

CHAPTER THREE

INTERNATIONAL OBLIGATION OF STATES TO ADDRESS CERTAIN CRIMES

3.1 Introduction

As discussed in the previous chapter, the parties to the LRA conflict perpetrated gross violations of human rights and humanitarian law, and the violations meet the threshold for war crimes and crimes against humanity as defined in ICL. The scale and impact of the crimes committed inevitably brings us to the question of solutions that provide a meaningful measure of accountability to ensure justice, truth and reparations to victims of the crimes. Questions on accountability are very sensitive and often politically contested and there appears to be no consensus on what the obligations of states are in these situations. The legal requirement to address certain international crimes is clearly set out in IHL, IHRL and ICL and under international customary law. In addition, several UN ‘soft law’ instruments set guidelines for nations on questions of accountability for mass atrocities.

The UN ‘soft law’ instruments referred to includes’ the Basic Principles and Guidelines on the right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Van Boven Principles).¹ The Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity first produced in 1997 and updated in 2005 (Principles to Combat Impunity);² and the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (Joinet Principles).³ These ‘soft laws’ do not purport to constitute legal standards and are offered as guidelines to demonstrate the existing state obligation to protect and remedy violations and abuse. In addition, UN Security Council resolutions, UN

¹ Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, GA Resolution 60/147, UN GAOR, 60th Session, 64th Plenary meeting, UN Doc A/Res/60/147 (16 Dec 2005) (by Theo Van Boven commonly known as Van Boven Principles).

² Protection and Promotion of Human Rights through Action to Combat Impunity, Commission of Human Rights, 61st session, Item 17 of the Provisional Agenda, E/CN.4/2005/02/Add.1 (8 Feb 2005) (Report of the Independent Expert to update the Set of Principles, Diane Orentlicher)

³ Basic Principles of Justice for Victims of Crime and Abuse of Power, United Nation, General Assembly, A/RES/40/34, 96 Plenary Meeting, (29 Nov 1985).

General Assembly resolutions, other reports, declarations and recommendations of various international bodies, international and national court decisions as well as writings of scholars also provide reliable sources that suggest the existence of particular obligations on states.⁴

Putting into consideration all the above instruments, the first part of this chapter discusses the obligation of states to investigate, prosecute or extradite and to ensure, protect and provide remedies for violations and abuses. It also investigates the legality of amnesties in international law. The second part gives an overview of the mechanisms through which states and the international community meet these obligations. The focus in this chapter is the specific mechanisms proposed for Uganda such as prosecutions both in domestic courts and in an international tribunal; non-judicial options such as truth telling, reparations and traditional justice and possible intervention by human rights bodies is discussed.

3.2 Duty to investigate, prosecute or extradite

Several international law instruments require states to investigate, prosecute or extradite offenders for crimes that they prohibit. These treaties specifically deal with international crimes such as war crimes, crimes against humanity, torture, genocide, slavery, sexual and gender based violence among others that by their extent and gravity go beyond the limits tolerable to the international community. As a result, international law demands punishment.⁵ For the purpose of this thesis, the discussion is limited to treaties and other international law instruments prohibiting international crimes perpetrated in the LRA conflict; that is, war crimes; crimes against humanity; torture and sexual violence.

3.2.1 Geneva Conventions and Protocol I

The Geneva Conventions and Protocol I make it mandatory for states to search for perpetrators of grave breaches regardless of their nationality and the territory where the

⁴ SR Ratner et al., *Accountability for Human Rights Atrocity in International Law: Beyond the Nuremberg Legacy* (3rd ed) (2009) 114.

⁵ FZ Ntoubandi *Amnesty for Crimes against Humanity under International Law* (2007) 54.

crimes were committed and to either prosecute and punish or extradite them to another state party for prosecution.⁶ Article 146 of Geneva Convention IV for instance states that:

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case.

This obligation to investigate, prosecute or extradite offenders provided for in the Convention is mandatory and not subject to any form of limitation. Protocol I further expanded this obligation⁷ with the view to improve its effectiveness.⁸ The Commentary of the Geneva Conventions provides that, the universality of jurisdiction for grave breaches is basis that they will be punished and that the obligation to extradite ensures the universality of punishment.⁹

3.2.2 Rome Statute

The Rome Statute entrusts states with the primary responsibility to prosecute offenders of international crimes, surrender them to the ICC, or extradite them to a state that has jurisdiction.¹⁰ It is however not clear whether this duty under the Rome Statute is mandatory for as much as the preamble to the Statute recalls that it is the duty of every

⁶ First Geneva Convention art 49; Second Geneva Convention art 50; Third Geneva Convention art 129; Fourth Geneva Convention art 146.

⁷ Protocol I art 85; this article deals with the repressions of breaches of the Convention and the Protocol and expands the scope of grave breaches; art 86 further extends liability for grave breaches to superiors for acts of their subordinates if they knew or had information that the subordinate was to commit a breach and did not take feasible measures to prevent or repress it. See also arts 87 to 91.

⁸ Ntoubandi (n 5 above) 116; MP Scharf 'The Letter of the Law: The Scope of International Legal Obligation to Prosecute Human Rights Crimes' (1996) *59 Law and Contemporary Problems* 43.

⁹ JS Pictet (ed) 'Commentary: The Geneva Conventions of 12 August 1949' (1958) 4 *International Committee of the Red Cross* (1958) 587; WN Ferdinandusse *Direct Application of International Criminal Law in National Courts* (2006) 91 – 99; notes that the Geneva Conventions and Protocol I have not lived up to their promise of ending impunity and ensuring universality of punishment as prosecutions for grave breaches is rare and impunity for the grave breaches reigns on.

¹⁰ Rome Statute art 1, establishes the jurisdiction of the court; art 5 provides for the crimes within the jurisdiction of the Court; art 89 provides for surrender of persons to the court; art 90 provides for competing requests and extradition of persons who may have committed crimes within the jurisdiction of the ICC.

state to exercise criminal jurisdiction over those responsible for international crimes; the operative part of the Statute lacks any affirmative obligation on the part of the state.¹¹ For instance, the Rome Statute does not specifically exclude issues that bar prosecutions such as amnesties and pardons. In addition, the Prosecutor has the obligation to decline to pursue a case where it would not be in the 'interest of justice' and the Security Council has powers to defer investigations or prosecutions.¹² All these factors play a central role in the Rome Statute and represent a grave challenge for its effectiveness to address impunity for international crimes.¹³

3.2.3 Protocols to the Great Lakes Pact

The Protocol on Genocide and Protocol on Sexual Violence require member states to undertake to prevent and to punish perpetrators of crimes provided therein.¹⁴ The Objective of the Protocol on sexual violence is to provide protection for women and children against the impunity for sexual violence in the specific context of the Great Lakes Region. The Protocol further establishes a legal framework under which states undertake to prosecute and punish the perpetrators of crimes of sexual violence. It also provides a legal basis for the surrender of persons and fugitives charged with committing offences of sexual violence, without prejudice to the Protocol on Judicial Cooperation. The Protocol further makes provision for the establishment of a regional mechanism to provide legal, medical, material and social assistance, including counselling and compensation, to women and children who are victims and survivors of sexual violence in the Region.¹⁵ In addition, member states to the Protocol on Genocide make an undertaking to prevent and punish the crimes listed in its provisions.¹⁶

¹¹ Ratner et al., (n 4 above) 169.

¹² Rome Statute art 53(1)(c) & art 16 respectively.

¹³ Ratner et al., (n 4 above) 242 – 243; making reference to S R Ratner 'New Democracies, Old Atrocities: An Inquiry in International Law' (1999) 87 *Georgetown Law Journal* 720 – 731.

¹⁴ Protocol on Sexual Violence, art 2 & 3; and para 5 to the preamble recognises the prevalence of sexual violence in the region; Protocol on Genocide para 5 of the preamble; affirms the obligation of states to exercise criminal jurisdiction over perpetrators.

¹⁵ Protocol on Sexual Violence art 2.

¹⁶ Protocol on Genocide art 8(1); art 13 further requires member states to assist each other in the prosecution of such offences; art 14 requires states to make provisions for extradition of persons responsible for such crimes.

3.2.4 CAT

CAT also imposes a legal obligation on states to put in place measures to prevent the commission, to prosecute, punish or extradite perpetrators including public officials for the crime of torture.¹⁷ The Convention in particular provides that ‘a state party under whose jurisdiction a person alleged to have committed torture is found, shall either extradite or submit the case to its competent authorities for the purpose of prosecution’,¹⁸ thereby affirming the duty to investigate, prosecute or extradite torture offenders.

3.2.5 UN resolutions and ‘soft laws’

United Nations political bodies have also endorsed the duty to investigate, prosecute or extradite. For instance, the Final Declaration of the 1993 World Conference on Human Rights as well as Resolution of the Security Council, General Assembly and the Human Rights Commission has called on states to prosecute human rights abuses.¹⁹ Various UN ‘soft laws’ affirm this obligation as well.²⁰

3.3 Obligation to enact penal sanction

The instruments discussed above further obligate states to enact penal sanctions to ensure the punishment of war crimes, crimes against humanity, sexual violence and torture in domestic courts.²¹ For instance, the preamble to the Rome Statute emphasises that the punishment of international crimes must be effectively ensured by legislative and

¹⁷ CAT art 2; obligates states to take effective legislative, administrative and judicial measures to prevent acts of torture in any circumstances; art 5 obligates states to establish jurisdiction over the crime of torture; art 7 & 8 obligates states to prosecute or extradite perpetrators of torture.

¹⁸ CAT art 7(1).

¹⁹ World Conference on Human Rights: The Vienna Declaration and Programme of Action (25 June 1993) para 60 & 61; UN Security Council Resolution 1265 ‘Protection of Civilians in Armed Conflict’ Security Council (17 September 1999) para 6; UN General Assembly Resolution 54/179 ‘Situation of Human Rights in the Democratic Republic of Congo’ (24 February 2000) para 4(e); calls upon the DRC to fulfil its obligations and ensure that those responsible for human rights atrocities are brought to justice; Van Boven Principles, para 4 provides for the duty to prosecute and punish human rights violators.

²⁰ Promotion and Protection of Human Rights through Action to Combat Impunity, principle 19; Van Boven Principles, principle III(4).

²¹ First Geneva Convention art 49; Second Geneva Convention art 50; Third Geneva Convention art 129; Fourth Geneva Convention art 146; see CAT art 7; Protocol on Sexual Violence art 3(4); Protocol on Genocide art 9(1).

constitutional measures at the national level.²² The Protocol on Genocide requires states to undertake necessary measures to ensure that the provisions of the Protocol are not only domesticated but also enforced through national action.²³

These laws do not explicitly require such prosecutions to reflect the international nature of the crimes; states can prosecute those crimes based on ordinary criminal law.²⁴ The ICTY has further found that war crimes do not have to be prosecuted based on humanitarian law alone but can also be prosecuted as ordinary crimes within domestic jurisdictions.²⁵ The complementarity regime of the Rome Statute that appears to regard prosecutions of international crimes based on ordinary criminal law, as a sufficient response, that would preclude the ICC from exercising jurisdiction, confirms this.²⁶

3.4 Obligation to respect, ensure rights and provide remedies

IHRL does not expressly require states to punish violations of the rights they protect²⁷ but requires states to respect and to ensure the rights enumerated and to provide remedies when the rights are violated. This right encompasses individual right to; have serious violations effectively investigated; provide equal and effective access to justice; and to provide effective remedies, including reparations.²⁸ Several IHRL instruments such as the UDHR, ICCPR, CAT, CRC, and ACHPR affirm the obligation of states to address the rights of victims.

UDHR for instance clearly provides that everyone is entitled to the rights and freedoms set forth in the Declaration,²⁹ while the ICCPR contains a less precise provision obligating states to 'undertake to respect and to ensure rights to all individuals within its territory and subject

²² Rome Statute preamble para 4.

²³ Protocol on Genocide art 9.

²⁴ *Ferdinandusse* (n 9 above) 18 – 21; further discussion on prosecution as ordinary offences in domestic courts is contained in chapter six of the thesis.

²⁵ *Hadzihasanovic case* ICTY IT-01-47-T 'Judgment' (15 March 2006) 260.

²⁶ JK Kleffner *Complementarity in the Rome Statute and National Criminal Jurisdictions* (2008) 119 – 123; further discussion on the principle complementarity of the ICC is done in chapter five of the thesis.

²⁷ With the exception of CAT that expressly provides for the duty to prosecute, punish or extradite in art 2.

²⁸ Van Boven Principles, principle II(3).

²⁹ Universal Declaration of Human Rights art 2.

to its jurisdiction.³⁰ The ACHPR obligates states to ‘recognise rights, duties and freedoms contained in the charter and to adopt measures to give them effect.’³¹ In addition, human rights instruments generally require states to remedy human rights violations.

A ‘remedy’ pertains to the means by which a right is enforced or the prevention, redress, or compensation for a violation of a right. Remedies vary from the right to lodge a complaint to a criminal court to monetary compensation.³² UDHR, in article 8, provides that everyone has a right to an effective remedy by a competent tribunal. This provision implies that the remedy must be individualised and adjudicatory. The ICCPR in defining the right to a remedy specifies that the right shall extend to violations committed by government officials.³³ For example in the case of Eduardo Bleier, the Human Rights Committee found that the state has a duty to investigate and if necessary prosecute, as well as pay compensation to victims of human rights violations.³⁴

In the same vein, the Inter-American Court of Human Rights in *Velasquez Rodriguez case* found an obligation of states to investigate and prosecute human rights violators by combining the general ‘ensure and respect’ language of article 1(1) of the American Convention with the substantive prohibitions on torture and arbitrary killing.³⁵ The African Commission has also noted that the violation of any ACHPR provisions is a violation of article 1 of the Charter that requires parties to recognise rights, duties and freedoms enshrined in the Charter and provide remedies for their violations.³⁶ In general, the remedies are required to be available, effective and sufficient.³⁷

³⁰ ICCPR art 2(1).

³¹ ACHPR art 1.

³² Ntoubandi (n 5 above) 131; European Convention on Human Rights art 13; Protocol to the African Charter on the Establishment of the African Court on Human and Peoples’ Rights art 26(1); ICCPR art 2(3); American Convention on Human Rights art 26; see also N Roht-Arriaza, ‘State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law’ (1990) 78(2) *California Law Review* 474.

³³ ICCPR art 2(3).

³⁴ Communication R 7/30 *Eduardo Bleier v Uruguay* UNHR Committee Doc 40 (A/37/40) (1982) para 19.

³⁵ *Velasquez Rodriguez v Honduras*, Judgment of 29 July 1988, Inter-American Court of Human Rights (Ser. C) No. 4 (1988)

³⁶ *Sir Dawda K Jawara v The Gambia* communications 147/95 & 149/96 (Decision of 11 May 2000) ACHPR (*Jawara Communication*) para 46; *Lawyers for Human Rights v Swaziland* communication 251/2002 (Decision of 11 May 2005) ACHPR para 50 & 51.

³⁷ *Jawara Communication* (n 36 above) para 32; the African Commission stated that a remedy is available if the petitioner can pursue them without impediment; effective, if it offers prospects of success; and sufficient, if it is capable of redressing the complaint.

Further, the Inter-American Court of Human Rights has found that the promulgation and application of two amnesty laws in Peru violated the American Convention. The Court observed that all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible. This is because; such provisions prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance. The Court further observed that such provisions are prohibited because they violate non-derogable rights recognised by international human rights law.³⁸

In addition, the African Commission on Human and Peoples' Rights has found that the Clemency Order adopted in Zimbabwe violated the African Charter. The Clemency Order in question granted pardon to every person liable to criminal prosecution for any politically motivated crime committed between January and July 2000, a period of violence surrounding the February 2000 constitutional referendum and June 2000 parliamentary elections in Zimbabwe. The Order also granted a remission of the whole or remainder of the period of imprisonment to every person convicted of any politically motivated crime committed during the stated period. It exempted, however, crimes of murder, robbery, rape, indecent assault, statutory rape, theft, possession of arms and any offence involving fraud or dishonesty.³⁹

The Human Rights Committee has further stated that the right to an effective remedy preclude the granting of blanket amnesties for violations of IHL and IHRL.⁴⁰ The ICJ and the ICTY decided that it is impossible to invoke an immunity created by national law before an international tribunal.⁴¹ In 2004, the Special Court for Sierra Leone (SCSL) found that it was not bound to respect the amnesty provisions agreed to by the government of Sierra Leone

³⁸ *Chumbipuma Aguirre et al., v Peru* (Decision of 14 March 2001) Inter-American Commission of Human Rights para 41.

³⁹ *Zimbabwe Human Rights NGO Forum v Zimbabwe* communication 245/02 (Decision of 15 May 2006) ACHPR paras 191, 193, 194, 204, 211, 212 & 215.

⁴⁰ Ratner et al., (n 4 above) 169 making reference to Human Rights Committee Comments on Nigeria, UN Doc A/51/40 (1996) 1 (40) *Report of the Human Rights Committee para 284*; Human Rights Committee comments on Argentina, UN Doc. A/50/40 (1995) *Report of the Human Rights Committee para 153 & 158*.

⁴¹ *Case Concerning the Arrest Warrant (Congo v Belgium)* (Decision of 11 April 2002) ICJ and *Prosecutor v Furundzija* Case No. IT-95-17/1- T (Judgment of 10 Dec 1998) ICTY Trial Chamber para 155.

and the warring rebel groups contained in the 1999 Lomé Agreement. Although the holding stemmed from a clear provision of the Court's Statute denying effect to amnesty, the Court added that in cases of universal jurisdiction, an amnesty granted by one state could not deprive another state of jurisdiction in cases dealing with international crimes.⁴² In the report on the Rule of Law and Transitional Justice in Conflict and Post Conflict Societies, the UN Secretary General recommended that UN mediators refuse to endorse amnesties within peace accords that include mass atrocities.⁴³ Whether amnesties and pardons are indeed incompatible with state obligations under international law warrants further discussion.

3.5 Legality of amnesties in international law

'Amnesty' is a sovereign act of oblivion for past acts, granted by a government to persons who are guilty of a crime and often condition upon their return to obedience and duty within a prescribed time.⁴⁴ Though clearly an exercise of sovereign power, critics of amnesties routinely condemn them as a violation of the duty to prosecute under international law, particularly when offered to high-level perpetrators of international crimes.⁴⁵ Yet amnesties are the most consistently used alternative to domestic or international criminal prosecutions; in fact, the number of amnesties granted far exceed prosecutions of the international crimes indicating that state practice clearly show that no *jus cogens* (customary international obligation without the possibility to opt out) exists on the matter.⁴⁶

As much as the several treaties discussed above call for investigation and prosecution of international crimes, some treaties for example Protocol II encourages grant of amnesty, without specifying to which crimes it should not apply at the end of non-international

⁴² *Prosecutor v Morris Kallon (SCSL-2004-15-AR72 (E), Brima Bazzy Kamara (SCL-2004-16-AR72(E))* 'Decision on Challenge to Jurisdiction: Lomé Accord Amnesty' (13 March 2004) SCSL para. 67.

⁴³ UN Secretary General 'Report of the Secretary General on the Rule of Law and Transitional Justice in Conflict and Post Conflict Societies' UN Doc S/2004/616 (23 August 2004) para 64(c).

⁴⁴ Black's Law Dictionary (5th ed) (1983) 76.

⁴⁵ RC Slye 'The Legitimacy of Amnesties Under International Law and General Principles of Anglo American Law: Is a Legitimate Amnesty Possible?' (2002) 43 *Virginia Journal of International Law* 191 – 197.

⁴⁶ J Alvarez 'Alternatives to International Criminal Justice' in A Cassese et al., (eds) *International Criminal Justice* (2009) 34.

conflict.⁴⁷ While the Rome Statute provides for criminal prosecution of international crimes, it does not explicitly reject amnesties for the same crimes. In addition, key human rights instruments, such as the ICCPR, do not spell out clear obligations for states to prosecute and punish all human rights violators or abusers.⁴⁸

State practices on amnesties also differ greatly; for instance while some amnesties exclude international crimes from their scope, others are ambiguous in this respect but have not prevented the prosecution of international crimes. Yet, others have extended their scope to include all crimes regardless of their gravity or definition clearly ignoring the international obligation to investigate and prosecute international crimes.⁴⁹ The practice of granting amnesties could be treated as breach of the duty to prosecute but the fact remains that amnesties have been deployed by virtually every society, and will continue to play an important role as a conflict resolution measure.⁵⁰

In the last 30 years, amnesties have been instrumental in halting human rights abuses and restoring peace in countries like Angola, Argentina, Brazil, Cambodia, Chile, El Salvador, Guatemala, Haiti, Honduras, Ivory Coast, Nicaragua, Peru, Sierra Leone, South Africa, Togo, and Uruguay.⁵¹ These countries have granted amnesty to members of the former regime or insurgencies that committed international crimes within their respective borders, as part of a peace arrangement. Sometimes, the UN itself pushed for or endorsed the grant of amnesty as a means to restore peace and democratic governments.⁵² Although the UN does not encourage or condone amnesties regarding international crimes or gross violations of human rights, foster amnesties that violate treaty obligations of the parties, or that impair victims' right to a remedy, or victims' or societies' right to the truth.⁵³

⁴⁷ Protocol II 6(5).

⁴⁸ Ratner et al., (n 4 above) 169.

⁴⁹ Ferdinandusse (n 9 above) 200 -201.

⁵⁰ Slye (n 45 above) 173 – 247.

⁵¹ Roht-Arriaza (n 32 above) 483.

⁵² MP Scharf 'Amnesty Exception to the Jurisdiction of the International Criminal Court' (1999) 32 (504) *Cornell International Law Journal* 41; noting the involvement of the UN in the amnesty negotiations in countries such as Cambodia, El Salvador, Haiti, Sierra Leone and South Africa. Note that the UN does not condone amnesty for persons responsible for international crimes as clearly indication in the Report of the Secretary General (n 41 above).

⁵³ Office of the United Nations High Commissioner for Human Rights (UNOHCHR) *Rule-of-Law Tools for Post-Conflict States: Amnesties* HR/PUB/09/1 (2009) 44.

Amnesties do not always endorse a culture of impunity; they usually vary along many dimensions depending on a particular conflict and sometimes are essential to meet practical demands of humanity like ending an armed conflict and atrocities. Amnesties are classified as ‘blanket’ where they offer immunity to all perpetrators no matter the crimes committed. ‘Partial’ where they exclude international crimes from their ambit; and ‘conditional’ where the grant is contingent on the perpetrator fulfilling some conditions for instance telling the truth, offering an apology and/or compensating victims for the crimes committed,⁵⁴ which are compatible with some notions of accountability.⁵⁵

While there is no clear agreement among commentators on when amnesties are illegal, many have agreed that blanket amnesties issued for a group with no regard to crimes committed, producing little or no information of abuse and violations are illegal.⁵⁶ While conditional amnesties granted upon acknowledgment of guilt like was the case with the South Africa has drawn the least criticism. This is because the acknowledgment of guilt was accompanied by the particularised consideration of individual cases that constituted a form of accountability and enabled preservation of collective memory. In addition, the process was not ‘imposed from the above’ but adopted democratically from within and was responsive to unique leadership and the historical and cultural circumstances in South Africa.⁵⁷ In addition, at the time, South Africa had not ratified relevant treaties such as CAT and crimes alleged to have been committed were crimes against humanity not grave breaches (war crimes committed in an international armed conflict) that require prosecution.⁵⁸

⁵⁴ W Burke-White ‘Reframing Impunity: Applying Liberal International Law Theory to an Analysis of Amnesty Legislation’ (2001) 42 *Harvard International Law Journal* 482; classifies amnesties into 4 categories from the least to the most legitimate.

⁵⁵ Alvarez (n 46 above) 34.

⁵⁶ B Chigara *Amnesty in International Law: The Legality under International Law of National Amnesty Laws* (2002); the author argues that amnesties are inconsistent with the notion of justice as fairness.

⁵⁷ Slye (n 45 above) 245 – 247.

⁵⁸ *The Azanian Peoples’ Organisation (AZAPO) & others v President of South Africa & others* (Constitutional Court of South Africa) (Judgment of 25 July 1996) (*AZAPO Case*) paras 26 30, 32; for the obligation of the Geneva Conventions and Protocol I to apply, grave breaches must have been committed, which was not the case in South Africa.

The grant of amnesty therefore, except in treaties requiring prosecution, are not, necessarily inconsistent with international law. Amnesties are therefore a possible exception to the duty to prosecute, rather than a denial of that duty if the circumstances require such a step and if the conditions of the amnesty reflect a proper balance between the different interests involved.⁵⁹ International law is not opposed to amnesties but seeks to limit their permissible scope. Amnesties can play a valuable role in ending armed conflicts, reconciling divided communities and restoring human rights – if they do not grant immunity to individuals responsible for international crimes and other gross violations of human rights. Gross violations of human rights are widely recognised to include extrajudicial, summary or arbitrary executions; torture, cruel, inhuman or degrading treatment; slavery; and enforced disappearance, including gender-specific instances of these offences.⁶⁰

In addition, the Rome Statute allows prosecutorial discretion in the ‘interest of justice’ and is silent on the legality of amnesties.⁶¹ The 2004 Report of the Truth and Reconciliation Commission of Sierra Leone further supports this assertion:

The Commission is unable to condemn the resort to amnesty by those who negotiated the Lomé Peace Agreement [which provides amnesty to persons who committed crimes against humanity in Sierra Leone]. The explanations given by the government negotiators, including in their testimonies before the Truth and Reconciliation Commission, are compelling in this respect. In all good faith, they believed that the RUF [insurgents] would not agree to end hostilities if the Agreement were not accompanied by a form of pardon or amnesty... The Commission is unable to declare that it considers amnesty too high a price to pay for the delivery of peace to Sierra Leone, under the circumstances that prevailed in July 1999. It is true that the Lomé Agreement did not immediately return the country to peacetime. Yet it provided the framework for a process that pacified the combatants and, five years later, has

⁵⁹ *AZAPO Case* (n 58 above) paras 25, 30 & 32; MP Scharf & P Dowd ‘No Way Out? Questions of Unilateral withdrawal of Referrals to the ICC and Other Human Rights Courts’ (2008) 8(21) *Case Legal Studies Research paper* 21.

⁶⁰ UNOHCHR (n 53 above) 44.

⁶¹ Rome Statute preamble para 6 & art 53 (1)(c) providing for interests of justice. Further discussion on ‘interests of justice’ is contained in chapter five of this thesis. For further reading, see MC Bassiouni ‘The Need for International Accountability’ in MC Bassiouni (ed) *International Criminal Law* (3rd edition III) (2008) 20 - 21.

returned Sierra Leoneans to a context in which they need not fear daily violence and atrocity.⁶²

In the final analysis, although arguments based on legal duties in treaties should and do influence decision makers, they hardly determine the policies of states and international organisations about accountability, criminal or otherwise. Ultimately, the responses of states to various atrocities will rely principally on moral, social, and political considerations.⁶³ In addition, grant of amnesty does not necessarily mean the absence of accountability, if amnesty is tied to accountability measures such as truth and reparations, documentation of abuses (and identification of perpetrators by name), and employment bans and purges (referred to as ‘lustration’) that keep such perpetrators from positions of public trust.⁶⁴

3.6 Accountability mechanisms

As discussed above, states are obligated to ensure accountability for certain criminal acts, this in practical sense requires the creation and engagement of specific mechanisms, either judicial or non-judicial, designed for this purpose. Domestic institutions, including courts, investigative commissions, reparations bodies and traditional justice practices are the primary mechanisms to ensure accountability for crimes.⁶⁵ International tribunals that are either, ad hoc, hybrid or permanent are additional measures used to ensure that international crimes are punished. These mechanisms can be used as alternatives or several can be used simultaneously.⁶⁶

⁶² Sierra Leone Truth and Reconciliation Commission ‘Witness to Truth: Report of the Sierra Leone Truth and Reconciliation Commission’ (2004) 365; quoted in WA Schabas ‘Amnesty, the Sierra Leone Truth and Reconciliation Commission and the Special Court for Sierra Leone’ (2004) 11 *UC Davis Journal of International Law and Policy* 163 – 164.

⁶³ Ratner et al., (n 4 above) 172; further discussion on amnesties focusing on Uganda is contained in chapter four.

⁶⁴ Roht-Arriaza (n 32 above) 482 – 491.

⁶⁵ These are the mechanisms proposed as accountability measures for crimes in the LRA conflict; the chapters that follow discuss each of the mechanisms.

⁶⁶ Uganda will use/is using these mechanisms simultaneously as set out in chapter one and four of this thesis.

3.6.1 Prosecutorial options

National courts⁶⁷

National courts are the main fora for ensuring the investigation, prosecution and punishment of offenders for international crimes. The legal basis for prosecution could be international treaties that have become part of the domestic laws of a state⁶⁸ or states may also utilise their existing criminal law to ensure prosecution, as prosecution does not entail the reliance on international law.⁶⁹ National courts are best suited to undertake this role since they are closer to the scene of the crime, therefore have greater access to evidence, witnesses, victims and perpetrators. National courts will however only yield benefits if the judicial system in question is impartial and effective. The impartiality and effectiveness of a judicial system depends on well defined criminal laws, evidence and procedural rules; well trained judges, law enforcement and legal officers; adequate infrastructures such as court rooms, investigative offices, record keeping facilities, detention and prison facilities. Where all or some of these conditions are absent, as is usually the case in states in the aftermath of atrocities, a government must make a concerted effort and investment to ensure that it meets these conditions.⁷⁰

In cases where national courts are ineffective, partial or where a national government is unwilling to prosecute certain offenders of international crimes; third countries could request for the extradition of offenders and conduct trials based on universal jurisdiction.⁷¹ Since the Nuremberg trials, there have been a surge in the use of national courts for the prosecution of international crimes and most charges are based on domestic rather than

⁶⁷ A detailed discussion on the role of national courts with specific reference to Uganda is contained in chapter six of this thesis.

⁶⁸ While such treaties, once ratified, are part and parcel of domestic law in monist states; they have to be domesticated by an act of Parliament to become domestic law in dualist states, so states sometime adopt the provisions as they appear in the international treaty, sometimes adopt certain aspects of the treaty and sometimes go beyond the required obligation and include other crimes within the scope of the law in domestic law.

⁶⁹ Ratner et al., (n 4 above) 177 and 185; a detailed discussion of this in relation to Uganda is contained in chapter six of this thesis.

⁷⁰ Ratner et al., (n 4 above) 203 – 204; further discussion on the specific issues is contained in chapter five and six of the thesis.

⁷¹ Ratner et al., (n 4 above) 198; in such cases, the country in question must have criminal codes permitting prosecutions for extraterritorial acts, or allow prosecution directly under international law.

international law.⁷² Most recently, the DRC gave its military courts jurisdiction over cases involving international crimes and the courts have carried out several prosecutions.⁷³

International criminal tribunals

Ad hoc international tribunals: the unwillingness and sometimes inability of governments to prosecute international crimes through national courts led to the creation of international criminal tribunals that could directly prosecute individuals for international crimes. Initially, international criminal tribunals were created on *ad hoc* basis in response to atrocities committed in particular conflicts; the Nuremberg⁷⁴ and Tokyo trials⁷⁵ are the first tribunals of this nature created to try international crimes committed in the World War II.⁷⁶ Fifty years down the road, the UN Security Council created the International Criminal Tribunal for the Former Yugoslavia (ICTY)⁷⁷ and the International Criminal Tribunal for

⁷² For example countries such as Ethiopia, Latvia, Guatemala, Iraq, Peru have conducted domestic trials for offenders of international law; see reports such as Human Rights Watch 'World Report' (2008) 210 – 211; Amnesty International 'Guatemala Disappearance Trial begins' Press Release 18 March 2008; 'Ex President Stands Trial in Edgy Peru' New York Times 10 December 2007.

⁷³ Avocates Sans Frontières (AFS) 'Case Study: Application of the Rome Statute of the International Criminal Court by the Courts of the Democratic Republic of Congo' <http://www.asf.be> (accessed 10 Sept 2011); discussion on domestic trials by Uganda is contained in chapter six of this thesis.

⁷⁴ The Nuremberg Trials were a series of military tribunals, held by the main victorious allied forces of the Second World War, most notable for the prosecution of prominent members of the political, military and economic leadership of the defeated Nazi Germany. The trials were held in Nuremberg in Germany from 1945 to 1946. The best-known and first trials were the trials of the Major War Criminals before the International Military Tribunal (IMT), which tried 24 of the most important captured leaders of Nazi Germany. The second set of trials of lesser war criminals was conducted under Control Council Law, No. 10 at the US Nuremberg Military Tribunals. These trials were conducted according to the London Charter of the International Military Tribunal (Nuremberg Charter) which was the decree issued on 8 August 1945, that set down laws and procedures by which the Nuremberg trials were to be conducted.

⁷⁵ This was the International Military Tribunal for the Far East that was convened on 29 April 1946 to try leaders of the Empire of Japan for three types of crimes; 'Class A' crimes were reserved for those who participated in a joint conspiracy to start and wage war, therefore those in the highest decision making bodies; 'Class B' crimes were reserved for those who committed 'conventional' atrocities or crimes against humanity; 'Class C' crimes were reserved for those who participated in the planning, ordering, authorisation or failure to prevent such transgressions at higher levels in the command structure. Twenty eight Japanese military and political leaders were charged with Class A crimes and more than five thousand and seven hundred Japanese nationals were charged with Class B and C crimes. The Charter of the International Tribunal for the Far East prescribed the formation of the tribunal, the crimes the tribunal would consider and how it would function on the model set by the Nuremberg Charter.

⁷⁶ For more on these tribunals, see GJ Bass *Stay the Hand of Vengeance: The Politics of War Crimes Trials* (2000); Y Totani *The Tokyo War Crimes Trials: The Pursuit of Justice in the Wake of World War II* (2009).

⁷⁷ M Martínez *National Sovereignty and International Organisations* (1996) 279; the ICTY was created by the United Nations Security Council Resolution 827 that was adopted unanimously on 25 May 1993, after reaffirming Resolution 713 (1991) and all subsequent resolutions on the topic of the former Yugoslavia. This

Rwanda (ICTR).⁷⁸ Both these tribunals have been viewed and criticised as a substitute for the international failure to stop the war or situations in those territories.⁷⁹

Hybrid or internationalised tribunals: due to the expense associated with the *ad hoc* tribunals; inaccessibility, due to remoteness of location⁸⁰; ineffectiveness in influencing accountability goals such as deterrence and reconciliation and because the tribunals did little or nothing to ensure national capacity building; the international community in the later years opted for hybrid tribunals.⁸¹ These tribunals have been created in countries such as East Timor, Sierra Leone, Cambodia, Kosovo, Bosnia, Serbia, Iraq and Lebanon.⁸² These hybrid tribunals share key attributes; for instance, they were all established to prosecute persons most responsible for international crimes in the territory concerned. They all have their seat in the location where atrocities were committed;⁸³ all have mixed benches of international and local judges, prosecutors, defence counsel and support personnel; and all have jurisdiction over international crimes though have additional jurisdiction over certain specified domestic crimes.⁸⁴

resolution also approved the report of the UN Secretary General [Report s/25704] and annexed the Statute establishing the ICTY.

⁷⁸ C Heyns *Human Rights Law in Africa* (1999) 8; the ICTR was created by the United Nations Security Council Resolution 955, adopted on 8 November 1994. The Resolution recalled all resolutions on Rwanda and noted that serious violations of IHL had taken place in the country, therefore acted under Chapter VII of the UN Charter.

⁷⁹ Ratner et al., (n 4 above) 212; also states that many states view these tribunals as extraordinary and sometimes threatening judicial enforcement mechanisms as they usurp powers of domestic courts; also note that the jurisdiction of both the ICTY and ICTR superseded jurisdictions of national courts.

⁸⁰ The ICTY is based in the Hague, the Netherlands though atrocities were committed in the former Yugoslavia and the ICTR is based in Arusha, Tanzania, though the atrocities were committed in Rwanda.

⁸¹ JK Kleffner & A Nollkaemper 'The Relationship between Internationalised Courts and National Courts' in CPR Romano et al., (eds) *Internationalised Criminal Courts and Tribunals: Sierra Leone, East Timor, Kosovo and Cambodia* (2004) 359; A Cassese, 'The Role of Internationalised Courts and Tribunals in the Fight Against International Criminality' in CPR Romano et al., (eds) *Internationalised Criminal Courts and Tribunals: Sierra Leone, East Timor, Kosovo and Cambodia* (2004) 3 – 6.

⁸² As above.

⁸³ Except the Lebanon Tribunal with its seat in the Hague, the Netherlands.

⁸⁴ Ratner et al., (n 4 above) 247; notes some fundamental differences between the tribunals for instance entities such as the Iraqi High Tribunal and the Serbian War Crimes Chamber are more of domestic courts assisted by international advisors; *Prosecutor v Charles Ghankay Taylor* SCSL-2003-01-1 Appeals Chamber 'Decision on Immunity from Jurisdiction' (31 May 2004) para 38, 42 & 53); notes that SCSL is completely independent of the Sierra Leonean domestic legal system and conceives itself very much as an international institution with attributes similar to the ICTY and ICTR; LA Dickenson 'The Relationship Between Hybrid Courts and International Courts: The Case of Kosovo' (2003) 37 *New England Law Review* 1060; R Cryer et al., *An Introduction to International Criminal Law and Procedure* (2007) 159 – 160; noting that, while the Extraordinary Chambers of Cambodia and the SCSL were set up under an agreement between the UN and the post conflict governments of Cambodia and Sierra Leone, the Courts of East Timor, Kosovo and Bosnia were established by international administrators exercising governmental control over the areas; MA Newton 'Legal

The International Criminal Court:⁸⁵ the initiative to create the ICC started in the 1990s and on 17 July 1998, the UN Diplomatic conference adopted the Rome Statute that brought the ICC into existence with effective jurisdiction from 1 July 2002.⁸⁶ The ICC has jurisdiction over international crimes in cases where national courts are either unable or unwilling to prosecute.⁸⁷ The Rome Statute represents a highly significant development for criminal accountability in terms enforcement of ICL and the codification and progressive element of the substantive law.⁸⁸ Unlike the international predecessors, the Rome Statute gives attention to crucial issues such as gender by adding gender based crimes and crimes of sexual violence to the list of crimes under the ICC jurisdiction.⁸⁹

The Rome Statute also ensures that the prosecutor appoints advisers with legal expertise on specific issues including sexual and gender based violence.⁹⁰ The Statute further ensures that the Victims and Witness unit⁹¹ include staff with expertise in trauma related to crimes of sexual violence; and specifies the need for a fair representation of female and male judges as well as the need to include judges with legal expertise on violence against women.⁹² Further, the Statute accords extensive protection to victims and witnesses.⁹³ The present situations being investigated or prosecuted by the ICC includes; DRC, Central African

Authority for the Creation of the Iraqi High Tribunal' in MP Scharf & GS McNeal (eds) *Saddam on Trial: Understanding and Debating the Iraqi Tribunal* (2006) 15 -23; notes that the Iraqi High Tribunal and Serbian Courts were established directly by the countries concerned with some assistance from international advisors.

⁸⁵ A detailed discussion of the ICC in relation to the LRA conflict in Uganda is contained in chapter five of this thesis.

⁸⁶ RSK Lee *International Criminal Court: The Marking of the Rome Statute, Issues, Negotiations and Results* (1999) provides an in-depth discussion on the creation of the ICC.

⁸⁷ Rome Statute preamble & arts 1, 5, 11(1) and 126 (1) for jurisdiction generally of the ICC.

⁸⁸ MS Ellis 'The International Criminal Court and Its Implication for Domestic Law and National Capacity Building' (2002) 15 *Florida Journal of International Law* 215.

⁸⁹ Rome Statute arts 7 & 8; elements of war crimes and crimes against humanity, include sexual and gender based crimes such as rape, sexual slavery, forced pregnancy among others.

⁹⁰ Rome Statute art 42.

⁹¹ This unit is established by art 43(6) of the Rome Statute.

⁹² Rome Statute art 36(8).

⁹³ Rome Statute art 15(3); provides for closed sessions; art 68(2) provides for extension of protection of victims and witnesses and their participation in the proceedings; art 43(6) provides for the establishment of a victim and witness unit within the Registry; art 75; provides for reparations for victims. Ratner et al., (n 4 above) 241; further discusses other important innovations of the Rome Statute that includes the continuation of trials even where the accused pleads guilty

Republic, Darfur (Sudan), Uganda, Kenya, Libya and Ivory Coast.⁹⁴ A more detailed discussion on the ICC and its investigations in Uganda is contained in chapter five of this thesis.

3.6.2 Non-prosecutorial options

Despite the appeal of criminal prosecutions as the most direct way of pursuing accountability for mass atrocities, political and practical challenges to employing prosecutorial mechanisms have led to the dramatic development over the last 25 years of alternative non-judicial processes. These processes may not provide rigorous investigations, determinations and punishment of offenders of international law but sometimes, they represent the best or the only alternative to criminal prosecutions. The mechanisms also act as valuable precursors or complement criminal prosecutions and may be the optimal form of accountability in certain situations.⁹⁵ The discussion of these accountability measures will be limited to investigative commissions, reparations and traditional justice measures that are relevant to the Ugandan situation.

Investigative commissions: these are relatively young, although increasingly common form of accountability. They usually focus on investigating events of the past, sometimes concentrating on specific atrocities or pattern of abuses over time. These commissions are often temporary entities that are required to conclude investigations and produce report of findings with recommendations within a specified time. Investigative commissions are created by executive or legislative action though sometimes ushered in as a result of an agreement between warring parties.⁹⁶ These bodies are often established as truth telling or fact-finding institutions and are victim centred in their approach. They can be established internationally, regionally or nationally and the features vary widely depending on historical, political, legal and security context in which they operate.⁹⁷ The scope of activities of these

⁹⁴ For further details on the situations see <http://www.icc-cpi.int/Menus/ICC/Situations+and+cases/> (accessed 21 January 2012).

⁹⁵ Ratner et al., (n 4 above) 259.

⁹⁶ PB Hayner *Unspeakable Truths: Confronting State Terror and Atrocity* (2001) 14.

⁹⁷ PB Hayner 'Fifteen Truth Commissions 1974 to 1994: A Comparative Study' (1994) 16 *Human Rights Quarterly* 597 & 607; M Freeman *Truth Commissions and Procedural Fairness* (2006) 12 – 22.

institutions very much depends on its mandate, financial resources, time constraints, political conditions and the scale of abuses it examines.⁹⁸

Numerous investigative bodies have been created worldwide though not all have performed their mandate to conclusion.⁹⁹ These bodies may serve as substitutes for, operate alongside, or be a precursor to international or national forms of criminal accountability. Amnesties have also been accepted or given as part of the mandate of the bodies. For instance, one of the best known commissions, the South African Truth and Reconciliation Commission (South Africa TRC) required truth in exchange for amnesty; while in Chile, an amnesty existed prior to the Commission's report; in Argentina grants of amnesty followed the commission's effort; yet in Sierra Leone, both criminal prosecutions, amnesty and commission's proceedings operated simultaneously.¹⁰⁰ Further discussion on truth commissions with specific reference to Uganda is contained in chapter eight.

Measures of reparations: several human rights instruments affirm the right of victims to various forms of reparations, including official acknowledgments, commemorative monuments and compensation. An ever-increasing concern for the rights of victims is also evident in the inclusion of victims' remedies and a trust fund for compensation in the ICC¹⁰¹ as well as in a number of UN 'soft law' instruments.¹⁰² Therefore, victims have, in theory, a right to reparations for among other things, physical or mental harm, emotional distress, lost education or other opportunities, loss of earnings, harm or reputation and dignity and costs for assistance. States must therefore provide a forum through which victims can

⁹⁸ A more detailed discussion on truth commissions is contained in chapter eight.

⁹⁹ Hayner (n 97 above) 260 - 261; these include; Uganda 1974 and 1986; Bolivia 1982; Argentina 1983; Uruguay 1985 and 2000; Zimbabwe 1985; Nepal 1990; Chile 1990; African National Congress 1992 and 1993; Germany 1992; El Salvador 1992; Sri Lanka 1994; Haiti 1994; Burundi 1995; South Africa 1995; Ecuador 1996; Guatemala 1997; Nigeria 1999; Republic of Korea 2000; Sierra Leone 2000; Panama 2001; Grenada 2001; Peru 2001; East Timor 2002; Ghana 2002; Morocco 2004; Paraguay 2004; DRC 2004; Liberia 2005; and a Joint Penal for Indonesia and East Timor 2005.

¹⁰⁰ EM Evenson 'Truth and Justice in Sierra Leone: Coordination between the Commission and the Court' (2004) 104 *Columbia Law Review* 730 – 767; W Schabas 'Conjoined Twins of Transitional Justice? The Sierra Leone Truth and Reconciliation Commission and the Special Court' (2004) 2 *Journal of International Criminal Law* 1082 – 1099.

¹⁰¹ Rome Statute art 75 & 79.

¹⁰² Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power; Joint Principles and Van Boven Principles.

satisfy their rights to restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.¹⁰³

Reparations are embodiment of a society's recognition, remorse and atonement for harms inflicted¹⁰⁴ and are meant to wipe out all the consequences of the criminal act and establish a situation, which would probably have existed, had the crime not been committed.¹⁰⁵ The Van Boven Principles give a detailed definition of each element of reparations. For instance, restitution includes as appropriate elements of restoration of liberty, enjoyment of human rights, identity, family life and citizenship among others that whenever possible restore the victim to the original situation before a violation of IHRL and IHL.¹⁰⁶ Compensation provides economically assessable damages that must be proportional to the gravity of the violation of IHL and IHRL.¹⁰⁷

Rehabilitation includes medical and psychological care as well as legal and social services.¹⁰⁸ Satisfaction measures aimed at the cessation of continuing violations, verification of facts and public disclosure of truth, search for the whereabouts of the disappeared, establish identities of children abducted and bodies for those killed, official declaration of a judicial body, public apology, commemorations and inclusion of an accurate account of the violations in educational materials.¹⁰⁹ Guarantees of non-repetition include ensuring effective civilian control of military and security forces, ensuring that proceedings abide by international standards of due process, strengthen the independence of the judiciary, provide human rights education and review and reform laws that allow human rights violations among others.¹¹⁰

Application of reparations regime is still unfolding and generates complex challenges. In aftermath of mass atrocities, states have usually designed reparations programmes that

¹⁰³ Joinet Principles principles 8 – 10; Alvarez (n 44 above) 34.

¹⁰⁴ J Torpey 'Making Whole what has been smashed: Reflections on Reparations' (2001) 73 *Journal of Modern History* 349.

¹⁰⁵ Case concerning Factory at Chorzow (1928) A 17 ICJ Series 47.

¹⁰⁶ Van Boven Principles principle 19.

¹⁰⁷ Van Boven Principles principle 20.

¹⁰⁸ Van Boven Principles principle 21.

¹⁰⁹ Van Boven Principles principle 22.

¹¹⁰ Van Boven Principles principle 23.

stem from recommendations of truth and other investigative commissions. Although states have, the option of not giving commissions created this responsibility, as was the case in Argentina and El Salvador.¹¹¹ In addition, some truth or investigative commissions that did receive this mandate, formulated recommendations that went unheeded or that have been implemented only partially for example South Africa, Guatemala, Haiti and Peru.¹¹²

Other states have implemented reparations initiatives that did not stem directly from truth commission recommendations for example Argentina and Germany. Some other states have established self-standing reparations commissions or procedures for example Brazil, Malawi, Morocco, and Guatemala. Other states have established reparations efforts out of ordinary legislative initiatives with no particular institution being in charge of their overarching supervision for example Argentina. States can therefore decide the way to go about designing reparations measures that best suits their different contexts.¹¹³ The most essential thing is for reparations programmes to establish a link between the benefits they distribute and other accountability measures such as justice and truth to distinguish them from purely financial compensation.¹¹⁴

Traditional justice and healing measures: these are yet another venue of accountability for mass atrocities and lesser offences committed during armed conflicts. Traditional healing ceremonies are designed to give therapy, remove stigma attached to victims and to reconcile them with perpetrators and society.¹¹⁵ In addition, these measures offer an accountability platform by allowing perpetrators to account for their crimes, show remorse, apologise and compensate victims.¹¹⁶ These mechanisms are very important in the aftermath of mass atrocities provided that procedural guarantees accorded by IHRL for accused persons is respected and that all victims, including women and children are

¹¹¹ See further and detailed discussion in chapter eight of this thesis.

¹¹² Detailed discussion is contained in chapter eight of this thesis.

¹¹³ Office of the High Commissioner for Human Rights (UNOHCHR) 'Rule-of-Law for Post-Conflict States: Reparations Programme' HR/PUB/08/1 (2008) 11.

¹¹⁴ As above, 12; further and detailed discussion is contained in chapter eight of this thesis.

¹¹⁵ For an overview of traditional healing ceremonies among the Acholi of Uganda, see chapter seven of this thesis.

¹¹⁶ Further and detailed discussion is contained in chapter seven of this thesis.

accorded the right to participate fully in the processes.¹¹⁷ However, traditional justice and healing practises though practised by several communities emerging from conflict, have only recently gained international recognition and have not yet been subject to much scholarly elaboration. Their value as an accountability measure for mass atrocities remains is still being investigated. Further discussion on the value of Acholi traditional justice in relation to the LRA conflict in Uganda is contained in chapter seven of the thesis.

Other accountability measures that are also important in the aftermath of mass atrocities but not considered in this thesis include immigration measures, civil suits and lustration measures.¹¹⁸ The accountability measures are used in isolation or two or more could be used simultaneously depending on the circumstances of a given situation or conflict and the anticipated outcomes.

3.7 Intervention by human rights bodies

Regional human rights courts such as the Inter-American Court of Human Rights, the European Court of Human Rights, the African Court on Human and Peoples' Rights may adjudicate cases dealing with mass atrocities.¹¹⁹ In addition, quasi-judicial bodies such as the Human Rights Committee (HRC), the Committee on the Elimination of Racial Discrimination (CERD), the Committee against Torture (CAT) and the Committee on the Elimination of Discrimination against Women (CEDAW) at the UN level.¹²⁰ The African Commission on Human and People's Rights, the African Committee of Experts on the Rights and Welfare of the Child and the inter-American Human Rights Commission at the regional level may also examine individual complaints of human rights violations.

These courts and quasi-judicial bodies do not have jurisdiction over individuals, neither do they have criminal or penal jurisdiction but they possess jurisdiction over states and

¹¹⁷ Chapter seven of this thesis gives further analysis of the compatibility of Acholi traditional justice system with human rights law.

¹¹⁸ Ratner et al., (n 4 above) provides further and detailed discussion of these measures.

¹¹⁹ International law bodies such as the International Court of Justice at the UN level, and other regional courts, such as the East African Community Court, that regulate relations between states are additional bodies that can intervene to prevent or adjudicate cases involving the commission of international crimes.

¹²⁰ Optional Protocol to the ICCPR; CERD art 14; CAT art 22.

adjudicate state responsibility for violations of IHRL.¹²¹ These bodies have varying powers of enforcement over the state. For instance, the European, inter-American and African Human Rights Courts issue legally binding orders while the HRC gives ‘views’ on situations. The treaty bodies are also empowered to make ‘general comments’ which are authoritative interpretations of the articles of the human rights treaties and adopt conclusions and recommendations after examining specific country reports.

Though primarily created to deal with human rights issues, some of these bodies have applied IHL in an attempt to give effective remedies to litigants in armed conflict situations. An example that clearly stands out is the decision of the Inter-American Commission on Human Rights in the *Tablada* case,¹²² where the complainants alleged violations by state agents not only of the American Convention on Human Rights but rules of IHL.¹²³ In its decision, the Commission made a detailed examination as to whether it was competent to apply IHL directly and decided that it was competent to do so,¹²⁴ reasoning that to apply IHL directly enhanced its ability to respond to situations of armed conflict.¹²⁵

The European Human Rights Court on the other hand has done exactly what the American Commission avoided - applying IHRL to situations of armed conflict directly rather than applying IHL.¹²⁶ This application remains controversial because of the inherent differences between the two bodies of law. IHL applies to all parties to a conflict (government and

¹²¹ These bodies emphasise domestic enforcement therefore require exhaustion of domestic remedies before referral of a matter to such a body. The requirement of exhaustion of local remedies has been elaborated by the different treaty bodies and has clearly attained the status of customary law. In addition, in 1991, the UN organised an international workshop on national human rights institutions in Paris and came up with Principles Relating to the Status of National Human Rights Institution (Paris Principles). The Paris Principles recommended a set of guidelines for the functioning of domestic human rights institutions that would receive complaints, undertake independent fact finding, offer conciliation services and appropriate remedies such as compensation – in this vain, the 1995 Constitution of the Republic of Uganda created the Uganda Human Rights Commission to offer such services and plays an important role in human rights monitoring and redress in Uganda

¹²² *Juan Carlos Abella v Argentina* (Judgment of 13 April 1998) Inter-American Commission of Human Rights (*La Tablada* case).

¹²³ *La Tablada* case (n 122 above) para 16.

¹²⁴ *La Tablada* case (n 122 above) para 327 & 328; though the Commission found that Argentina had not violated the applicable provisions of international humanitarian law, it found that it had competence to directly apply international humanitarian.

¹²⁵ *La Tablada* case (n 122 above) para 161.

¹²⁶ Most notably see decisions of the European Court of Human Rights in relation to the second conflict in Chechnya delivered by the Court between February 2005 and July 2008. The Court published 37 judgments against Russia due to the events in Chechnya in this period.

dissident armed groups alike) while, IHRL rules essentially bind only states, and has little relevance in regulating the behaviour of non-state armed groups.¹²⁷ In addition, IHRL does not contain rules that moderate conduct of hostilities therefore leaves a challenge on how to apply the broad principles to the conduct of hostilities in a manner that is persuasive and realistic.¹²⁸

This may be the case but the judgments of these bodies can put pressure on governments to comply with international obligations including duties to prosecute offenders and remedy violations. In addition, the decision of these bodies also serve the cause of developing IHRL and IHL by interpreting unsettled legal issues; cases before the bodies can be initiated relatively quickly and inexpensively and adjudication does not require attendance of offenders.¹²⁹ A case originating from the failure to ensure the rights of children during the LRA conflict is pending decision before the African Committee of Experts on the Rights and Welfare of the Child. The complainants in this case allege that Uganda failed to ensure children's rights to mandatory social services such as education, health, water and sanitation and that the state used and failed to ensure that others do not use children in armed hostilities violating articles 22(2), 22(3) and 29(a) of the African Children's Charter. Other violations alleged in this case include torture of children, sexual violence against them, and failure to ensure their rights to survival and development.¹³⁰ A decision in this case will create a precedent and provide reference for the accountability pursuits in Uganda today. Human rights bodies therefore remain an important avenue in governing mass atrocities that evolve in situations of armed conflicts and even those that do not reach the threshold of armed conflicts, applying the same rules to all situations.¹³¹

¹²⁷ W Abresch 'A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya' (2005) 4 *Centre for Human Rights and Global Working Paper* 2-3.

¹²⁸ Abresch (n 127 above) 4 & 13; notes that IHRL must be realistic in the sense of not categorically forbidding killing in the context of armed conflict or otherwise making compliance with the law and victory in battle impossible to achieve. These realistic rules must be persuasively derived from legal standards of humanitarian law.

¹²⁹ Ratner et al., (n 4 above) 257.

¹³⁰ *Children affected by the LRA conflict in Uganda v Republic of Uganda* 'Complainants Submission on Merits' African Committee of Experts on the Rights and Welfare of the Child 001/2005 para 8.

¹³¹ Abresch (n 127 above) 17-18. A case pending decision before the African Committee of Experts on the Rights and

3.8 Conclusion

In the final analysis, there is no single model for addressing international crimes. Although, the experiences of other nations may offer some lessons for nations recovering from or in conflict situations, the political, social and historical conditions in a country will govern the weights of the competing considerations and thus the means of approaching accountability.¹³² States therefore have to make the ultimate moral, political and legal decision on which measure or combination of which will achieve the expected outcomes of accountability undertaking. This leaves room for states to come up with novel ways of tackling the question of accountability for the good of a country.

The chapters that follow provide an analysis of the accountability processes that Uganda has committed to undertake to address mass atrocities in the LRA conflict. This commitment was made when the government referred the LRA situation to the ICC and in Juba when it negotiated and signed the Agreement on Accountability and Reconciliation. Before the ICC referral and the agreement in Juba, the government had created a law that granted amnesty to anybody who gave up armed rebellion against it as a conflict resolution measure.¹³³ The next chapter analyses this law and the Agreement on Accountability and Reconciliation for consistency with Uganda's international obligation before discussion of specific accountability measures in the latter chapters.

¹³² Ratner et al., (n 4 above) 175.

¹³³ Codified as the Amnesty Act 2000, Laws of Uganda.