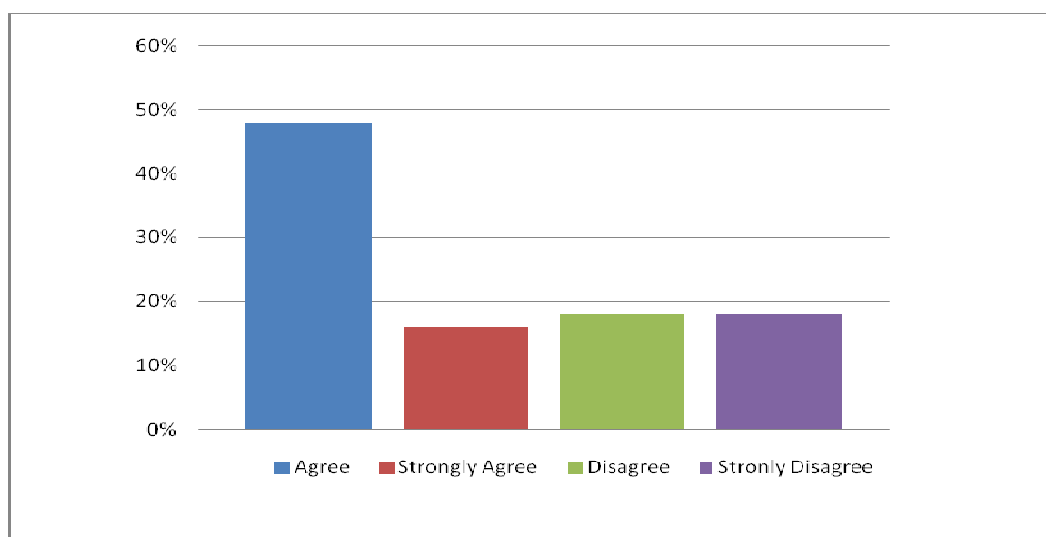
<sup>173</sup> Neil Kritz, *Transitional Justice*, Washington DC: USIP Press, 1997 pg.34

<sup>174</sup> Teitel G. Ruti, *Transitional Justice*, Oxford University Press, 2000, pg.79

#### Frequency table 4.4 prosecutions in criminal Justice Transitional in EAC

Response	Frequency	Percentage
Agree	19	48
Strongly Agree	5	14
Disagree	8	19
Strongly disagree	8	19

**Figure 4.5: Illustration on prosecutions in criminal Justice Transitional in EAC**



According to Gahima <sup>175</sup> in a post-conflict society, it has been argued that the national courts present the best forum for conflict resolution, in terms of investigations, prosecution and punishment of the perpetrators of crime. This is because; the process is seen to be legitimate and enhances legitimacy and credibility of a new and fragile government. In this vein, Carsten Stahn <sup>176</sup> argues that international criminal court is toothless on the basis that it lacks the capacity to undertake investigations as it neither has its independent police force to undertake investigations nor effect arrests of suspected criminals but it relies on individual states to arrest

<sup>175</sup> See Chapter One ,page 2

<sup>176</sup> Carsten Stahn. Complementarity, a Tale of Two Notions, *Criminal Law Forum* 19, 2008, p.87-119

and surrender suspects to ICC. He uses the example of the ICC indictment of Al Bashir, the president of Sudan who is accused of crimes against humanity at the ICC, the court is entirely relying on the government of Sudan and other State Parties to the Rome Statute to arrest and surrender its own leader to the ICC for prosecution. On the issue of traditional mechanism, it is argued that it suffers from procedural flows, it does not respect the principle of natural justice and human rights, hence members of the civil society argue that traditional mechanism though quick, they violate the human rights particularly of the accused.

It is theoretically argued that national courts are the best forum for conflict resolution. However, Carroll<sup>177</sup> argues that post-conflict national criminal justice suffers great shortcomings on the basis that they suffer from near breakdown of law and order, insufficient professionalism, lack of political goodwill to punish perpetrators of crime, massive displacement of people resulting to lack of evidence, to sufficiently prosecute criminals, some of post-conflict societies also lack professionals to undertake such trials, hence in Carroll's argument such processes do not bring about justice and reconciliation. In fact, according to Nash, national prosecutions hinder reconciliation as the perpetrators see their detainment and prosecution merely as a result of losing the war and not necessarily as a consequence of their actions in the conflict.

From the study majority agreed that prosecutions would endanger peace (44%). However, others disagreed that prosecutions would endanger peace. Asked after how long should prosecutions take place majority agreed that they should take place within one year. According to informants Prosecutions provide the most direct form of accountability, and work best when there are credible courts national, international, or hybrid available to hold trials. Because the number of potential defendants implicated in past abuses is often quite large, and prosecuting them all would generally be beyond the financial, human and political capacity of the state, the

---

<sup>177</sup> See Chapter One, page 2

number of perpetrators who can be prosecuted is typically small. There must be strong political will to sustain prosecutions, which is often lacking when perpetrators or their political partners are still sharing power<sup>178</sup>. Prosecutions take significant time and money to conclude, and only address the crimes of individual defendants. But in many ways, successful prosecutions make the strongest statement against impunity and signal to victims that the new government is willing to make a clean break with an abusive past

#### **4.7 Contribution of Amnesty in Transitional Justice in EAC**

A discussion on the legality of Amnesty in International law requires us to analyze the rule of law at individual level and state level. International Criminal Court (ICC) and the International Special Criminal Trials for countries deal with individual accountability while the International and Regional System of Human Rights work as watch-dog to see how states violate the right for victim for Justice. Many countries are part of those International and Regional Conventions and Treaties for Human Rights (such as the African Human and People Rights, the European Court of Human Rights and the Inter-American Court of Human Rights) but when it comes to resolve conflict they forget their obligation to protect civilians against the repetition of the crimes against Humanity, war crimes and crime of genocide in proclaiming Amnesties<sup>179</sup>. And, most of the time, they ignore even that those Amnesties can only be applied on national level. But, even it is applied at national level; it is very hard to convince a government that has granted Amnesties to a certain group of people to allow, for instant, the International Criminal

---

<sup>178</sup> Akhavan Payam, “Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?” *American Journal of International Law* 95(1), 2001 p.12

<sup>179</sup> Thoms, Ron & Paris, “ The Effects of Transitional Justice Mechanisms: A Summary of Empirical Research Findings and Implications for Analysts and Practitioners, April 2008.p. 21

Court to arrest on its territory even when ICC has issued a warrant of arrest for them. Because it has to make sure that country is incompetent and unable to determine the case and judge it<sup>180</sup>.

Nowadays, there is a tendency to talk about complementarities between trials and truth commissions. Trials will prosecute those who are responsible and accused of the most international crimes. In the case of juvenile offenders or lesser crimes then to include them in truth commission mechanisms. A special attention has been paid to the juvenile case by the United Nations to avoid their detention. In the Secretary General Report on Rule of Law and Transitional Justice<sup>181</sup> states that: this provides an alternative to detention for children has been a priority. A detailed toolkit on diversion from judicial proceedings and alternatives to detention has been finalized, and a global study on the administrative detention of children is in its final stages.

According to interviewees' amnesty is curtailing justice and encouraging impunity but while others view them as charity from the leadership and actually being accommodative of agents of bad regime.<sup>182</sup> In one of the FGDs participants said it was difficult to go back to that kind of society where forgiveness was given to agents of past abusive regimes. The participants insisted that the gravity of crimes committed by these perpetrators could not be forgiven or wished away. Therefore the study has identified the categories to be guided according to the gravity of the offence such as grave crimes should not attract amnesty at all. But partial amnesty would apply to the perpetrators of less serious crimes. All this is guided by the use of truth seeking commissions that would easily establish the gravity of offences. Quantitatively, majority

---

<sup>180</sup> Akhavan Payam, "Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?" *American Journal of International Law* 95(1), 2001 p.12

<sup>181</sup> Wolf Linder, André Bächtiger and Georg Lutz, "*Democratisation, rule of law and development*" (2004) Paragraph 64

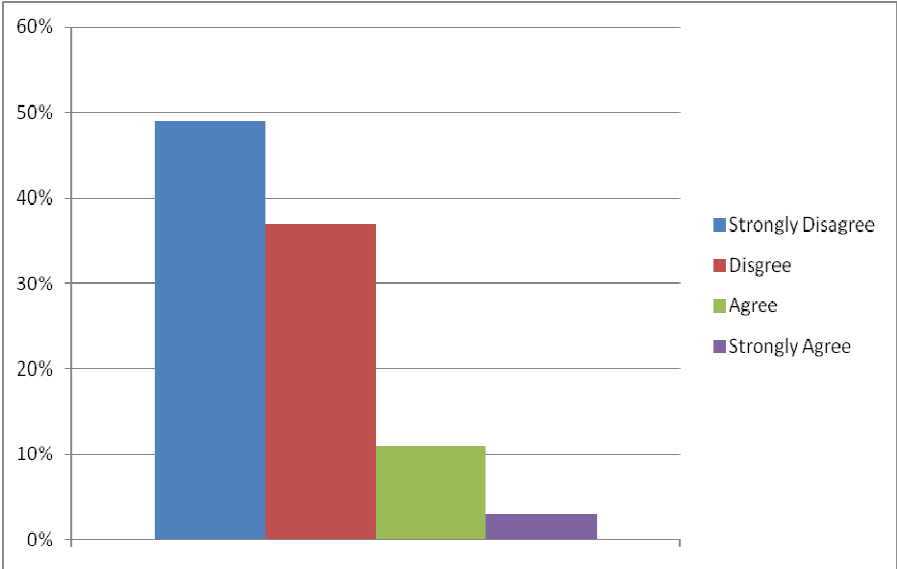
<sup>182</sup> Thoms, Ron & Paris, "The Effects of Transitional Justice Mechanisms: A Summary of Empirical Research Findings and Implications for Analysts and Practitioners, April 2008.p. 25

of the respondents (77%) said that the human rights violators and perpetrators should not receive amnesty for their crimes. They pointed out that the persons who should receive.

**Frequency table 4.5 willingness to pardon crime perpetrators**

Response	Frequency	Percentage
Agree	19	11
Strongly Agree	5	2
Disagree	8	38
Strongly disagree	8	49

**Figure 4.6:Illustration on willingness to pardon crime perpetrators**



The peaceful transitional justice in Burundi was largely successful due to the international amnesty prohibition. The successful negotiations between the UN and the Government of Burundi were clearly impacted upon by this prohibition. All the respondents were of the view that granting of amnesty in connection with truth seeking processes was only viable option in a situation of amnesty of crimes under international law. The respondents also argued that the local

Burundi politically negotiated power-sharing deal, was genuine hence the sustainable peace in Burundi. The respondents therefore argued that the local justice mechanisms mean well for the community if done in a genuine manner, hence more effective than the international justice systems

From the study respondents give their opinions on willingness to pardon perpetrators on criminal justice 2% of the respondents strongly agreed to pardon perpetrators, 11% of the respondents agreed to pardon perpetrators, 38% of the respondents disagreed to pardon perpetrators while 49% of the respondents strongly disagreed to pardon perpetrators, this implies that though there are those who will pardon the perpetrators but majority are not will to pardon this infor of amnesty. According to the respondents, President Paul Kagame pardoned hundreds of genocide prisoners who had confessed and asked for forgiveness. Ndagiza<sup>183</sup> argued that, before they went back to their communities, they were taken to solidarity camps for rehabilitation and taught how the new Rwanda operates. In 1999, five years after the genocide, the government set up the National Unity and Reconciliation Commission to work towards reconciling the convicts and the victims. However, it was not until when President Kagame passed a decree to set free at least 23,000 people who fall in the 2-4 categories of genocide crimes. These categories cover those who killed because they were forced to and had since confessed. There are 18 solidarity camps countrywide, where these people went through what is known as engando rehabilitation and sensitisation before they return home. About 12km east of Kigali is Kinyinya solidarity camp, which played host to close to 1,000 pardoned genocide convicts.

According to Matsiko Peter<sup>184</sup> the challenge of pardon to perpetrators focuses on several interrelated issues and attention has to be paid to the suffering of individuals and of the nation as a whole. Furthermore, Matsiko argued that the truth about past atrocities had to be established

---

<sup>183</sup> Fatuma Ndagiza, Secretary General of the Reconciliation Commission, 23 June, 2013

<sup>184</sup> Matsiko Peter First Secretary, Rwandan Embassy in Kenya (2000).



through the Courts rather than the ICTR. He went on to argue that, it was very important that the basic human emotional needs of justice, empowerment, security and recognition were met in order for the Rwandan society to move forward from the genocide. The fact that the court was based in Tanzania and not in Rwanda made it difficult for Rwandese to attend the trials or to receive prompt news of its work during the trials sessions. Matsiko went on to state, ‘until 2000 the official languages of the ICTR were English and French. Kinyarwanda, the native language of all Rwandese, was only accepted as the official language for the court proceedings in 2000

#### **4.8 Reparations in Transitional Justice in EAC**

Reparations should come primarily from the parties responsible for the violations. Thus, in cases of statesponsored human rights violations, it is important that reparations come from the state, rather than from outside agencies. Reparations programs in EAC have benefited from external support, but to a much lesser extent. This may in part be because it is difficult to show the necessary favorable payback periods and rates of return on investment in a reparations program, given its focus on intangibles, such as dignification and inclusion. At the same time, however, there may be risks, especially with large, multilateral donors, in allowing the conceptual basis or practical implementation of reparations projects to be too closely linked to or dependent on the other agendas of a donor. A bias in the culture, expertise, and mission of these institutions may lead to excessive focus on the monetizable aspects of programs, or to the imposition of unrealistic cost-benefit evaluation rubrics. Furthermore, in implementing their other agendas, donors may also make reparations programs more difficult: too strong a focus on cutting budget deficits and state payrolls to meet externally imposed structural adjustment, for example, will undermine a government’s ability to fund any kind of reparation scheme. Reparations and development agency agendas overlap during the period of planning and programming after a conflict has ended, when there is an opportunity for donors to understand the extent to which

national funds will need to be committed to reparations programs, and to hold governments accountable for promises to institute reparations initiatives.

According to interviewees Reparations and Compensation to victims of conflict in EAC are often the most demanded recourse for past violence, but the most difficult to achieve particularly when the government has few resources to give as compensation. For reparations to work effectively, victims must be identified, their injuries must be quantified for example, what is appropriate compensation for the mother of a murdered child, or of a torture survivor, and resources must be available to make some form of payment or in kind service to the aggrieved party. Reparations may be tied to the work of a truth commission to make these assessments. Compensation may be symbolic a memorial or an apology, or in-kind such as free health or education benefits as well as monetary recognizing that no material payment can fully compensate for an emotional loss. Reparations are a powerful tool for helping victims to recover from conflict, but can also sow division when one group is favored for reparations over others who may deserve them.

#### **4.9 Conclusion**

From the analysis above, it is evident that no one criminal justice mechanism is sufficient to guarantee transition in a post conflict society, with the victims and perpetrators reconciling and living peacefully. It can however be safely concluded that a process that actively involves the community members has a higher success rate of reconciliation than processes that are far removed from the affected people. It is also safe to conclude that the international criminal justice serves as a complementary process to the domestic justice, from the research above it is clear that the international criminal court has only exercised its jurisdiction where the individual state is unable or has failed to undertake criminal prosecution in the post-conflict society, or where the situation is referred to the ICC by the individual state. The international criminal

court's presence in East Africa has arguably helped leverage improvement to criminal justice systems with respect to adjudication, judicial reforms. Therefore, even though the international criminal court may not have impacted much on the administration of justice in East Africa, it is evident that it has contributed to a better justice system within the region. Where substantial and irreparable harm has been inflicted, even the best reparations program may fall short of victims' needs and expectations. But having no concrete reparations may undermine all other efforts of transitional justice. Because reparations have a direct effect on victims' daily lives, as well as on society, they have a significant potential to contribute to the building of sustainable peace.

According to the analysis the local trial and traditional approaches were found to have dealt with more cases, and were applauded by both the victims and the perpetrators enhancing not just justice but reintegration of the perpetrators back to the community<sup>185</sup>. It is also clear from the statistics that retribution tempered by orders of reparation was more favoured over the purely retributive approach of the formal criminal justice in post conflict cases although, the concept of reparation is equally dependent on the outcome of the prosecutions at both international and domestic level<sup>186</sup>. In conclusion, according to the respondents, Rwanda could not accept the limitation of the Tribunal's rationale to acts committed in during the 1994 genocide. It cogently argued that the acts committed in 1994 had not occurred spontaneously but had been preceded by a planning period, and that smaller-scale massacres had occurred before 1994. It was told that, under its Statute, the Tribunal's jurisdiction would not be limited in time in respect of any person who had planned, instigated or otherwise aided and abetted in the execution of any of the crimes referred to in the Statute. However, that approach required

---

<sup>185</sup> Roht, A M & Javier *Transitional Justice in the Twenty- First Century*, Cambridge, UK: Cambridge University Press. (2006).

<sup>186</sup> Kritz, Neil J, ed *Transitional Justice: How Emerging Democracies Reckon with Former Regimes. 3 Vols.* Washington, DC: United States Institute of Peace. (1995).

delicate proof of a causal link between such acts, regarded as a form of criminal participation, and the 1994 genocide itself<sup>187</sup>.

A well-designed and implemented reparations program can have follow-on and spillover effects that affect longer-term development. Such a program can help to create sustainable, culturally relevant change while addressing both root causes and survivors' immediate needs. Reparations can play an important role in changing citizens' relationship to the state, in strengthening civic trust, and in creating minimum conditions for victims to contribute to building a new society.

---

<sup>187</sup> Wolf Linder, André Bächtiger and Georg Lutz, *“Democratisation, rule of law and development”* (2004) Paragraph 64

## CHAPTER FIVE

### CONCLUSIONS AND RECOMMENDATIONS

#### 5.1 Introduction.

This chapter presents the summary of findings, discussion according to objectives, conclusion and recommendations. The researcher herein sought to carry an assessment of determine transitional justice mechanisms in post conflict societies in East Africa using with Kenya, Uganda and Rwanda as case studies. The specific objective of the study was to give analytical situation of Transitional Justice Mechanism in East Africa Community. Secondly, the researcher sought to give systematic situation evolution of Transitional Justice Mechanism in Post Conflict Society.

Transitional justice mechanism is critical for any society that has gone through civil unrest. The paper looked at different approaches to transitional justice mechanisms justice – the transitional justice mechanisms through international courts and tribunals, justice through national courts, and traditional mechanisms. The paper discussed each of these different mechanisms in reference to the East African Region, in countries which have experienced civil upheavals. The paper sought to do a assessment analysis of evolution of transitional justice mechanisms, with a view to establish the best approach in ending impunity among the war leaders, restoring law and order and encouraging reconciliation and peaceful coexistence among the previously warring communities. It however drew some important lessons and analogies from post conflict criminal justice interventions further afield, for instance the International Criminal Tribunal for Yugoslavia.

The paper sought to establish how effective these criminal justice mechanisms have been in ensuring reconciliation and sustainable peace in the communities recovering from violent

politically instigated and in most cases ethnic based wars. After such unrest, most societies suffer from a complete breakdown of the judicial system and the rule of law. There exists a lot of animosity and suspicion between members of the opposing ethnic or political groups. There is always a very high chance of recurrence of violence as opposing groups seek to retaliate and revenge for the lost lives and property. There is therefore need for interventions, either locally or internationally mechanisms in order to end the culture of impunity.

## **5.2 Summary of the Research Findings and Conclusions**

In summary, conclusions have been drawn from the research summed up as follows: (i) International, domestic and traditional criminal justice processes are complementary in nature and they evolved consequentially to promote justice; (ii) Criminal Prosecutions as a form of transitional justice mechanism in post-conflict society upholds the rule of law and enhances the community's confidence in the government of the day and its institutions; (iii) Transitional justice mechanisms uphold Retributive justice as an important process in post-conflict society but it must be carried out simultaneously with Restorative Justice Process for reconciliation and sustainable peace. (iv) Community participation through traditional transitional justice processes legitimizes the criminal justice process and reduces chances of conflict recurrence;(v) Indigenous mechanisms of conflict resolution are widely and informally used by most communities within East Africa region.

## **5.3 Key Findings and Conclusions**

From the research above, various findings have been drawn. This section will discuss the key findings of the study relating those findings with the objectives of the study, the hypothesis; and thereafter various conclusions will be drawn on every finding.

### **5.3.1 Objective I: To give the analytical situation of Transitional Justice Mechanism in East Africa Community**

This objective of the study was intended to give analytical situation of Transitional Justice Mechanism in East Africa Community; while explaining how relevant criminal justice processes is in post-conflict society. Research has shown that it is imperative to undertake analytical situation of EAC criminal justice in post-conflict societies; and where the individual state fails or is unable, then it is incumbent upon the international community to intervene with a view to bring to account the perpetrators of crimes. Galtung view, she underscores that where there is rule breaking then the perpetrators of such rule breaking must be punished for the crimes committed during conflict; because failure to do so encourages impunity, further, removal of such perpetrators of human rights abusers reduces the likelihood of retaliation by the victims.

From a theoretical perspective, TJ mechanisms have an influence in determining conflict transformation in a society. Conflict transformation must actively envision, include, respect, and promote the human and cultural resources from within a given setting. This involves a new set of lenses through which we do not primarily, see the setting and the people in it as the, problem and the outsider as the, answer'. Rather, we understand the longterm goal of transformation as validating and building on people and resources within the setting.<sup>188</sup> Galtung points out that conflicts have aspects that form contradictions in the society which become manifest in attitudes and behaviour. Hypothetically, Transitional justice system in a society does not guarantee sustainable peace in post conflict in Kenya this implies that the perception of the TJ discourses has no influence on the degree of a peaceful society. Transitional justice system has no influence promote sustainable peace and post conflict society. This implies that the perception of the TJ discourses has no influence on the degree of a peaceful society

---

<sup>188</sup> Lederach J.P., *Preparing for Peace: Conflict Transformation Across Cultures*, New York: Syracuse University Press, 1995

Transitional justice mechanisms are meant to handle the perpetrators of heinous crimes that were committed during the time of conflict. According to Charles,<sup>189</sup> transitional justice ensures and promotes protection of the rule of law rather than the use of violence to resolve communal differences. They are efforts and mechanisms meant to help the society transit from a failed state to one of democracy, rule of law inherent and peace. There are wide-ranging options available, to the transitional governments and the international community assisting them, to develop these mechanisms – not only a dichotomy of punish or forgive, and local ownership of these processes is paramount.

Transitional justice mechanisms may take a number of forms that include the international criminal court, international tribunals, special courts, truth commissions, local courts and traditional methods of justice Transitions. This paper has established that none of these Transition Justice mechanisms can solely be able to bring about a comprehensive reconciliation and peace Transition Justice mechanisms in a post conflict society. The study established that where effective transitional justice mechanism takes place then there is a likelihood that the society will return to normalcy, democratic ideals are promoted and the state recovers from a failed state.

### **5.3.2 Objective II: To give a systematic situation evolution of Transitional Justice Mechanism in Post Conflict Society**

This objective of the study requires the research to give systematic situation evolution of Transitional Justice Mechanism in Post Conflict Society. Transitional justice mechanisms have taken a number of forms that include the international criminal court, international tribunals, special courts, truth commissions, local courts and traditional methods of justice. Research has

---

<sup>189</sup> Charles T. Call, “ Is Transitional Justice Really Just?”, Summer/Fall 2004 Volume XI, ISSUE 1, Watson Institute for International Studies



established that each of the Transitional Justice Mechanism has its own strength and limitations, consequently none of them can stand on its own in a post-conflict society. This means that all processes have strength and weaknesses and and necessitate for an alternative where one fails for example where the domestic process fails the international criminal process steps in.

According to William<sup>190</sup> post-conflict literature denotes that post-conflict societies suffer from several challenges for example lack of trust among the citizen, total breakdown of law and order, dysfunctional judicial and administrative institutions and as such the state may not have the capacity to prosecute the perpetrators of crime during the war period. Thomas<sup>191</sup> while commenting on the Rwandan legal system noted that where a state has completely failed to undertake the prosecution the international criminal court does not necessarily take over the process but assists the affected state to undertake the process.

Theoretically, transitionaj justice mechanisms jurisdictionally complement each other due to lack of caoacity to deliver justice or where the mechanism is unable or unwilling to prosecute perpetrators of war crime<sup>192</sup>. By complementing each other, it means that the processes support each other for example the international criminal court can help re-establish the criminal justice in a post-conflict state either financially or otherwise. Occasionally, the international court provides judges to preside over cases within a particular state as well as upholding traditional justice mechanisms and recncilation through amnesty. It is also clear that none of them can alone be effective in enhancing justice in post conflict society.

The evolution Transition Justice mechanism operates on the precept that removal of perpetrators of human rights abuses, the likelihood of retaliation by the victims diminishes

---

<sup>190</sup> See deterrence effect on tribunals Chapter One, P 28

<sup>191</sup> See Chapter One page 7

<sup>192</sup> Minow, *Between Vengeance and Forgiveness : Facing History after Genocide and Mass Violence*, 1998, pp. 107-112

whistle the incentives for the new leaders to cooperate with other ethnic communities and the international community enhanced evolution of Transition Justice Mechanism. Transitional justice mechanisms primarily view that perpetrators of heinous crimes must be prosecuted and punished as a way of ending impunity<sup>193</sup>.

The Traditional criminal justice mechanisms like the Gacaca courts in Rwanda and the Acholi Mato Oput in northern Uganda combined both retributive and restorative justice systems. They are more concerned with truth, compensation for loss, forgiveness and reconciliation between the perpetrators and the victims. They are informal and do not follow strict rules of legal procedure, facing challenges of going contrary to human rights principles. Gacaca courts were instrumental in bringing justice to many lesser offenders of the Rwanda genocide and helped lessen the pressure from the national courts. Being set in the traditional communities and involving the victims actively in the prosecutions, they helped in the reconciliation process as the victims had an opportunity to confront their persecutors in truth-telling sessions that generated a sense of justice.

These informal traditional approaches to criminal justice however face the challenge of lack of strong punitive mechanisms that can help deter a repeat of similar violence. There were also cases of some perpetrators fearing to admit wrong doing for fear of retaliation, and where they had committed crimes against their relatives. According to Thomas <sup>194</sup> traditional justice mechanisms denotes that, apart from traditional or indigenous mechanisms helping ease pressure from the national courts and even offloading prison authorities, they have, over the years emerged as a significant addition to the other range of mechanisms that post-conflict societies with gross violations of human rights also serve as alternative criminal process to the national court process. In assessing the various models of criminal justice in post-conflict East Africa, it

---

<sup>193</sup>Thomas Obel Hansen, 'Facing the Challenges of Transitional Justice; Reflections from Post Genocide Rwanda and Beyond', PhD Thesis, School of Law, Aarhus University, 2010, p.39.

<sup>194</sup> See Chapter One page 10

emerges that justice before the traditional mechanisms is quick, meets punishment commensurate to the crime; and not strict on procedural matters. The later consumes a lot of time in the national and international justice systems. From a theoretical perspective these mechanisms reduce the workload in the national and international processes like it was experienced in the Gacaca courts. From the research finding, justice before the traditional mechanism appears to be satisfying and acceptable by the victims, the perpetrators and even the community at large because of the wider participation by the community. The consequence of this acceptability of the process is that it legitimizes the process and reduces chances of the society reverting back to conflict.

Domestic criminal justice may take the form of formal judicial prosecutions or the traditional predominantly restorative transitional justice mechanisms. Formal courts administer retributive justice that is aimed at punishing the offenders and deterrence of the rest from such crimes in future. Anne Kirstine<sup>195</sup> argues that this kind of mechanism lack of proper police investigation like was the case in Kenya, a breakdown of the legal institutions like was the case in Rwanda, forceful eviction of victims and massive displacement; and lack of political goodwill by the governments of the day hinders the criminal justice process thus necessitate an alternative form of justice.

The international criminal court operates on the principle of complementarity, the international community only steps in where the national government has failed to effectively deal with the punishment of the perpetrators of war crimes and crimes against humanity commonly committed during conflict. Even so, the lack of capacity to prosecute every person involved in the conflict means that the international interventions only go for the key perpetrators, mainly the leaders of the warring groups.

---

<sup>195</sup> See Chapter One page 7

On the other hand national institutions may not have the capacity and necessary political will to deal with the senior perpetrators of crimes against humanity, but they can ably handle the lesser offenders. Duthie <sup>196</sup> argues that in a post-conflict society, there exists deep rooted suspicion among the community and if this suspicion is not well handled, it leads to eruption of conflict. In terms of the legislative framework, research established that many countries do not have a legal framework on international crimes or crimes against humanity as stipulated under the Rome Statute. Further, the breakdown of judicial infrastructure and lack of manpower, as well as lack of political goodwill from the government of the day also derails any efforts for local realization of retributive justice. This was the case in Rwanda, where many judges and lawyers had either been killed or were living in exile.

In conclusion, it is evident that although attention in terms of criminal justice has shifted from the age old traditional mechanisms of conflict resolution to formal courts and international mechanisms, the society should not lose sight of the important role these mechanisms play in post-conflict criminal justice process. Therefore due regard must be given to such informal mechanisms for administering justice or settling disputes to ensure there is continuity with their role with compromising the international standards and the municipal law.

#### **5.4 Conclusion**

All regimes coming out of a devastating conflict are confronted with a formidable transition agenda. This raises intricate problems of prioritizing and sequencing. When to address a legacy of mass violence if basic needs in the areas of physical security, housing and so on remain unanswered or if the conflict has not ended yet, as in northern Uganda. In addition to repairing the material consequences of past violations, it is essential to address the non-material consequences, including the sense of victimisation, vulnerability and disempowerment of victims. State -sponsored TJMs offer an official acknowledgement of past human rights

---

<sup>196</sup> See Chapter One page 9

violations, which are widely considered to be an essential part of the healing process. TJMs that provide satisfaction to victims may improve levels of mental health among victims, and processes that recognise the individual victim rather than collective suffering are likely to have the strongest impact on the healing process<sup>197</sup>.

In spite of Kenya existing as an independent nation state for over 45 years, successive regimes have failed to implement measures that would significantly move the country from a situation of oppressive rule and conflict to people-centred governance. Each regime, since Kenya attained independence in 1963, has been autocratic; and has systematically applied

governance policies similar to those of the past colonial regime. This failure has ultimately culminated in the culture of impunity, and widespread corruption that is prevalent in virtually every administrative and public service institution in the country. The disputed outcomes of the 2007 General Elections and the chaos that ensued, demonstrated the depth to which the state had lost its democratic compass, and brought the nation to the brink of anarchy.

The intervention of the international community, through the panel of Eminent Personalities led by Kofi Annan, mitigated the chaos and began the process of Peace Building and Reconciliation. The outcome of this initiative was the Kenya National Dialogue and Reconstruction Agreement (commonly referred to as the National Accord) that established the 'grand coalition' government. The Accord proposed amongst other things, a comprehensive TJ process that is designed to deal with the underlying causes of impunity, inequality and systemic human rights abuse.

The effectual implementation of the various transitional justice mechanisms mentioned

---

<sup>197</sup>See Roht – Arriaza, 'Reparations in the Aftermath of Repression and Mass Violence', 2004, pp. 121-161.

here offer the best hope of ending the culture of impunity that plagues the nation and its people today. Impunity exists where the rule of law is neither respected nor observed; where there is consistent failure of the systems that are meant to protect the public from incidences of intentional or inadvertent maladministration of the authority entrusted to public servants (whether elected or appointed). It is these systems that need reform; some through repair most by a complete overhaul.

The grand coalition government, has so far initiated piece-meal TJ processes, the main ones being the ongoing Constitutional Review process, Boundaries Commission, establishment of a Task Force on Police Reforms and the Truth Justice and Reconciliation Commission. However, the implementation of these TJ mechanisms, are facing significant hurdles, ranging from lack of political will, to lack of legitimacy, and public interest.

The above hurdles exist, and will continue to exist, should the people fail to aggressively and deliberately reclaim and own the TJ processes. And continue to hope that those vested with political and administrative authority will benevolently opt to change a system that has for decades served their exploitative ambitions so richly. The foxes must not continue to take charge over the affairs of the chicken coup. There must be a changing of the guard.

For this country to achieve lasting peace, end the culture of impunity and foster democratic governance. There is need for strategic partnership, between the public, Civil Society, the Media, the political class, and other stakeholders that is geared toward the successful execution of all the transitional justice initiatives set out under Agenda Item 4 of the Kenya National Dialogue and Reconciliation Agreement. It is the hope of the KHRC, ICPC and ICJ- Kenya that we shall all pull together in the effort to provide this country with the healing and new direction that it has been calling for desperately for almost half a

century. The citizens of this country are the true sovereigns of this great nation. Their moment to exert that sovereignty is now. The change this nation needs has been long overdue.

However, the linkage between TJMs and the psychological health of victims requires close examination, and where measures involve submission of individual testimony or confrontation with perpetrators, they may entail a risk of further traumatising. General or blanket amnesty refers to amnesty given to groups of individuals, usually covering all crimes committed during a specific period of time. These are granted by governments in post-conflict or post-authoritarian transitions to members of specific institutions, for crimes committed during the relevant period. The crimes are forgotten in the sense that they are erased from legal memory, and the perpetrators are not held accountable. Conditional amnesty refers to the grant of amnesty upon fulfillment of certain conditions. Conditional amnesties differ from general amnesties on the crucial point that as individual responsibility must be determined for the amnesty to be granted, the crime is not “forgotten”, but the perpetrator is exempt from certain forms of punishment. In this sense a conditional amnesty is somewhat closer to the meaning of a pardon.

Mechanisms such as official truth commissions are particularly conducive to providing victims with an opportunity to voice their experiences, and a chance for those that were previously marginalised or abused to participate in post-conflict decision-making processes. The information they provide can form the basis of recommendations for tackling discrimination and abuse through legal, policy and institutional reforms. While relying on an active civil society for their successful implementation, truth commissions have also inspired the creation of and strengthened civil society initiatives, including those that represent the interests of the most vulnerable groups in society. However, TJMs are limited in that they are unlikely to offer all victims the opportunity to voice their experiences, or to participate in processes of justice and accountability. As such, they may enhance the sense of exclusion of others. TJMs that provide

satisfaction to victims offer the prospect of empowering those that were previously exploited and marginalised within society. Participatory and community-based forms of justice, such as those offered by quasi-traditional justice mechanisms, can give victims a sense of empowerment by facilitating their involvement in the process of giving evidence and determining appropriate penalties for perpetrators of past abuses. They can also strengthen community support systems, although there is the potential risk of increased community tensions. Formal criminal prosecution can provide empowerment in the form of satisfaction to victims in cases that are successfully completed, but these often operate on a more limited scale, and formal courts do not necessarily provide a platform that allows the victim to recount their experience in an empowering manner. Local justice initiatives offer rich possibilities and by their nature are closer to victims' groups. But in most instances they work well when they are part of a holistic strategy to seek and publicize the truth, restore broken relations, and pursue justice for serious crimes. They are also increasingly being offered as solutions in peace agreements, such as in Uganda

## **5.5 Recommendations**

At the commencement of this study, the research problem highlighted the gap in literature which necessitated this research, having undertaken the research albeit, the challenges I concluded that indeed there is a clear relationship between Transitional justice mechanism in post-conflict criminal justice and peace and reconciliation. However, due to limitations in time, resources and limited data available particularly on the Kenyan case, the study could not ascertain the specific mechanisms that can be put in place to ensure maximum justice realisation. With more people developing interest in the study of International Conflict Management and with more data becoming available on post-conflict societies for example, Kenya, Sudan, and Uganda and other international trouble spots, a comprehensive research need to be undertaken on this subject. Such investigations should be able to yield more rigorous results which may require



the legislature to adopt the relevant legal mechanism. The analytical results in this paper should open up for new questions and more research to be done.

This section will state and explain some of policy recommendations that are drawn based on the findings of the study.

### **5.5.1 Broad based approach**

Post conflict states desiring post-conflict criminal justice should not restrict themselves to only one or two approaches to transitional justice mechanisms, but rather make use of the various available criminal justice mechanisms in dealing with justice, reconciliation and restoration of the rule of law. Where all mechanisms of criminal justice are applied, the government and the community at large must ensure that the mechanisms complement each other hence the need for cooperation.

### **5.5.2 Government Front**

For whatever mechanisms, there is need for political will on the part of the government to be able to support the process and ensure its success. Political will by government will ensure proper investigation and prosecution of crimes committed during the violence and support development and implementation of restorative justice programmes of post conflict victims through:

- a. Non-discrimination when dealing with perpetrators and cooperation with international criminal justice agencies like the ICC and ICTR
- b. Compensation of victims for lost property
- c. Restoration of land and any other identifiable property in the hands of non-owners
- d. Medical and psycho-social support programmes to those who suffered physical and psychological injuries in the conflict

### **5.5.3 Bottom-up Approach**

Public participation in post-conflict legitimises the process and reduces chances of societal relapse, consequently while undertaking the process, it is important that the government ensures, the active involvement of as many of the victims affected by the violence, in the transitional justice processes. This can be done through:

- a) Opening up communication channels where regular information is received by the affected people on the progress of the investigations and prosecutions
- b) Holding sensitization campaigns on the criminal justice programmes
- c) Providing for 'return to owner' orders especially where it is proved that perpetrators are holding the property of the victims.
- d) Providing compensation for victims and having the same included in the retributive criminal justice programmes especially where it is proved that the perpetrators inflicted bodily harm

### **5.5.4 Embracing the use of Traditional Mechanisms**

In relation to traditional justice mechanisms it is important that states enact enabling laws to institutionalize the processes and give them legal mandate. Further such institutions require financial and material support to the institutions implementing the traditional justice mechanisms and finally ensuring the implementation and enforcement of the orders issued by the traditional courts against the perpetrators

## Bibilograpy

- Akhavan, Payam. "Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?" *The American Journal of International Law*, 95(1), 2001: 7-31.
- Arbour, Louise. *Economic and Social Justice for Societies in Transition*. Second Annual Transitional Justice Lecture hosted by the New York University School of Law Center for Human Rights and Global Justice and by the International Center for Transitional Justice, New York: United Nations Office of the High Commissioner for Human Rights, 25 Oct 2006.
- Aron, Raymond. *Peace and War: A Theory of International Relations*. Garden City, NY: Doubleday & Company, 1981.
- Backer, David. "Civil society and transitional justice: possibilities, patterns and prospects." *Journal of Human Rights*, 2(3): September 2003, 297-313.
- Bass, Gary J. "Managing Amnesty." Paper presented at the Transitional Justice and Civil War Settlements workshop, Bogota, Colombia, 18-19 October 2005.
- Stay the Hand of Vengeance: The Politics of War Crimes Tribunals*. Princeton: Princeton University Press, 2000.
- Boraine, Alex. "Truth and Reconciliation in South Africa: The Third Way." *Truth v. Justice: The Morality of Truth Commissions*. Robert I. Rotberg & Dennis Thompson eds., Princeton: Princeton University Press, 2000.
- Brahm, Eric. "Uncovering the Truth: Examining Truth Commission Success and Impact." *International Studies Perspectives*, 8, 2007: 16-35.

- Bremer, Stuart. "Democracy and Militarized Interstate Conflict, 1816-1965." *International Interactions*, Vol. 18, 1993: 231-249.
- Cohen, Stanley. "State Crimes of Previous Regimes: Knowledge, Accountability, and the Policing of the Past." *Law and Social Inquiry*, 20, 1995: 7-50.
- Collier, Paul. "Development and Conflict." Working Paper, Oxford: Center for the Study of African Economies, 2004.
- Collier, Paul, et al. *Breaking the Conflict Trap: Civil War and Development Policy*, Oxford: Oxford University Press, 2003.
- Collier, Paul, and Anke Hoeffler. "Greed and Grievance in Civil War." Working Paper, Oxford: Center for the Study of African Economies, 2002.
- Collier, Paul, Anke Hoeffler, and Mans Soderbom. "Post-conflict Risks." *Journal of Peace Research*, 45(5), 2008: 461-478.
- Collier, Paul, and Nicholas Sambanis. "Understanding Civil War: A New Agenda." *The Journal of Conflict Resolution*, 46(1), Understanding Civil War, 2006: 3-12.
- Doyle, Michael W., and Nicholas Sambanis. "International peacebuilding: A theoretical and quantitative analysis." *American Political Science Review*, 94(4), 2000: 779-801.
- Drumble, Mark A. *Atrocity, Punishment, and International Law*. Cambridge: Cambridge University Press, 2007. Dunoff, Jeffrey L., Steven R. Ratner and David Wippman. *International Law Norms, Actors, Process*. 2nd ed., New York: Aspen Publishers, 2006.
- Elster, Jon. *Closing the Books: Transitional Justice in Historical Perspective*. Cambridge: Cambridge University Press, 2004.

Fearon, James D. "Comments on the Ex Ante / Ex Post Problem in Transitional Justice." Paper presented at the Transitional Justice and Civil War Settlements workshop, Bogota, Colombia, 18-19 October 2005.

Fearon, James D., and David D. Laitin. "Ethnicity, Insurgency, and Civil War." *American Political Science Review*, 97(1), 2003: 75-90.

Finnström, Sverker. *Living with Bad Surroundings: War and Existential Uncertainty in Acholiland, Northern Uganda*, Uppsala University Library, Uppsala, 2003.

Fletcher, Laurel E., and Harvey M. Weinstein. "Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation." *Human Rights Quarterly*, 24, 2002: 573-639.

*Forgotten Voices: A Population-Based Survey on Attitudes about Peace and Justice in Northern Uganda*. International Center for Transitional Justice and the Human Rights Center at the University of California at Berkeley, July 2005.

Friman, Håkan. "The Democratic Republic of Congo: Justice in the aftermath of peace?" *African Security Review*, 2001: 10(3).

Gettleman, Jeffrey. "U.N. Envoy Meets with Ugandan Rebel." *New York Times*, 13 November 2006. Gleditsch, Nils Petter, Peter Wallensteen, Mikael Eriksson, Margareta Sollenberg, and Håvard Strand.

Armed Conflict 1946-2001: A New Data set." *Journal of Peace Research*, 39(5), 2002: 615-637.

Gloppen, Siri. "Roads to Reconciliation: A Conceptual Framework." In *Roads to Reconciliation*, by Elin

Skaar, Siri Gloppen and Astrid Suhrke, 17-50. Lanham: Lexington Books, 2005.

- Goldstone, Richard J. "Justice as a Tool for Peacemaking: Truth Commissions and International Criminal Tribunals." *New York University Journal of International Law and Politics*, 28, 1996: 485-503.
- Hayner, Priscilla. *Unspeakable Truths: Facing the Challenge of Truth Commissions*. New York: Cambridge University Press, 2002.
- Hegre, H. *Disentangling Democracy and Development as Determinants of Armed Conflict*. Manuscript, PRIO, 2003.
- Hegre, H., R. Gissinger, and Nils Petter Gleditsch. "Globalization and Internal Conflict." In *Globalization and Conflict*, by G. Schneider, K. Barbieri and Nils Petter Gleditsch, 251-275. Lanham: Rowman & Littlefield, 2003.
- Hegre, H., T. Ellingsen, S. Gates, and Nils Petter Gleditsch. "Toward a Democratic Civil Peace? Democracy, Political Change, and Civil War, 1816-1992." *American Political Science Review*, 95, 2001: 33-48.
- Henderson, E.A., and J.D. Singer. "Civil War in the Post-Colonial World, 1946-1992." *Journal of Peace Research*, 37, 2000: 275-299.
- Huggins, Chris. *Land Issues and Peacebuilding in Burundi*. Unpublished working draft, Presented at a briefing by UNHCR Representative Bo Shack on land tenure issues in Burundi, held at the Quaker UN Office (QUNO), 9 May 2008.
- Huntington, Samuel P. *The Third Wave: Democratization in the Late Twentieth Century*. Oklahoma: University of Oklahoma Press, 1993.
- Ignatieff, Michael. In *Human Rights as Politics and Idolatry*, by Amy Gutmann, 25-40. Princeton: Princeton University Press, 2001.

International Criminal Court Press Release, "Statements by ICC chief prosecutor and the delegation of Acholi leaders." The Hague, 18 Mar 2005.

Keesing's Contemporary Archives, 2008, Version 10. Universal Digital Library Collection.

Kerr, Rachel and Ririn Mobekk. *Peace and Justice: Seeking Accountability After War*. Cambridge: Polity Press, 2007.

Kritz, Neil J. "Coming to Terms with Atrocities: A Review of Accountability Mechanisms for Mass Violations of Human Rights. *Law and Contemporary Problems*, 59(4), Accountability for International Crimes and Serious Violations of Fundamental

Human Rights, 1996: 127-152. "The Rule of Law in the Post-conflict Phase." In *Turbulent Peace: The Challenges of Managing International Conflict*, by Chester A. Crocker, Fen Osler Hampson and Pamela Aall, 801-820. Washington DC: United States Institute of Peace, 2001.

. "War Crime Trials: Who Should Conduct Them--and How?" In *War Crimes: The Legacy of Nuremberg*, by Belinda Cooper, 168-182. New York: TV Books, 1999.

Lie, Tove Grete, Helga Malmin Binngsbø, and Scott Gates. "Post-Conflict Justice and Sustainable Peace." Post-Conflict Transitions Working Paper No. 5; World Bank Policy Research Working Paper 4191, April 2007.

Lobe, Jim. "Rights: Historic ICC Arrest Warrants Evoke Praise, Concern." *Inter Press Service News Agency*, 14 October 2005.

Lomo, Zacharu A. Why the International Criminal Court must withdraw indictments against the top LRA leaders: A legal perspective." Refugee Law Project, August 2006.

- Long, William J., and Peter Brecke. *War and Reconciliation: Reason and Emotions in Conflict Resolution*. Cambridge: MIT Press, 2003.
- Magarrell, Lisa. "Reparations in Theory and Practice." International Center for Transitional Justice Occasional Paper, September 2007.
- Malamud-Goti, J. "Transitional Governments in the Breach: Why Punish State Criminals?" *Human Rights Quarterly*, 12(1), 1990: 1.
- Mani, Rama. *Beyond Retribution: Seeking Justice in the Shadow of War*. Cambridge: Blackwell Publishers, 2002. Maoz, Zeev, and Bruce Russett. "Normative and Structural Causes of Democratic Peace, 1946-1986." *American Political Science Review*, Vol. 87, 1993: 624-638.
- Mendeloff, David. "The Psychological Impact of Post-conflict Truth-telling: A Critical Examination." Paper presented at Responses to Atrocity Workshop, University of Wisconsin-Madison, 21 April 2007.
- . "Truth-Seeking, Truth-Telling, and Postconflict Peacebuilding: Curb the Enthusiasm?" *International Studies Review*, 6(3), 2004: 355-380.
- Méndez, Juan E. "Accountability for Past Abuses." *Human Rights Quarterly*, 19, 1997: 255. In Defense of Transitional Justice. In *Transitional Justice and the Rule of Law in New Democracies*, by James McAdams, 1-26. University of Notre Dame Press, 1997.
- Miguel, Edward, Shanker Satyanath and Ernest Sergenti. "Economic Shocks and Civil Conflict: An Instrumental Variables Approach. *Journal of Political Economy*, 112, 2004: 725-753.
- Minow, Martha. *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence*. Boston:



- Beacon Press, 1998. Orentlicher, Diane. *Updated Set of principles for the protection and promotion of human rights through action to combat impunity*. Report of independent expert to the UN Human Rights Commission, (E/ CN.4/2005/ 102/Add.1), New York: United Nations Office of the High Commissioner for Human Rights, 5 February 2005.
- Othman, Mohamed. Justice and Reconciliation. In *Roads to Reconciliation*, by Elin Skaar, Siri Gloppen and Astrid Suhrke, 249-270. Lanham: Lexington Books, 2005.
- Payne, Leigh A., Tricia D. Olsen, and Andrew G. Reiter. “Does Transitional Justice Work?” Paper presented at the International Studies Association Convention, San Francisco, 26-29 March 2008.
- Polity IV Data set. 2007. College Park, MD: Center for International Development and Conflict Management, University of Maryland.
- Powell, G. Bingham. *Contemporary Democracies: Participation, Stability, and Violence*. Cambridge: Harvard University Press, 1982.
- Przeworski, Adam and Fernando Limongi. “Modernization: Theories and Facts.” *World Politics*, 49(2), 1997: 155-183.
- Putnam, Tonya. “Human Rights and Sustainable Peace.” In *Ending Civil Wars: The Implementation of Peace Agreements*, by Stephen J. Stedman, Donald Rothchild and Elizabeth Cousens, 237-271. New York: Lynne Rienner, 2002.
- Raknerud, Arvid and Håvard Hegre. “The Hazard of War. Reassessing the Evidence of the Democratic Peace.” *Journal of Peace Research* 34(4), 1997: 385–404.
- Roco Wat I Acoli/Restoring Relationships in Acholi-land: Traditional Approaches to Justice and*

*Reconciliation.* Liu

Institute for Global Issues, Gulu District NGO Forum and Ker Kwaro Acholi. September 2005.

Roht-Arriaza, Naomi. *Impunity and Human Rights in International Law and Practice.*

New York: Oxford University Press, 1995.

The New Landscape in Transitional Justice. In *Transitional Justice in the Twenty-First Century:*

*Beyond Truth Versus Justice*, by Naomi Roht-Arriaza and Javier Mariezcurrena, 1-16.

Cambridge: Cambridge University Press, 2006.

Roth, Kenneth. The Case for Universal Jurisdiction. *Foreign Affairs*, 80(5), 2001: 150-154.

Rummel, R.J. "Democracy, Power, Genocide, and Mass Murder." *Journal of Conflict*

*Resolution*, Vol. 39, 1995: 3-26.

Shraga, Daphna. "The Second Generation UN-Based Tribunals: A Diversity of Mixed

Jurisdiction." In *Roads to Reconciliation*, by Elin Skaar, Siri Gloppen and Astrid Suhrke,

55-82. Lanham: Lexington Books, 2005.

Snyder, Jack, and Leslie Vinjamuri. "Trials and Errors: Principle and Pragmatism in Strategies of

International Justice. *International Security*, 28(3), Winter 2003/2004: 5-44.

Stedman, Stephen J. "Spoiler Problems in Peace Processes." *International Security*, 22(2), Fall

1997: 5-53. Strand, Håvard. "Onset of Armed Conflict: A New List for the period 1946-

2004, with Applications," under review at *Conflict Management and Peace Science*,

2006.

Tepperman, Jonathan D. Truth and Consequences. *Foreign Affairs*, 81(2), March/April 2002.

Thoms, Oskar N.T., James Ron, and Roland Paris. *The Effects of Transitional Justice*

*Mechanisms: A Summary of Empirical Research Findings and Implications for Analysts and Practitioners.* CIPS Working Paper, Ottawa: Centre for International Policy Studies, April 2008.

Uganda, Government of. Amnesty Act, 2000.

Uppsala/PRIO Conflict Database: <http://www.pcr.uu.se/database/index.php>

United Nations General Assembly. "Convention on the Prevention and Punishment of the Crime of Genocide." 9 December 1948.

United Nations General Assembly. Resolution 60/146. "Basic Principles and Guidelines on the Right to Remedy and Reparation for Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law. 16 December 2005.

United Nations High Commissioner for Refugees, Office for the Coordination of Humanitarian Affairs and the Norwegian Refugee Council. *Housing and Property Restitution for Refugees and Displaced Persons.* Implementing the Pinheiro Principles. March 2007.

United Nations Office of the High Commissioner for Human Rights. "Rule-of-Law Tools for Post-Conflict States: Maximizing the legacy of hybrid courts." Geneva, 2008.

United Nations Office of the High Commissioner for Human Rights. "Rule-of-Law Tools for Post-Conflict States: Prosecution initiatives." Geneva, 2006.

United Nations Peacebuilding Commission. "Strategic Framework for Peacebuilding in Burundi." (PBC/2/BDI/4), New York, 20 July 2007.

United Nations Security Council. "Report of the Secretary-General on the rule of law and transitional

justice in conflict and post-conflict societies.” (S/2004/616), New York, 3 August 2004. United Nations Security Council. “Report of the Secretary-General on the United Nations Observer Mission in Sierra Leone.” (S/ 1999/836), New York, 30 July 1999.

United States Institute for Peace, Peace Agreements Digital Collection:  
<http://www.usip.org/library/pa.html>

University of Wisconsin-Madison, Transitional Justice Database (unpublished), 2008.

Walter, Barbara F. “Does Conflict Beget Conflict? Explaining Recurring Civil War.” *Journal of Peace Research*, 41(3), 2004.

Wippman, David. Atrocities, Deterrence, and the Limits of International Justice. *Fordham International Law Journal*, 23, 1999: 473-488.

World Bank. 2008. *World Development Indicators*. Washington DC: International Bank for Reconstruction and Development / The World Bank.

World Federalist Movement – Institute for Global Policy Database (unpublished), 2008.

## **APPENDICES**

### **Appendix 1: Questionnaire on the Assessment of the Transitional Justice Mechanisms in Post conflict Society: A case Study of the East Africa Society.**

#### **UNIVERSITY OF NAIROBI**

#### **INSTITUTE OF DIPLOMACY AND INTERNATIONAL STUDIES**

Good morning/ afternoon, my name is Damaris Were Ogama a Master's of Arts in International Conflict Management student at the University of Nairobi, Institute of Diplomacy and International Studies. I am currently undertaking research on an Assessment of the transitional Justice mechanisms in Post conflict Society: A case Study of the East Africa Society.

As a requirement for the award of the Master Degree. Due to your personal and professional experience in this field of study, I have selected you to provide relevant information to the study by filling the questionnaire attached herewith and revert. The information you give in response to these questions and statement will be held in confidence and not used for any other purpose apart from the academic purpose.

## **SECTION A: GENERAL INFORMATION**

### **1. Personal Characteristics. (Please tick the answer)**

#### **Gender**

Male  Female

#### **Education**

Primary  Secondary  University  None of the above

#### **Age**

20-30  31-40  41-50  51 and above

## **SECTION B: KNOWLEDGE ON INTERNATIONAL CRIMINAL JUSTICE**

### **i. International Criminal Justice In Post-Conflict Society**

On average, how do you rate your understanding of international criminal justice mechanism?

Very good  Good knowledge  fair knowledge  know nothing at all

### **ii. International Criminal Justice**

International criminal justice is relevant in enhancing the delivery of justice in post-conflict East Africa?

Strongly Relevant  Relevant  Do not know  Irrelevant

### **iii. International Criminal Justice And Reconciliation**

International criminal justice in post conflict society has an impact on reconciliation in the EAC

Strongly Agree  Agree  Disagree  Strongly disagree

**SECTION C: KNOWLEDGE ON TRUTH COMMISSIONS IN EAC**

**1. Truth Commissions in post-conflict society.**

(i) Truth Commissions in post-conflict society should involve the community at all stages of the proceedings

(a) Civil Society;

Strongly Agree  Agree  disagree  strongly disagree

(b) Victims;

Strongly Agree  Agree  disagree  strongly disagree

(c) Perpetrators

Strongly Agree  Agree  disagree  strongly disagree

(ii) Truth Commissions in a post-conflict Society is a good mechanism

a. Civil Society;

Strongly Agree  Agree  disagree  strongly disagree

b. Victims;

Strongly Agree  Agree  disagree  strongly disagree

c. Perpetrators

Strongly Agree  Agree  disagree  strongly disagree

(iii) Truth Commissions bring about reconciliation in a post conflict Society

(a) Civil Society;

Strongly Agree  Agree  disagree  strongly disagree

(b) Victims;

Strongly Agree  Agree  disagree  strongly disagree

(c) Perpetrators

Strongly Agree  Agree  disagree  strongly disagree

**2. Local Trials In Post-Conflict Society**

(i) Local Trials are the most suited criminal justice mechanism in post-conflict criminal justice

Strongly Agree  Agree  disagree  strongly disagree

(ii) Local trials have a positive impact on reconciliation.

Strongly Agree  agree  disagree  strongly disagree

(iii) Perpetrators should be tried by local courts

Strongly Agree  Agree  disagree  strongly disagree

**Any other information on Transitional Justice mechanisms in post conflict East Africa will be appreciated.**

.....  
.....  
.....

THANK YOU FOR TAKING YOUR TIME!



## **Appendix 2: Questionnaire Forwarding Note**

Dear Sir/Madam,

I am a student at the University of Nairobi, Institute of Diplomacy and International studies, undertaking a Masters of Arts Degree in International Conflict Management. My research study is to carryout an Assessment of the transitional Justice mechanisms in Post conflict Society: A case Study of the East Africa Society, as a requirement for the award of the Master Degree. As a key player in the field of transitional justice in post-conflict societies, this is to request you to kindly fill the questionnaire attached herewith and revert. The responses shall be treated with utmost confidentiality.

Should you require further clarifications or details, do not hesitate to let me know.

Please let me know when you have done so.

Thank you,

Damaris Were Ogama