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Forgiveness in the Age of Accountability – Assessing Amnesty in Northern Uganda

Doctoral Thesis

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Apwoyo matek.

To my mother, Mary, who made everything in life possible.

Abbreviations

ACPHR	African Court of Human and Peoples' Rights
ADF	Allied Democratic Forces
AP I/II	Additional Protocol I/II
ARLPI	Acholi Religious Leaders Peace Initiative
CRC	Convention on the Rights of the Child
DDR	Disarmament Demobilization and Reintegration
DPP	Director of Public Prosecutions
DRC	Democratic Republic of Congo
DRT	Demobilization and Resettlement Team
ECCC	Extraordinary Chambers in the Courts of Cambodia
ECHR	European Court for Human Rights
FUNA	Former Uganda National Army
GUSCO	Gulu Support the Children Organisation
HSM	Holy Spirit Movement
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICRS	Information Counselling and Referral Services
ICD	International Crimes Division
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICTY	International Criminal Tribunal for the former Yugoslavia
ICTR	International Criminal Tribunal for Rwanda
IDP	Internally Displaced Persons
ILC	International Law Commission
IACHR	Inter-American Court of Human Rights
JLOS	Justice, Law and Order Sector
JRP	Justice and Reconciliation Project
LRA	Lord's Resistance Army
OHCHR	Office of the High Commissioner for Human Rights
MDRP	Multi-Country Demobilization and Reintegration Program
MP	Member of Parliament
NRA/M	National Resistance Army/Movement
OTP	Office of the Prosecutor
WNBF	West Nile Bank Front
RLP	Refugee Law Project
SCSL	Special Court for Sierra Leone
SGBC	Sexual and Gender-Based Crimes
TRC	Truth and Reconciliation Commission
UN	United Nations
UNLA	Ugandan National Liberation Army
UNSC	United Nations Security Council
UNSG	United Nations Secretary General
UNRF	Ugandan National Rescue Front
UPDA	Ugandan Peoples Defence Army
UPDF	Ugandan Peoples Defence Forces

Table of contents

Figure 1 - Map of Uganda

Figure 2 - Wall mural depicting victims of an LRA attack on Abia, Northern Uganda in 2004.

1 Introduction

Amnesty otima kica pi jami weng ma atimo i lum. Oweka adwogo gang, atye ka bedo ki kuc kacel ki lugang wa.

Amnesty forgave me for everything I did in the bush. It allowed me to come home and stay in peace with my family.[1]

These are the spoken words of Informant "J", a formerly conscripted rebel in the Lord's Resistance Army ("LRA"). Abducted from her home when she was barely a teenager, she was beaten, enslaved, and later distributed as a forced "wife" to an LRA commander, whereupon she was subjected to prolonged victimisation and sexual abuse. During her near decade in the bush, she also committed unspeakable crimes. Crimes against civilians. Crimes against the government. In the context of the armed conflict between the LRA and the Ugandan People's Defence Forces ("UPDF"), some of these were arguably war crimes, contrary to international law. Yet, through the passing of the *Amnesty Act 2000*, the sovereign government of Uganda forgave her. Completely and unconditionally. The Amnesty Commission, the state body mandated to implement the amnesty regime, issued her with an amnesty certificate, and she returned to her community where she lives to this day, along with the two children she mothered in the bush. However, in the age of accountability,[2] the use of such an amnesty as a response to serious violations of human rights is considered incompatible with state obligations to investigate, prosecute and provide effective remedies to victims. This leaves states like Uganda, transitioning from conflict to peacetime with a difficult and stark dilemma – do they abide by these treaty obligations to prosecute, thereby risking social instability and a recurrence of conflict, or do they forego accountability to ensure a lasting and peaceful transition?

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[1] Informant J, Gulu, Uganda, November 2018.

[2] "*Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured* […]." Rome Statute of the International Criminal Court, Preamble. (emphasis in original) *See also* the UN Secretary General's "An Age of Accountability" address to the Review Conference on the International Criminal Court, 31 May 2010: "The old era of impunity is over. In its place, slowly but surely, we are witnessing the birth of a new Age of Accountability." The "age of accountability" is referred to here not as realised political concept, but one that international law increasingly demands. In practical terms, achieving accountability is extremely difficult, and due to under-enforcement and limited jurisdictional reach of international courts, the present political age has also been referred to as the "age of impunity." *See* David Miliband, 'The new arrogance of power: Global politics in the age of impunity', 2019 Fulbright Lecture, 19 June 2019. Available here https://www.rescue.org/press-release/new-arrogance-power-global-politics-age-impunity (accessed 1 May 2021).

Amnesty in the aftermath of atrocity is thus intrinsically linked to the discourse of transitional justice,[3] defined by the United Nations Secretary-General as "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."[4] States transitioning from conflict to peace are encouraged to implement measures – judicial and non-judicial – that address periods of civil strife, to bring truth, justice and accountability.[5] Although not traditionally understood as a transitional justice measure, amnesty is nonetheless a transitionary response, typically designed to forgive, demobilize and reintegrate on a mass scale. Depending on their context and design, amnesties can be blanket or conditional in nature, and can facilitate truth-telling and measures of accountability. They have been used in numerous countries in periods of transition from illiberal rule to a more democratic order, for example in Chile and Argentina following military dictatorship, in South Africa after apartheid,[6] and after periods of internecine conflict, as occurred in Uganda. Often labelled as state-sanctioned impunity, amnesty directly clashes with the anti-impunity and human rights agenda, which champions the contemporary "turn" to criminal law as a means of human rights enforcement.[7] After an initial period of unadulterated amnesty, Uganda experienced its own such turn, with both domestic and international efforts at narrow retributive justice, operating in parallel to the amnesty regime.

In essence, this thesis is an attempt to assess Uganda's experience with amnesty as a response to its civil war, and relatedly, how recent criminal trials have impacted amnesty's legacy. More broadly, it is situated in a field of literature that calls for a reassessment of

[3] *See generally* Neil Kritz, *Transitional Justice: How Emerging Democracies Reckon with Former Regimes* (United States Institute of Peace Press, 1995); Ruti Teitel, *Transitional Justice* (Oxford University Press, 2000); Jon Elster, *Closing the Books: Transitional Justice in Historical Perspective* (Cambridge University Press, 2004); Kieran McEvoy & Lorna McGregor (Eds), *Transitional Justice from Below: Grassroots Activism and the Struggle for Change* (Hart, 2008); Colleen Murphy, *The Conceptual Foundations of Transitional Justice* (Cambridge University Press, 2017).

[4] United Nations, Report of the Secretary-General, *The rule of law and transitional justice in conflict and post-conflict societies*, UN Doc. S/2004/616, 23 August 2004, para.8.

[5] *Id*.

[6] For a comparative overview of various transitional experiences of amnesty, *see* Francesca Lessa & Leigh Payne (Eds), *Amnesty in the Age of Human Rights Accountability*, *Comparative and International Perspectives* (Cambridge University Press, 2012).

[7] Natalie Sedacca, 'The 'Turn' to Criminal Justice in Human Rights Law: An Analysis in the Context of the 2016 Colombian Peace Agreement,' *Human Rights Law Review*, Vol. 19, Issue 2 (2019) 315–345; Karen Engle (Ed), *Anti-Impunity and the Human Rights Agenda* (Cambridge University Press, 2016); Kathryn Sikkink, 'The Age of Accountability: The Global Rise of Individual Criminal Accountability' in Lessa & Payne *supra* note 6; Kathryn Sikkink, *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics* (WW Norton, 2012); Ellen Lutz & Kathryn Sikkink, 'The Justice Cascade: The Evolution and Impact of Foreign Human Rights Trials in Latin America', *Chicago Journal of International Law,* Vol. 2, Issue 1 (2001).

amnesty within international law.[8] With compelling arguments evidenced in a careful examination of state practice, the nuances of treaty wording, and the fragile realities of post-conflict societal reconstruction, this body of literature cogently challenges the crystallising "anti-amnesty norm" argument that is stridently advanced by international courts, scholars and the United Nations, who point to seemingly inflexible treaty-based obligations to investigate and prosecute serious crimes.[9] To contextually frame this debate as the basis for in-depth analysis of Uganda's experience with amnesty[10] and trials,[11] this thesis labels this divide as the "Amnesty Canyon."

1.1 The "Amnesty Canyon"

As we look down over the expanding plains of transitional justice, there is a canyon. On one side, is the "law". Here stand domestic, regional and international courts, the United Nations, treaty bodies, advocacy groups and scholars who hold that amnesties for serious crimes – including war crimes, crimes against humanity, genocide and other gross violations of human rights – are contrary to international law. In support of this position, they rely on positive treaty-based obligations, and point to a crystallising *jus cogens* norm that prohibits amnesty. A consistent line of international jurisprudence in this regard was recently endorsed by judges at the International Criminal Court ("ICC"), who held that:

> "[t]here is a strong, growing, universal tendency that grave and systematic human rights violations – which may amount to crimes against humanity by their very nature – are not subject to amnesties or pardons under international law. […] It follows that granting amnesties and pardons for serious acts such as murder constituting crimes against humanity is incompatible with internationally recognized human rights. Amnesties and pardons intervene with States' positive obligations to investigate, prosecute and punish perpetrators of core crimes. In addition, they deny victims the right to truth, access to justice, and to request reparations where appropriate."[12]

On the other side of this canyon, are certain states – which, ostensibly bound by the law which faces them – nevertheless continue to enact and implement laws that either implicitly or

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[8] *See generally* Louise Mallinder, *Amnesty, Human Rights and Political Transitions: Bridging the Peace and Justice Divide* (Hart Publishing, 2008); Mark Freeman, *Necessary Evils: Amnesties and the Search for Justice* (Cambridge University Press, 2009); Renée Jeffery, *Amnesties, Accountability, and Human Rights* (University of Pennsylvania Press, 2014); Josepha Close, *Amnesty, Serious Crimes and International Law* (Routledge, 2019).

[9] *See further* chapter 2, *infra*.

[10] *See further* chapter 3, *infra*.

[11] *See further* chapter 4, *infra*.

[12] ICC, *Prosecutor v Saif Gadaffi*, 'Decision on the 'Admissibility Challenge by Dr. Saif Al-Islam Gadafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute'', 5 April 2019, paras.61, 77. On appeal, this quoted passage was deemed to be *obiter dicta* by the Appeals Chamber. For further analysis of this decision, *see* section 2.5.3, *infra*.

explicitly grant amnesty for serious violations of human rights. They have primarily done so either to quickly dispose of oppressive regimes, or simply because it was the only way to effectively end bloody civil war and peacefully reintegrate insurgent groups. Amnesty thus still remains a crucial "negotiating tool" for states who are faced with the difficult choice of either ending war through amnesty, or prolonging conflict by pursuing justice, thereby risking the recurrence of atrocity.[13] States continue to enact amnesty laws in order to move past conflict. For example, in 2018 in Ivory Coast, President Alassane Outarra, retroactively amnestied over 800 people detained since post-election violence in 2011, among them Simone Gbagbo, an ICC indictee.[14] In 2019, the Malian government passed amnesty legislation that applies to serious human rights violations.[15] In countries that have negotiated recent peace agreements, amnesties have also been included, for example in Afghanistan[16] and Ukraine.[17] In the fragile setting of South Sudan, its leaders have promoted the granting of amnesty,[18] despite agreed-upon commitments to judicial accountability.[19] After conflict has long since ended, states still attempt to pass amnesty laws, even in defiance of regional courts ordering otherwise, as occurred recently in Guatemala.[20] Also present on this side of the canyon are notable scholars who argue that the absolute prohibition on amnesty is legally questionable. They contend that, in certain circumstances, particularly in internal armed conflict, obligations to prosecute are

[13] Priscilla Hayner, *The Peacemaker's Paradox, Pursuing Justice in the Shadow of Conflict* (Routledge, 2018).

[14] In 2018, President Outarra of Ivory Coast addressed the nation to announce the amnesty of 800 persons including Simone Gbagbo, an ICC indictee: "On Monday I signed an amnesty order that will benefit about 800 citizens prosecuted or sentenced for offences related to the post-election crisis of 2010 or state security offences committed after May 21, 2011." *See France 24*, 'Ivory Coast announces amnesty for former first lady Simone Gbagbo', 6 August 2018.

[15] *See* OHCHR Press Statement, 'New Mali law risks giving rise to impunity for many past human rights violations, says UN expert', 10 September 2019.

[16] United Nations of the High Commissioner for Human Rights, *Afghanistan Annual Report on Protection of Civilians in Armed Conflict: 2016* (February 2017), p. 11: "The peace agreement – which could act as a precedent for future talks with the Taliban − granted a broad amnesty to Hekmatyar and other members of Hezb-i-Islami (Gulbuddin), which would prevent the domestic prosecution of individuals who may be legally responsible for war crimes, genocide, crimes against humanity and other gross violations of human rights."

[17] *See* 'Package of Measures for the Implementation of the Minsk Agreements', 12 February 2015, para.5: "Ensure pardon and amnesty by enacting the law prohibiting the prosecution and punishment of persons in connection with the events that took place in certain areas of the Donetsk and Lugansk regions of Ukraine."

[18] UN Human Rights Council, Assessment mission by the Office of the United Nations High Commissioner for Human Rights to improve human rights, accountability, reconciliation and capacity in South Sudan: detailed findings, UN Doc. A/HRC/31/CRP.6, 10 March 2016: "On 24 February 2015, President Kiir issued Republican Order No. 6/2015, granting amnesty to "all those waging war against the State" who report to Government-controlled areas to take advantage of the offer." *See also* Reuters, 'South Sudan president Kiir grants Machar, other rebels amnesty', 9 August 2018.

[19] Agreement on the Resolution of the Conflict in South Sudan, Addis Ababa, 17 August 2015. *See also* Human Rights, 'South Sudan: No Amnesty for War Crimes, Don't Ignore Victims' Rights, International Obligations', 10 August 2018; Amnesty International, 'South Sudan, crippled justice system and blanket amnesties fuelling impunity for war crimes – new report', 7 October 2019.

[20] Human Rights Watch, 'Guatemala: Reject Amnesty for Atrocity, Inter-American Court Orders Bill Shelved', 13 March 2019.

permissive rather than mandatory.[21] Moreover, they submit that where amnesties incorporate measures that include truth-telling, apology and reparations, they can be considered compatible with international law.

This dividing canyon of opinion on amnesty was recently encapsulated in the International Law Commission's ongoing drafting of the Draft Convention on Crimes Against Humanity.[22] When faced with an ideal opportunity to expressly prohibit amnesty for crimes against humanity, states firmly declined to do so. Notably, states with troubled history of amnesties, like Argentina and Peru, called for an express prohibition of amnesties.[23] Interestingly, Sierra Leone, which decreed an extensive amnesty in wake of a brutal civil war, agreed with the call for express prohibition, but proposed that a distinction be drawn whereby blanket and unconditional amnesties be prohibited, while narrow and conditional amnesties could be permissible.[24] Notably, the Office of the High Commissioner for Human Rights considered it was advisable that an express prohibition be included.[25] However, France and the United Kingdom both argued *against* an amnesty prohibition, with the latter considering "it would be unhelpful to the goal of a widely-accepted convention."[26] Although not mentioning amnesties, the United States was of the view that the *aut dedere aut judicare* wording in draft article 10 should be reconsidered. It was of the view that "the obligation should be to *consider* the matter for prosecution, not to prosecute" and that "a State need not prosecute a case automatically."[27] In addition, the United States argued that "a State could decide to dispose of allegations in other appropriate ways, for example, if the allegations have already been investigated and found to be without basis, or through immigration removal proceedings."[28]

In his Third Report on the draft convention, the Special Rapporteur Prof. Sean Murphy, reviewed the major caselaw on amnesty, and acknowledged the diverging scholarly position

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[21] Kieran McEvoy & Louise Mallinder, 'Amnesties in Transition: Punishment, Restoration, and the Governance of Mercy', *Journal of Law and Society*, Vol. 39, Issue 3 (2012) 410-440 at 418.

[22] Sarah Nouwen, 'Is there Something Missing in the Proposed Convention on Crimes Against Humanity?: A Political Question for States and a Doctrinal One for the International Law Commission,' *Journal of International Criminal Justice*, Vol. 16, Issue 4 (2018) 877–908.

[23] International Law Commission, Crimes against humanity: Comments and observations received from Governments, international organizations and others, UN Doc. A/CN.4/726, 21 January 2019: chapter II.B.7, p.65 (Argentina); chapter II.A, p.15 (Peru); and chapter II.B.7, p.21 (Uruguay).

[24] *Id*., chapter II.B.10, p.95 (Sierra Leone).

[25] *Id*., chapter III.A, p.132.

[26] *Id.*, chapter II.A, p.20 (United Kingdom).

[27] *Id*., Addendum, UN Doc. A/CN.4/726/Add.2, pp.15-16 (United States).

[28] *Id*., p.16.

that exists.[29] He referred to the *The Belfast Guidelines on Amnesty and Accountability*, which concluded that the current state of *opinio juris* and state practice on amnesties "does not reflect an established, explicit and categorical customary prohibition of amnesties for international crimes."[30] Consequently, he recommended that the draft convention should not address the issue of amnesty,[31] a position reaffirmed in his Fourth Report in 2019.[32] However, the International Law Commission commentary on the convention states that where an amnesty is adopted, its permissibility would need to be evaluated "in the light of that State's obligations under the present draft articles to criminalize crimes against humanity, to comply with its *aut dedere aut judicare* obligation, and to fulfil its obligations in relation to victims and others,[33] a position recently reaffirmed.[34] It remains clear, therefore, that there presently exists no customary international norm that defined as "a general practice accepted as law,"[35] that prohibits amnesty. The two elements of a customary norm, state practice (being extensive and virtually uniform) and *opinio juris* (the belief of states that they are legally bound to follow such practice)[36] have yet to firmly align on the amnesty question. Nonetheless, states in the aftermath of mass atrocity are told in no uncertain terms by multilateral institutions, international courts, advocacy groups and certain scholars that amnesties for serious crimes are iniquitous, because their (international) legality is questionable and their enactment a vehicle for impunity, and thus, morally abhorrent in the age of accountability.

Yet, in the valley of this amnesty canyon, live ordinary people. Ordinary people dealing with extraordinary circumstances, struggling to deal with the horror of war and its aftermath. Men who willingly chose to rebel against the state. Conscripted children forced to kill and

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[29] UN Special Rapporteur, *Third report on crimes against humanity*, UN Doc. A/CN.4/704, 23 January 2017, paras.281-297.

[30] *The Belfast Guidelines on Amnesty and Accountability* (University of Ulster, 2013), guideline 6(d).

[31] *Third report on crimes against humanity*, *supra* note 29, para.297.

[32] UN Special Rapporteur, *Fourth report on crimes against humanity*, UN Doc. A/CN.4/725, 18 February 2019, paras.302-305: "The Special Rapporteur remains of the view that a prohibition on amnesties need not be reflected in the draft articles, just as it does not exist in treaties addressing other crimes, but that the Commission may wish to consider changes to the commentary to take into account some of the comments received."

[33] International Law Commission, *Report of the International Law Commission on the work of its sixty-ninth session*, UN. Doc. A/72/10, 1 May-2 June and 3 July-4 August 2017, commentary to draft article 10, p.88, para.11.

[34] International Law Commission, *Report of the International Law Commission on the work of its seventy-first session*, UN. Doc. A/74/10, 29 April–7 June and 8 July–9 August 2019, commentary to draft article 10, p.97, para.13 (Advance version).

[35] *See* Statute of the International Court of Justice, article 38(1), which states:
1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: [...] b. international custom, as evidence of a general practice accepted as law; [...] d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law. (emphasis added)

[36] International Court of Justice, *North Sea Continental Shelf Cases* (Federal Republic of Germany v Denmark/ Federal Republic of Germany v Netherlands) (Merits) [1969] ICJ Rep 3, para.74.

fight. Abducted girls forcibly married, raped and enslaved. Innocent civilians killed. Many others emotionally and physically maimed forever, displaced from their homes and rebuilding their lives now that war has ended – a war ended by amnesty. The people of northern Uganda live in this valley.

1.2 Background – Northern Uganda and the Journey Towards Amnesty

For the best part of two decades, northern Uganda was ravaged by war and conflict. From the mid-1980s, the Lord's Resistance Army ("LRA") was engaged in a prolonged armed rebellion against the Ugandan government. A religious politico-military movement, the LRA evolved out of the remnants of a similar group operating in northern Uganda, the Holy Spirit Movement, led by Alice Lakwena.[37] Led by a reputed cousin of Lakwena, Joseph Kony, the LRA essentially fought on a platform of correcting long-term social neglect of the Acholi people of northern Uganda. Commonly referred to as the group that sought to "rule Uganda by the Ten Commandments", there is evidence that the LRA also sought to advance a sophisticated political agenda, with manifestos being circulated among the general population in the mid-1990s that discussed policy on areas such as health, education and political reform.[38] However, in pursuing political change on behalf of the Acholi, devastating cruelty was inflicted on the very people the LRA sought to represent. Adopting a warped pseudo-religious outlook, Kony presided over an armed regime that abducted thousands of civilians into the LRA, many of them young children, and forced them to participate in a rebellion that became notorious for committing serious violations of human rights.[39] These violations included murder, cruel treatment, enslavement, conscription and use of child soldiers in hostilities, pillaging, destruction of property and systemic practices of sexual and gender-based violence, whereby young women and girls were distributed as "forced wives" to LRA fighters.[40] The LRA was

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[37] On the origins of the LRA, *see* Rudy Doom & Koen Vlassenroot, 'Kony's Message: A New Koine? The Lord's Resistance Army in Northern Uganda', *African Affairs,* Vol. 98, Issue 390 (1999) 5-36; Heike Behrend, *Alice Lakwena and the Holy Spirits, War in Northern Uganda 1986-1997* (Currey, 1999).

[38] For further discussion of these manifestos, *see* Sverker Finnström, *Living in Bad Surroundings* (Duke University Press, 2008), chapter 3.

[39] The nature of the victimisation of the civilian population has been well documented throughout the conflict by various national and international bodies and academics. *See, e.g.*, Chris Dolan, *Social Torture, The case of northern Uganda 1986-2006* (Berghahn, 2009); United Nations Office of the High Commissioner for Human Rights, *The Dust Has Not Yet Settled* (2011); Adam Branch, *Displacing Human Rights, War and Intervention in Northern Uganda* (Oxford University Press, 2011).

[40] *See further*, Erin Baines, 'Forced Marriage as a Political Project, Sexual Rules and Relations in the Lord's Resistance Army', *Journal of Peace Research*, Vol. 51, Issue 3 (2014) 405-417; Holly Porter, *After Rape, Violence, Justice and Social Harmony in Uganda* (Cambridge University Press, 2016).

not alone in committing human rights violations during the conflict. The state army, the UPDF, was also implicated in perpetrating human rights violations,[41] with some arguing that the government artificially prolonged the war for strategic and military reasons.[42]

As the conflict worsened, the Ugandan government mandated that the local population move to internally displaced persons ("IDP") camps, which by 2004 contained an estimated 1.7 million people.[43] Infamously referred to by Jan Egeland as the "most forgotten and neglected humanitarian crisis in the world",[44] in 2005 the WHO estimated that the camp conditions were causing in excess of 1,000 deaths a week.[45] Camps were also subject to routine attack by the LRA, who came in search of supplies and abductees.[46] Prolonged existence in these IDP camps deeply eroded the cultural and social norms of the people in northern Uganda, and the conflict has severely damaged the region's economy, from which it is still recovering.[47]

For many years, a resolution to the conflict seemed elusive. Periodic attempts at peace talks failed, and war resumed. Throughout, criminal accountability for crimes committed by LRA fighters was non-existent. Unable to comprehensively defeat the LRA militarily, the government began contemplating alternative methods of ending the war. Following sustained lobbying from religious, political and community leaders in northern Uganda, in December 1999 the Ugandan parliament passed the *Amnesty Act*, which came into force in January 2000. This landmark piece of legislation marked a key transitional turning point in the history of the northern conflict, with the state granting amnesty to all those who "renounced rebellion." In attempting to overcome the conflict, Uganda provided a fascinating example of just one of many states grappling with the complex realities of the peace versus justice dilemma – whether to choose the path of accountability at the potential expense of reconciliation and social cohesion, or to abandon justice in the hope of ensuring a lasting, peaceful transition after conflict.[48] It is to be acknowledged that "justice" has different meanings for different societies.

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[41] *See e.g.*, Human Rights Watch, *Uprooted and forgotten: Impunity and human rights abuses in northern Uganda* (2005).

[42] Adam Branch, 'Uganda's Civil War and the Politics of ICC intervention', *Ethics and International Affairs*, Vol. 21, Issue 2 (2007) 179-198.

[43] World Food Programme, *Annual Report* (2004), p.19.

[44] Jan Egeland, *A Billion Lives: An Eyewitness Report from the Frontlines of Humanity* (Simon & Schuster, 2008) p.201.

[45] World Health Organisation & Ugandan Ministry of Health, *Health and Mortality Survey Among Internally Displaced Persons in Gulu, Kitgum and Pader Districts, Northern Uganda* (July 2005), p.35.

[46] Human Rights Watch, *supra* note 41, pp.22-24.

[47] *See* Finnström, *supra* note 38.

[48] *See generally* Chandra Lekha Siriam & Suren Pillay, *Peace versus Justice – The Dilemma of Transitional Justice in Africa* (University of KwaZulu Natal, 2009).

In Uganda, and for the Acholi people in particular, the language of justice is not inherently linked to formal, judicial processes. Local accountability processes focus on the restoration of relationships, reparation and apologies, rather than retributive, criminal justice.[49] Although traditional justice has frequently been put forward by academics as a viable and culturally appropriate alternative in Uganda, the reality is that its utilisation to respond to civil war atrocities has been virtually non-existent.[50] After a slow start, by 2005 almost 10,000 LRA fighters had received amnesty.[51] However, after a number of productive years of the amnesty regime, Uganda turned to more formal methods of accountability, as the following section explains.

1.3 The Prosecutorial Turn

As the amnesty regime in Uganda progressed with large numbers of defections occurring, the prospect of prosecutorial justice also emerged. In 2005, following the state referral of the situation in Uganda by the government,[52] the Court issued arrest warrants for five leading members of the LRA.[53] It has been argued that ICC intervention jeopardized any prospect of a negotiated settlement, but others contend that the warrants were a key factor in persuading the LRA to participate in the Juba peace negotiations that began in 2006 under the mediation of South Sudanese politician, Riek Machar.[54] Although Kony did not sign the final peace agreement, one of the annexes on proposed accountability and reconciliation measures

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[49] *See* Sarah Nouwen & Wouter Werner, 'Monopolizing Global Justice: International Criminal Law as Challenge to Human Diversity', *Journal of International Criminal Justice,* Vol. 13, Issue 1 (2015) 157-176.

[50] The reasons for this are discussed in Chapter 5.4, *infra*.

[51] Ganyana Miiro records the number of LRA amnesty recipients in 2005 to be 9,555. *See* Bruhan Ganyana Miiro, *Amnesty and Peace Building in Uganda* (Bugambi, 2015), p.75.

[52] Initially referred by Ugandan government as the 'Situation concerning the Lord's Resistance Army', it was later referred to by the OTP as the 'Situation in Uganda,' a clarification that the ICC may investigate crimes committed by any person within its jurisdiction, regardless of affiliation.

[53] Following a self-referral inviting ICC intervention in the Ugandan situation, warrants of arrest were issued for Joseph Kony, Vincent Otti, Okot Odhiambo, Raska Lukwiya and Dominic Ongwen. Ongwen surrendered in the Central African Republic in January 2015 and was transferred to the seat of the Court in The Hague, and his trial commenced in December 2016. Lukwiya and Odhiambo are confirmed to be deceased, while Otti is also presumed dead after being allegedly executed by Kony in 2007, who still remains at large. For an in-depth account analysis of the intervention of the ICC in the Ugandan context, *see* Tim Allen, *Trial Justice, The International Criminal Court and the Lord's Resistance Army* (Zed Books, 2006).

[54] For further discussion of this aspect, *see* Kasaija Apuuli, 'The ICC Arrest Warrants for the Lord's Resistance Army Leaders and Peace Prospects for Northern Uganda', *Journal of International Criminal Justice*, Vol.4, Issue 1 (2006) 179-187; Mark Kersten, *Justice in Conflict, The Effects of the International Criminal Court's Interventions on Ending Wars and Building Peace* (Oxford University Press, 2016), Chapter 4, 'The ICC and the Road to Juba'.

was signed by the LRA delegation,[55] aspects of which the Ugandan government has sought to implement. This particular agreement provided for the creation of a special division of the High Court, "to try individuals who have committed serious crimes during the conflict",[56] a clear recognition by the parties that prosecution of serious human rights abuses was expected. This subsequently led to the creation of the International Crimes Division ("ICD") of the High Court, which was formally established in 2011.[57]

Despite national and international commitment to criminal accountability, the prospect of retributive justice for LRA fighters in Uganda remained theoretical and spoken of in the abstract – never existent. With the LRA out of reach in the Democratic Republic of the Congo, the ICC warrants could not be executed, and the ICD took years to become operational. Meanwhile, the domestic policy of mass forgiveness through amnesty continued unabated. For the rank and file of the LRA, the transitional reality was one of unconditional forgiveness through amnesty. However, while the legislative amnesty was unconditional in the sense that nothing was required of the applicant in terms of specific admission of conduct or responsibility, other locally utilised mechanisms of reconciliation do require an apology by the perpetrator, and usually the offering of compensation to victims.[58]

Between the years 2000-2011, almost 13,000 LRA fighters received amnesty and returned home to their communities.[59] That is, until 10 January 2010, when an LRA commander named Thomas Kwoyelo applied for amnesty from his prison cell. It was an application that was to be ultimately denied five years later by a landmark Supreme Court judgement in 2015, a decision which narrowed the scope of amnesty to exclude crimes against civilians, thus sanctioning Kwoyelo's prosecution for international crimes committed during the conflict, including murder, rape and torture.[60] The amnesty question may be legally settled in his case, but the social ramifications of this ruling, particularly for thousands of amnesty recipients, run much deeper. In the same year Kwoyelo was denied amnesty, one of the ICC

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[55] Agreement on Accountability and Reconciliation between the Government of Uganda and the Lord's Resistance Army/Movement, 29 June 2007, section 4.1.

[56] Annexure to the Agreement on Accountability and Reconciliation, 19 February 2008, section 7.

[57] Republic of Uganda, The High Court (International Crimes Division), Practice Directions, Legal Notice no. 10 of 2011, Legal Notices Supplement, Uganda Gazette, no. 38, vol. CIV (31 May 2011).

[58] *See* Erin Baines, 'The Haunting of Alice: Local Approaches to Justice and Reconciliation in Northern Uganda', *International Journal of Transitional Justice,* Vol.1, Issue 1 (2007) 91-114.

[59] Ganyana Miiro, *supra* note 51, p.78.

[60] *See generally* Paul Bradfield, 'Reshaping Amnesty in Uganda, The Case of Thomas Kwoyelo', *Journal of International Criminal Justice*, Vol. 15, Issue 4 (2017) 827-855. For further discussion of Kwoyelo's case, see chapter 4.5 *infra*.

indictees, Dominic Ongwen, was arrested and transferred to The Hague for trial, which began in December 2016. Amnesty has not been raised as a legal issue in his case. Rather, the focus has instead been on Ongwen's victimhood, presented as the factual basis for the legal defences of duress and mental disease. Dominic Ongwen was abducted into the LRA as a young boy, rising through the ranks to hold significant authority as a Brigade Commander. He stands accused of 70 counts of war crimes and crimes against humanity,[61] including personally committing rape and sexual slavery.[62] He is both a victim and a perpetrator.[63] This "victim-perpetrator" dilemma is a central theme of the amnesty process in Uganda. Given that the LRA was, in essence, an army of conscripted and enslaved abductees, amnesty was seen by cultural and political leaders as the morally "right" thing to do – a non-retributive measure designed to encourage mass defection and reintegrate persons who could be legally culpable, but were deemed morally innocent.[64]

Under the letter of the *Amnesty Act*, both Kwoyelo and Ongwen were arguably entitled to amnesty. Indeed, many of their LRA peers, some of them more senior in rank and themselves implicated in serious crimes, have received amnesty and live as free men in the communities they previously victimised. However, the prosecution of these two men – particularly Kwoyelo, who litigated the amnesty issue in Ugandan courts – arguably erodes the legitimacy of the amnesty project in Uganda, as it undermines the assurances that amnesty initially offered to rebels in the bush. These themes – both forgiving and prosecuting victim-perpetrators – form the contextual bedrock of this thesis, which, as discussed in the next section, aims to ultimately assess the impact of these processes upon the people of northern Uganda.

1.4 The Thesis Question: Assessing the Impact of Amnesty in Northern Uganda

The *Amnesty Act 2000* is now 20 years old, and the part of the Act granting amnesty itself lapsed in 2019. Over two decades, 27,000 people received amnesty certificates – half of these from the LRA. During this time, however, the transitional justice literature on Uganda has not

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[61] ICC, *Prosecutor v Dominic Ongwen*, 'Decision on the confirmation of charges against Dominic Ongwen', 23 March 2016.

[62] *See further* Paul Bradfield, 'Preserving Vulnerable evidence at the International Criminal Court – the Article 56 Milestone in Ongwen', *International Criminal Law Review*, Vol. 19, Issue 3 (2019) 373-411.

[63] *See generally* Erin Baines, 'Complicating Victims and Perpetrators in Uganda: On Dominic Ongwen', Justice and Reconciliation Project Field Note No. 7 (2008); Mark Drumbl, 'Victims who victimise', *London Review of International Law,* Vol. 4, Issue 2 (2016) 217-246; Adam Branch, 'Dominic Ongwen on Trial, The ICC's African Dilemmas', *International Journal of Transitional Justice*, Vol. 11, Issue 1 (2017) 30-49.

[64] Acholi Religious Leaders Peace Initiative, *Seventy Times Seven*, *The Implementation and Impact of the Amnesty Law in Acholi* (2002), p.7; Refugee Law Project, *Whose Justice? Perceptions of Uganda's Amnesty Act 2000: The Potential for Conflict Resolution and Long-Term Reconciliation*, Working Paper No. 15 (2005), p.6.

embarked upon critical assessments of the amnesty project. Instead, the literature has heavily focused on the peace process,[65] the intervention of the ICC,[66] its role in catalysing domestic judicial efforts,[67] the politics of the Court's intervention,[68] possible recourse to traditional justice,[69] the impact of the war on victims and abductees,[70] and the politics of the transitional justice policy space in general.[71] While Uganda's recourse to amnesty has prompted interesting legal analyses,[72] mid-term appraisals,[73] and one domestic publication recounting its work,[74] it is notable that there is no comprehensive assessment of its impact or overall performance in the existing literature. As such, little is empirically known about the social impact of the amnesty in Uganda. The existing literature that examines amnesty – which is often only a partial component of broader research topics and reports – is to be found in a mixture of quantitative population-based surveys,[75] academic reports,[76] NGO reports,[77] UN reports,[78]

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[65] Joanna Quinn, 'Getting to Peace? Negotiating with the LRA in Northern Uganda', *Human Rights Review*, Vol. 10, Issue 1 (2009) 55-71.

[66] Allen, *supra* note 53.

[67] Sarah Nouwen, *Complementarity in the Line of Fire, The Catalysing Effects of the International Criminal Court in Uganda and Sudan* (Cambridge University Press, 2013).

[68] Phil Clark, *Distant Justice, The Impact of the International Criminal Court on African Politics* (Cambridge University Press, 2019).

[69] Baines, *supra* note 58.

[70] *See e.g.,* Phoung Pham, Patrick Vinck & Eric Stover, 'The Lord's Resistance Army and Forced Conscription in Northern Uganda', *Human Rights Quarterly* Vol. 30, Issue 2 (2008) 404-411; Erin Baines, *Buried in the Heart, Women, Complex Victimhood and the War in Northern Uganda* (Cambridge University Press, 2017).

[71] Anna Macdonald, 'Somehow This Whole Process Became so Artificial': Exploring the Transitional Justice Implementation Gap in Uganda', *International Journal of Transitional Justice*, Vol. 13, Issue 2 (2019) 225–248.

[72] Apuuli, *supra* note 54; Manisuli Ssenyonjo, 'Accountability of Non-State Actors in Uganda for War Crimes and Human Rights Violations: Between Amnesty and the International Criminal Court,' *Journal of Conflict and Security Law*, Vol. 10, Issue 3 (2005) 405–434.

[73] Louise Mallinder, 'Uganda at a Crossroads: Narrowing the Amnesty?', Working Paper No.1 from *Beyond Legalism, Amnesties, Transition and Criminal Justice* (Queens University Belfast, 2009).

[74] Ganyana Miiro, *supra* note 51.

[75] Phuong Pham, Patrick Vinck, Marieke Wierda, Eric Stover & Adrian di Giovanni, *Forgotten Voices: A Population-Based Survey of Attitudes about Peace and Justice in Northern Uganda* (International Center for Transitional Justice & Berkley Human Rights Centre, 2005); Phuong Pham, Patrick Vinck, Marieke Wierda, Eric Stover, Andrew Moss & Richard Bailey, *When the War Ends: A Population-Based Survey of Attitudes about Peace, Justice and Social Reconstruction in Northern Uganda* (International Center for Transitional Justice & Berkley Human Rights Centre, 2007); Phuong Pham & Patrick Vinck, *Transitioning to Peace: A Population-Based Survey on Attitudes About Social Reconstruction and Justice in Northern Uganda* (Berkley Human Rights Centre, 2010).

[76] Tim Allen & Marieke Schomerus, *A Hard Homecoming: Lessons Learned from the Reception Center Process in Northern Uganda* (Management Systems International, 2006; Zachary Lomo & Lucy Hovil, *Behind the Violence, the War in Northern Uganda* (Institute for Security Studies, 2004).

[77] Refugee Law Project, *Whose Justice? Perceptions of Uganda's Amnesty Act 2000: The Potential for Conflict Resolution and Long-Term Reconciliation*, Working Paper No. 15 (February 2005); *Peace First, Justice Later: Traditional Justice in Northern Uganda,* Working Paper No. 17 (July 2005); Justice and Reconciliation Project, *Who Forgives Whom? Northern Uganda Grassroots Views on the Amnesty Act*, Policy Brief (June 2012).

[78] United Nations Office of the High Commissioner for Human Rights, *Making Peace Our Own, Victims' Perceptions of Accountability, Reconciliation and Transitional Justice in Northern Uganda* (2007).

World Bank reports,[79] and multi-faith group reports.[80] Moreover, there is a wealth of scholarship that analyses the psychological harm and reintegration challenges faced by former combatants, including men, women and children "born of war" in northern Uganda.[81] However, few scholars tie such analyses, or consider it in conjunction with, the operation of amnesty, or offer in-depth appraisals of amnesty as a transitional justice mechanism. This is a significant gap in the literature on transitional justice in northern Uganda.

This thesis therefore seeks to fill this critical gap in transitional justice discourse in Uganda. With the amnesty project thus effectively completed, at least in the administrative sense, the time now is ripe to ask a critical set of questions, which heretofore has not been attempted in any meaningful or rigorous way, academically or on a policy level:

- How has Uganda's amnesty process *performed*?
- What has been the *impact* on both recipients and their communities?
- Relatedly, what has been the *effect* of recent prosecutions on the amnesty project?
- And more broadly, how does Uganda's domestic experience with amnesty *inform* the ongoing debate around the compatibility of amnesty with international law?

To embark on such a study, two salient questions first demand enquiry: (i) By what criteria should amnesty as a transitional justice mechanism be assessed; and (ii) how can amnesty's impact then be measured? To ground discussion of these two important questions, it is necessary to first survey the literature on impact assessment of transitional justice mechanisms, a body of theoretical work that, despite the exponential growth in transitional justice scholarship, itself remains nascent and contested.

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[79] Anthony Finn, *The Drivers of Reporter Reintegration in Northern Uganda* (World Bank, 2012); Anthony Finn *et al., Uganda Demobilization and Reintegration Project, The Beneficiary Assessment* (World Bank, 2012).

[80] Acholi Religious Leaders Peace Initiative, *Seventy Times Seven*, *The Implementation and Impact of the Amnesty Law in Acholi* (2002); Muslim Centre for Justice & Law, *A Qualitative Assessment on the Effectiveness of the Amnesty Commission in Rehabilitating and Reintegrating of Former Violent Offenders, A focus on ex-offenders (WBNF, UNRF I, UNRF II and ADF) as well as the extent to which Muslim civil society has played a complementary role in these efforts*, Research Report (2017).

[81] *See for example*, Tim Allen *et. al*, 'What Happened to Children Who Returned from the Lord's Resistance Army in Uganda?' *Journal of Refugee Studies* (2020) (Note: at the time of writing, this article is online only and has no assigned volume number); Grace Akello, 'Reintegration of Amnestied LRA Ex-Combatants and Survivors' Resistance Acts in Acholiland, Northern Uganda,' *International Journal of Transitional Justice*, Vol. 13, Issue 2 (2019) 249–267; Jeannie Annan, Christopher Blattman, Dyan Mazurana & Khristopher Carlson, 'Civil War, Reintegration, and Gender in Northern Uganda', *Journal of Conflict Resolution*, Vol. 55, Issue 6 (2011) 877-908; Kennedy Amone-P'Olak, 'Coping with Life in Rebel Captivity and the Challenge of Reintegrating Formerly Abducted Boys in Northern Uganda,' *Journal of Refugee Studies*, Vol. 20, Issue 4 (2007) 641–661.

1.4.1 Assessing the Impact of Transitional Justice Mechanisms

The last 30 years have produced a surge of scholarship and literature on transitional justice and post-conflict studies. To effect a "just" transition, societies emerging from conflict and authoritarian regimes are now encouraged to implement one or more of the mechanisms found in the transitional justice "toolbox", *i.e.,* the mechanisms most associated with the field, namely trials, truth-telling, reparations, memorialisation, lustration and institutional reform.[82] Scholars have advanced a series of claims about these mechanisms, principally that they promote peace, enhance respect for the rule of law, foster reconciliation, and allow broken societies to rehabilitate after conflict to coalesce around core principles of democracy and human rights. Attached to each of these mechanisms are conceptual claims that have hardened over time. For example, trials are said to promote respect for the rule of law[83] and strengthen democracy,[84] truth commissions are said to foster reconciliation and social healing,[85] while reparations enhance trust and social cohesiveness.[86] Amnesties are said to promote conflict resolution and peacebuilding,[87] but are also said to undermine – by reason of the impunity that can sometimes result – both the rule of law and reconciliation efforts.[88] Yet, despite these sweeping theoretical assumptions and conceptual claims, there remains extremely limited empirical work that tests these claims, to undertake the difficult task of assessing the impact of transitional justice mechanisms on community level, state level, or from a comparative perspective between states. Hazan considers that this lack of evaluative data is down to two reasons, namely methodological obstacles and the fact that transitional justice debates are ideological and deeply polarized.[89]

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[82] Dustin Sharp, *Rethinking Transitional Justice for the Twenty First Century: Beyond the End of History* (Cambridge University Press, 2018), p.43.

[83] Juan Méndez, 'Accountability for Past Abuses', *Human Rights Quarterly*, Vol. 19, Issue 2 (1997) 255–82; Teitel, *supra* note 3.

[84] Aneta Wierzynska, 'Consolidating Democracy through Transitional Justice: Rwanda's Gacaca Courts', *New York University Law Review,* Vol. 79, Issue 5 (2004) 1934–1970.

[85] Priscilla Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions* (Routledge, 2010).

[86] Pablo de Greiff, 'Justice and Reparations' in *The Handbook of Reparations* (Oxford University Press, 2006) 451–477.

[87] Mallinder, *supra* note 8; Freeman, *supra* note 8.

[88] United Nations, *Rule-of-Law Tools for Post-Conflict States – Amnesties* (2009), p.45: "Experience has shown that a culture of impunity and a legacy of past crimes that go unaddressed are likely to undermine a lasting peace."

[89] Pierre Hazan, ''Measuring the Impact of Punishment and Forgiveness: A Framework for Evaluating Transitional Justice, *International Review of the Red Cross*, Vol. 88, Issue 861 (2006) 19-47 at 22.

Scholars within the field has recognised this gap in the literature, and there have been notable attempts to tackle it. In 2009, Van der Merwe *et al*. produced a seminal work to begin addressing this lacuna, noting that empirical research "can make a vital contribution to understanding what it means for a society to go through a transitional justice process, and it can help analyse the process' short- and long- term impact."[90] Two special journal editions have since sought to analyse impacts and effects of transitional justice interventions,[91] and further studies have sought to undertake the difficult tasks of assessing the impact of individual mechanisms such as trials,[92] outreach initiatives[93] and truth commissions.[94] However, attempts to analyse the impact, and effectiveness of, amnesties *per se* remain scarce. The most commonly studied example is South Africa, regarding which there has been a large amount of literature examining the performance of its conditional amnesty process, and whether its objectives have been realised.[95] Yet, most of this literature focuses on perceptions of the Truth and Reconciliation Commission process, rather than the impact of amnesty.

Beyond the South African experience, the lack of performative assessment of amnesties, and their contribution – positive or negative – to societies transitioning from conflict is stark. This absence is remarkable, considering that in a database of transitional justice mechanisms compiled by Olsen *et al*., of a total of 848 mechanisms (trials, truth commissions, amnesties, reparations, lustration policies) used in 161 countries, amnesties were the most frequently used form of transitional justice, accounting for half (424) of mechanisms adopted.[96]

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[90] Hugo Van Der Merwe, Victoria Baxter & Audrey Chapman, *Assessing the Impact of Transitional Justice: Challenges for Empirical Research* (United States Institute of Peace Press, 2009), p.4.

[91] Colleen Duggan, 'Editorial Note, Special Issue: Transitional Justice on Trial – Evaluating its Impact,' *International Journal of Transitional Justice*, Vol. 4, Issue 3 (2010) 315–328; Thorsten Bonacker & Susane Buckley-Zistel, 'Introduction, Transitions from Violence, Analysing the Effects of Transitional Justice', *International Journal of Conflict and Violence*, Vol. 7, Issue 1 (2013) 4-9.

[92] Kathryn Sikkink & Carrie Walling, 'The Impact of Human Rights Trials in Latin America,' *Journal of Peace Research*, Vol. 44, Issue 4 (2007) 427-455; Diane Orentlicher, *Some Kind of Justice: The ICTY's Impact in Bosnia and Serbia* (Oxford University Press, 2018); Phil Clark, *Distant Justice, The Impact of the International Criminal Court on African Politics* (Cambridge University Press, 2019).

[93] Patrick Vinck & Phuong Pham, 'Outreach Evaluation: The International Criminal Court in the Central African Republic', *International Journal of Transitional Justice*, Vol. 4, Issue 3 (2010) 421–442.

[94] Eric Wiebelhaus-Brahm, *Truth Commissions and Transitional Societies*: *The Impact on Human Rights and Democracy* (Routledge, 2010); Anita Ferrara, *Assessing the Long-term Impact of Truth Commissions: The Chilean Truth and Reconciliation Commission in Historical Perspective* (Routledge, 2015).

[95] *See e.g.* Jay Vora & Erika Vora, 'The Effectiveness of South Africa's Truth and Reconciliation Commission: Perceptions of Xhosa, Afrikaner, and English South Africans' *Journal of Black Studies*, Vol. 34, Issue 3 (2004) 301–322; Hugo Van Der Merwe & Audrey Chapman (Eds), *Truth and Reconciliation in South Africa, Did the TRC deliver?* (University of Pennsylvania Press, 2008); David Backer, 'Watching a Bargain Unravel? A Panel Study of Victims' Attitudes about Transitional Justice in Cape Town, South Africa', *International Journal of Transitional Justice*, Vol. 4, Issue 3 (2010) 443–456.

[96] Tricia Olsen, Leigh Payne & Andrew Reiter, *Transitional Justice In Balance, Comparing Processes, Weighing Efficacy* (United States Institute of Peace Press, 2010) p.39.

Yet, the weight of scholarship lies on the side of trials and truth commissions. While there has been recent rich analysis and reflections upon the use of amnesties in settings such as Aceh,[97] Mozambique,[98] and even in Uganda,[99] this body of work does not seek to empirically *assess* the performative impact of these amnesties. On a comparative level, one large-N comparative study of post-conflict justice mechanisms carried out by Lie *et al*. concluded that amnesties "reduced peace duration" and "increases the risk of peace failure".[100] However, in their seminal study of 161 countries, Olsen *et al*. conclude differently, finding that when used alone, both trials and amnesties "had no significant effect on the quality of democracy or human rights measures."[101] Notably, when used alone and not paired with amnesties, truth commissions "had a negative effect on human rights protections."[102] However, when used in combination, their effect was positive, particularly the combination of trials and amnesties.[103] Recent research of trials and amesites in over one hundred democratic transitions conducted by Dancy *et al* suggests that amnesties "enhance the prospects for civil and political rights protections."[104] Also, Dancy's individual research on amnesties passed amid ongoing intrastate hostilities since 1946 finds that amnesties "do not appear to increase the probability of conflict termination. However, they do decrease the risk of conflict recurrence when offered during negotiations at the end of fighting."[105] Moreover, Dancy finds that "amnesties' post-termination pacifying effects are strong when they accompany a formal peace agreement, but absent in instances where the offer exculpates combatants for atrocity crimes and other serious violations of human rights."[106] Conceptual claims therefore remain contested and scholars in strong disagreement over the impact of transitional justice mechanisms, in particular the utility and effect of amnesties.

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[97] Renée Jeffery, 'Amnesty and Accountability: The Price of Peace in Aceh, Indonesia, *International Journal of Transitional Justice*, Vol. 6, Issue 1 (2012) 60–82.

[98] Victor Igreja, 'Amnesty Law, Political Struggles for Legitimacy and Violence in Mozambique', *International Journal of Transitional Justice*, Vol. 9, Issue 2 (2015) 239–258.

[99] Grace Akello, 'Reintegration of Amnestied LRA Ex-Combatants and Survivors' Resistance Acts in Acholiland, Northern Uganda, *International Journal of Transitional Justice*, Vol. 13, Issue 2 (2019) 249–267.

[100] Tove Grete Lie, Helga Malmin Binningsbø & Scott Gates, *Post-Conflict Justice and Sustainable Peace*, Post-Conflict Transitions Working Paper No.5 (World Bank, 2007), p.15.

[101] Olsen *et al.*, *supra* note 96, pp.143-144.

[102] *Id*., p.144.

[103] *Id*., p.145.

[104] Geoff Dancy *et al*., 'Behind bars and bargains: New findings on transitional justice in emerging democracies', *International Studies Quarterly,* Vol. 63, Issue 1 (2019) 99-110 at 109.

[105] Geoff Dancy, 'Deals with the devil? conflict amnesties, civil war, and sustainable peace', *International Organization*, Vol. 72, Issue 2 (2018) 387-421 at 388.

[106] *Id*. For similar research findings that shows that giving generous amnesties during conflict is not of use in ending conflict sooner, *see* Lesley-Ann Daniels, 'How and when amnesty during conflict affects conflict termination', *Journal of Conflict Resolution,* Vol. 64, Issue 9 (2020) 1612-1637.

In 2010, Thoms *et al*. conducted a systematic review of the literature on state-level impacts of transitional justice mechanisms, which they acknowledged to be limited and nascent. Notably, they assert that strong transitional justice claims tended to be based on "faith rather than fact", with both individual and cross-national case studies often raising contradictory findings. For example, they note that Snyder and Vinjamuri find potentially negative effects of trials and truth commissions, but Sikkink and Walling find no harmful effects in the case of trials.[107] More generally, they argue that strong claims that transitional justice mechanisms have positive or negative effects are not supported by the existing literature. When it comes to empirical research, Dancy makes a distinction between "evaluation" and "impact assessment", with the former assessing the strengths and weaknesses of programs, with the latter isolating social or political factors that might be affected by a process, and examining how they have been changed or altered.[108]

In essence, the existing literature focuses on the method of transitional justice mechanisms or their legal foundation. These analyses are useful, but tell us little about the impact of such mechanisms on different sectors of society.[109] Empirical research can begin to answer the questions of impact and serve as a basis for evaluating transitional justice mechanisms.[110] For example, do key groups – victims, perpetrators, beneficiaries, bystanders – view a mechanism as unbiased and objective? Were the methods appropriate? Are the results or outcomes accepted or contested?[111] If actors such as the United Nations, advocacy groups, NGOs and scholars seek to put forward a set of best practices to be employed in transitional settings, such as those contained in the metaphorical "toolbox", then it then becomes incumbent to then evaluate those mechanisms where implemented, and ask the difficult follow-up empirical questions that pertain to efficacy, impact and legacy. Furthermore, where international law dictates that certain responses should be prohibited – like amnesty for serious crimes – it becomes even more crucial to examine and evaluate such responses where they occur. The results of such empirical enquiries directly affect how state practice is shaped and

[107] Oskar Thoms, James Ron & Roland Paris, 'State-Level Effects of Transitional Justice: What Do We Know?', *International Journal of Transitional Justice*, Vol. 4, Issue 3 (2010) 329–354 at 351, *referring to* Kathryn Sikkink and Carrie Walling, 'The Impact of Human Rights Trials in Latin America,' *Journal of Peace Research*, Vol. 44, Issue 4 (2007) 427-455 and Jack Snyder & Leslie Vinjamuri, 'Trials and Errors: Principle and Pragmatism in Strategies of International Justice,' *International Security,* Vol. 28, Issue 3 (2003/04) 5-44.

[108] Geoff Dancy, 'Impact Assessment, Not Evaluation: Defining a Limited Role for Positivism in the Study of Transitional Justice', *International Journal of Transitional Justice*, Vol. 4, Issue 3 (2010) 355–376 at 359.

[109] Van Der Merwe, et al., *supra* note 90, p.4.

[110] *Id*.

[111] *Id.*, p.5.

constituted, which in turn affects the overall state of custom. By using a single case study of Uganda, my approach is distinguishable from the types of political science studies that focus on state-level indicators, bringing both a legal and empirical perspective that provides a richer assessment of sub-national impact, rather than nationwide impact.

1.4.2 Formulating an Impact Assessment Framework

To assess the impact of a given mechanism, Pham and Vinck posit that there are three stages where impact evaluation can be carried out, namely (i) conceptualization and planning stage; (ii) implementation stage; and (iii) completion stage.[112] In the completion phase, research evaluation measures the outcome, *i.e.*, whether the mechanism achieved its stated objectives. They explain that:

> Whether or not a specific policy has achieved any or all of these goals can be assessed through outcome monitoring and evaluation. Outcome monitoring first determines whether or not the expected outcomes were realized (e.g., peace was achieved), regardless of the role of the program or policy in achieving those outcomes. Outcome evaluation then assesses whether or not a causal link exists – such as, for example, whether a truth commission contributed to a sustainable peace.[113]

Assessing causality between a mechanism and a stated outcome is, however, a fraught exercise, as many variables are at play, including for example parallel economic and poverty reduction programmes, which will also have a stabilising effect on a post-conflict society. Isolating causal links between transitional justice mechanisms and macro-level outcomes like improved peace and democracy will not easily be discernible.

According to Bunselmeyer and Schulz, the methodology utilised to assess a given instrument is "highly dependent on the transitional justice mechanism under investigation, the context in which it operates and the research question."[114] Importantly, they emphasise that the impact to be evaluated depends on the "specific theorized and mandated objectives or goals of the transitional justice mechanism".[115] However, Ainley considers that to define "success"

[112] Phuong Pham & Patrick Vinck, 'Empirical Research and the Development and Assessment of Transitional Justice Mechanisms', *International Journal of Transitional Justice*, Vol. 1, Issue 2 (2007) 231–248 at 236.

[113] *Id*., at 237.

[114] Elisabeth Bunslemeyer & Philipp Schulz, 'Quasi-experimental research designs as a tool for assessing the impact of transitional justice mechanisms', *The International Journal of Human Rights*, Vol. 24, Issue 5 (2020) 688-709 at 691.

[115] *Id*.

when evaluating a transitional justice mechanism to be "impossible".[116] She further notes that it is important to first consider what was possible in a given context before deciding how to measure success.[117] Measuring change, or impact, is all the more difficult because as Duggan notes, the change sought is nonlinear, and that "one of the most critical features of transitional justice processes is that they are nested in social systems. It is through the workings of entire systems of social relationships that any changes in behaviour or social conditions will be effected."[118]

In the transitional justice literature, generalised outcomes are presented as the most common measure of success. Transitional justice mechanisms are thought to impact upon democratisation, the rule of law, increased respect for human rights, a reduction in violence, peace and reconciliation.[119] Ainley considers that a number of areas can be examined to assess the success of a transitional justice mechanism, namely, what outcomes have been produced (for example, truth or justice), whether a mechanism has achieved its mandate, the processes of establishment and functioning, involvement of victims and affected populations, adherence to universal normative standards, cost-effectiveness and the broader impact on the local political economy.[120] Skaar *et al*. consider the overarching claim that four central mechanisms (trials, truth commissions, reparations and amnesties) impact upon peace and democracy through three intervening variables of justice, truth and reconciliation.[121] They put forward a 4-step approach to impact assessment that may be applicable to any country going through transition.[122] **First**, the contextual parameters should be examined, including the nature of the conflict and its termination. **Second**, the mechanisms that have been established should be analysed, in particular what are the objectives, scope and provisions. In the case of amnesties, this would include the criteria for inclusion and type of crimes amnestied. **Third**, the implementation of the mechanism is examined, *i.e.,* looking at the concrete outputs such as legislation, verdicts, a truth commission report, etc. They note that a "good (though imperfect) start for measuring impact is to check whether or not a particular mechanism fulfils its

[116] Kirsten Ainley, 'Evaluating the Success of Transitional Justice in Sierra Leone and Beyond', in Kirsten Ainley, Rebekka Friedman & Chris Mahony (Eds), *Evaluating Transitional Justice, Accountability and Peacebuilding in Post-Conflict Sierra Leone* (Palgrave, 2015) p.241.

[117] *Id*., p.254.

[118] Duggan, *supra* note 91.

[119] Elin Skaar, Camila Gianella Malca & Trine Eide, *After Violence: Transitional Justice, Peace, and Democracy* (Routledge, 2015), p.20.

[120] Ainley, *supra* note 116, pp.253-258.

[121] Skaar *et al., supra* note 119.

[122] *Id*., chapter 2.

mandate."[123] The **fourth**, and most challenging step of all, is the impact assessment itself. The core of this assessment stage is as follows:

> "Impact assessment is the core and most difficult challenge. In our country studies, we assess the achievement of each transitional justice mechanism **in relation to its stated mandates and the expectations of different actors** (victims, government officials, perpetrators, civil society, the international community). We then try to show how the **achievements or failures of each country's transitional justice process may have promoted or hindered peace and democracy**.[124] (emphasis added)

Thus, in essence, the assessment examines the stated mandate of a given mechanism together with stakeholder expectations, and second, how the process promoted (or not) peace and democracy. To gauge whether amnesties in particular have had a positive impact on peace and democracy, Skaar *et al.* explain that:

> [t]hey must be enacted with the intention of facilitating a transition from a non-democratic to a democratic regime – or to facilitate the transition from war to peace. [...] One way to check the immediate effectiveness of an amnesty is to ask whether it has indeed facilitated the transition to either democracy or peace, or both. How do amnesty laws influence power structures? We want to assess to what extent amnesty laws have kept people with blood on their hands in positions of power, continuing to wield influence in the societies where they committed crimes against the population.[125]

To assess the causal link between a mechanism and peace and democracy, Skaar *et al*. propose a combination of qualitative analysis of primary and secondary material, as well as quantitative analysis using statistical indicators used in other large-N studies, such as Olsen *et al.*'s 2010 study. As "peace" and "democracy" are the two key dependant variables in Skaar *et al's* model, defining both is critical when it comes to measurement, given competing definitions in the literature. Skaar *et al.* refer to three definitions of peace: a "negative" peace (armed conflict ceased, but a low probability of recurrence), a "liberal" peace (involving democratic and market reforms) and a "positive" peace (characterised by high civic trust and little structural violence).[126] With regard to democracy, Skaar *et al*. posit that "a minimum definition of democracy entails free and fair elections, where the losing parties accept the outcome and do not respond by resorting to violence."[127] But democracy means more than holding elections, it involves the strength of the rule of law, the level of political space to voice

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[123] *Id*.

[124] *Id*.

[125] *Id*.

[126] *See further* Johan Galtung & Dietrich Fischer, 'Positive and Negative Peace', in *Johan Galtung*, *Pioneer of Peace Research* (Springer, 2013) 173-178.

[127] Skaar *et al*., *supra* note 119.

opposition, absence of state repression, civic trust, the extent of civilian control over institutions and the extant level of human rights protections.[128] Skaar *et al*. argue:

> To the extent that transitional justice contributes to strengthening democratic institutions, norms, and values as well as respect for human rights, we can expect transitional justice measures or processes to make a difference to both peace and democracy.[129]

Thus, they consider that "peace = violence reduction", and "democracy = free and fair elections + protection of human rights + rule of law".[130] To measure improvements in these indicators before and after the mechanism's implementation, Skaar *et al*. rely on four datasets, including the Political Terror Scale and Freedom House index,[131] both of which were used by Olsen *et al*. and other similar studies, such as Sikkink and Walling's 2007 research.[132] Skaar *et al*. nevertheless concede that isolating the causal impact between a mechanism on peace and democracy is "nearly impossible", but retort that while "causality cannot be proved, it must be plausibly argued."[133]

I agree with the view that determining whether a transitional justice mechanism has *definitively* "worked" or "succeeded" is not doctrinally or empirically feasible. However, I argue that assessing a mechanism's impact *is* feasible. It is submitted that such an assessment can, therefore, allow for a conclusion as to whether or not a mechanism has achieved a *measure* of success, when its theorized mandate is compared against the outputs, outcomes and discernible impact. As will be explained further in the next section on methodology, this thesis adopts Skaar *et al.*'s 4-step conceptual framework for assessing the impact – and therefore the success – of the use of amnesty in northern Uganda. I choose to adopt this model because it offers a logical and academically credible structure with which to undertake the difficulty task of impact assessment, particularly for a single case study such as Uganda. However, I recognise that this model is not without its limitations and deficiencies. Therefore, as I explain in the next section, the model adopted is slightly modified to the extent that the indicators examined are sub-national, rather than nationwide, thus making the impact assessment exercise more feasible and realistic.

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[128] *Id*.

[129] *Id*.

[130] *Id*.

[131] *Id*. The others are the Cingranelli-Richards (CIRI) Human Rights Dataset and Polity IV.

[132] *Id*. *See further* Sikkink and Walling, *supra* note 92.

[133] *Id*.

1.5 Methodology

The present research may be classified as a socio-legal study of Uganda's principal transitional justice response to the LRA conflict, *i.e.*, amnesty. A socio-legal study can be understood to be an "interdisciplinary study of law", that includes both theoretical and empirical research. It indicates "an ambition to integrate aspects of two or several disciplinary perspectives into one single approach."[134] It is the combination of knowledge, skills, and types of research that "transcend theoretical and methodological limitations" and help to create "a new form of analysis."[135]

Socio-legal methodology examines law as a social institution, its effects, processes and the influence of political and economic factors on the workings of law.[136] The emergence of socio-legal research approaches recognizes that law is one social phenomenon among many others, and that the operation of law can be properly understood only as part of the wider social context.[137] O'Donovan identifies two planks of socio-legal research: first, "law in action" scholarship, *i.e.*, how legal norms actually function in reality; and second, theoretical perspectives on the relationship between law and society, which are informed by sociology, economics, anthropology and political science.[138] He further notes that these two categories are not mutually exclusive. Rather, research should be theoretically informed and empirically grounded, and that socio-legal scholars work in the middle ground between these two approaches.[139]

My thesis draws on multiple disciplines to interrogate the core research question. My research is informed by academic and policy literature on transitional justice, and societies emerging from conflict. It includes extensive desk-based analysis of primary and secondary legal and policy sources specific to Uganda, as well as comparative analyses of specific topics, including amnesty in state practice, the place of amnesty in international law, and Uganda's

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[134] *See generally*, Reza Banakar & Max Travers, *Theory and Method in Socio-Legal Research* (Hart, 2005), Chapter 1.

[135] *Id*.

[136] Socio Legal Studies Association, *SLSA Statement of Principles of Ethical Research Practice* (January 2009), para.1.2.1.

[137] Don Harris, 'The development of socio-legal studies in the United Kingdom', *Legal Studies*, Vol. 3, Issue 3 (1983) at 315-333 at 315.

[138] Darren O'Donovan, 'Socio-Legal Methodology: Conceptual Underpinnings, Justifications and Practical Pitfalls' in Laura Cahillane & Jennifer Schweppe (eds), *Legal Research Methods: Principles and Practicalities* (Clarus Press, 2016).

[139] *Id*.

experience with amnesty and accountability mechanisms. Given the nature of my research questions and the subject-matter, my work is informed by research in law, sociology, anthropology, history and political science. I draw on feminist transitional justice scholarship in particular, by analysing the gendered gaps in the implementation of amnesty as a transitional response to the conflict. For example, the lack of gender sensitivity when demobilizing and resettling girls, women and children "born of war", the inattention to their individual circumstances and their reintegration challenges, is examined. The "one size fits all" approach to amnesty meant that resettlement and reintegration was particularly difficult for this cohort of victims and ex-combatants. Furthermore, my thesis includes analysis of scholarship on international criminal law, international human rights law, and international humanitarian law. I draw on comparative analyses of transitional justice processes, especially truth commissions, trials and amnesties. I also draw on international and states' policy response to "complex victims" and the victim-perpetrator phenomenon, particularly children who are implicated in human rights abuses in armed conflict contexts. The nature of "complex victimhood" is explored in-depth, drawing on scholarship from the domains of sociology, political science and law, and how this concept is manifested in the northern Ugandan post-war context.

Socio-legal studies are typically pursued through the adoption of either one or a combination of quantitative and/or qualitative research. Quantitative research may be understood as methodology that emphasizes the mechanical "quantification in the collection and analysis of data", and usually involves the employment of survey questionnaires. In contrast, qualitative research emphasizes the recording of "complete and detailed descriptions" and involves extended interaction between the researcher and the interviewee.[140] It facilitates a richer, in-depth analysis, and allows the researcher to witness the "complexities of social, legal and political interaction".[141]

In assessing transitional justice settings, there is also diverging approaches of method. While qualitative research has been most prevalent, there has been increasing use of the quantitative method,[142] exemplified by the research of the Harvard Humanitarian Initiative and University of California, Berkley, which has employed population-based surveys as a means to discern attitudes and perspectives on justice issues in various post-conflict settings, including

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[140] Ashish Singhal & Ikramuddin Malik, 'Doctrinal and socio-legal methods of research: merits and demerits', *Educational Research Journal,* Vol. 2, Issue 7 (2012) 252-256 at 254.

[141] *Id*.

[142] Brandon Stewart & Eric Wiebelhaus-Brahm, 'The Quantitative Turn in Transitional Justice Research: What Have We Learned About Impact?' *Transitional Justice Review*, Vol. 1, Issue 5 (2017) 97-133.

in Uganda.[143] Yet this quantitative method is also subject to limitations, as they typically employ closed questions, lack sensitivity,[144] leave little room for nuance or reflection, as well as exhibiting "methodological constraints such as selection bias, which ultimately weaken their explanatory power."[145] As Mallinder notes, with this method there is also the risk that victims' views are "reduced to statistics".[146]

The adoption of amnesty legislation as a response to the LRA conflict, and the return of thousands of former combatants has had a profound effect on the dynamics of community life in northern Uganda. Therefore, in order to assess the performance and impact of amnesty, I consider it crucial that the principal beneficiaries – amnesty recipients and their communities – be consulted. Victims' perspectives and appraisals are essential to any assessment exercise. By conducting semi-structured qualitative interviews, greater light can be shed on the true operation and social effects of the amnesty law. Patton notes "fieldwork is the central activity of qualitative inquiry. Going into the field means having direct personal contact with the people under study in their own environments."[147] He further argues that:

> "Approaching fieldwork without being constrained by predetermined categories of analysis contributes to the depth, openness, and detail of qualitative inquiry. […] qualitative methods typically produce a wealth of detailed information about a much smaller number of people and cases. This increases the depth of understanding of the cases and situations studied but reduces generalizability."[148]

Therefore, in order to adequately explore all of the issues with the required depth, while also achieving a broad, geographical sample of opinion in northern Uganda, a qualitative approach was employed for the fieldwork in this thesis.

Thus, the methodology consists of two main pillars:

(1) Desk-based research of primary and secondary sources, including legislation, policy documents, parliamentary debates, reports from development agencies and civil

[143] Harvard Humanitarian Initiative ("HHI"), *Never Forget: Views on Peace and Justice Within Conflict-Affected Communities in Northern Iraq* (2020); HHI, *Searching for Lasting Peace: Population-Based Survey on Perceptions and Attitudes about Peace, Security and Justice in Eastern Democratic Republic of the Congo* (2014), Berkley Human Rights Centre, *Transitioning to Peace: A Population-Based Survey on Attitudes About Social Reconstruction and Justice in Northern Uganda* (2010).

[144] Skaar *et al*., *supra* note 119.

[145] Bunslemeyer & Schulz, *supra* note 114.

[146] Mallinder, *supra* note 8, p.356.

[147] Michael Patton, *Qualitative Research and Evaluation Methods* (Sage, 2015) p.55.

[148] *Id*., p.47.

society organisations, including in particular, victims' groups and human rights NGOs; and

(2) Fieldwork, comprising one-to-one qualitative interviews with 20 former combatants and 4 key stakeholders; and two focus group discussions with a total of 40 community members.

For the field work, a "purposive sampling" approach was adopted.[149] This technique is described as one:

> "[w]idely used in qualitative research for the identification and selection of information- rich cases for the most effective use of limited resources. This involves identifying and selecting individuals or groups of individuals that are especially knowledgeable about or experienced with a phenomenon of interest. In addition to knowledge and experience, Bernard (2002) and Spradley (1979) note the importance of availability and willingness to participate, and the ability to communicate experiences and opinions in an articulate, expressive, and reflective manner."[150]

This thesis therefore seeks to place the affected community at its heart, and draw conclusions based on their views and experiences of amnesty.

Ultimately, this socio-legal approach adopted for this research differs from the traditional political science approach. It is more inductive, seeks to discern more micro-level effects and not only state-level effects. It looks at the more social dimensions of impact, not merely political aspects. Drawing on a single case study, the qualitative method of data collection consequently produces more in-depth and richer findings compared to large-N studies, for example. Gready and Robins note that while large N studies have advanced understanding of change processes, they have also been subject to significant critique, because:

> "[t]hey remain vague about pathways to impact, or causal processes that link mechanism and outcomes. Where such pathways are identified they are typically linear and fail to link specific transitional justice interventions with the wider socio-political context of transitions, since a large N approach necessarily generalises across multiple contexts. As such, results are unlikely to provide models that coincide with the complexity in any one given transitional context."[153]

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[149] Kate Kelley et al, 'Good Practice in the Conduct and Reporting of Survey Research,' *International Journal for Quality in Health Care* Vol. 15, Issue 3 (2003) 261-266 at 264.

[150] Lawrence A. Palinkas *et al*., 'Purposeful Sampling for Qualitative Data Collection and Analysis in Mixed Method Implementation Research,' *Administration and Policy in Mental Health*, Vol. 42, Issue 5 (2015) 534. Internal citations omitted.

[153] Paul Gready & Simon Robins, 'Transitional Justice and Theories of Change: Towards evaluation as understanding', *International Journal of Transitional Justice*, Vol. 14, Issue 2 (2020) 280-299 at 290.

I agree with Gready and Robins that "deeper causal insights into transitional change processes will require qualitative or mixed methods",[154] which is why I chose to carry out interviews with those who participated in, and were affected by, the amnesty process in Uganda. This approach is also more "actor-oriented and "holistic, in contrast to the programme-oriented approach of mechanistic, log-frame led evaluation."[155]

Key informant interviews

Through established networks and personal connections with non-governmental organisations working in the field of amnesty and reintegration, 20 former combatants who have received amnesty were sourced for interview. These organisations are the Foundation for Justice and Development Initiative ("FJDI") and War Victims' Children Networking, two Gulu-based NGOs that work in the area of reconciliation, transitional justice, documentation and reintegrative support. For eight of the key informant interviews, my FJDI interlocutor, Susan Acen, acted as my interpreter to interview informants that were sourced through the War Victims' Children Networking, with the kind assistance of its Director, Stella Lalam. This cohort of informants came mainly from the urban setting of Gulu town and its rural hinterland.

A second interpreter, Grace Acan, connected me with a further twelve interviewees. Herself a former abductee for over ten years, she had a pre-existing relationship of friendship or acquaintance with some, but not all, of these 12 interviewees. I acknowledge the risk that this pre-existing acquaintance with could potentially pose to the data-collection process, for example, by infusing a level of bias or creating a conflict of interest. However, I believe this risk was minimal and was mitigated by the interpreter's professionalism. She is an experienced interpreter, and has assisted other academics in similar research projects. In addition, a pre-existing acquaintance existed for only 4 interviewees, and there was no discernible divergence in the answers recorded when compared to the other 16 interviewees for whom there was no pre-existing acquaintance between them and the interpreter. Despite this risk, I nevertheless observed this pre-existing relationship between interpreter and interviewee led to in-depth conversation and reflective answers, which seemed to flow much easier in an environment of trust. It was a key intention of mine to have a broad geographical and urban/rural sample of interviews, to not simply stay within the comfort of 'town' as Gulu is locally referred to. This

[154] *Id*.

[155] *Id*., at 296.

would also avoid the risk of "interview fatigue", where returned abductees are routinely subjected to academic research interviews, given the high level of field research carried out in northern Uganda, which has become what Scott *et al*. refer to as a "project district."[156] Grace, through village contacts established through NGO advocacy networks, was able to source interviewees deep in the rural bush. This involved a series of day trips where myself and Grace hired two *boda boda* drivers to carry us by motorcycle deep into the rural bush to speak with former abductees about amnesty and their lives today. These interviews were among the most powerful in terms of content. For most, the enduring stigma and discrimination in rural areas meant that topics related to their abduction – including amnesty – had not been discussed for years, or at all, until they spoke with myself and Grace. Interviews lasted on average two hours, but could have lasted days, given the breadth of topics and emotion involved, in recounting traumatic periods of their lives, both past and present. I acknowledge the limitations in drawing conclusions from a relatively small group of interviewees. However, I sought to tackle this limitation by sourcing interviewees from both rural and urban areas, from different villages and regions, and from direct ethnicities (Acholi and Lango), thus bringing a diverse sample of views from across the north. All key informants were from a subsistence farming background.

Community focus groups

The community member sample selected 40 adults (18 years of age or older) living in 2 pre-selected sub-regions of northern Uganda, Acholi and Lango. The districts were chosen on the basis of the level of their exposure to the conflict. My interlocutor in FJDI, Susan, proposed that the villages of Parabongo (15 km outside of Gulu in the Acholi sub-region) and Abia (35km from Lira in Lango sub-region) be used to conduct the focus groups. Both of these villages were the subject of LRA attacks in the war, during which dozens of civilians were abducted and killed. Poignant memorials and wall murals in Abia in particular, tell the story of these attacks that have deeply scarred both communities. Susan was able to coordinate with local leaders on the ground to mobilise and gather a random cohort of community members to interview. It was my stated intention that the focus group attendees should not themselves be amnesty holders, as the goal was to gauge the views of community members separately from amnesty holders, but also to avoid any open stigmatisation. From an ethical point of view, it

[156] Steffanie Scott, Fiona Miller & Kate Lloyd, 'Doing fieldwork in development geography: research culture and research spaces in Vietnam', *Geographical research*, Vol. 44, Issue 1 (2006) 28-40: "'[i]nterview fatigue' can set in as local people tire of being approached and asked a multitude of questions. In such circumstances, it is not surprising that local people may begin to strategise and ask for compensation for granting yet another interview. For this reason, one of us was advised to avoid conducting field research in some areas that were becoming known as 'project districts.'"

was not considered appropriate to interview amnesty holders collectively or in a mixed group with community members.

Stakeholder interviews

Four key stakeholder figures that have worked in the amnesty process were selected for in-depth qualitative interviews that explored a number of central themes that are also contained in the interview questionnaires used with amnesty recipients and community members. I considered that key stakeholder interviews would give critical insight into the motivation for amnesty, and offer frank and informed appraisals of its performance as a transitional justice mechanism. These stakeholders were the Principal Legal Officer of the Amnesty Commission, Nathan Twino, the Gulu Amnesty Commission Officer, Bernard Festo and 2 leading religious leaders, Archbishop John Baptist Odama and Sheikh Khalid Mohammed. Both of these religious leaders played central roles in the Juba peace process and remain pivotal figures in cultural life in northern Uganda today.

Ethical considerations and positional reflections

Prior ethical approval for the research was received from the Social Research Ethics Committee (SREC) of University College Cork and adheres to the 2010 Code of Research Conduct.[157] All interviews were audio-recorded and transcribed by me. The interview data is stored on an encrypted laptop and will be destroyed after ten years. As a preliminary step before the start of every interview, full and informed consent was recorded in writing.[158] Each participant was informed about the purpose of the research, the topics to be discussed, the importance of confidentiality, before securing their consent. Participants were given the opportunity to ask any questions they had about the interview process before the interview began and at the end. They were also given a copy of an Information Sheet and Consent Form,

[157] University College Cork, Code of Research Conduct, 2010. *See* https://www.ucc.ie/en/media/research/researchatucc/documents/UCCCodeofResearchConduct.pdf

[158] *See* Socio Legal Studies Association, *SLSA Statement of Principles of Ethical Research Practice* (January 2009), Principle 7.

which was verbally translated to them in full. These are appended as Annexes A,[159] B[160] and C,[161] respectively.

The well-being of the interviewees was paramount throughout the process.[162] Participants were informed they may be asked to share opinions on issues that might trigger memories of traumatic and painful events, which could evoke varying levels of distress. There was also a risk that those still suffering from the trauma of war and its related effects could experience heightened anxiety through their participation. These risks were managed on a interview-by-interview basis. By this, I mean that sensitivity and awareness on the part of myself and the interpreter of the potential for re-traumatization was crucial when conducting these interviews. If at any stage it became apparent that the interviewee was uncomfortable or somewhat distressed, the interview was to be ceased and psycho-social support made available. Prior to the commencement of data collection process, I organised for psycho-social support from the African Youth Initiative Network (AYINET) should interviewees wish to access it. Contact details of an AYINET representative were given to the interviewee to allow for follow-up communication. AYINET is the leading NGO in northern Uganda working in the area of medical rehabilitation and psycho-social assistance for victims of the LRA conflict.[163] Based in Lira, they have representatives in the three main urban centers in northern Uganda (Gulu, Kitgum and Lira). In terms of security, all interviews were conducted in either a private room setting, or when in rural areas, a short walk from the interviewee's homestead to ensure privacy. Interviews were recorded on a digital recorder which remained in my possession, and the audio files transferred onto my encrypted laptop immediately after interview. The audio files were then deleted from the digital recorder.

The interviews were later transcribed by me and analysed through the lens of the main themes of this thesis, namely views on amnesty, prosecutions and the level of reintegration. Where answers were selected for full quotation in the fieldwork chapter, they were chosen because the answer was particularly rich, meaningful, or usefully surmised a commonly-held view among interviewees. All amnesty recipients and community members are referred to anonymously to ensure their confidential participation in the research, and pseudonyms are

[159] Annex A: Information Sheet and Consent Form – Amnesty Recipient.

[160] Annex B: Information Sheet and Consent Form – Focus Group Participant.

[161] Annex C: Information Sheet and Consent Form – Stakeholder.

[162] Paul Connolly, *Ethical Principles for Research with Vulnerable Groups* (University of Ulster, 2003), p.20.

[163] *See, e.g.,* AYINET's 2016 Annual Progress Report, available at: https://africanyouthinitiative.org/wp-content/uploads/2019/04/AYINET-Progress-Report-2016-for-mail-final.pdf (accessed 14 January 2021).

used to differentiate between them. However, the four key stakeholders that were interviewed were offered the choice to be referred to anonymously or to be named in this research, given that each of them played a public and/or outspoken role in the amnesty process. Each of the four stakeholders agreed for their words to be attributed to them in this thesis, and this consent was recorded in writing.

I recognise that I came to this research as white Western male, and the limitations and biases that come with that status. However, my position as a field researcher was grounded in personal experience of having worked and lived in Gulu, northern Uganda between 2012-2013, as a Human Rights Officer for the Office of the High Commissioner for Human Rights. Living in Gulu and working on issues of peacebuilding and transitional justice every day, I developed an intimate knowledge of the cultural context in which transitional justice has operated in northern Uganda, and how the Acholi people viewed internal and external mechanisms to address the legacy of war. As a resident of Gulu, I learned the local language, Acholi, to a basic conversational level. I interacted with the locals, ate my lunch in local restaurants, avoided the expat existence, and built trusting relationships. This knowledge of the language assisted greatly in building rapport with my interviewees. The first 20-30 minutes of each interview consisted entirely of small talk in Acholi between me and the informant. Topics such as the weather, the level of rainfall, what crops they were growing, how their children were doing, etc., were discussed at length and with some joviality, considering their shock that a *munu* (white man) could speak their local language. This approach helped to break the ice and build rapport, as they knew I was not a complete "outsider." I continue to engage in reflective practice, continually reflecting on my position as am academic researcher, which is neither "insider" or "outsider", and attempt to approach my research with a neutral, unbiased and sensitive mindset.

In 2012, through a local reception centre, GUSCO (Gulu Support the Children Organisation), I coached football to formerly abducted children now re-settled in the village of Bungatira, 10km outside of Gulu. Here, I witnessed first-hand the challenges that resettlement brings. Broken familial and community ties has led to social degradation, with enduring stigma and poverty contributing to high levels of mental health problems and substance abuse amongst returnees. My footballers gave me an Acholi name, *Omara*, which I learned only months later means "loved one". I took this as a signal of my acceptance in the community. It was during my time in Gulu that I realised how crucial a role amnesty has played in ending the war and returning so many children and young adults to their communities.

Later in 2013, I began working as a Prosecution lawyer at the International Criminal Court and spent 4 years working on the Dominic Ongwen case. In this role, I conducted field investigations, interviewed victims of sexual violence and former child soldiers, and led them through their testimony in court. I also proposed an outreach strategy, whereby the Office of the Prosecutor would undertake regular outreach visits to the affected communities to meet with the local and cultural leaders to build a relationship of trust and sense of ownership over the trial process. For three years myself and other colleagues went on regular outreach missions to the villages of Odek, Pajule, Abok and Lukodi, advocating for the work of the ICC. We appeared on radio and held workshop meetings with key stakeholders. A common question raised was about amnesty: *Why not give Ongwen amnesty? He was abducted as a child! He is a victim! He should get amnesty like the rest of us!* Meanwhile, victims of his crimes longed for accountability and reparation. This is the complexity of the situation in northern Uganda. Having seen the benefits of amnesty on the ground, and later being involved directly in accountability processes in The Hague, I felt compelled to research further by undertaking this thesis, to try to reconcile my lived experience of peace attained through amnesty, with my professional role in seeking accountability for victims. I am acutely aware that my positionality as a former Prosecution staff member undoubtedly colours my analysis and opinions, particularly in relation to the *Ongwen* case. In this regard, I continually attempt to temper any bias by ensuring I make reference to divergent views, both within academia and in the public sphere, and make clinical arguments based on law and field-based evidence, rather than emotion or dogmatic sentiment. Ultimately, all researchers bring their own experiences, professional formation, practice and lived personal history to their work. I should also note that I did not embark upon this research with only "prosecutorial" baggage. Prior to working for OHCHR in Uganda, from 2010-2011 I worked as a Defence lawyer on two separate cases at the International Criminal Tribunals for the former Yugoslavia and Rwanda. Working as both a Defence and Prosecution lawyer has therefore ensured, form a personal and research point of view, a continually neutral approach to the interpretation of the law and assessment of the evidence, prior to advancing any adversarial viewpoints. I believe I carry that open-minded and balanced approach to this thesis. No purely objective position is ultimately attainable. From a research integrity perspective, I remain aware of my positionality, and continually attempt to check any potential bias that may infuse my research.

Methodological framework of the thesis

This thesis seeks to adopt the 4-step conceptual framework advanced by Skaar *et al.,* discussed above, *i.e*., (1) Context (2) Process (3) Implementation and (4) Assessment. Detailing and analysing the first three steps – context, process and implementation of amnesty in Uganda – is arguably straightforward. However, to conduct an assessment of amnesty it is necessary, to establish what were, in my view, the "objectives" of amnesty in Uganda.

As Skaar *et al.*[164] and Bunselmeyer & Schulz[165] acknowledge, assessing whether a particular measure has "worked", *i.e.*, achieved its objectives, it is necessary to recall what the measure initially set out to achieve and what its theorized mandate was. Indeed, as Gready and Robins now, "at the heart of evaluation dilemmas is the question of who decides what the goals of the process are."[166] In complex transitional justice contexts, where evaluation must be sensitive to unique social contexts, Dancy argues that "evaluation implies judgment of the goal-reaching capabilities of mechanisms" and requires two steps: first, selection of a set of appropriate objectives toward which a body aims *i.e*., performance criteria, and second, a review of a body's performance based on those criteria.[167] In respect of amnesty in Uganda, I argue that the stated mandate is to be found in the enacting legislation, the *Amnesty Act 2000*, in particular its preamble, which in Ugandan law is considered to be an aid to interpreting the purpose of individual legislation.[168] The Preamble to the Act states as follows:

> "An Act to provide for an **Amnesty for Ugandans involved in acts of a war-like nature** in various parts of the country and for other connected purposes.
>
> WHEREAS it is common knowledge that hostilities directed at the Government of Uganda continue to persist in some parts of the country, thereby causing unnecessary suffering to the people of those areas;
>
> AND WHEREAS it is the expressed desire of the people of Uganda to **end armed hostilities, reconcile with those who have caused suffering and rebuild their communities**;
>
> AND WHEREAS it is the desire and determination of the Government to **genuinely implement its policy of reconciliation in order to establish peace**, security and tranquillity throughout the whole country." (emphasis added)

[164] *Supra* note 119.

[165] *Supra* note 114.

[166] Gready & Robins, *supra* note 153 at 290.

[167] Dancy, *supra* note 108 at 359.

[168] *See Uganda v Atugonza* (Constitutional Reference No. 31 of 2010) [2011] UGCC 11 (1 March 2011): "The preamble is a vital aid to its interpretation. It determines its objective. The preamble normally is a preliminary statement of the reasons which have made the Act desirable."

Three main objectives are apparent from this preamble. First, the act intends to provide "amnesty for Ugandans involved in acts of a war-like nature." Second, the Act views amnesty as a means to "end armed hostilities and reconcile with those who have caused suffering." Third, reference is made to the government's desire to "implement its policy of reconciliation in order to establish peace." Later in the Act, section 8 establishes the Amnesty Commission to implement the amnesty regime. Its mandate is:

> (a) to monitor programmes of –
> (i) demobilization;
> (ii) reintegration; and
> (iii) resettlement of reporters;
> (b) to co-ordinate a programme of sensitization of the general public on the amnesty law;
> (c) to consider and promote appropriate reconciliation mechanisms in affected areas;
> (d) to promote dialogue and reconciliation within the spirit of this Act;
> (e) to perform any other function that is associated or connected with the execution of the functions stipulated in this Act.[169]

Thus, reading the preamble and section 8 of the Act together, four main objectives can be discerned:

- ***First***, the Act intends to amnesty, or forgive, those who have committed acts of rebellion.
- ***Second***, the Act intends to demobilize and reintegrate former rebels, or "reporters".
- ***Third***, the Act intends to end hostilities to bring peace.
- ***Fourth***, the Act seeks to promote reconciliation between former rebels and the broader population.

For the purpose of this thesis, impact will be measured according to the four aims described above: to amnesty, to reintegrate, end hostilities and to promote reconciliation. In doing so, it is important there are guiding definitions in respect of these four pillars. The first two – amnesty and reintegration are perhaps more concrete. The granting of amnesty is a tangible act, in this case the issuing of an amnesty certificate. Reintegration, often conflated

[169] *Amnesty Act 2000*, s.8.

with reinsertion, has been defined as "the acquiring of civilian status and gaining a sustainable livelihood," and is a long-term social and economic process.[170] Reconciliation, however, is a complex social phenomenon, a concept varies across cultures and societies, and is not easily measurable. It has been generally defined as the repair and restoration of relationships, and the rebuilding of trust. Rather than a measurable outcome, it is both a goal and a long-term process, definition from the Colombian National Commission for Reparation and Reconciliation aptly explains:

> "Reconciliation is as much a goal as it is a long-term process involving people or societies working together to create a climate of peaceful coexistence (*convivencia*) based on the beginning of new relationships of trust between citizens, the state, and between themselves, as it is the deepening of a democratic state with participation of civil society and institutions."[171]

Despite the difficulties in measuring reconciliation, progress is being made in this area. Dixon and Firchow's ground-breaking research on "everyday peace indicators" in Colombia seeks to collect data on reconciliation and justice and use it to draw conclusions on how different combinations of truth, justice, reparation and development influence reconciliation processes and outcomes, combining "top-down" and "bottom up" measurement approaches.[172]

In order to assess the fourth objective of "promotion of reconciliation", the above working definition of reconciliation as cited by Firchow will be adopted. However, I must emphasise that it was the *promotion* of reconciliation that was the theorized objective in the *Amnesty Act*. The Act did not seek to comprehensively *achieve* it, difficult as that would obviously be, and indeed, to measure. The preamble spoke of the "desire" to reconcile, and that reconciliation was a government "policy", but all the Amnesty Commission was mandated to do was "promote" it.[173] Therefore, I consider that assessing the level of the *promotion* of reconciliation in the Ugandan amnesty context is thus a more realistic, credible and defensible exercise. This is also more tangibly measured, for example, in the guise of community sensitisations, radio programs, stakeholder workshops, and encouraging local cultural practices of reconciliation in the community. Indeed, I acknowledge that reconciliation is deeply

[170] Stephanie Perazzone, 'Reintegrating former fighters in the Congo: ambitious objectives, limited results, *International Peacekeeping*', Vol. 24, Issue 2 (2017) 254-279 at 255.

[171] As cited and translated by Pamina Firchow in 'Do Reparations Repair Relationships? Setting the Stage for Reconciliation in Colombia', *International Journal of Transitional Justice*, Vol. 11, Issue 2 (2017) 315–338 at 319.

[172] Peter Dixon & Pamina Firchow, 'Everyday Justice: Assessing Transformative Reparations', Paper Presented at American Society of International Law Transitional Justice Works-in-Progress Conference (November 2018).

[173] *See* s.8(c)-(d) of the *Amnesty Act 2000*.

personal, and its definition is admittedly contested.[174] Moreover, cultural context often dictates its operation. In northern Uganda, where social norms have been violated, tradition and culture govern the appropriate reconciliatory responses when inter-personal harm has occurred. A commonly cited ceremony, *mato oput*, which is discussed later in the thesis, involves the drinking of a bitter root to restore relationships between two clans.[175] However, the extremely rare occurrence of such ceremonies as a response to LRA atrocities would thus arguably make an assessment of *true* reconciliation in northern Uganda a theoretically hollow exercise.

Following a measured assessment of the four objectives, the impact on peace will then be assessed. However, I will not seek to assess the second limb of Skaar's impact assessment stage, namely democracy. I consider that it would be methodologically imprudent to do so for a number of reasons. First, the conflict in northern Uganda, and the amnesty used to respond to it, was geographically focused on conflict emanating from the north and west of the country. However, the institutions of democracy in Uganda are all centred in the capital Kampala, hundreds of miles away. Parliament, business, state institutions, are all based in and operate from the capital. During the war, political and social life, and civil society all continued to operate and function as normal while a conflict raged in the north of the country. As Finnström recounts, even diplomats were oblivious to the war.[176] The north's historic and continued isolation from mainstream political and social life in Uganda has been well documented in the literature.[177] Therefore, in the context of amnesty in Uganda, a true assessment of the impact on democracy would require a regional impact assessment focused on the north and west only, an exercise that would be beyond the scope of this thesis. Moreover, such a regional breakdown is not generally provided in the major indexes such as Polity IV or Freedom House. These datasets are therefore of limited utility, especially given they represent a *national* range of variables which inform their calculation, whereas the present enquiry of amnesty is *sub-national* in nature. The fourth step of impact assessment will thus focus on assessing the 4 stated objectives of amnesty, and the impact on peace only. In this sense, "peace" will be understood in the literal sense, *i.e.*, the absence of hostilities. This is more readily defined, and given the diverging definitions of "peace" acknowledged above, defining peace as the presence or absence of armed conflict is more concretely ascertainable and measurable. It may be noted

[174] *See* Elin Skaar, 'Reconciliation in a Transitional Justice Perspective', *Transitional Justice Review*, Vol. 1, Issue 1 (2013) 54-103.

[175] *See* Baines, *supra* note 58; Sverker Finnström, 'Reconciliation grown bitter?: War, retribution, and ritual action in northern Uganda', in Rosalind Shaw & Lars Waldrof (Eds) *Localizing Transitional Justice, Interventions and Priorities after Mass Violence* (Stanford University Press, 2010) 135-156.

[176] Finnström, *supra* note 38.

[177] *See* Ron Atkinson, *The Roots of Ethnicity, Origins of the Acholi of Uganda before 1800,* 'Afterword: A Perspective on the Last Thirty Years.' (Fountain Publishers, 2010).

that peace is, in any event, closely linked to democracy. Poor democratic governance itself can lead to internal disturbance and conflict, as the latest pre-election violence in Uganda demonstrates.[178]

1.6 Structure of the Thesis

Adopting Skaar *et al.*'s 4-step conceptual framework for impact assessment, modified to the extent that the impact on democracy will not be assessed, the main themes to be covered in the thesis can be distilled as follows:

Step 1 – Contextual parameters	**Step 2 – Establishment of amnesty**	**Step 3 – Implementation of amnesty**	**Step 4 – Assessing the impact of amnesty**

[178] In November 2020, 54 people were killed during protests following the arrest of opposition candidates in the presidential election. *See Daily Monitor*, 'Bring killers of 54 protestors to justice', 2 December 2020.

• Background to the conflict (Ch. 1) • Clash with international law (Ch. 2) • Prosecutorial turn: Kwoyelo & Ongwen cases (Ch. 4) • Complex victimhood: forgiving victim-perpetrators (Ch. 5)	• Parliamentary Debates (Ch. 3) • *Amnesty Act 2000* (Ch. 3) • Amnesty Commission (Ch. 3)	• Granting of amnesty (Ch. 3) • Amnesty figures (Ch. 3) • Resettlement and promotion of reconciliation (Ch. 3)	• Assessing the four stated objectives: (i) granting of amnesty (ii) resettlement (iii) ending conflict, and (iv) promotion of reconciliation (Ch. 6) • Assessing impact on peace (Ch. 6)

Using this guiding framework, I consider that a rigid grouping of above themes into Skaar *et al*.'s numeric order would be unsuitable, as a number of the themes contained in step 1 are of central importance and deserving of entire chapter analysis. Thus, the above themes will be structured into chapters to provide what I consider to be a linear, logical, and persuasive thesis, while adhering to the central thrust of Skaar *et al*.'s model of context → mechanism implementation → impact assessment. The thesis is therefore structured as follows.

Following this introductory chapter, Chapter 2 presents an overview of the concept of amnesty and its historical evolution, tracing its development from pre-modern times through to the post-Nuremburg age of accountability. Three examples of notable state practice on amnesty (Argentina, South Africa and Angola) are surveyed, to show how amnesties have been applied in different settings and contexts. The chapter then moves to analyse the current state of amnesty in international law, interrogating major caselaw, academic opinion and policy stances from bodies such as the United Nations.

Chapter 3 seeks to give an in-depth account of amnesty in Uganda, charting its journey towards amnesty, the context of civil war, and the motivation of parliament in legislating for mass amnesty. The key legislation – the *Amnesty Act 2000* - is examined in detail, as is the mandate and performance of the Amnesty Commission, the state body that implemented the amnesty regime. The chapter finishes by comparing the legislation against prevailing international legal standards that are discussed in chapter 2.

Chapter 4 then analyses in detail the prosecutorial "turn" that began with the intervention of the ICC in 2004 and the arrest warrants for leading commanders of the LRA. The chapter focuses on the two cases that have commenced to date, that against Thomas Kwoyelo at the

ICD, and Dominic Ongwen at the ICC. Both cases and their relationship with the amnesty is examined, in particular the Kwoyelo case and the Supreme Court judgement of 2015, which I argue redefines the prevailing meaning of amnesty in Uganda.

Chapter 5 moves to examine the complex notion of the "victim-perpetrator", a central aspect of, and motivation for, amnesty in Uganda. A key aspect is how the discourse of victimhood infused the amnesty project, and is contrasted with the reality of agency within the LRA. Debates around how to deal with juvenile perpetrators in particular, including restorative and retributive arguments, are reviewed and situated in the Ugandan context.

Chapter 6 then presents key findings from fieldwork conducted in northern Uganda over three months in 2018. The views of 20 male and female former members of the LRA, together with 40 community members from two different regions (Acholi and Lango), are collated and analysed around three key themes: (i) understanding and experiences of amnesty (ii) views on reintegration and reconciliation; and (iii) views on recent LRA prosecutions. On the basis of this qualitative data, the impact of amnesty will be assessed, using the qualitative measures described in the table above.

Chapter 7 contains the conclusion, drawing the above themes together, and considers whether amnesty has achieved a measure of success in light of the assessed impact. The conclusion also reflects on how the Ugandan experience with amnesty impacts upon the anti-amnesty legal norm debate.

2 Amnesty and International Law

2.1 Introduction

Amnesty, in the literal sense of the word, is understood to be the act of forgiving another for their wrongdoings. In the modern age, it is typically understood as the process whereby the state absolves the transgressor of criminal liability for act(s) committed against that same state. Given that the meaning of amnesty has changed over time, not least in judicial settings, this chapter seeks to provide an overview of what amnesty means, its historical evolution and presents three examples of state practice relating to amnesty, namely Argentina, South Africa and Angola. The chapter then moves to analyse how international law has increasingly viewed amnesty as being incompatible with treaty-based obligations to investigate and prosecute serious crimes, by reviewing the principal treaties where these obligations are contained, and the jurisprudence of international courts that have interpreted these obligations. Finally, the chapter surveys contrary scholarly opinion that challenges the anti-amnesty norm that prevails in international legal opinion. This chapter falls within step 1 of Skaar et al's 4-step assessment framework adopted in this thesis, as it provides important context to the specific transitional justice mechanism at issue, namely amnesty.

2.2 Defining Amnesty

At this stage, it is helpful to ground this chapter with a working definition of amnesty. Black's Law Dictionary defines amnesty in the following terms:

> "A sovereign act of oblivion for past acts, granted by a government to all persons (or to certain persons) who have been guilty of crime or delict, generally political offences – treason, sedition, rebellion – and often conditioned upon their return to obedience and duty within a prescribed time."[1]

Scholars have put forward variations of this definition. Ben Chigara defines amnesty as laws that "purport to extinguish legal liability of agents of a prior regime alleged to have violated basic human rights of individuals,"[2] while O'Shea defines it as "immunity in law from either criminal or civil legal consequences, or form both for wrongs committed in the past in a

[1] *Black's Law Dictionary* (Thomson West, 2014), p.76.

[2] Ben Chigara, *Amnesty in International Law*, *The Legality Under International Law of National Amnesty Laws* (Longman, 2002) pp.1-2.

political context."[3] Freeman offers a similar yet broader definition, one that notably omits any political ingredient that the former definitions include, stating that amnesty is "an extraordinary legal measure whose primary function is to remove the prospect and consequences of criminal liability for designated individuals or classes of persons in respect of designated types of offences."[4] The United Nations describes amnesty as a legal measure that has the effect of "prospectively barring criminal prosecution and, in some cases, civil actions against certain individuals or categories of individuals in respect of specified criminal conduct committed before the amnesty's adoption."[5] In more simple terms, in 1877, the United States Supreme Court considered amnesty to be the "extinction of the offence of which it is the object, causing it to be forgotten."[6]

Historically derived from the Greek word "*amnestia*", it is generally classified as the formal application of state forgiveness.[7] The application of an amnesty may be general in nature, covering multiple classes of persons or crimes, or more specific, applying only to certain individuals in respect of certain offences. It may be conditional, *i.e*., granted in return for reciprocal actions, or simply granted unconditionally. The above definitions are somewhat clinical and of limited utility, considering that the application of amnesty in state practice will always be context-specific, and will vary in nature and effect.

Amnesty is to be differentiated from the act of pardoning, which presupposes the presence of a conviction on the part of the individual. Amnesty requires no such prior finding of fact. Rather, pardoning is better considered as the process of remission of sentence, rather than complete forgiveness. As O'Shea points out, they serve different purposes. Amnesty promotes peace and reconciliation, while pardoning provides a discretionary mechanism for sidestepping the courts.[8] Often characterised as a form of impunity, amnesty typically forecloses the possibility of criminal sanction. Perpetrators are not subject to any inquiry that might lead to their being tried, sentenced or made to pay reparations to victims.[9]

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[3] Andreas O'Shea, *Amnesty for Crime in International Law and Practice* (Kluwer, 2002), p.2.

[4] Mark Freeman, *Necessary Evils: Amnesties and the Search for Justice* (Cambridge University Press, 2009), p.13.

[5] United Nations, *Rule-of-Law Tools for Post-Conflict States – Amnesties* (2009), p.5.

[6] *Knote v. U.S.* 95 U.S. 149 at 152.

[7] Norman Weisman, 'A History and Discussion of Amnesty', *Columbia Human Rights Law Review*, Vol. 4, Issue 2 (1972) 529-540 at 529.

[8] O'Shea, *supra* note 3, p.2.

[9] United Nations Commission on Human Rights, 'Updated set of principles for the protection and promotion of human rights through action to combat impunity', UN Doc E/CN.4/2005/102/Add.1, 8 February 2005, p.6.

2.3 Historical Evolution of Amnesty

The historical justification for utilising a process of amnesty is an inherently moral one. It serves to guide the path of transition from conflict to peace, fostering reconciliation and forgiveness between parties who were once at conflict. Weisman asserts that the practice of amnesty dates back to 404 B.C., when the Athenian General, Thrasybulus, forbade any punishment of Athenian citizens for political acts committed before the expulsion of the Spartan Tyrants.[10] The Tyrants killed over 1,500 people across eight months of rule over Athens. Following a proposal by Thrasybulus, an amnesty law was passed called the "law of forgetfulness". It stated that no one should be punished after "oblivion had been decreed" of wrongs and offences committed on either side.[11]

Amnesty was also employed in the course of ending numerous European conflicts in the pre-modern era. Article II of the Treaty of Westphalia of 1648, which ended the Thirty Years War between the Holy Roman Empire and the King of France and other allies, contained an express provision on amnesty. It provided that "there shall be peace on the one side and the other a perpetual Oblivion, Amnesty, or Pardon of all that has been committed since the beginning of these Troubles."[12] The Treaty of Westphalia set the stage for the regular inclusion of amnesty clauses in European peace treaties in the 17th and 18th centuries.[13] Among these were the Treaties of Paris and Hubertsberg in 1763, which, in ending the Seven Years War, provided that both sides shall "totally wipe from their memory all hostilities, losses, damages and injuries."[14]

Since pre-modern times, the concept and application of amnesty has developed extensively. It has been formally implemented in various guises in many modern legal systems, as well as informally in more localised, traditional settings. It has come to be utilised as an effective and often a more culturally appropriate method of conflict resolution. In more recent centuries, it has been used as a tool to enable nations make the transition from war to peace in

[10] Weisman, *supra* note 7 at 530.

[11] Nicholas Hammond, *A History of Ancient Greece to 322 BC* (Oxford University Press, 1986), p.444.

[12] Treaty of Westphalia, Peace Treaty between the Holy Roman Empire and the King of France and their respective Allies (24 October 1648), Article II. Available here: http://avalon.law.yale.edu/17th_century/westphal.asp (accessed 15 January 2021).

[13] O'Shea, *supra* note 3, p.9.

[14] *Id.*

a way that minimized internal wounds.[15] The Paris Peace Treaty of 1783, between the British and the Americans, provided that there were to be no further prosecutions for war-related actions, and that anyone imprisoned on such charges was to be "set at liberty".[16] Similarly, in the *Confiscation Act of 1862*, the United States Congress authorized President Lincoln to grant "pardon and amnesty" to the Confederate rebels, at his discretion.[17]

The reasons behind a state's decision in implement an amnesty can be varied. It might be introduced to satisfy both short- and long-term goals, such as ending violence or provide a climate of trust that fosters national reconciliation.[18] Moving to the early 20th century, there is a notable shift towards prosecuting those responsible for heinous criminality in particular, rather than granting immunity in return for lasting peace. Following World War I, The Treaty of Versailles in 1919 expressly provided for the prosecution of the Kaiser for a "supreme offences of international morality," with a special tribunal to be constituted to try him,[19] a prosecution which ultimately did not occur.[20] After World War II, the victors sought to prosecute those responsible for serious crimes at the Nuremburg Tribunal.[21] Some Japanese officials were, however, granted amnesty by General MacArthur, after being sentenced to death. This act was seen as a move to reconcile the Japanese with the Americans.[22] The Allies also ensured that amnesty would be granted to those who supported the war effort against the defeated enemy, as it was deemed undesirable to punish such persons for political offences.[23] Since this period, the use of amnesty as an *international* means of resolving disputes has largely ceased. This is mainly due to the growing recognition that those responsible for serious acts of criminality, such as acts of aggression, which are contrary to established peremptory norms of

[15] Weisman, *supra* note 7 at 538.

[16] The Paris Peace Treaty (30 September 1783), article 6. Available here: http://avalon.law.yale.edu/18th_century/paris.asp (accessed 15 January 2021).

[17] *Confiscation Act of 1862*, s.13. Available here: http://www.freedmen.umd.edu/conact2.htm (accessed 15 January 2021). Later in American history, amnesty was also granted not to active aggressors *against* the state, but also for those who did not fulfil their duties in *serving* the state. For example, during the Korean War, President Truman issued a proclamation that granted amnesty to all those convicted of desertion from the army in the mid 1940's. Weisman, *supra* note 7 at 532.

[18] Louise Mallinder, *Amnesty, Human Rights and Political Transitions: Bridging the Peace and Justice Divide* (Hart Publishing, 2008), p.37.

[19] The Versailles Treaty (28 June 1919) Part VII, article 227. Available here: http://avalon.law.yale.edu/imt/partvii.asp (accessed 15 January 2021).

[20] *See* William Schabas, *The Trial of the Kaiser* (Oxford University Press, 2018).

[21] *See* Kevin Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* (Oxford University Press, 2011).

[22] O'Shea, *supra* note 3, p.16.

[23] *Id*., p.17.

international law, should be held to account. On the other hand, amnesties continue to be a common *national* response to internal conflict.

According to former UN Special Rapporteur, Louis Joinet, the move away from amnesty and the growth of the anti-impunity global consensus occurred over four distinct periods. During the first stage in the 1970s, "non-governmental organizations, human rights advocates and legal experts […] mobilized to argue for an amnesty for political prisoners", as was typical in Latin American countries then under dictatorial regimes. In the 1980s, or the second stage, amnesty was more and more seen as a kind of "down-payment on impunity" with the emergence "self-amnesty" laws proclaimed by declining military dictatorships which "provoked a strong reaction from victims". The third stage was symbolized by the fall of the Berlin wall and was "marked by many processes of democratization or return to democracy along with peace agreements putting an end to internal armed conflicts". The fourth stage was that of international recognition, notably at the 1993 World Conference on Human Rights when the international community realized the importance of combating impunity.[24] According to Joinet, the right to justice entails certain obligations for the State: to investigate violations, to prosecute the perpetrators and, if their guilt is established, to punish them.[25]

Despite the international policy shift away from amnesty, it has been increasingly employed as a national means of resolving conflict, even in contexts of serious violations of human rights. In particular, during domestic civil strife, amnesty has often been used as a tool to end internal rebellions or facilitate the transition from one regime to another. States still turn to amnesties as "a mechanism of choice" to address human rights violations and facilitate transition.[26] Legally, there is a growing consensus among jurists and policymakers that amnesty is not compatible with peremptory norms that expect accountability for serious crimes. The argument that amnesties violates the duty to prosecute serious violations of human rights, protect victims' rights and undermine the rule of law are met with the rebuttal that amnesties foster peace, reconciliation, and help to establish the truth. Yet, as the international legal order demands justice, states continue to grant amnesty. In doing so, states often cite the need to re-establish an environment of peace as soon as possible, prioritising stability and ending conflict in the short term. Before addressing the contentious question of the legality of amnesty, to

[24] United Nations Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Question of the impunity of perpetrators of human rights violations (civil and political) Final report prepared by Mr. Joinet,* UN Doc. E/CN.4/Sub.2/1997/20, 26 June 1997, pp.3-4.

[25] *Id*., para.27.

[26] Ronald Slye, 'The Legitimacy of Amnesties under International Law and General Principles of Anglo-American Law: Is a Legitimate Amnesty Possible?', *Virginia Journal of International Law*, Vol. 43, Issue 1 (2002) 173-248 at 179.

further understand this complex and often case-specific dilemma of employing amnesty, it is helpful to refer to examples of relevant state practice. Three notable, yet markedly different, examples of amnesty are presented here as both a representative and geographical sample of amnesties in practice, as each amnesty differed in form and application. These are Argentina, South Africa and Angola.

2.4 State Practice on Amnesty

The experiences of Argentina, South Africa and Angola will be examined to demonstrate the diverse nature of amnesties within state practice. Argentina is selected as it deals with a so-called "self-amnesty", granted to state officials by the state itself. South Africa utilised a conditional amnesty, tied to participation and full disclosure before a truth and reconciliation commission. Angola is chosen because, like Uganda, it implemented a blanket and unconditional amnesty following internal civil war.

2.4.1 Argentina

From 1976-1983, Argentina experienced seven years of military dictatorship following a *coup d'état* that overthrew President Isabel Martinez de Perón. This repressive military rule resulted in thousands being "disappeared" and killed. During this period, the Argentinean Supreme Court requested the clarification of the status of hundreds of missing persons, with the ruling military *junta* denying all knowledge of the disappearances.[27] In the final days of the regime, the *junta* passed the "Law of National Pacification" – retrospective amnesty legislation that immunized every member of the military from prosecution.[28] This law effectively shielded those suspected of acts of state terrorism between 1976-1983. However, the newly elected government of President Alfonsín succeeded in nullifying the amnesty law in 1983, paving the way for the prosecution of nine senior *junta* officers.[29] Trials subsequently began for offences committed between 1976-1983, while President Alfonsín later introduced the so-called "full stop law" (*ley de punto final*), imposing a 60-day deadline for lodging formal charges, seeking

[27] Douglas Jacobson, "A break with the past or justice in pieces: Divergent paths on the question of amnesty in Argentina and Colombia", *Georgia Journal of International & Comparative Law*, Vol. 35, Issue 1 (2006) 175-204 at 187.

[28] Law No. 22.924 of 22 September 1983.

[29] Jacobson, *supra* note 27, at 188.

to limit the scope of the prosecutions.[30] Argentina's Supreme Court declared the military's "self-amnesty" law unconstitutional, convicting a number of *junta* members in 1986.[31]

Subsequently, in June 1987, the Argentinian Congress passed the "due obedience law".[32] This created a presumption that, without "proof to the contrary being admitted", officials were following orders and had no possibility of resisting those orders, which would thus render them innocent.[33] This was amnesty in all but name, or what Freeman calls a "pseudo-amnesty".[34] It effectively shielded those responsible for serious violations of human rights, and was perceived as a secret pact between the government and the military aimed at preventing more destabilizing military actions.[35] Alfonsín's successor, President Menem, also granted unconditional amnesties to specific individuals in the form of presidential pardons in 1989 and 1990.[36]

In the seminal *Simón* case in 2001, Judge Cavallo ruled that the so-called "impunity laws" were unconstitutional, because they violated Argentina's international treaty obligations to investigate and prosecute serious human rights violations.[37] President Kirchner subsequently led congress to nullify the amnesty laws in August 2003, as well passing the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crime against Humanity, thus opening the door for prosecutions.[38] In June 2005, the Supreme Court affirmed the *Simón* ruling and declared the impunity laws to be unconstitutional.[39] The judicial floodgates have now been opened, with as many as 847 persons being indicted.[40] According to Engstrom & Pereira, the gradual move from impunity to accountability in Argentina can be explained by a number of factors: the mobilization of human rights organisations in lobbying for change; the

[30] Law 23.492 of 23 December 1986.

[31] Alejandro Garro & Henry Dahl, 'Legal Accountability for Human Rights Violations in Argentina: One Step Forward and Two Steps Backward,' *Human Rights Law Journal*, Vol. 8 (1987) 283-344 at 306.

[32] Law 23.521 of 4 June 1987.

[33] O'Shea, *supra* note 3, p.58.

[34] Freeman, *supra* note 4, p.11.

[35] Par Engstrom & Gabriel Pereira, 'Ebb and Flow in the Search for Justice in Argentina', in Francesca Lessa & Leigh Payne (Eds), *Amnesty in the Age of Human Rights Accountability*, *Comparative and International Perspectives* (Cambridge University Press, 2012), p.105.

[36] Decree 1002/89 of 6 October 1989 and Decree 2741/90 of 29 December 1990.

[37] Christine Bakker, 'A full stop to Amnesty in Argentina', The Simón Case', *Journal of International Criminal Justice*, Vol. 3, Issue 5 (2005) 1106-1120.

[38] Engstrom & Pereira, *supra* note 35, p.115.

[39] Supreme Court of Argentina, *Simón, Julio Héctor y otros s/ privación ilegítima de la libertad*, Case No. 17.768, 14 June 2005.

[40] Engstrom & Pereira, *supra* note 35, p.118.

shift in political leadership in supporting human rights policies; critical evolution in judicial thinking; increased institutional capacity; and strengthening of civilian control over the armed forces.[41] All of these factors allowed for a more "lawful" environment in Argentina, one where the political establishment had the confidence to challenge the weakened "authority" of the *ancien* military regime, and where the judiciary had the conviction to rely on established norms of international law.

2.4.2 South Africa

Before 1994, South Africa's government ruled on the basis of apartheid, whereby the ruling white minority systemically discriminated against the majority black population. From the 1960s, internal strife gradually increased through both civil protests and paramilitary violence, met with state repression. As a result, mass human rights violations occurred.[42] During the apartheid era, the government passed two amnesty laws in 1961 and 1977, granting immunity from civil and criminal liability over any act committed while maintaining public order.[43] The security forces were thus effectively shielded from prosecution, including from incidents such as the infamous Soweto riots in 1976, when 76 students died during clashes with the armed security forces.[44]

In 1990, the apartheid policy was relinquished, and the ban on the African National Congress lifted. The *Indemnity Act* of 1990 was passed into law, giving the President the discretionary power to grant temporary immunity from criminal and civil proceedings.[45] South Africa's new constitution subsequently came into being in 1994. In its epilogue, it required amnesty to be granted in respect of acts, omissions, or offences "associated with a political objective and committed in the course of the conflicts of the past". Pursuant to this epilogue, in 1995 parliament enacted what became known as the Truth and Reconciliation Act ("TRC Act").[46] The TRC Act established a truth commission consisting of three committees, the

[41] *Id*., p.121.

[42] *See generally*, Nelson Mandela, *Long walk to freedom* (Little, 1995); Jeremy Sarkin, *Carrots and Sticks: The TRC and the South African Amnesty Process* (Intersentia, 2004); Ante Du Bois-Pedain, *Transitional Amnesty in South Africa* (Cambridge University Press, 2011).

[43] O'Shea, *supra note* 3, p.43.

[44] *Id*., p.44.

[45] *Id*.

[46] The full title of the act is the *Promotion of National Unity and Reconciliation Act 34 of 1995* (Hereafter, "TRC Act").

Committee on Reparation and Rehabilitation,[47] the Committee on Human Rights Violations,[48] and the Committee on Amnesty.[49] It was the responsibility of the latter committee to implement the amnesty provisions contained in the legislation. The TRC Act set out a two-part test for granting amnesty. First, the applicant must have shown that he or she acted as a member or supporter of a liberating movement, political party or a state institution or in the performance of a *coup d'état*. Second, once the previous threshold is passed, the committee was to consider the political nature of the conduct, by reference to certain criteria such as the motive, context and objective of the deed in question.[50] Thus, amnesties were only granted if the act, omission or offence was committed with a *political objective*, in the course of the conflicts of the past.[51] Conversely, any act in furtherance of "personal gain", or committed out of "personal malice", could not be amnestied.[52]

In contrast to the unconditional amnesty granted in Argentina, the applicant for amnesty in South Africa was required to make "full disclosure" of all relevant facts.[53] Furthermore, amnesty was available to all parties, those who were part of the governmental and security forces, as well as civilians who were members of political groups. Rather than denying the past, the purpose was to document the truth, thus inverting the association of amnesty with "amnesia".[54] It was hoped that the truth-telling process would contribute to a process of reconciliation and ensure a more peaceful future.[55] A constitutional challenge to the amnesty provisions, discussed further below, failed in 1996.[56]

Between 1996-2001, the Amnesty Committee held over 250 hearings and made 1,100 formal amnesty decisions.[57] Of the 7,112 amnesty applications received by the Amnesty

[47] TRC Act, ss.23-27.

[48] TRC Act, ss.12-15.

[49] TRC Act, ss.16-22.

[50] TRC Act, s.20(3)(a)-(f).

[51] TRC Act, s.20(1)(b).

[52] TRC Act, s.20(3)(f)(i) and (ii).

[53] TRC Act, s.20(1)(c).

[54] Jessica Gavron, 'Amnesties in the Light of the Developments of the Establishment of the International Criminal Court', *The International and Comparative Law Quarterly,* Vol. 51, Issue 1 (2002) 91-117 at 115.

[55] O'Shea, *supra* note 3, p.45.

[56] Constitutional Court of South Africa, *The Azanian Peoples Organization et al v The President of South Africa et al*, Case 17/96, 25 July 1996 (Hereafter, "*AZAPO* Judgment")

[57] A report of its work is contained in volume 6 of the *Truth and Reconciliation Report of South Africa*. Available at https://www.justice.gov.za/trc/report/ (accessed 16 January 2021).

Committee, 1,167 were granted and 5,392 were rejected.[58] Some of the most common reasons for the refusal of amnesty were the failure of an applicant to make "full disclosure", *i.e.*, to be completely forthcoming about all the relevant facts, or that the admitted conduct did not qualify for amnesty because, for example, it was not in further of a political objective or disproportionate.[59] Therefore, violence which served a political function, and seen as proportionate to its objective, was within the realms of amnesty. That international law might condemn the act in question as criminal was considered unimportant, as long as the TRC Act meant to make amnesty available.[60] Thus, any act in the mind of the offender which was connected to the struggle for power could qualify for amnesty regardless of the gravity of the act itself.[61]

A case in point is that of police officer Jeffrey Benzien, who killed and tortured political detainees. The argument that his actions could be considered as torture under international law was dismissed by the Amnesty Committee which stated that: "[T]orture or severe ill treatment are included in the definition of 'gross violation of human rights in terms of Section (1) of the Act of 1995.' The Committee is obliged to conduct a hearing where the offence for which amnesty is sought constitutes a gross violation of human rights and was associated with a political objective."[62] Most amnesty applicants were either still serving sentences for their crimes, were currently subject to prosecution, or had concrete reason to fear investigation in the future.[63] The majority were low-level perpetrators, relatively low in the hierarchical structure of their organization, and with little authority. Only 29 applicants could be described as true "leaders" who were part of the top structures, while the generals and politicians stayed away from the amnesty process.[64]

Du Bois-Pedain argues that the broad interpretation of the Amnesty Committee's interpretation of the "political offence" requirement was a prerequisite to the scheme's success,

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[58] Leila Sadat, 'Exile, Amnesty and International Law', *Notre Dame Law Review*, Vol. 81, Issue 3 (2006) 955-1036 at 983.

[59] Antje Du Bois-Pedain, 'Conditional Amnesty: The Case of South Africa', in Lessa & Payne, *supra* note 35, p.250.

[60] *Id*., p.252.

[61] *Id*.

[62] Truth and Reconciliation Commission, 'Amnesty Committee Application in terms of section 18 of the Promotion of National Unity and Reconciliation Act No. 34 of 1995', AM 5314/97. Available here: https://www.justice.gov.za/trc/decisions/1999/99_benzien.html (accessed 16 January 2021).

[63] Du Bois-Pedain, *supra* note 59, p.244.

[64] *Id*., p.248.

as it encouraged more applicants to come forward and give full disclosure.[65] It allowed for a more comprehensive documentation of South Africa's fraught social history, shedding light on the "causes, nature and effect" of the violations that occurred.[66] In this context, the notion that the crime has been completely obviated is somewhat diluted, as such crimes were acknowledged, recorded, and discussed in public discourse.[67] Sadat suggests that the South African experience of carefully focused amnesty provisions, combined with the threat of prosecutions, may be both a normatively and legally acceptable means to promote transitional justice.[68] However, as Du Bois-Pedain points out, the post-amnesty prosecution count is disappointingly low, with some cases ending in acquittals, and only a handful of fresh cases being brought.[69] She cites the lack of political will for such cases, noting that they would have been politically divisive to pursue. A further pardoning process initiated in 2007 has meant prisoners who did not apply in the previous amnesty process can now also seek absolution without any formal "disclosure".[70] In the South African amnesty process, the pursuit of truth, public accountability and political stability came at the expense of justice in the criminal sense. In the view of some commentators, this "justice deficit" is a price worth paying, while others lament the lost opportunity for re-establishing the rule of law through judicial procedures.[71]

In the *AZAPO* case, the family of murdered anti-apartheid activist, Steve Biko, argued that the amnesty law was incompatible with the constitution, as it extinguished criminal and civil liability. Justice Mahomed held that truth was more likely to be discovered through a process of disclosure. He began by recalling the preamble to the constitution, which is intended to be a "historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy, and peaceful coexistence."[72] Judge Mahomed held that the constitution made a deliberate choice: "preferring understanding over vengeance, reparation over

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[65] *Id*., p.253.

[66] *See* TRC Act, s.3(1)(a): "The objectives of the Commission shall be to promote national unity and reconciliation in a spirit of understanding which transcends the conflicts and divisions of the past by- (a) ***establishing as complete a picture as possible of the causes, nature and extent of the gross violations of human rights which were committed*** […]." (emphasis added)

[67] Jeremy Sarkin, 'An Evaluation of the South African Amnesty Process', in Hugo Van Der Merwe & Audrey Chapman (Eds), *Truth and Reconciliation in South Africa, Did the TRC deliver?* (University of Pennsylvania Press, 2008), pp. 93-115.

[68] Sadat, *supra* note 58 at 987.

[69] Du Bois-Pedain, *supra* note 59, p.255.

[70] *Id*., p.256.

[71] *Id*., p.261.

[72] *AZAPO* Judgement, *supra* note 56, para.3.

rehabilitation, *ubuntu* over victimisation."[73] The universal acceptance of the South African TRC model by the international community runs counter to the predominant view, including the United Nations, that amnesty for serious crimes such as apartheid is not acceptable.[74] Despite the accountability that the TRC process established, is arguable that the TRC model would not withstand present-day judicial scrutiny before international criminal for a such as the ICC, whose statute lists apartheid as a crime against humanity.[75]

2.4.3 Angola

Following independence from Portugal, Angola descended into a protracted and brutal civil war that was characterised by cold war ideological division and proxy intervention from states such as Cuba, South Africa and the DRC. Between 1975-2002, soldiers from the newly installed government forces, the *Movimento popular de libertação de Angola* ("MPLA"), led by José Eduardo dos Santos, fought the rebel group, *União nacional para a independência total de Angola* (UNITA"), who were led by Jonas Savimbi.[76] The war reduced whole cities to ruins, upwards of 500,000 people were killed or died from war-related deprivation and disease, and millions were displaced.[77] There were many infamous incidents of large-scale civilian death caused by the fighting, with both sides blatantly disregarding international humanitarian law that governed what was an internal armed conflict.[78] For example, in August 2001, UNITA forces attacked a passenger train in Kwanza Norte province on the pretext it was carrying government supplies, killing over 250 civilians.[79] Following this attack, the Angolan government called on the UN to intervene to hold Savimbi responsible for "indiscriminate attacks on civilians and crimes against humanity."[80] The MPLA forces were not without censure either. Between October 1992 and February 1993, many thousands of people were

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[73] *Id.*, para.19.

[74] *Rule-of-Law Tools for Post-Conflict States – Amnesties*, *supra* note 5 p.33.

[75] Rome Statute, article 7(1)(j).

[76] *See generally* Inge Tvedten, *Angola, Struggle for Peace and Reconstruction* (Westview Press, 1997), chapter 2; Justin Pearce, *Political Identity and Conflict in Central Angola, 1975-2002* (Cambridge University Press, 2015).

[77] Conciliation Resources, *From Military Peace to Social Justice? The Angola Peace Process* (ACCORD, 2004), p.15.

[78] José Doria, 'Angola: A Case Study in the Challenges of Achieving Peace and the Question of Amnesty or Prosecution of War Crimes in Mixed Armed Conflicts', *Yearbook of International Humanitarian Law*, Vol. 5 (2002) 3-60 at 18.

[79] United Nations, Report of the Secretary-General on the United Nations Office in Angola (UNOA), UN Doc. S/2001/956, 10 October 2001, para.3.

[80] Associated Press, 'Angola asks UN to try Savimbi for war crimes', 18 August 2001.

extrajudicially executed or "disappeared" by government forces.[81] Human Rights Watch documented government violations such as arbitrary killing, acts of torture and the use of indiscriminate weapons in civilian areas.[82] The war had a devastating effect on the civilian population. For example, in Kuito, a city almost totally destroyed by bombing, 30,000 people were said to have died during an 18-month siege by UNITA between 1992-1994.[83]

Following Savimbi's killing in February 2002, peace negotiations between the warring parties resumed again after years of failed efforts, which included the collapse of the Bicesse Accords and Lusaka Protocol in 1991 and 1994, respectively.[84] Shortly thereafter, in April 2002, the Angolan government passed a blanket amnesty law "covering all crimes committed in conjunction with the armed conflict between UNITA Military Forces and the Government."[85] This amnesty was understood by all stakeholders to cover all serious crimes committed during the war. The UNSG Representative, Ibrahim Gambari, added a reservation into the Memorandum that the UN did not recognize "any general amnesty that includes genocide, crimes against humanity and war crimes."[86] According to Gambari, that statement of principle "left some apprehension in the minds of UNITA and some people in the armed forces of Angola as well as in some segments of civil society who felt that this position by the United Nations may undermine the peace process, because some combatants may believe that it negates the provisions of the amnesty law that had recently been passed by the Angolan National Assembly."[87]

In the years since the conflict ended, high-ranking UNITA soldiers were incorporated into the MPLA forces and the government has not pursued any accountability efforts with

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[81] Amnesty International, *Angola: Assault on the Right to Life* (August 1993), p.7.

[82] Human Rights Watch, *Angola Unravels; The Rise and Fall of the Lusaka Peace Process* (September 1999).

[83] Amnesty International, *Angola, The Lusaka Protocol: What Prospect for Human Rights? (*April 1996), p.8.

[84] *See* Christine Messiant, 'Why did Bicese and Lusaka Fail? A Critical Analysis', in Conciliation Resources, *supra* note 77, pp.16-23.

[85] 'Luena Memorandum of Understanding the Government of the Republic of Angola and UNITA on the peace process', 4 April 2002, Chapter II, para.2.1: "The Government guarantees, in the interest of peace and national reconciliation, the approval and publication by competent organs and institutions of the state of the Republic of Angola an Amnesty Law covering all crimes committed in conjunction with the armed conflict between UNITA Military Forces and the Government." The domestic enacting law is: Lei de Amnistia, Lei No. 4 /02, de 4 de Abril de 2002.

[86] UN Security Council, 'The Situation in Angola', 4517th Meeting of the UN Security Council, 23 April 2002, UN Doc. S/PV.4517, p.3.

[87] *Id*.

respect to crimes committed during the civil war.[88] Increased wealth due to diamond and oil exploitation has brought relative economic prosperity and facilitated regional development, a growing middle class and a generally stable society, despite endemic poverty. Van Wijk posits that the government did not want to risk peacebuilding efforts by prosecuting war criminals and "jeopardize the sustainability of peace."[89] Yet, he considers it remarkable that in the age of accountability, NGOs and the international community have remained largely silent in response to the blanket amnesty granted by the government, stating that "after their initial expressions of 'concern' that the blanket amnesty would lead to impunity, these NGOs seem to have missed that a situation of impunity indeed *is* taking place."[90] Certain NGOs and advocacy groups have lobbied hard for accountability in places like Uganda and Sierra Leone, but yet remain strangely silent in relation to Angola. In 2009, Human Rights Watch, which has been strident in its opposition to amnesty for serious crimes, nevertheless acknowledged that "after 27 years of bloodletting, the Luena Accord did bring an end to the conflict."[91] While there are domestic calls for greater reconciliatory efforts and the creation of truth-telling mechanisms, there are no domestic calls for prosecutions.[92] According to research by the International Center for Transitional Justice, the use of amnesty as a strategy for reconciliation resulted in "a popularised national discourse of 'forgive and forget' towards the atrocities of the war period – and which is now preserved, at least in part, through a sense of fear of what reopening the wounds of the past might do to the country."[93] Notably, because of the widespread participation of the majority of Angolans in the conflict, local sentiment was that a South African TRC model would therefore be of little utility.[94]

The muted response of the international community to Angola's blanket amnesty leads Van Wijk to opine that perhaps they think it is better "to be principled for a day" and "let the past in Angola rest".[95] Moreover, they may well realise that "prosecuting war criminals who currently hold important positions in the Angolan administration might only stir up political antagonism, negatively impact political and economic interests and endanger the current

[88] Joris van Wijk, 'Amnesty for War Crimes in Angola: Principled for a Day?', *International Criminal Law Review,* Vol. 12, Issue 4 (2012) 743-761 at 754-755.

[89] *Id*., at 756.

[90] *Id*., at 758.

[91] Human Rights Watch, 'Selling Justice Short, Why Accountability Matters for Peace' (July 2009), chapter V.B (Angola).

[92] Van Wijk, *supra* note 88, at 759.

[93] International Centre for Transitional Justice, 'Southern Africa Regional Mission Reports' (2009), p.13.

[94] *Id*., p.23.

[95] Van Wijk, *supra* note 88, at 759.

peace."[96] However, in December 2019, the Angolan government reversed its "forgive and forget policy", announcing a new "embrace and forgive" reconciliation plan to honour the memory of victims of Angolan armed conflicts.[97] While this decision appears to be the result of advocacy surrounding a deadly intra-MPLA purge in 1975, the mandate of the new reconciliation commission is to cover the entire period of the 27-year armed conflict.[98] The commission will make suggestions how the state should pay tribute to victims, through establishing appropriate mechanisms and memorials. Whether this development signals a turn towards truth and accountability remains to be seen, but at present there is no indication of the 2002 general amnesty being disturbed or reversed in Angola. It is therefore a striking example of state practice that goes against the emerging "anti-amnesty" norm.

As the above three examples of state practice show, the implementation of amnesty can vary considerably, depending on the stage and nature of the transition a particular society is undergoing at a given time. From the self-granted amnesty in Argentina, to the conditional amnesty in South Africa, and the blanket amnesty in Angola, rarely is any amnesty the same in form or application. Despite the diverging practical implementation of amnesty in the three states above, and indeed in every other modern application of amnesty in the context of mass atrocity, there is one common dilemma present in all of these settings: whether the application of amnesty for serious violations of human rights is legally appropriate. It is this question of the *legality* of amnesty, and its relationship with peremptory norms of international law, that this chapter now turns to.

2.5 The Legality of Amnesties Under International Law

There is a growing international consensus that amnesties are generally inconsistent with the obligation of states to provide accountability for serious crimes.[99] There is still reluctance, however, for states to expressly agree that amnesty for *jus cogens* crimes is to be prohibited. Indeed, the late Antonio Cassese noted there is no express prohibition on the use of amnesties:

> **"There is not yet any general obligation for States to refrain from amnesty laws on these crimes. Consequently, if a State passes any such law, it does not breach**

[96] *Id.*

[97] Joris van Wijk & Maarten van Munster, 'Angola: The Pandora Box of Embracing and Forgiving', *Justiceinfo.net*, 14 January 2020.

[98] *Id.*

[99] For example, Principle 7 of the Princeton Principles on Universal Jurisdiction states: "Amnesties are generally inconsistent with the obligation of states to provide accountability for serious crimes under international law as specified in Principle in 2(1)." Available here: https://lapa.princeton.edu/hosteddocs/unive_jur.pdf (accessed 16 January 2021).

> **a customary rule.** Nonetheless if a court of another State having in custody persons accused of international crimes decide to prosecute them although in their national State they would benefit from an amnesty law, such court would not thereby act contrary to general international law, in particular to the principle of respect for the sovereignty of other States."[100] (emphasis added)

This reluctance is perhaps due to the fact that the law in this area has been slow to evolve and is in "disarray".[101] There is a notable conflict between jurisprudence and state practice on this matter. Where international courts and tribunals have addressed this issue, they have generally concluded that amnesties for gross violations of human rights violate fundamental principles of international human rights law. In contrast, state courts sometimes uphold their legality, as the South African experience demonstrates. International scholars differ on whether amnesties are prohibited under international law.[102] Freeman points out that on every occasion where an explicit prohibition or discouragement of amnesties has been mooted in the context of a multilateral treaty negotiation, states have demonstrated "a resolute unwillingness to agree to even the mildest discouragement".[103] He states that it is hard to reconcile states' refusal to codify an absolute prohibition or discouragement of amnesties, with the purported existence of a custom-based, amnesty prohibition.[104] While scholars point out the lack of a prohibition on amnesties, this stands in contrast to treaty-based obligations to investigate, prosecute and punish persons who commit serious crimes, which the next section surveys.

2.5.1 Treaty-Based Duties to Investigate and Prosecute

In the decades that followed the prosecution of Nazi war criminals at Nuremburg, a number of international conventions were adopted to repress certain grave crimes of international concern, imposing upon states the obligation to investigate and prosecute persons responsible, or as once described by Grotius, the principle of *aut dedere aut judicare*.[105] What

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[100] Antonio Cassese, *International Criminal Law* (Oxford University Press, 2013), p.315.

[101] Sadat, *supra* note 58 at 1018.

[102] *Compare* Cassese, *supra* note 100 *with* Diane Orentlicher, 'Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime,' *Yale Law Journal* Vol. 100, Issue 8 (1991) 2537-2615 at 2585-2593, arguing that customary international law imposes an obligation to punish crimes against humanity. For more in-depth discussion on these diverging views, see section 2.6, *infra*.

[103] Freeman, *supra* note 4, p.33.

[104] *Id*.

[105] Hugo Grotius described this principle as follows: "When appealed to, a State should either punish the guilty person as he deserves, or it should entrust him to the discretion of the party making the appeal." Hugo Grotius, *De Jure Belli ac Pacis*, Book II, chapter XXI, section IV (translation by Francis Kelsey (London, 1925), p.527).

follows is an overview of the principal treaties that contain such obligations. Upon closer scrutiny, it becomes clear that not all obligations are framed the same and that they can differ between international and internal armed conflicts. Moreover, in respect of certain acts, there appears to be discretion on the part of the contracting party whether to actually prosecute.

- **Genocide Convention of 1948**

Under the Genocide Convention of 1948,[106] Article 1 provides that states "undertake to prevent and punish" the crime of genocide,[107] while article 5 requires that states enact the necessary legislation and "provide effective penalties" for persons guilty of the crime.[108] Furthermore, article 6 requires that persons charged with genocide "shall be tried by a competent tribunal", be it domestically or in an international court with the appropriate jurisdiction.[109] The requirement to prosecute perpetrators would therefore seem to disbar the possibility for any amnesty in respect of such crimes, a view supported by scholars.[110]

- **Geneva Conventions of 1949**

In the aftermath of World War II, states negotiated a codification of the laws of war to prohibit certain acts and conduct and mandate their punishment.[111] The "grave breaches" regime of the four Geneva Conventions of 1949[112] provide for the exercise of universal jurisdiction over crimes committed in international armed conflicts. The conventions require signatories to criminalise grave breaches, search for alleged perpetrators, and either prosecute

[106] Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277.

[107] *Id*., article 1.

[108] *Id*., article 5.

[109] *Id*., article 6.

[110] *See, e.g.*, Michael Scharf, 'The Letter of the Law: The Scope of the International Legal Obligation to Prosecute Human Rights Crimes', *Law and Contemporary Problems*, Vol. 59, Issue 4 (1996) 41-61 at 60: "[w]here mass violence is directed at ethnic, national, racial, or religious groups, the Genocide Convention requires prosecution [...] Any amnesty conferred in those limited circumstances would constitute a violation of treaty law and would be subject to challenge in a variety of domestic and international fora." *See also Barcelona Traction, Light and Power Co. Ltd* (Belgium v. Spain) (1970), ICJ, 5 February 1970, para.34 (noting that all States must enforce the prohibition against genocide as an obligation *erga omnes*).

[111] Raymund Yingling & Robert Ginnane. 'The Geneva Conventions of 1949', *American Journal of International Law*, Vol. 46, Issue 2 (1952) 393-427.

[112] Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, 75 UNTS 31 ("Geneva Convention I"); Geneva Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea of 12 August 1949, 75 UNTS 85 ("Geneva Convention II"); Geneva Convention III Relative to the Treatment of Prisoners of War of 12 August 1949, 75 UNTS 135 ("Geneva Convention III"); Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 UNTS 287 ("Geneva Convention IV") (collectively "Geneva Conventions").

them or extradite them for trial in another state party.[113] Such grave breaches include wilful killing, torture, inhuman treatment and unlawful confinement of civilians. Given the strict obligation to prosecute or extradite, there is no room to grant amnesty where grave breaches have been committed. As such, for crimes committed in international armed conflict, scholars have argued a customary international duty exists to not only prosecute or extradite the offender, but also to prohibit amnesties as well.[114]

- **Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity of 1968**

In the mid 1960s, with concern over fugitive Nazi war criminals still at large, growing state support for a formal convention prohibiting statutory limitations for international crimes culminated in a Polish resolution to the UN Commission on Human Rights in 1965.[115] During the drafting negotiations, there was intense debate between delegates on the proposed retroactive nature of the convention, and the impact this would have on crimes already amnestied by a contracting state. Numerous attempts to mollify its retroactive effect did not find consensus.[116] The final convention adopted in 1968 provided that statutory limitations would not apply to war crimes (as described in the Nuremburg Charter and the grave breaches regime) and crimes against humanity "irrespective of the date of their commission."[117] This aspect has likely resulted in the low number of ratifying states, which today stands at 55.[118] The convention provides that states should legislate for the extradition of perpetrators[119] and ensure that statutory limitations shall not apply to the prosecution and punishment of crimes

[113] Geneva Convention I, Article 49; Geneva Convention II, Article 50; Geneva Convention III, Article 129; Geneva Convention IV, Article 146 (stipulating that "[t]he High Contracting Parties undertake to enact any legislation necessary to **provide effective penal sanctions** for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article. 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 […]").

[114] *See e.g.*, Sadat, *supra* note 58 at 1019.

[115] Draft resolution submitted by Poland to the Commission on Human Rights, 'Question of punishment of war criminals and of persons who have committed crimes against humanity', UN Doc. E/CN.4/L.733/Rev.1, 25 March 1965.

[116] *See* UN Commission on Human Rights, Report on the 23rd session, UN Doc. E/4322, February-March 1967, paras.151 & 166-171.

[117] Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity (adopted 26 November 1968, entered into force 11 November 1970) 754 UNTS 73, article 1.

[118] *See* Robert Miller, 'The Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity', *American Journal of International Law*, Vol. 65, Issue 3 (1971) 476-501.

[119] *Supra* note 117, article 3.

specified in articles 1 and 2.[120] The implicit rejection of any possibility of amnesty for these crimes is clear both in the drafting negotiations and the final wording of the convention, which envisages prosecution unfettered by temporal limitation.

- **Second Protocol Additional to the Geneva Conventions of 1949, adopted in 1977**

In June 1977, recognising that the Geneva Conventions of 1949 did not adequately regulate the conduct of war in internal armed conflict, states adopted the Second Protocol Additional to the Geneva Conventions of 1949, commonly referred to as Additional Protocol II.[121] Additional Protocol II develops and supplements Common Article 3 of the 1949 Conventions,[122] and requires both armed groups and states to ensure absolute protection of those taking no active part in hostilities, be they civilians or persons *hors de combat* (outside of the theatre of combat).[123] While Additional Protocol I extends the obligation to prosecute and extradite in respect of grave breaches,[124] Additional Protocol II contains no such requirement for internal armed conflicts. Article 6(1)-(4) of the latter deals with prosecutions and punishment of criminal offences and provides for due process rights of accused persons. Notably, article 6(5) of Protocol II encourages the use of amnesty in the aftermath of conflict:

> "At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to any persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interested or detained."

The scope of the amnesty envisaged under article 6(5) has been the subject of intensive scholarly debate. Early commentary by the International Committee of the Red Cross ("ICRC") states the objective of the provision is to "promote reconciliation which can contribute to establishing normal relations in the life of a nation which has been divided."[125] This position later hardened in the 1990s, with the ICRC stating that the provision was only intended to provide "combat immunity" to those who respected the laws of war, not to enable war criminals

[120] *Id*., article 4.

[121] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609 ("Additional Protocol II").

[122] *Id*., article 1.

[123] *Id*., article 4(1).

[124] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3 ("Additional Protocol I").

[125] Yves Sandoz, Christophe Swinarski & Bruno Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Martinus Nijhoff ,1987) p.1402.

to evade punishment.[126] In a 1997 letter to the Office of the Prosecutor of the ICTY, the Head of the ICRC Legal Division wrote that article 6(5) "does not aim at an amnesty for those having violated international humanitarian law."[127] Later, in its 2005 study of Customary International Humanitarian Law, the ICRC argued that its interpretation of article 6(5) had become part of customary law.[128] This position has been endorsed by the caselaw of the Inter-American Court on Human Rights[129] and the European Court of Human Rights.[130] Some scholars also take this view, noting that it would be contradictory to the very purpose of the protocol, which is to increase protection for victims.[131] More persuasively, they argue it would be illogical to have a provision providing for the prosecution for offences under the Protocol, only to then amnesty those same offences within the same provision. If that were so, article 6 would become redundant.[132]

However, Schabas states this is a "dubious proposition", arguing that the limited reference to state practice by the ICRC study "does not prove a norm simply because some people appear to abide by it."[133] He criticises the ICRC for not referring to the amnesty granted in the South African transition, and the promise not to prosecute those responsible for the crime against humanity of apartheid. He also questions the ICRC's inattention to the fact that there is "quite inconsistent practice in the area, and that one "cannot conclude there is a prohibition

[126] *See* Naomi Roht-Arriaza & Lauren Gibson, 'The Developing Jurisprudence on Amnesty', *Human Rights Quarterly*, Vol. 20 (1998) 843-885 at 865.

[127] International Committee of the Red Cross, Practice relating to rule 159, Amnesty, section. B, part XI. Available at https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule159_sectionb#sectionb_xiinrecr (accessed 16 January 2021).

[128] Jean-Marie Henckaerts & Louise Doswald-Beck (eds.), *Customary International Humanitarian Law, Volume 1: Rules* (Cambridge University Press, 2005), "Rule 159", p.611.

[129] IACHR, *The Massacres of El Mozote and nearby places v El Salvador* (Merits, Reparations and Costs) Case No. 252, 25 October 2012, paras.284–86: "Consequently, it may be understood that article 6(5) of Additional Protocol II refers to extensive amnesties in relation to those who have taken part in the non-international armed conflict or who are deprived of liberty for reasons related to the armed conflict, provided that this does not involve facts, such as those of the instant case, that can be categorized as war crimes, and even crimes against humanity."

[130] ECHR, *Marguš v Croatia,* Application No. 4455/10, 27 May 2014, paras.210–11: "Likewise, in an interpretation of Article 6-5 of the Protocol II Additional to the Geneva Convention on International Humanitarian Law, the ICRC stated that amnesties cannot protect perpetrators of war crimes."

[131] Roht-Arriaza & Gibson, *supra* note 126 at 866.

[132] *Id*. *See also* Yasmin Naqvi, 'Amnesty for war crimes: Defining the limits of international recognition', *International Review of the Red Cross,* Vol. 85, Issue 851 (2003) 583-626 at 604: "[i]f one applies the rules of interpretation of the 1969 Vienna Convention on the Law of Treaties, which directs States Parties to interpret in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose, it is difficult to conclude that Article 6(5) covers amnesties for war crimes."

[133] William Schabas, *Unimaginable Atrocities, Justice Politics and Rights at the War Crimes Tribunals* (Oxford University Press, 2012), p.180.

under customary international law", noting that while some amnesties exclude war crimes, this cannot be said to be a general rule based on uniform state practice.[134]

Moreover, a close reading of the *travaux préparatoires* of article 6(5) arguably does not support the absolutist position that the drafters intended it to be a provision restricted to combat only, thereby excluding other crimes.[135] There is the discernible view among state delegates that the provision, as framed, *could permit amnesty for serious crimes*. For example, the delegates from Mongolia and the Soviet Union were concerned that mercenaries and persons guilty of war crimes, crimes against humanity and genocide could receive protection under the provision.[136] Because of this concern, the Soviet Union, together with other eastern bloc states, proposed to add a paragraph ensuring that "[N]othing in the present protocol shall be invoked to prevent the prosecution and punishment of persons charged with crimes against humanity or who participate in the conflict as foreign mercenaries."[137] But, this proposal was not accepted. Other states, such as Spain and Nigeria, proposed the entire deletion of the paragraph, arguing that amnesty should instead be the sole prerogative of states.[138] Notably, New Zealand, Belgium, and the Netherlands jointly proposed that "anyone sentenced shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases" – a proposal also not accepted.[139] A number of states were of the view that the provision amounted simply to a non-binding "recommendation,"[140] and "not subject to any legal consideration but rests on the humanitarian spirit of political leaders."[141] The final wording of article 6(5) was ultimately adopted by 37 votes to 15, with 31 abstentions.[142] The adoption notwithstanding, a number of states who voted against the provision underscored that it infringed upon state sovereignty and domestic

[134] *Id.*, p.181.

[135] For an in-depth analysis of the *travaux préparatoires* of article 6(5) of Additional Protocol II, *see* Josepha Close, *Amnesty, Serious Crimes and International Law* (Routledge, 2019), pp.125-133.

[136] Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflict (1974–1977), Vol. VIII, pp.364-365, paras. 36 (Mongolia) & 41(Soviet Union). Available here: https://www.loc.gov/rr/frd/Military_Law/pdf/RC-records_Vol-8.pdf (accessed 16 January 2021).

[137] *Id.*, Vol. IV, p.34. Available here: https://www.loc.gov/rr/frd/Military_Law/pdf/RC-records_Vol-4.pdf (accessed 16 January 2021).

[138] *Supra* note 136, pp.361-362, paras. 21 (Nigeria) & 29 (Spain).

[139] *Supra* note 137, p.36. This proposed wording mirrors that of article 6(4) of the International Covenant on Civil and Political Rights.

[140] *Supra* note 136, Vol. VII, p.93-94, para.73 (Syrian Arab Republic), para.79 (Canada) and p.104 (Zaire). Available here: https://www.loc.gov/rr/frd/Military_Law/pdf/RC-records_Vol-7.pdf (accessed 16 January 2021).

[141] *Id.*, p.104 (Cameroon).

[142] *Id.*, p.96, para.100.

discretion to decide on the utility of an amnesty in certain situations. For example, the Spanish delegate stated that measures of clemency and amnesty "fall within the exclusive competence of States", who "can alone decide whether or not an amnesty is conducive to the restoration of public peace."[143]

The (combat) restrictive interpretation of the ICRC relies upon reference to state practice and a statement by Soviet Union during the negotiations that the article should not be construed as enabling war criminals "to evade severe punishment."[144] However, Close points out that this statement was in response to the deletion of a paragraph designed to prohibit death sentences being executed during conflict except with regard to perpetrators of war crimes and crimes against humanity[145] – *not* the paragraph that became article 6(5): the provision of broad amnesty. Importantly, it should be recalled that the Soviet Union's reservations over the ambiguous wording of 6(5) led to their proposal to insert a paragraph ensuring the prosecution of war criminals, a proposal which was rejected.[146]

Close persuasively argues that if states had understood 6(5) as *excluding* certain categories of offenders, they would have explicitly said so.[147] Given the absence of a positive obligation to prosecute in Additional Protocol II, Close states "it cannot be assumed that serious violations committed during the course of an internal armed conflict would be prosecuted." [148] Close notes that paragraphs aiming to provide leniency and guarantees to combatants were deleted after states opposed their inclusion.[149] She argues that "the claim that article 6(5) was intended to apply solely to rebel combatants having respected international law seems

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[143] *Id*., p.103.

[144] Henckaerts & Doswald-Beck, *supra* note 128, p.612, *citing to* note 136, Vol. IX, p.319, para.85. Available here: https://www.loc.gov/rr/frd/Military_Law/pdf/RC-records_Vol-9.pdf (accessed 16 January 2021). The full quotation from the Soviet Union was as follows: "As to new article 10 of draft Protocol II, his delegation, being anxious to facilitate an agreement had refrained from opposing the deletion of paragraph 4. Nonetheless, it was convinced that the text elaborated by Committee I could not be construed as enabling war criminals, or those guilty of crimes against peace and humanity, to evade severe punishment in any circumstances whatsoever."

[145] The full text of the deleted paragraph in question was: "The death penalty pronounced against a person convicted of an offence other than a war crime or a crime against humanity shall not be carried out until the end of the armed conflict." *See* Close, *supra* note 135, p.128.

[146] *Supra* note 137.

[147] Close, *supra* note 135, p.132.

[148] *Id*.

[149] *Id*. *See also* note 145, *supra*. The other deletion was that of draft paragraph 5, which encouraged lenience where a convicted person had respected the provisions of the protocol: "In case of prosecutions carried out against a person only by reason of his having taken part in hostilities, the court, when deciding upon the sentence, shall take into consideration, to the greatest possible extent, the fact that the accused respected the provisions or the present Protocol. In no such case shall a death penalty be carried out until the end of the armed conflict." *See* Vol. VII, *supra* note 140, p.95.

inconsistent with the deletion of these paragraphs."[150] Given that states rejected language granting lenience to combatants, it seems more likely states understood article 6(5) as a general provision applying to all persons involved in an internal armed conflict, including government forces.[151] Close concludes that the *travaux préparatoires* of article 6(5) does not support the conclusion that the drafters intended it as a provision excluding certain categories of offenders, but rather it "seems to confirm a literal interpretation of the provision as applying broadly to all persons having taken part in an internal conflict without distinctions or exceptions."[152] Similarly, Freeman notes that the provision does not prohibit or encourage any kind of amnesty, and that the one most can argues is that it may encourage certain kinds of amnesties.[153]

- **The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984**

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[154] requires states parties to criminalise all acts of torture [155] and to "submit the case to its competent authorities for the purpose of prosecution."[156] State authorities shall then "procced with a prompt and impartial investigation."[157] Article 5 also provides for universal jurisdiction for acts torture, where the perpetrator or victim a national of the state. Mallinder suggests that the requirement to submit the case to the competent authorise contained in article 7(1) is ambiguous, and that there is a degree of permissiveness in this provision. Rather than imposing an absolute duty, she argues that the authorities may use their discretion and decide not to prosecute, for example where prosecution would not be in the public interest.[158] However, others consider that this view misconstrues the nature the "prosecute or extradite" formulation in the convention, which is reproduced verbatim in other international conventions.[159] Scharf argues that the convention was carefully worded to reflect developments

[150] *Id*., pp.132-133.

[151] *Id*., p.133.

[152] Close, *supra* note 135, p.133.

[153] Freeman, *supra* note 4, p.36.

[154] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 ("Convention against Torture"). Article 1 defines torture as: "[a]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession […]"

[155] *Id*., article 4.

[156] *Id*., article 7(1).

[157] *Id*., article 12.

[158] Mallinder, *supra* note 18, pp.127-128. *See also*, Orentlicher, *supra* note 102 at 2604: "[t]he Convention Against Torture requires States Parties to "submit" cases involving allegations of torture to the "competent authorities for the purpose of prosecution"; it does not explicitly require that a prosecution take place."

[159] *See* Scharf, *supra* note 110 at 46, citing to, *inter alia*, International Convention Against the Taking of Hostages (adopted 17 December 1979, entered into force June 4, 1983).

in international standards of due process, and that the convention had to be drafted in such a way as to avoid the suggestion of a predetermined outcome of judicial proceedings.[160] He concludes that the wording should not be interpreted to suggest the permissibility of amnesties or pardons, as it was the "manifest intent" of the drafters that those convicted of torture receive harsh sentences.[161]

The UN Committee against Torture has also declared that "amnesties or other impediments which preclude or indicate unwillingness to provide prompt and fair prosecution and punishment of perpetrators of torture or ill-treatment violate the principle of non-derogability."[162] The Committee has, however, taken an inconsistent stance when it comes to criticising amnesties which either expressly, or in practice, amnesty acts of torture. For example, while the Committee called for the repeal of amnesties in states such as El Salvador[163] and Sierra Leone,[164] it praised the work of the South African Truth and Reconciliation Commission and its role in the peaceful transition (while noting the *de facto* impunity for those responsible for acts of torture).[165] The Committee recently expressed its concern over the lack of prosecutions for apartheid-era cases of torture, "particularly those who were deemed ineligible for amnesty,"[166] which suggests implicit approval of grants of amnesty for acts of torture. Notably, in its report on Uganda in 2005, while criticising impunity for acts of torture in the country, the Committee does not mention the *Amnesty Act 2000*.[167] This stands in contrast to the UN Committee on the Rights of the Child, which in 2008 expressed concern that the *Amnesty Act 2000* was not in compliance with the Rome Statute, and resulted in

[160] *Id*., at 47.

[161] *Id*.

[162] UN Committee against Torture, General Comment no 2, Implementation of article 2 by States Parties, UN Doc. CAT/C/GC/2/CRP. 1/Rev.4, 24 January 2008, para.5.

[163] UN Committee against Torture, Concluding observations on El Salvador, UN Doc. CAT/C/SLV/CO/2, 9 December 2009: "The Committee urges the State party to repeal the General Amnesty (Consolidation of the Peace) Act. [...] all necessary steps should be taken to guarantee that investigations of cases of torture and other cruel, inhuman or degrading treatment or punishment are carried out thoroughly, promptly and impartially, that the perpetrators are prosecuted and punished and that measures are adopted to provide redress and rehabilitation for the victims, in accordance with the provisions of the Convention."

[164] UN Committee against Torture, Concluding observations on Sierra Leone, UN Doc. CAT/C/SLE/CO/1, 20 June 2014: "[t]he Committee urges the State party to repeal the amnesty provisions in the Lomé Peace Agreement (Ratification) Act of 1999 and to take all the necessary steps to ensure : (i) that cases of torture and other cruel, inhuman or degrading treatment or punishment be thoroughly and promptly investigated in an impartial manner; (ii) that the perpetrators be subsequently tried and punished ; and (iii) that steps be taken to provide reparation to the victims."

[165] UN Committee against Torture, Conclusions and recommendations on South Africa, UN Doc. CAT/C/ ZAF/CO/1, 7 December 2006, para.18.

[166] UN Committee against Torture, Conclusions and recommendations on South Africa, UN Doc. CAT/C/ZAF/CO/2, 7 June 2019, para.28.

[167] UN Committee against Torture, Conclusions and recommendations on Uganda, UN Doc. CAT/C/CR/ 34/UGA, 21 June 2005, para.4.

impunity for serious violations of international law, including the conscription and use of children in hostilities.[168]

- **The International Convention for the Protection of All Persons from Enforced Disappearances of 2006**

The International Convention for the Protection of All Persons from Enforced Disappearances[169] prohibits "the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person."[170] States must criminalise the offence[171] and can exercise universal jurisdiction over the offender.[172] Article 11(1) contains similar langue to that found in article 7 of the Convention against Torture, specifically, that if an offender is not extradited, states must "submit the case to its competent authorities for the purpose of prosecution."[173] It is notable that the original draft of the convention included a provision prohibiting amnesties for enforced disappearances, but no consensus could be reached among delegates, and so it was removed.[174]

- **Draft Convention on Crimes Against Humanity**

As discussed in the introduction, states have declined to include a provision prohibiting amnesty in the latest draft Convention on Crimes Against Humanity.[175] Instead, the

[168] UN Committee on the Rights of the Child, Consideration of reports submitted by states parties under article 8 of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, Concluding Observations: Uganda, UN Doc. CRC/C/OPAC/UGA/CO/1, 17 October 2008, part III: "The Committee recognises that the Amnesty Act of 2000 has contributed to the return, demobilization and reintegration of thousands of children forcefully recruited by the LRA, however is concerned that the criteria for granting amnesties are not in compliance with the international legal obligations of the State party, notably the Rome Statute of the International Criminal Court. The Committee is concerned that serious violations of international law such as the recruitment and use of children in hostilities may consequently remain in impunity."

[169] The International Convention for the Protection of All Persons from Enforced Disappearances (adopted on 20 December 2006 and entered into force on 23 December 2010) 2716 UNTS 3.

[170] *Id*., article 2.

[171] *Id*., article 4.

[172] *Id*., article 9(1).

[173] *Id*., article 11(1).

[174] *See* UN Commission on Human Rights, Report of the intersessional open-ended working group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance, UN Doc. E/CN.4/2004/59, 23 February 2004, paras.73-80.

[175] *See* section 1.1 of this thesis.

International Law Commission ("ILC") has recommended *aut dedere aut judicare* language akin to that found in the Convention Against Torture, requiring states to submit the case to the competent authorities for the purpose of prosecution.[176] As previously noted, the ILC commentary warns of the incompatibility of amnesty with *aut dedere aut judicare* obligations to investigate and prosecute. However, one may be further guided by relevant *opinio juris* and state practice to ascertain the presence of a customary norm prohibiting (or not) amnesty for such crimes. Since 1998, 124 States have recognised the necessity to prosecute serious international crimes by ratifying the Rome Statute, whose preamble states that "it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes". The Rome State enumerates crimes against humanity in article 7.[177] The United Nations General Assembly[178] and the Human Rights Committee[179] have both stated that amnesties violate international law. The latter Committee, which interprets and supervises the implementation of the ICCPR, considers this obligation to include a duty to investigate allegations of such violations and bring their alleged perpetrators to justice.[180] Reports of various Special Rapporteurs have also recognised a duty to prosecute grave international crimes and the incompatibility of amnesties for such crimes with these goals.[181] Furthermore, the Basic Principles and Guidelines on the Right to Remedy and reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International

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[176] Draft Article 10 of the Convention on Crimes Against Humanity reads as follows:
"Aut dedere aut judicare
The State in the territory under whose jurisdiction the alleged offender is present shall, if it does not extradite or surrender the person to another State or competent international criminal court or tribunal, submit the case to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any other offence of a grave nature under the law of that State."

[177] These crimes include: murder, torture, rape, sexual slavery, persecution, enforced disappearance of persons and the crime of apartheid, committed as part of a widespread and systematic attack on a civilian population.

[178] United Nations General Assembly, UN Doc. A/RES/47/133, Declaration on the Protection of All Persons from Enforced Disappearance, 18 December 1992, article 18: "Persons who have or are alleged to have committed offences referred to in article 4, paragraph 1, above, shall not benefit from any special amnesty law or similar measures that might have the effect of exempting them from any criminal proceedings or sanction."

[179] United Nations Human Rights Committee, Comments on Peru, UN Doc. CCPR/C/79/Add.67, 25 July 1996, para.9**:** "The Committee is deeply concerned that the amnesty granted by Decree Law 26,479 on 14 June 1995 absolves from criminal responsibility and, as a consequence, from all forms of accountability, all military, police and civilian agents of the State who are accused, investigated, charged, processed or convicted for common and military crimes for acts occasioned by the "war against terrorism" from May 1980 until June 1995 […] [T]he Committee reiterates its view, as expressed in its General Comment 20 (44), that this type of amnesty is incompatible with the duty of States to investigate human rights violations, to guarantee freedom from such acts within their jurisdiction, and to ensure that they do not occur in the future."

[180] UN Human Rights Committee, General Comment No. 36, UN Doc. CCPR/C/GC/36, 3 September 2019, para.27: "Immunities and amnesties provided to perpetrators of intentional killings and to their superiors, and comparable measures leading to de facto or de jure impunity, are, as a rule, incompatible with the duty to respect and ensure the right to life, and to provide victims with an effective remedy."

[181] *See. e.g.*, Report of the independent expert to update the Set of principles to combat impunity, Diane Orentlicher - Updated Set of principles for the protection and promotion of human rights through action to combat impunity, UN Doc. ElCNAI2005/102/Add.l, 8 February 2005, Principles 1 & 24; Final report of the Special Rapporteur, Cherif Bassiouni, UN Doc. E/CNA12000/62, 18 January 2000, Principle 3.

Humanitarian Law, adopted by the UN Commission on Human Rights in 2005, provides that states have a duty to investigate and submit to prosecution those responsible for such violations.[182]

Following a close review of the aforementioned treaty provisions, it is apparent that the obligations to prosecute and investigations serious crimes are only strictly required with regard to crimes of genocide and grave breaches committed in international armed conflict. However, for war crimes committed in internal armed conflict, torture and crimes against humanity, the obligation to prosecute is presented as being discretionary. Therefore, in line with Mallinder's view, this legal permissiveness affords states the flexibility to implement domestic amnesties for such crimes. However, where states are also parties to the Rome Statute, the obligation to prosecute is nevertheless expected of them, otherwise the ICC may intervene in line with the complementarity principle.[183] Thus, while states may implement a domestic amnesty, even one with accountability characteristics such as truth-telling or reparations, such an amnesty would arguably not be binding on the ICC and the proper exercise of its jurisdiction. Despite the apparent permissive nature of certain treaty wording, there is a growing body of international jurisprudence that holds that amnesty for *jus cogens* crimes is unacceptable as a matter of law and policy.[184] Before charting this case-law, it is important to first ground this jurisprudential discussion with a brief description of what is a peremptory norm, and how it relates to the debate on amnesties.

2.5.2 Peremptory Norms and Customary Law

Peremptory norms are considered to be norms or principles that no state may derogate from.[185] The near universal acceptance of the notion of peremptory or *jus cogens* norms, as set

[182] United Nations General Assembly, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UN Doc. A/RES/60/147, 21 March 2006, Annex, para.4.

[183] Article 17(1) reads:

"1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:
(a) The case is being investigated or prosecuted by a State which has jurisdiction over it, **unless the State is unwilling** or unable genuinely to carry out the investigation or prosecution;" (emphasis added)

[184] *See* section 2.5.3 "Jurisprudence on Amnesty".

[185] "Peremptory" is defined as: "Imperative; final; decisive; absolute; conclusive; positive; not admitting of question, delay, reconsideration or of any alternative. Self-determined; arbitrary; not requiring any cause to be shown." *Black's Law Dictionary* (Thomson West, 2014), p.1136.

out in the 1969 Vienna Convention on the Law of Treaties,[186] suggests that modern international law embodies within its prescriptions certain non-derogable norms of peremptory application.[187] When considering whether a particular legal rule has reached the status of a peremptory norm, Bassouni opines that three considerations are key: the historical evolution of the crime; the number of states that have incorporated the crime into their national laws; and the number of international national prosecutions for the crime in question and how those crimes have been characterized.[188] He further states that the list of *jus cogens* crimes under international law includes genocide, war crimes, crimes against humanity, aggression, torture, piracy, slavery and slave-related practices.[189] Indeed, the ICJ has held that the Genocide Convention forms part of customary law,[190] and the Geneva Conventions have reached near universal ratification. However, there remains is no treaty-based obligation to prosecute crimes against humanity, and the wording of Common Article 3 and Additional Protocol II makes clear that there is no explicit obligation to prosecute violations of war committed in internal armed conflict. Yet, a seminal decision in the *Tadić* case at the ICTY held that "customary international law imposes criminal liability for serious violations of Common Article 3, as supplemented by other general principles and rules on the protection of victims of internal armed conflict, and for breaching certain fundamental principles and rules regarding means and methods of combat in civil strife."[191]

The notion of accountability has gained considerable traction in international and domestic practice – what Sikkink refers to as the "justice cascade".[192] The creation of the

[186] Vienna Convention on the Law of Treaties**,** 23 May 1969, article 53: "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." Available at http://www.oas.org/legal/english/docs/Vienna%20Convention%20Treaties.htm (accessed 17 January 2021).

[187] Sadat, *supra* note 58 at 970.

[188] Cherif Bassouni, *Introduction to International Criminal Law* (Martinus Nijhoff, 2012), p.174.

[189] *Id*.

[190] ICJ, Advisory Opinion on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 1951 ICJ 15 (28 May 1951) 23; ICJ, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*) (Merits), (26 February 2007), paras.161-162.

[191] ICTY, *Prosecutor v Tadić*, 'Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction', Appeals Chamber, 2 October 1995, para.134.

[192] *See generally* Kathryn Sikkink, *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics* (WW Norton, 2012).

ICTR,[193] ICTY[194] the Special Court for Sierra Leone[195] and the Special War Crimes Panels for East Timor[196] among others by the international community were a means to establish peace and security, foster a transition to democratic principles of government, and establish general principles of international law to deter future atrocities.[197] The establishment of a permanent International Criminal Court in 1998 is further evidence of this emerging accountability norm. However, scholarly views differ on what is the legal consequence of establishing the *jus cogens* status of international crimes, and whether a *jus cogens* crime entails a procedural duty to prosecute that same crime. For example, Jacobs argues that "the recognition of the *jus cogens* nature of international crimes, does not necessarily mean that the duty to prosecute these crimes is itself a *jus cogens* norm".[198] Meanwhile, others affirm the existence of a duty to prosecute and investigate.[199] According to Ntoubandi, "recognising a crime as *jus cogens* carries with it the duty to prosecute or extradite, the non-applicability of statutes of limitation to such crimes, and universality of jurisdiction over such crimes."[200] As such, he argues that amnesty cannot be a lawful response to crimes against humanity, because of *erga omnes* obligations to prosecute.[201] However, Close persuasively notes that states' refusal to include a prohibition on amnesties in treaties "casts doubt on the *opinio juris* of states in believing that an international norm prohibits amnesties for international crimes."[202] Sadat argues that efforts to revive the practice of amnesty, particularly for high-level accused, are inconsistent with crystallizing or already existent international law norms, as opposed to evidence of a change in state practice as regards the ultimate legality of amnesties.[203] This "anti-amnesty" norm debate is addressed in more detail below.[204] Before that contentious matter is addressed, it is prudent to first analyse

[193] United Nations Security Council, S/Res/955, 8 November 1994.

[194] United Nations Security Council, S/Res/827, 25 May 1993.

[195] United Nations Security Council, S/Res/1315, 14 August 2000.

[196] United Nations Security Council, S/Res/1272, 25 October 1999; UNTAET, Regulation on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences, UNTAET/REG/2000/15, 6 June 2000.

[197] Sadat, *supra* note 58 at 960.

[198] Dov Jacobs, 'Puzzling over Amnesties: Defragmenting the Debate for International Criminal Tribunals' in Larissa van den Herik and Carsten Stahn (Eds), *The Diversification and Fragmentation of International Criminal Law* (Martinus Nijhoff, 2012) p.344.

[199] *See e.g.,* Geoffrey Robinson, *Crimes Against Humanity, The Struggle for Global Justice* (Penguin, 2012), pp.248-53.

[200] Faustin Ntoubandi, *Amnesty for Crimes against Humanity under International Law* (Martinus Nijhoff, 2007), p.217.

[201] *Id*., p.226.

[202] Close, *supra* note 135, p.144.

[203] Sadat, *supra* note 58 at 969.

[204] *See* section 2.6 of this thesis.

the international jurisprudence on the legality of amnesty, by reference to regional courts, international tribunals, and a sample of domestic courts.

2.5.3 Jurisprudence on Amnesty

There is now a significant body of jurisprudence which holds that amnesty cannot apply to the most serious international crimes: war crimes, crimes against humanity and genocide. Most of this jurisprudence has been recent, but there is also historical support, notably in Control Council Law No. 10, the law created the Nuremburg Tribunal. Article II states that no "immunity, pardon or amnesty granted under the Nazi regime be admitted as a bar to trial or punishment."[205] The present section proceeds to c, the major decisions from regional human rights courts, international criminal tribunals, and selected domestic courts that have rendered judgements amnesties for serious violations of international law. It does so to interrogate the soundness of the judicial reasoning, as well as ascertaining the level of inter-court consistency in relation to the anti-amnesty norm.

- **Inter-American Court of Human Rights**

The Inter-American Court of Human Rights ("IACHR") has been to the fore in pronouncing on the illegality of amnesties. In the seminal *Barrios Altos* case, the facts concerned the murder of 15 people, perpetrated by a Peruvian government "death squad". The Congress of Peru later adopted an amnesty law which exonerated members of the army, police force and also civilians who had violated human rights from 1980 to 1995. In a landmark opinion, the IACHR held:

> "This Court considers that all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law.[206]

While this passage would, on its face, appear to foresee criminal "punishment", Mallinder opines that the lack of reference to prosecutions could support an interpretation that the non-

[205] Control Council Law No. 10, Article II, para.5.

[206] *Barrios Altos v Peru*, Merits, Inter-Am. Ct. H.R. (Ser. C) No. 75, 14 March 2001.

criminal sanctions might be acceptable.[207] However, later, in the *Almonacid-Arellano*[208] and *Gomes Lund* cases,[209] the IACHR held that murder as a crime against humanity and enforced disappearances were *jus cogens* violations, and amnesties for such crimes could not be permitted under international law. In the *Gomes Lund* case, in finding that Brazil's amnesty law violated the convention by impeding investigation and prosecution of serious crimes, the IACHR did not analyse the underlying transitional context in Brazil, where civil society and the political opposition supported the amnesty.[210] It came to a similar conclusion in *Herzog*.[211] Despite the IACHR holding that the Brazilian amnesty law violated the convention, Brazil has openly refused to comply with the decisions. However, in what might signal a domestic shift, a domestic Brazilian court has recently disapplied the amnesty law, relaying on IACHR jurisprudence to find that crimes against humanity charges could proceed against a former army sergeant.[212] In *Gelman*, the state of Uruguay pointed to the fact that the amnesty law was endorsed by two popular referenda, in which voters rejected the chance to repeal amnesty legislation.[213] Yet, in both *Gomes Lund* and *Gelman*, the IACHR held that "amnesties and other analogous measures contribute to impunity and constate and obstacle to the right to the truth in that they block an investigation on the facts on the merits."[214]

In *El Mozote*, the IACHR considered an amnesty that helped to end an internal civil war in El Salvador. The court interpreted article 6(5) of AP II (which encourages the granting of amnesties after conflict) to *exclude* amnesties which preclude the investigation and

[207] Louise Mallinder, 'Can Amnesties and International Justice be Reconciled?', *International Journal of Transitional Justice*, Vol. 1 (2007) 208-230 at 216.

[208] *Almonacid Arellano v Chile*, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (Ser. C) No. 154, 26 September 2006, para.99: "Said prohibition to commit crimes against humanity is a *jus cogens* rule, and the punishment of such crimes is obligatory pursuant to the general principles of international law."

[209] *Gomes Lund ("Guerrilha do Araguaia") v Brazil*, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (Ser. C) No. 219, 24 November 2010 (Hereafter, "*Gomes Lund*"), para.105: "The practice of enforced disappearance implies a gross abandonment of the essential principles upon which the Inter-American System of Human Rights is founded and its prohibition is of *jus cogens* nature."

[210] Fabia Veçoso, 'Whose Exceptionalism? Debating the Inter-American View on Amnesty and the Brazilian Case', in Karen Engle (Ed), *Anti-Impunity and the Human Rights Agenda* (Cambridge University Press, 2016), p.195.

[211] *Herzog et al v Brazil*, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R., (Ser. C) No. 353, 15 March 2018, para.312.

[212] *Antônio Waneir Pinheiro Lima*, Vara Federal de Petrópolis, 14 August 2019. *See* Alonso Gurmendi, 'At Long Last, Brazil's Amnesty Law is Declared Anti-Conventional', *Opinio Juris*, 16 August 2019.

[213] *Gelman v Uruguay*, Merits and Reparations, Inter-Am. Ct. H.R. (Ser. C) No. 221, 24 February 2011 (Hereafter, "*Gelman*").

[214] *Gomes Lund*, para.151; *Gelman*, para.199.

prosecution of war crimes.[215] Notably, the Court held that truth commissions, while useful in establishing a historical record, are not a "substitute for the State's obligation to establish the truth through judicial proceedings."[216] While the decision in *El Mozote* was unanimous, Judge García-Sayán appended a concurring opinion that acknowledged the tension in the peace versus justice debate, and that states are sometimes faced with a difficult choice when attempting to overcome conflict. While the primary aim should be that combatants "submit to justice", he considered that "alternative or suspended sentences" could be possible, taking into account the seriousness of the crimes and the degree to which responsibility is admitted.[217] The judge opined that "international human rights law should consider that peace is a right and that the State must achieve it", and that given such rights are not absolute, "it is legitimate they be weighed in such a way that the satisfaction of some does not affect the exercise of the others disproportionately."[218] This opinion has been cited as encouraging the legality of amnesties in certain conditional circumstances.[219] Engle states that to the extent the opinion suggests an exception, it is a "narrow one would in fact apply to few amnesties" and that Judge García-Sayán makes clear it would not apply to amnesties the Court has considered in the past.[220] Nevertheless, the judicial suggestion that peace is a right to be balanced against other human rights is an important contribution to the current debate on amnesty.

- **European Court of Human Rights:**

A number of cases have been heard at the European Court of Human Rights concerning amnesties, and typically have arisen in situations where defendants argue due process violations because amnesties granted to them have not been honoured by the state concerned.[221] For example, in *Ould Dah v France*, the court upheld the application of universal jurisdiction by France in respect of torture committed in Mauritania, even though a domestic Mauritanian

[215] *Massacres of El Mozote and Surrounding Areas v El Salvador*, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (Ser. C) No. 252, 25 October 2012, para. 286 (Hereafter, "*El Mozote*").

[216] *El Mozote*, para.298.

[217] *El Mozote*, Concurring Opinion of Judge García-Sayán, para.30.

[218] *Id.*, para.38.

[219] Louise Mallinder, 'The End of Amnesty or Regional Overreach? Interpreting the Erosion of South American's Amnesty Laws', *International and Comparative Law Quarterly,* Vol. 65, Issue 3 (2016) 645-680.

[220] Karen Engle, 'A Genealogy of the Criminal Turn in Human Rights', in Engle *supra* note 210, p.34.

[221] *See e.g*., *Dujardin v France*, Application No 16734/90, 2 September 1991; *Ould Dah v France*, Decision No. 13113/03, 30 March 2009 (hereafter, "*Ould Dah v France*"); *Marguš v Croatia*, Application no. 4455/10, Judgment, 27 May 2014 (hereafter, "*Marguš v Croatia"*). For a review of this caselaw and its future likely direction, *see* Miles Jackson, 'Amnesties in Strasbourg', *Oxford Journal of Legal Studies*, Vol. 38, Issue 3 (2018) 451-474.

law granted amnesty for the same acts. The court held that amnesties are impermissible for crimes such as murder and torture and that third States were not bound by amnesty clauses violating the duty to prosecute *jus cogens* crimes.[222] In 2014, the Grand Chamber addressed the issue of amnesty in the case of *Marguš v Croatia*. The applicant argued that his 2007 conviction for war crimes committed in the 1990s was invalid because the charges were estopped in 1997 on the basis of a general amnesty law, thus giving rise to a situation of double jeopardy. The court examined whether the amnesty violated the right to life in article 2 and prohibition against torture in article 3 of the convention. Citing the IACHR's jurisprudence with approval, the Grand Chamber held:

> "In the present case the applicant was granted amnesty for acts which amounted to grave breaches of fundamental human rights such as the intentional killing of civilians and inflicting grave bodily injury on a child, and the County Court's reasoning referred to the applicant's merits as a military officer. A growing tendency in international law is to see such amnesties as unacceptable because they are incompatible with the unanimously recognised obligation of States to prosecute and punish grave breaches of fundamental human rights. Even if it were to be accepted that amnesties are possible where there are some particular circumstances, such as a reconciliation process and/or a form of compensation to the victims, the amnesty granted to the applicant in the instant case would still not be acceptable since there is nothing to indicate that there were any such circumstances."[223]

Mallinder considers that this last reservation would appear to leave open the possibility that an amnesty would be permissible if accompanied with non-judicial accountability and reparation.[224] However, Engle considers that most of the decision "belied that possibility", and that the decision sets an important precedent for future claimants who may contend that amnesties violate states duties under articles 2 and 3.[225]

- **International Criminal Tribunal for the former Yugoslavia:**

Moving from the regional courts to the international criminal tribunals, while the issue of amnesty was not directly raised as a means to exclude criminal responsibility at the ICTY, judges have noted that that "[crimes against humanity] are inhumane acts that by their extent and gravity go beyond the limits tolerable to the international community, which must perforce

[222] *Ould Dah v France*, pp.16-17.

[223] *Marguš v Croatia*, para.139.

[224] Louise Mallinder, *Investigations, Prosecutions and Amnesties under Articles 2 & 3 of the European Convention on Human Rights*, Transitional Justice Institute Research Paper No. 15-05 (March 2015), p.29.

[225] Engle, *supra* note 220, p.36.

demand their punishment."[226] In the *Furundžija* case, the Trial Chamber held in *obiter* that not only was the prohibition on torture *jus cogens*, but that any amnesty would therefore be inconsistent with international law. The Trial Chamber cited with approval a Comment from the Human Rights Committee that "amnesties are generally incompatible with the duty of States to investigate [torture]."[227]

- **Special Court for Sierra Leone**:

In a seminal and much cited decision on the question of amnesties for international crimes, the Special Court for Sierra Leone ("SCSL") Appeals Chamber considered the appeals of two accused who argued the amnesty granted under the Lomé Peace Agreement precluded their trial before the SCSL.[228] Article IX of this agreement stated that the Government of Sierra Leone shall "grant absolute and free pardon and reprieve to all combatants and collaborators in respect of anything done by them in the course of their objectives."[229] The UN Special Representative controversially appended a handwritten disclaimer to this clause, noting that "[T]he United Nations does not recognize amnesty for genocide, crimes against humanity, war crimes, and other serious violations of international humanitarian law."[230] The defendants argued that, notwithstanding the international nature of the crimes, the SCSL was bound to respect the amnesty granted by the Lomé Peace Agreement because it was an international treaty signed by six states and a number of international organisations. The Appeals Chamber disagreed, noting that article 10 of the SCSL statute expressly stated that:

> "An amnesty granted to any person falling within the jurisdiction of the Special Court in respect of crimes referred to in Articles 2 to 4 of the present Statute shall not be a bar to prosecution."

It further held:

> "Where jurisdiction is universal, a State cannot deprive another State of its jurisdiction to prosecute the offender by the grant of amnesty. It is for this

[226] ICTY, *Prosecutor v Erdemović*, Sentencing Judgement, 29 November 1996, para.28.

[227] ICTY, *Prosecutor v Furundžija,* Trial Judgement, 10 December 1998, para.155, *citing to* Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI\GEN\1\Rev.1, 29 July 1994, p.30.

[228] SCSL, *Prosecutor v Kallon & Kamara*, 'Decision on challenge to jurisdiction: Lomé Accord Amnesty', 13 March 2004 (hereafter, "*Kallon & Kamara* Decision").

[229] Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone, Article IX, Pardon and Amnesty, 7 July 1999, para.2.

[230] Analytical Study on Human Rights and Transitional Justice, UN Doc. A/HRC/12/18, 6 August 2009, para.53. For an in-depth account of this episode, *see* Priscilla Hayner, 'Negotiating peace in Sierra Leone: Confronting the justice challenge' (Centre for Humanitarian Dialogue & International Centre for Transitional Justice, 2007).

> reason unrealistic to regard as universally effective the grant of amnesty by a State in regard to grave international crimes in which there exists universal jurisdiction. A State cannot bring into oblivion and forgetfulness a crime, such as a crime against international law, which other States are entitled to keep alive and remember."[231]

The Appeals Chamber concluded that the crimes within its jurisdiction – war crimes and crimes against humanity – are the subject of universal jurisdiction under international law.[232] In the Chamber's view, "the obligation to protect human dignity is a peremptory norm and has assumed the nature of obligation *erga omnes.*"[233] Professor Diane Orentlicher, submitting as *amicus curiae*, submitted that given the existence of a treaty obligation to prosecute or extradite an offender, the granting of amnesty in respect of such crimes as specified in the Statute of the SCSL would not only be incompatible with, but would be in breach of an obligation of a state towards the international community as a whole.[234] The Court accepted that there is a "crystallising international norm that a government cannot grant amnesty for serious violations of crimes under international law."[235] It pointed to the fact that several treaties require prosecution for such crimes. These included Genocide Convention, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the four Geneva conventions. While this decision is routinely cited as support for the illegality of amnesty vis-à-vis international crimes, ultimately the ruling turned on the application of its own statutory provisions, rather than the existence of any purported international customary norm that prohibits amnesty.[236] The decision has been criticised for the methodology of its reasoning,[237] and a lack of examination of state practice to support the "crystallising norm" position.[238] The Appeals Chamber also held that it was:

> "entitled in the exercise of its discretionary power, to attribute little or no weight to the grant of such amnesty which is contrary to *the direction in which customary international law is*

[231] SCSL, *Prosecutor v Kallon & Kamara*, 'Decision on challenge to jurisdiction: Lomé Accord Amnesty', 13 March 2004 (Hereafter, Lomé Amnesty Decision") para.67.

[232] *Id.*, para.69.

[233] *Id.*, para.71.

[234] *Id.*, para.73.

[235] *Id*., para.82.

[236] *Id*., para.88: "Whatever effect the amnesty granted in the Lomé Agreement may have on a prosecution for such crimes as are contained in Articles 2 to 4 in the national courts of Sierra Leone, it is ineffective in removing the universal jurisdiction to prosecute persons accused of such crimes that other states have by reason of the nature of the crimes. It is also ineffective in depriving an international court such as the Special Court of jurisdiction."

[237] *See* Antonio Cassese, 'The Special Court and International Law-The Decision Concerning the Leone Agreement Amnesty' (2004) 2 Journal of International Criminal Justice 1130.

[238] Charles Jalloh, *The Legal Legacy of the Special Court for Sierra Leone* (Cambridge University Press, 2020) p.298.

> *developing* and which is contrary to the obligations in certain treaties and conventions the purpose of which is to protect humanity."[239] (emphasis added)

Yet, as Schabas notes, courts are to apply the law as it exists today, not as it might be developing tomorrow.[240] The persuasive value of the decision is also undermined by the Chamber's approach to effectively extend the duty to prosecute to apply to all the crimes listed in the statute, despite this not being a correct reflection of treaty law.[241]

- **Extraordinary Chambers in the Courts of Cambodia:**

In 2011, Ieng Sary, accused of war crimes, crimes against humanity, genocide, filed a motion before the Extraordinary Chambers in the Courts of Cambodia ("ECCC") alleging that the Trial Chamber lacked jurisdiction because a Cambodian Royal Decree issued on 14 September 1996 granted him a valid amnesty over the crimes charged. Relying on the foregoing jurisprudence from the ICTY, SCSL and other regional human rights tribunals, the Trial Chamber concluded that there is "an emerging consensus prohibits amnesties in relation to serious international crimes, based on a duty to investigate and prosecute these crimes and to punish their perpetrators", referring to the treaty obligations imposing an absolute prohibition in relation to genocide, torture and grave breaches of the 1949 Geneva Conventions.[242] Even though state practice in relation to other serious international crimes (*i.e.*, crimes against humanity) was "arguably insufficiently uniform to establish an absolute prohibition of amnesties in relation to them", in the view of the Chamber, this practice demonstrated "at a minimum a retroactive right for third States, internationalised and domestic courts to evaluate amnesties and to set them aside or limit their scope should they be deemed incompatible with international norms."[243] The Chamber therefore held that the scope of the application of the 1996 Royal Decree excluded the crimes of genocide, war crimes, grave beaches and crimes against humanity. While the 1996 amnesty may have been "a useful negotiation tool in ending the conflict", the Chamber noted that "it was unaccompanied by any truth or reconciliation process through which information regarding Ieng Sary's alleged crimes

[239] Lomé Amnesty Decision, *supra* note 228, para.84.

[240] William Schabas, 'Amnesty, the Sierra Leone Truth and Reconciliation Commission and the Special Court for Sierra Leone' (2004) 11 U.C. Davis Journal of International Law & Policy 145, 163.

[241] *Id*.: "There is no treaty obligation, on Sierra Leone or for that matter any other State, concerning a duty to try or extradite for crimes against humanity, violations of Common Article 3 and Protocol Additional II, or the other "serious violations" listed in the Statute, such as conscripting child soldiers."

[242] ECCC, *Case 002*, 'Decision on Preliminary Objections (amnesty and pardon and *ne bis in idem*)', 3 November 2011, para.53.

[243] *Id*.

could be revealed, or the internationally-enshrined rights of victims to an effective remedy otherwise acknowledged".[244] This reservation, which is similar to the one in the *Marguš* case, suggests there may be some circumstances where non-judicial accountability, such as a truth commission that accompanies the grant of amnesty and which provides an effective remedy, might be compatible with international law to the extent that prosecutorial accountability would not be necessitated.

- **International Criminal Court**

For over two decades, scholars have hypothesised about how amnesties might come to be treated at the ICC.[245] On its face, the complementarity framework of the court – which expects domestic investigation and prosecution of serious crimes that occur on the territory of states parties – should logically exclude the possibility that an amnesty could block the exercise of the court's jurisdiction. The drafting history of the Rome Statute reveals that states could not agree on the express inclusion of a reference to amnesties or alternative accountability mechanisms, such as a truth commission. South Africa lobbied for such an exemption, but states were ultimately unable to draft a provision that could legitimise the South African amnesty model yet condemn unacceptable ones like the self-amnesty enacted by the Chilean dictatorship.[246] Schabas recalled how some states argued that the South African model – of foregoing justice in exchange of the peaceful transition of power – was no longer possible, a view that was re-iterated at the Kampala Review Conference in 2010.[247]

As to how an amnesty might be considered legally permissible under the Rome Statute framework, two broad theories have been offered in the scholarship. The first is that a domestic "decision not to prosecute" made by a truth commission body might satisfy the

[244] *Id*.

[245] *See e.g.,* Michael Scharf, 'The Amnesty Exception to the Jurisdiction of the International Criminal Court', *Cornell International Law Journal*, Vol 32 (1999) 507-527; Carsten Stahn, 'Complementarity, Amnesties and Alternative Forms of Justice: Some Interpretative Guidelines for the International Criminal Court,' *Journal of International Criminal Justice*, Vol.3, Issue 3 (2005) 695-720; Martha Minow, 'Do Alternative Justice Mechanisms Deserve Recognition in International Criminal Law? Truth Commissions, Amnesties, and Complementarity at the International Criminal Court', *Harvard International Law Journal*, Vol.60, Issue 1 (2019) 1-45.

[246] William Schabas & Mohamed El Zeidy, 'Article 17, Issues of Admissibility', in Otto Triffterer & Kai Ambos (Eds), *The Rome Statute of the International Criminal Court, A Commentary* (Bloomsbury, 2016) p.806.

[247] Schabas, *supra* note 133, p.176.

complementarity test contained in article 17 of the Statute.[248] That is, a truth commission has investigated, discovered the facts, and only then granted amnesty on condition of full disclosure and acknowledgment of responsibility. However, this theory presupposes that ICC judges will agree that an "investigation" need not be confined to a criminal investigation, but one that may be carried out by a non-judicial, truth-finding body. Given that the Rome Statute foresees criminal proceedings, this interpretation arguably cannot be reconciled with the object and purpose of the Statute, as stated in its preamble.[249] Deputy Prosecutor of the ICC, James Stewart, put forward this view in a recent speech to stakeholders in Colombia:

> "By "proceedings", of course, the Rome Statute refers to criminal proceedings, in the traditional sense, that is, proceedings involving a criminal prosecution, a decision on guilt or innocence of the person charged and, in the event of a conviction, the imposition of a penal sanction. Non-criminal proceedings, such as proceedings to establish reparations for victims, may be considered for the purposes of assessing the seriousness of national efforts, in the context of a holistic evaluation, but, in and of themselves, would not be capable of rendering a case inadmissible before the ICC.[250]

The second possible avenue that scholars have considered is that, depending on the context, amnesties could be interpreted to fall within the concept of "the interests of justice", an ambiguous and undefined concept written into the statute that grants discretion to the ICC Prosecutor to *not* proceed with an investigation,[251] or an individual prosecution,[252] where the "interests of justice" justify such action.[253] The difficulty associated with the meaning of this concept was recently illustrated in litigation in the Situation in Afghanistan. The Pre-Trial Chamber rejected the Prosecutor's request to authorise an investigation in Afghanistan on the basis that it would not be in the "interests of justice", citing to factors such as the probable lack of state cooperation, the amount of resources needed, and the raising of victims' expectations

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[248] Rome Statute, article 17(1)(b): "The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute."

[249] *Id*., Preamble: "Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that **their effective prosecution must be ensured** by taking measures at the national level and by enhancing international cooperation." (emphasis added)

[250] James Stewart, Deputy Prosecutor of the International Criminal Court, 'The Role of the ICC in Transitional Justice Processes in Colombia', speech delivered in Bogotá, Colombia, 30 May 2018.

[251] *Id*., article 53(1)(c): "Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice."

[252] *Id*., article 53(2)(c): "If, upon investigation, the Prosecutor concludes that there is not a sufficient basis for a prosecution because: […] (c) A prosecution is not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime."

[253] Either course would be subject to judicial approval by the Pre-Trial Chamber. *See Id*., article 53(3)(b): "In addition, the Pre-Trial Chamber may, on its own initiative, review a decision of the Prosecutor not to proceed if it is based solely on paragraph 1 (c) or 2 (c). In such a case, the decision of the Prosecutor shall be effective only if confirmed by the Pre-Trial Chamber."

with little hope of a case coming before the court.[254] The Appeals Chamber overturned this ruling, principally on procedural grounds, but nevertheless was compelled to note in *obiter* that the Pre-Trial Chamber's reasoning was "cursory and speculative", and that it "did not properly assess the interests of justice."[255]

Robinson argues that an amnesty could fall within the interests of justice criterion in situations of "drastic necessity", but only if certain factors were present. These would include, *inter alia*, whether the measure was adopted by democratic will, there is a full investigation of the facts, and if reparations are made to victims.[256] If such factors were present, and only in the "most compelling of cases", he opines that the ICC could defer to a domestic amnesty.[257] Similarly, Mallinder argues that conditional amnesties that receive democratic approval and which provide for truth-finding and reparations could lawfully co-exist alongside a prosecutorial strategy to prosecute those deemed "most responsible."[258] Blanket amnesties, on the other hand, are in Robinson's view, the "antithesis of the purpose of the ICC" and should never receive deference.[259] Again, this theory entirely depends on agreeable judges who would be willing to interpret the "interests of justice" in a manner that views a conditioned amnesty to secure a transitional peace as satisfying such criterion. However, where serious international crimes have occurred, the factors militating against prosecution such crimes would have to be very persuasive. Indeed, some contend that if ever there was a scenario where the "the interests of justice" justified a permanent stay of proceedings, it was arguably the situation in northern Uganda, where ICC intervention was criticised as jeopardizing prospects for a lasting peace settlement, and that its withdrawal might allow the 2008 Juba peace talks to successfully conclude.[260] Although, one scholar considers that the application of the "interests of justice" bar to the Ugandan situation would not be legally correct.[261] This argument being that once

[254] ICC, *Situation in the Islamic Republic of Afghanistan*, 'Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan', 12 April 2019, paras.90-96.

[255] ICC, *Situation in the Islamic Republic of Afghanistan*, 'Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan', 5 March 2020, para.49.

[256] Darryl Robinson, 'Serving the Interests of Justice, Amnesties, Truth Commissions and the International Criminal Court', *European Journal of International Law*, Vol.14, Issue 3 (2003) 481-505 at 497-498.

[257] *Id*., at 498.

[258] Louise Mallinder, 'Can Amnesties and International Justice be Reconciled?', *International Journal of Transitional Justice*, Vol. 1 (2007) 208 at 228-229.

[259] Robinson, *supra* note 256, at 497.

[260] Anna Macdonald, 'In the interests of justice? The International Criminal Court, peace talks and the failed quest for war crimes accountability in northern Uganda,' *Journal of Eastern African Studies*, Vol.11, Issue 4 (2017) 628-648.

[261] For contrary opinion *see* Michael Kourabas, 'A Vienna Convention Interpretation of the Interests of Justice Provision of the Rome Statute, the Legality of Domestic Amnesty Agreements, and the Situation in Northern

issued, arrest warrants cannot be withdrawn under the "interests of justice" provision as worded, as it envisages its invocation *before* warrants are sought by the Prosecutor. The Prosecution could, however, apply to simply have the charges withdrawn and the case terminated, as occurred in the *Kenyatta* case.[262]

In 2007, the Office of the Prosecutor published a policy paper outlining its interpretation of the "interests of justice". The paper states that the discretion not to prosecute is "exceptional in nature" and there "is a presumption in favour of investigation or prosecution", pointing to a consistent trend imposing a duty on States to prosecute crimes of international concern committed within their jurisdiction."[263] According to Schabas, the presumption in favour of prosecution is unrealistic, because for every handful of defendants prosecuted, many thousands of others go unprosecuted.[264] The paper does not directly tackle the issue of amnesty and whether this might be a valid criterion for not proceeding under article 53. However, in support of the "consistent trend" the paper cites to UN Legal Counsel, Nicolas Michel who stated that "[J]ustice should never be sacrificed by granting amnesty in ending conflicts," and that justice and peace should be considered as complementary demands and that the international community should "consider ways of dovetailing one with the other."[265]

The policy paper refers to paragraph six of the preamble of the Rome Statute, which states that "it is the duty of every state to exercise its criminal jurisdiction over those responsible for international crimes." Furthermore, the policy paper states that the interpretation of the concept of "interests of justice" should be guided by the ordinary meaning of the words in the light of their context and the objects and purpose of the Statute, *i.e*., the prevention of serious crimes.[266] The policy paper goes on to make a distinction between the interests of justice and the interest of peace, the latter of which is not within the Prosecutor's mandate, but rather belongs to other political bodies and institutions. Yet, as the policy paper notes, there is nothing in the drafting history to assist with interpreting the phrase. The policy paper states:

Uganda: A Great Qualitative Step forward, or a Normative Retreat,' *U.C. Davis Journal of International Law & Policy*, Vol.14, Issue 1 (2007) 59-94.

[262] ICC, *Prosecutor v Kenyatta*, 'Decision on the withdrawal of charges against Mr Kenyatta', 13 March 2015.

[263] Office of the Prosecutor, Policy Paper on the Interests of Justice (September 2007), p.3.

[264] Schabas, *supra* note 133, p.190.

[265] Report of the statement of the United Nations Under Secretary General for Legal Affairs, Nicolas Michel, UN Security Council Press Release on the 5474th meeting, 22 June 2006.

[266] Policy Paper on the Interests of Justice *supra* note 263, p.4.

> "With the entry into force of the Rome Statute, a new legal framework has emerged and this framework necessarily impacts on conflict management efforts. The issue is no longer about whether we agree or disagree with the pursuit of justice in moral or practical terms: it is the law. Any political or security initiative must be compatible with the new legal framework insofar as it involves parties bound by the Rome Statute."

This passage suggests that the new legal environment would not be compatible with transitional justice initiatives such as the South African experience, and that the OTP would not be dissuaded from prosecutions should a domestic amnesty be in operation. Schabas states that the "the South African experience stands as a valuable and effective model, and it may prove helpful to other societies confronted with similar problems. To exclude it from the palette of the peacemaker would be a great shame."[267] In his view, the lack of any universal jurisdiction cases against South African individuals disproves the "claim of an emerging prohibitive norm concerning amnesties or an obligation to prosecute."[268]

To permit national amnesties to extinguish obligations imposed by international law would arguably be contrary to the foundational principles of international criminal law, and in opposition to much of state and international practice.[269] Ultimately, states that have joined the Rome Statue leave themselves vulnerable to ICC intervention, should national amnesties leave them "unwilling or unable" to prosecute serious crimes. While the Rome Statute does not prohibit amnesties *per se*,[270] Sadat contends that if the drafters intended its inclusion, they could have easily done so in article 31, the provision that contains grounds excluding criminal responsibility. The prior granting of amnesty is not one of them.[271] Although, under article 31(3),[272] the Court may consider a ground for excluding criminal responsibility *other* than those expressly referred to, where such a ground is derived from applicable law as set forth in article 21.[273] However, even if one were to make the argument that state practice legitimising amnesty

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[267] Schabas, *supra* note 133, p.193.

[268] *Id*.

[269] Sadat, *supra* note 58 at 1028.

[270] *Id*.

[271] In summary, the four enumerated grounds that may exclude responsibility in article 31 are: (a) The person suffers from a mental disease or defect that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct; (b) The person is in a state of (involuntary) intoxication; (c) The person acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person; (d) The conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person.

[272] Rome Statute, article 31(3): "At trial, the Court may consider a ground for excluding criminal responsibility other than those referred to in paragraph 1 where such a ground is derived from applicable law as set forth in article 21."

[273] Rome Statute, article 21: "The Court shall apply: (a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence; (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict; (c) Failing that, general principles of law derived by the Court from national laws of legal systems of

for *jus cogens* crimes could gain recognition by virtue of article 21(1)(c), which permits recourse to general principles of national legal systems, national law falls in a clear third place in terms of the Court's potential applicable law, with general principles of international law (in second place) generally holding that amnesty for *jus cogens* crimes is not acceptable.

The decades-long wait to see how the ICC would entertain an amnesty ended in 2019 in the case against Saif Gaddafi, charged with crimes against humanity committed during the Libyan uprising in 2011. In 2018, his defence team challenged the admissibility of the ICC proceedings, making two core arguments. First, Gaddafi argued that he had been domestically tried, convicted and sentenced *in absentia* for substantially the same conduct as alleged in the ICC warrant.[274] Second, Gaddafi argued that he had received a pardon through domestic amnesty legislation, Law No.6 of 2015, which effectively ended judicial proceedings against him.[275] Although, Gaddafi stressed that this did not amount to the granting of amnesty since he was already convicted. Rather, it was a "commutation of sentence."[276] The Pre-Trial Chamber rejected both arguments, holding that Gaddafi's domestic conviction could not be considered final and with *res judicata* effect, because no appeal on the merits was heard, and since he was tried *in absentia*, he would nevertheless be entitled to have a re-trial *in presentia*.[277] The Chamber also noted that crimes such as murder (one of the ICC charges against him) were excluded from the amnesty provisions in Law No. 6 of 2015, thus excluding the possibility Gaddafi could possibly benefit from its protection.

Despite the admissibility challenge failing due to the lack of finality, and acknowledging that Law No.6 of 2015 could not apply to Gaddafi anyway, the Chamber nevertheless proceeded to pronounce – and thus, in *obiter* – at length on the acceptability of amnesties for international crimes, stating at the outset of its analysis:

> "61. The Chamber believes that there is a strong, growing, universal tendency that grave and systematic human rights violations – which may amount to crimes against humanity by their very nature – are not subject to amnesties or pardons under international law. Regardless of the technical differences between amnesties and pardons (both of which may result in impunity), the Chamber

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the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards."

[274] ICC, *Prosecutor v Gaddafi*, 'Admissibility Challenge by Dr. Saif Al-Islam Gadafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute', 5 June 2018, paras.40-49.

[275] *Id*., para.26.

[276] *Id*., para.88.

[277] ICC, *Prosecutor v Gaddafi,* 'Decision on the 'Admissibility Challenge by Dr. Saif Al-Islam Gadafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute'', 5 April 2019, paras.48-59.

> shall treat Law No. 6 of 2015 as defined by the Libyan Government and presented by the Defence – as a general amnesty law."[278]

The Pre-Trial Chamber cited with approval the IACHR decisions in *El Mozote*, *Gomes Lund***,** *Almonacid-Arellano*, *Barrios Altos* and *Gelman, Marguš v Croatia* from the ECHR, *Kallon and Kamara* from the SCSL, *Furundžija* from the ICTY, *Ieng Sary* from the ECCC, each of which are discussed above. It also endorsed similar rulings from the African Commission on Human and Peoples Rights (although it did not acknowledge the fragmentation in its jurisprudence, which is discussed below). On the basis of this caselaw, and as quoted in the Introduction of this thesis, the Chamber held:

> "77. It follows that granting amnesties and pardons for serious acts such as murder constituting crimes against humanity is incompatible with internationally recognized human rights. Amnesties and pardons intervene with States' positive obligations to investigate, prosecute and punish perpetrators of core crimes. In addition, they deny victims the right to truth, access to justice, and to request reparations where appropriate.
>
> 78. Thus, applying the same rationale to Law No. 6 of 2015 assuming its applicability to Mr Gaddafi leads to the conclusion that it is equally incompatible with international law, including internationally recognized human rights. This is so, in the context of the case *sub judice*, due to the fact that applying Law No. 6 of 2015 would lead to the inevitable negative conclusion of blocking the continuation of the judicial process against Mr Gaddafi once arrested, and the prevention of punishment if found guilty by virtue of a final judgment on the merits, as well as denying victims their rights where applicable."[279]

With this holding, the Pre-Trial Chamber joined other international courts and tribunals in finding that amnesty for serious crimes is "incompatible with international law." This is perhaps unsurprising, given the foregoing discussion that emphasises how the Rome Statute framework foresees domestic prosecution. The Chamber did not make any distinction between blanket and conditional amnesties, although the emphasis on the need for "punishment"[280] would suggest that a conditional amnesty – even one that establishes truth and provides reparations to victims – would still not bar the exercise of the court's jurisdiction. However, as noted above, it needs to be underscored that the entirety of the Chamber's discussion on amnesty was made in *obiter*, and thus of limited jurisprudential persuasive value. This was made clear when the Appeals Chamber rendered its judgement on Gaddafi's appeal against the admissibility ruling.[281] The Appeals Chamber first affirmed the Pre-Trial Chamber's findings that Gaddafi's domestic conviction was not final, and because this was dispositive of the

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[278] *Id*., para.61.

[279] *Id*., paras.77-78.

[280] *Id*., para.78.

[281] ICC, *Prosecutor v Gaddafi*, 'Judgment on the appeal of Mr Saif Al-Islam Gaddafi against the decision of Pre-Trial Chamber I entitled 'Decision on the "Admissibility Challenge by Dr. Saif Al- Islam Gadafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute"' of 5 April 2019', 9 March 2020.

appeal, its substantive *ratio* analysis stopped there. Notably, however, the Appeals Chamber chose to then distance itself from the findings of the Pre-Trial Chamber on amnesty, stating that:

> "96. Lastly, the Appeals Chamber finds that the Pre-Trial Chamber's holdings on Law No. 6's compatibility with international law were obiter dicta. In light of the Appeals Chamber's conclusions above, that the Pre-Trial Chamber did not err in finding a lack of finality of the Tripoli Court Judgment, and that Law No. 6 is not applicable to the crimes for which Mr Gaddafi was convicted, the Appeals Chamber does not find it necessary to address the remaining arguments in the second ground of appeal. **For present purposes, it suffices to say only that international law is still in the developmental stage on the question of acceptability of amnesties**. The Pre-Trial Chamber appears to have accepted this: rather than determining that this question was settled, it found 'a strong, growing, universal tendency that grave and systematic human rights violations – which may amount to crimes against humanity by their very nature – are not subject to amnesties or pardons under international law'. In these circumstances, the Appeals Chamber will not dwell on the matter further."[282] (emphasis added)

It is somewhat difficult to conclude what the import of this passage is. Clearly, the Appeals Chamber considered it important to clarify that the amnesty discussion was *obiter*, and thus of limited jurisprudential consequence to the proceedings. It then uses markedly conservative language when stating that international law is still in the "developmental stage on the question of acceptability of amnesties", and that the Pre-Trial Chamber "appears to have accepted this." This language is a far cry from the language of other courts surveyed above. The intentional usage of "developmental" to describe a purported customary rule prohibiting amnesty is much more restrained wording compared to language used in other courts, where it is referred to as an "emerging consensus", a "growing universal tendency" and a "crystallising international norm" prohibiting amnesties for serious crimes. An affirmative ruling from the ICC, a permanent international tribunal with two thirds of the world's nations as members, would have perhaps pushed the anti-amnesty norm to the cusp of crystallisation. Instead, the ICC's highest court pulled back. Rather than maturing, the use of "developmental" suggests a norm that is still in its infancy. The future of amnesty before the ICC is therefore very much an open question. The Appeals Chamber's ruling potentially leaves the door open for a conditional amnesty to perhaps satisfy the complementarity test, or indeed an "interests of justice" exception. What is more likely is that if any amnesty is considered to be illegitimate by the ICC, it won't be on the basis of any purported customary international norm that prohibits it. Rather, it will be because the complementarity test, contained in the court's legal framework, has not been satisfied.

[282] *Id*., para.96.

- **African Commission on Human and People's Rights**

The African Commission on Human and People's Rights addressed the issue of the legality of amnesty in *Zimbabwe NGO Forum v Zimbabwe*.[283] In this case, the government invoked constitutional clemency powers to prevent the prosecution of members of the state security apparatus and the ZANU-PF ruling party for serious human rights violations committed election violence in the year 2000. Clemency Order No. 1 of 2000 granted a free pardon to "every person liable to criminal prosecution for any politically motivated crime" committed between January and July 2000. The order excluded murder, rape, robbery, from its ambit. In the view of the Commission, this clemency order violated article 7(1) of the African Charter.[284] In issuing an order that prohibited prosecution and released perpetrators of politically motivated crimes such as abduction, "the State did not only encourage impunity but effectively foreclosed any available avenue for the alleged abuses to be investigated, and prevented victims of crimes and alleged human rights violations from seeking effective remedy and compensation."[285]

While the *Zimbabwe* decision did not concern an amnesty for international crimes, another decision rendered by the Commission did, in a case concerning Thomas Kwoyelo from Uganda.[286] An in-depth analysis of Kwoyelo's domestic case is discussed at length in Chapter 4, but in brief, Kwoyelo filed a complaint with the ACHPR in 2012, arguing, *inter alia*, that he was discriminated against by being denied amnesty while thousands of other LRA fighters received it. It was alleged this amounted to a violation of article 3 of the African Charter, which provides "that every individual shall be entitled to equal protection of the law." In rendering its decision on the merits, it is remarkable that the ACHPR's decision, issued in mid-2018, makes no reference to, and is seemingly unaware of, the Ugandan Supreme Court judgement of 2015 that ultimately denied amnesty to Kwoyelo.[287] This is particularly surprising given that Uganda was still sending additional submissions to the ACHPR in September 2015,[288] five months *after* the Supreme Court judgement in April of the same year. This absence is regrettable and a missed opportunity for important legal debate and engagement, because many

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[283] *Zimbabwe Human Rights NGO Forum v Zimbabwe*, Communication no. 245/2002, AHRLR 128 (ACHPR 2006) (Hereafter "*Zimbabwe Human Rights NGO Forum*").

[284] Article 7(1) states: "Every individual shall have the right to have his cause heard […]."

[285] *Zimbabwe Human Rights NGO Forum*, para.211. For a similar holding*, see Mouvement Ivoirien des Droits Humains v Côte d'Ivoire*, AHRLR 62 (ACHPR 2008), para.98.

[286] *Thomas Kwoyelo v Uganda*, Communication no. 431/12 (17 October 2018).

[287] *See e.g*. *Id*., para.45, noting that the appeal was pending before the Supreme Court.

[288] *Id*., para.22, noting that the Commission had received submissions from Uganda in September 2015.

of the legal stances taken by the ACHPR are directly addressed in the Supreme Court judgement, which takes an opposing view on many of them, not least of which the issue of Kwoyelo's eligibility for amnesty.

In essence, the ACHPR held that the denial of amnesty to Kwoyelo was discriminatory and a violation of his right to equal protection under the law, as provided for in article 3 of the Charter. Noting the blanket and unconditional nature of the Ugandan amnesty, the ACHPR opined that being charged with serious crimes was not a stated ground for the denial of amnesty under the Act.[289] In the view of the Commission, the criminal charges against Kwoyelo (which include, *inter alia*, the murder of civilians) "arose out of the alleged activities of the rebellion […] which qualify for amnesty under the Amnesty Act of 2000".[290] As mentioned above, the Supreme Court held precisely the opposite in 2015.[291] Yet, the ACHPR was of the view the differential treatment of Kwoyelo was "without reasonable justification or explanation", and in violation of his right to equal protection under the law.[292] To remedy this violation, the ACHPR ordered Uganda to provide adequate compensation to Kwoyelo, but did not stipulate the amount to be paid.[293] These passages from the ACHPR appear significant, because here is an international, quasi-judicial body, handing down jurisprudence which goes directly against the "crystallizing" legal norm that amnesty cannot be granted for serious crimes – most notably expounded upon in the *Kallon and Kamara* case at the SCSL, in Case 0002 at the ECCC, and in numerous cases at the IACHR including *Barrios Altos*, discussed above.

Despite the firm holding that Kwoyelo was discriminated and should have received amnesty, later in the decision the ACHPR makes, a legally irreconcilable *volte-face* (at least with regard to its finding on amnesty). In a section titled "obiter dictum", and in open contradiction with its earlier finding that Kwoyelo should have received amnesty (which it attempts to distinguish), the ACHPR explains at length that its finding of discrimination should not be construed as sanctioning amnesty for serious crimes, and considered it necessary to provide further guidance.[294] Thus, rather than departing from the crystallizing, anti-amnesty norm as it initially appeared to do, the ACHPR then realigns itself with it. The ACHPR states that amnesties that preclude accountability measures for gross violations of human rights

[289] *Id*., para.181.

[290] *Id*., para.186.

[291] *See further* section 4.6 of this thesis, which analyses the *Kwoyelo* Supreme Court Judgement in detail.

[292] *Thomas Kwoyelo v Uganda*, *supra* note 286, para.195.

[293] *Id*., para.295.

[294] *Id*., paras. 283-293.

"violate international customary law",[295] and recalled its own General Comment no. 4 which noted that states should not extend amnesties to the war crime of torture,[296] even though Kwoyelo is charged with that very crime. The ACHPR concludes by stating:

> 'It is, therefore, the considered view of the Commission that blanket or unconditional amnesties that prevent investigations (particularly of those acts amounting to most serious crimes referred to in Article 4(h) of the AU Constitutive Act) are not consistent with the provisions of the African Charter. African states in transition from conflict to peace should at all times and under any circumstances desist from taking policy, legal or executive/administrative measures that in fact or in effect grant blanket amnesties, as that would be a flagrant violation of international law. When they resort to amnesties as necessary measures for ending violence and continuing violations and achieving peace and justice, they should respect and honor their international and regional obligations. Most particularly, they should ensure that such amnesties comply with both procedural and substantive conditions. In procedural terms, conditional amnesties should be formulated with the participation of affected communities including victim groups. Substantively speaking, amnesties should not totally exclude the right of victims for remedy, particularly remedies taking the form of getting the truth and reparations. They should also facilitate a measure of reconciliation with perpetrators acknowledging responsibility and victims getting a hearing about and receiving acknowledgment for the violations they suffered.[297]

The ACHPR's labelling of this section as *obiter* (and thus of no legal consequence for the purpose of rendering the decision) is, in my view, incorrect. Because the legal question of what acts can be covered by amnesty (and therefore whether Kwoyelo was discriminated by not receiving it) was, in fact, plainly *ratio decidendi* territory. In sum, by finding Kwoyelo was entitled to amnesty for serious crimes, before later endorsing an international norm that holds the opposite, the ACHPR's decision is left prone in fundamental contradiction. Its persuasive value is therefore limited. However, it does also suggest, in line with *Marguš* case at the ECHR, that conditional amnesties that respect victims' rights to remedy, truth and reparation would potentially be compatible with international law.

- **National Courts:**

There is a divergent practice at the national level when it comes to assessing the legality of amnesties that may infringe broader principles of international law. A comprehensive review of domestic judicial practice is beyond the scope of this chapter, but it can be noted that, in contrast to international tribunals, national courts states have frequently chosen to uphold amnesties. Courts tend to examine the extent to which an amnesty is constitutional, is compatibility with municipal law, and the role of international law within the domestic legal

[295] *Id*., para.289.

[296] *Id*., para.292.

[297] *Id*., para.293.

system. Extensive research of national judgements has been undertaken by Mallinder, who found that the majority of amnesties (including a number that included international crimes) have been upheld at the national level.[298] She also notes that judicial assessments of amnesty can change over time. For example, in 1998 the Argentine Supreme Court in the *Raffo* case, which concerned torture allegations, found that the constitution did not give precedence to treaties over national laws.[299] Later in 2001, in the *Simón* case, Judge Cavallo opined that international law had precedence over domestic laws by virtue of constitutional reform in 1994, and that a reference to "international norms" in the Argentine constitution granted the power to prosecute crimes against humanity, thus nullifying amnesty legislation.[300]

Whereas international case law would point to an internationally recognised trend outlawing amnesty for serious crimes, South Africa resisted this trend by affirming the legality of the amnesty offered in the 1995 TRC Act, which provided amnesty for politically motivated acts. As discussed above,[301] in the *AZAPO* case the appellants challenged the constitutionality of the TRC Act, which granted amnesties from personal criminal and civil liability. In its judgement, the Court relied on the amnesty provision in article 6(5) of Protocol II, as supporting the validity of the South African amnesty under international law, noting that for internal armed conflict, "there is no obligation on the part of a contracting state to ensure the prosecution of those who might have performed acts of violence or other acts which would ordinarily be characterised as serious invasions of human rights."[302] In a seminal passage, the court justified the legality of the South African amnesty as one that was enacted by a sovereign state, regulating its own affairs, and which is best equipped to decide on what measures to use to facilitate reconciliation:

> "It is one thing to allow the officers of a hostile power which has invaded a foreign state to remain unpunished for gross violations of human rights perpetrated against others during the course of such conflict. It is another thing to compel such punishment in circumstances where such violations have substantially occurred in consequence of conflict between different formations within the same state in respect of the permissible political direction which that state should take with regard to the structures of the state and the parameters of its political policies and where it becomes necessary after the cessation of such conflict for the society traumatised by such a conflict to reconstruct itself. The erstwhile adversaries of such a conflict inhabit the same sovereign territory. They have to live with each other and work with each other and the state concerned is best equipped to determine what measures may be most conducive for the facilitation of such reconciliation and reconstruction. That is a difficult exercise which the nation within such a state has to perform by having regard to its own peculiar history, its complexities, even its contradictions and its emotional and institutional

[298] Mallinder, *supra* note 18, p.208.

[299] *Raffo, José Antonio y otros*, Corte Suprema de Justicia [CSJN] 28 April 1998, R 453. XXI.

[300] *Simón*, *supra* note 39.

[301] *See* section 2.4.2 of this thesis.

[302] *AZAPO* Judgment, *supra* note 56, para.30.

> traditions. What role punishment should play in respect of erstwhile acts of criminality in such a situation is part of the complexity."[303]

However, Sadat notes that this decision is arguably deficient in that it failed to analyse the crimes committed as crimes against humanity (of which apartheid is one) and to establish whether there is exists a duty to punish offenders of such acts.[304]

In contrast to South Africa, the Supreme Court in Uganda determined that its amnesty law did not encompass serious crimes, a ruling analysed in-depth in Chapter 4.[305] In the year 2000, Uganda passed the *Amnesty Act*, which provided for amnesty to those who "renounced rebellion".[306] In denying amnesty to former LRA, Thomas Kwoyelo, Chief Justice Katurebe held that "it is difficult to see how acts of genocide against a civilian population, or the wilful killing of civilians when there is no military necessity, can be regarded as being in furtherance of the war or rebellion […] Those acts, in my view, do not qualify for the grant of amnesty under the Amnesty Act."[307] Notably, Justice Katurebe was of the view that the *Amnesty Act 2000* was not inconsistent with Uganda's international obligations under the Geneva Conventions, because it *did not* provide for amnesty for serious crimes. Although, as argued in Chapter 3, this ignores the intention of the parliament in passing the Act, and how it was implemented in practice.[308]

The above international caselaw evinces a clear trajectory towards a crystallising rule of customary international law that amnesty, as a matter of law and policy – at least with regard to serious violations of human rights – is to be considered unlawful and incompatible with treaty-based obligations to investigate and prosecute. Notwithstanding possible exceptions for conditional amnesties that ensure a measure of non-judicial accountability, the crystallising "anti-amnesty norm" remains prevalent in judicial opinion. However, as detailed in the next section, this view is being increasingly and persuasively challenged by scholars.

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[303] *Id.*, para.31.

[304] Sadat, *supra* note 58 at 1020.

[305] *See* section 4.6 of this thesis.

[306] *Amnesty Act 2000*, s.2.

[307] *Uganda v Thomas Kwoyelo* (Constitutional Appeal No 01 of 2012) [2015] UGSC 5, 8 April 2015, p.41.

[308] *See* section 3.5 of this thesis for an analysis of the parliamentary debates when the *Amnesty Act 2000* was being considered.

2.6 Challenging the "Anti-Amnesty Norm"

Some legal scholars are of the view that the absolute duties to prosecute grave breaches, genocide and torture, are not applicable to many modern conflicts, the majority of which are internal armed conflicts. These conventions are not widely viewed as imposing an unrealistic duty on states to prosecute all perpetrators of these crimes, and instead, it is argued there is scope for selectivity.[309]

"Permissive" treaty obligations

According to Mallinder and McEvoy, the extensive data gathered on amnesty law enactment in the Amnesty Law Database by Mallinder, and comparative research conducted by other scholars, contradicts the findings of the ICRC study and instead suggests that states continue to enact amnesty laws even for the most serious crimes,[310] including crimes against humanity and war crimes committed in internal conflicts.[311] Writing in the Angolan context, Doria considers that "a sound argument may be advanced that prosecution of violations of the laws of internal armed conflicts is a right and not a mandatory duty imposed upon territorial states under international law, or alternatively, it is a duty from which derogation is permissible in the interest of ensuring a lasting peace."[312] In Mallinder and McEvoy's view, the duty to prosecute is "permissive, rather than mandatory, which leaves more discretion for states to explore alternative approaches to truth and accountability."[313] They posit that amnesties can be, if properly designed and implemented, perfectly lawful: "a lawful amnesty which requires the performance of certain obligations, such as occurs in a truth commission may in fact be preferable to *de facto* impunity where the vast bulk of perpetrators are untouched by any legal process."[314] Pointing to the experiences of Timor-Leste, Uganda and South Africa, they argue that amnesties can help to foster the rebuilding of relationships shattered by mass violence,

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[309] Kieran McEvoy & Louise Mallinder, 'Amnesties in Transition: Punishment, Restoration, and the Governance of Mercy', *Journal of Law and Society*, Vol. 39, Issue 3 (2012) 410-440 at 418.

[310] *Id.*, at 419.

[311] *Id*., at 419, *citing to* Robert Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (Cambridge University Press, 2005); Charles Trumbull, 'Giving Amnesties a Second Chance', *Berkeley Journal of International Law*, Vol. 25, Issue 2 (2007) 283-345; Freeman, *supra* note 4.

[312] Doria, *supra* note 78 at 43.

[313] McEvoy & Mallinder, *supra* note 309 at 419.

[314] *Id*., at 422.

through the facilitation of an inclusive, participative dialogue.[315] Noting the benefits that can accrue from conditional amnesties, where the offender is required to disclose and participate in a dialogue, amnesties can contribute to offender rehabilitation by creating "a forum for offender narratives to be told and incorporated into national truth recovery projects."[316] In such contexts, they argue, "rather than being a denial of justice, amnesty laws can in fact complement restorative justice principles and objectives."[317]

Properly constituted, amnesties bring law to a previously lawless domain in the exercise of post-conflict mercy, as Mallinder and McEvoy term it, the "governance of mercy".[318] In effect, they argue, and in contrast to the ICRC and the case-law discussed above, that state practice points to a different emerging norm: the legal acceptability of amnesties. Mallinder notes that states "rarely face a binary choice between amnesty and justice, but rather undergo a continual process of renegotiation of the balance between impunity and accountability as the transition evolves."[319] It is notable that states have continued to legislate for amnesty, with Mallinder noting that the number of newly enacted amnesties peaked in 2003, the year after the creation of the ICC.[320]

State practice – for and against the anti-amnesty norm

Non-retributive settlements continue to be a demand of parties negotiating peace.[321] Engle points to the fact that Brazil continues to act in defiance of the *Gomes Lund* ruling from the IACHR, with one government minister stating that the amnesty law was part of the process of national reconciliation.[322] Veçoso writes that the political and societal context of a given amnesty becomes "submerged under the claim of an absolute duty to punish."[323] She argues that amnesty provided the nuanced political space to address difficult issues during regime

[315] *Id*., at 432-437.

[316] *Id*., at 437.

[317] *Id*.

[318] *Id*.

[319] Louise Mallinder, 'Beyond the Courts? The Complex Relationships of Trials and Amnesties' in William Schabas (Ed), *International Criminal Law, Volume 2* (Elgar, 2011) p.758.

[320] Louise Mallinder, 'Amnesties' Challenge to the Global Accountability Norm? Interpreting Regional and International Trends in Amnesty Enactment', in Lessa & Payne (Eds), *supra* note 35, p.81

[321] Engle, *supra* note 220, p.37.

[322] *Id*.

[323] Veçoso, *supra* note 210, p.203.

change in Brazil.[324] In deciding the *Gomes Lund* case, the IACHR ignored concomitant programmes of reparation and truth-finding mechanisms in the Brazilian context. The absence of trials did not necessarily mean the total disregard of victims' rights.[325] Veçoso argues that defining justice only in the prosecutorial sense results in a very restricted understanding of justice.[326] She asks whether individual criminal responsibility is enough to address the root causes of structural violence.[327] The victims' perspective is also lost in this debate. In the Brazilian context, there was widespread civil support for the amnesty law. In this regard, Veçoso opines that amnesty may help to open up a new political space that can help to promote the goals of human rights.[328] Before deciding to invalidate the Brazilian amnesty, the IACHR should arguably have engaged in a deeper contextual analysis, asking, *inter alia*, how the amnesty was enacted, was it democratic, what were the legal effects, how victims were treated, and what were the political considerations prevailing at the time.[329]

In the 1980s and 90s, Colombia passed a number amnesty laws that were relatively uncontroversial. Aimed at paramilitary groups such as M-19 and the Revolutionary Armed Forces of Colombia ("FARC"), the laws granted amnesty for political and related crimes, but excluded "atrocious crimes" such as homicide outside of combat and kidnapping.[330] In 2005, the Colombian government passed the Justice and Peace Law, a product of peace negotiations between paramilitaries and the government.[331] The law offered reduced sentences for those who participated in the process. At the time, the law was criticised as a mechanism for impunity, as the law required no admission of criminal conduct. In 2006, the Constitutional Court upheld the validity of the law, holding that the law extinguished neither the crime nor the punishment.[332] The Court held that "it is impossible to restore justice, peace and victims' right at the same time", and that the "substantial reduction of punishment is constitutionally necessary in the pursuit of peace."[333] A 2015 peace deal between FARC and the government stipulated that a Special Jurisdiction for Peace would try individuals most responsible, with the

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[324] *Id*.

[325] *Id*., p.204.

[326] *Id*.

[327] *Id*.

[328] *Id.,* p.205.

[329] *Id.,* p.206.

[330] Helena Garcia & Karen Engle, 'The Distributive Politics of Impunity and Anti-Impunity: Lessons from Four Decades of Colombian Peace Negotiations', in Engle (Ed), *supra* note 210, p.222.

[331] *Ley de Justicia y Paz,* Law No. 975 of 2005.

[332] Garcia & Engle, *supra* note 330, p.231.

[333] *Id*.

power to issue sentences of between 5-8 years, while a broadest possible amnesty for political and related crimes would be granted.[334] The amnesty would not cover genocide, crimes against humanity or other serious human rights violations, and this was enacted into law.[335] Because of the possibility for reduced sentences and for non-custodial sentences, NGOs such as Human Rights Watch and Amnesty International severely criticised the deal as facilitating *de facto* impunity.[336] The ICC's Office of the Prosecutor is also monitoring closely to see how the alternative sentencing regime will operate in practice:

> "In assessing such sentences, the OTP will consider a range of factors that would include the usual national practice in sentencing for Rome Statute crimes, the proportionality of the sentence in relation to the gravity of the crime and the degree of responsibility of the offender, the type and degree of restrictions on liberty, any mitigating circumstances, the reasons the sentencing judge gave for passing the particular sentence, and so on."[337]

In the future, ICC state parties who are implementing transitional justice mechanisms will be guided by whether such mechanisms are compatible with the Rome Statute requirement for prosecution. This may deter future amnesty laws in many states. In recent years, the courts of Chile,[338] Argentina,[339] Peru[340] and Colombia[341] have either retroactively repealed their blanket amnesty laws or limited their scope of application. Whereas blanket amnesties were previously the norm, an increasing number of amnesties *exclude* their application to certain serious international crimes. This has been the recent experience in Colombia,[342] Venezuela,[343] the

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[334] *Id*., p.235.

[335] Articles 23, 30, and 46 of Law 1820 of 30 December 2016.

[336] Garcia & Engle, *supra* note 330, p.236.

[337] Speech by James Stewart, Deputy Prosecutor of the ICC, *supra* note 250.

[338] Supreme Court of Chile, *Re Claudio Lecaros Carrasco*, Rol. No. 47.205, Recurso No. 3302/2009, 18 May 2010 (excluding illegal confinement as a crime against humanity from amnesty).

[339] Supreme Court of Argentina, *Simon, Julio Hector y otros s/privacion ilegitima de la libertad*, 14 June 2005, Causa No. 17.768 (finding the 1986 Full Stop Law and the 1987 Due Obedience Law to be unconstitutional and in violation of Argentina's international obligations).

[340] Constitutional Court of Peru, *Santiago Martin Rivas*, EXP. N.D 4587-2004-AAffC, 29 November 2005 (annulling the amnesty law).

[341] Constitutional Court of Colombia, Revisions Ley 742, 5 June 2002 (holding that blanket amnesties deprive victims of an effective remedy); Supreme Court of Colombia, *Caso de Masacre de Segovia*, May 2010 (citing IACHR jurisprudence on the unacceptability of amnesty provisions for grave violations of human rights).

[342] Colombia's 2005 Justice and Peace Law (excluding from the complete amnesty combatants who committed certain serious crimes under international law).

[343] Venezuela's 2016 Law of Amnesty and National Reconciliation, article 3 (excluding crimes against humanity and serious human rights violations).

Democratic Republic of the Congo,[344] Bosnia and Herzegovina,[345] and Poland.[346] Yet, states also continue to enact legislation that amnesties all crimes that have occurred after a period of conflict, such as in Afghanistan,[347] Ukraine[348] and Cote d'Ivoire.[349]

'Most' versus 'Least' responsible?

It cannot be ignored that there is no treaty text expressly prohibiting amnesties, and no consistent practice of states confirming that this is a norm of customary international law. Thus, according to Schabas, the prohibition argument relies on implication.[350] The approach in Sierra Leone, for example, of a truth commission combined with limited prosecutions, does not evince exhaustive implementation of duties to prosecute.[351] Moreover, there is no suggestion in the caselaw above, or in state practice, that amnesties for *all* serious crimes that have been committed be prohibited completely and without exception.[352] There is also the scholarly suggestion that international courts should only deal with those *most responsible*, and that other perpetrators, in particular those lower down the chain of command, should be able to receive a domestic amnesty.[353] However, this argument lacks a firm basis in law. Treaty-based obligations to investigate and prosecute make no reference to a hierarchy of responsibility. It also implies that foot soldiers don't willingly commit, or shouldn't be punished for

[344] Democratic Republic of the Congo's Amnesty Law No. 09/003 of 2009, article 3 (excluding genocide, war crimes and crimes against humanity).

[345] Federation of Bosnia and Herzegovina's Law No. 48/1999 on Amnesty, article 1 (excluding crimes against humanity).

[346] Poland's 1998 Act on the Institute of National Remembrance, article 4 (excluding crimes against humanity from any prior amnesties).

[347] Afghanistan's National Amnesty Law of 2008, articles 1-4 (amnestying all parties involved in hostilities).

[348] *See* 'Package of Measures for the Implementation of the Minsk Agreements', 12 February 2015, para.5: "Ensure pardon and amnesty by enacting the law prohibiting the prosecution and punishment of persons in connection with the events that took place in certain areas of the Donetsk and Lugansk regions of Ukraine."

[349] National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21*, Côte d'Ivoire, UN Doc. A/HRC/WG.6/33/CIV/1, 19 February 2019, para.29: "On 6 August 2018, the Government adopted Ordinance No. 2018-669 concerning amnesty in order to strengthen social cohesion and national reconciliation." In response, the Independent Working Group recommended that "the State reaffirm the priority of criminal justice over social appeasement and reject amnesties for crimes against humanity or war crimes, while striking a balance between the various mechanisms of transitional justice." *See* Compilation on Côte d'Ivoire, Report of the Office of the United Nations High Commissioner for Human Rights, UN Doc. A/HRC/WG.6/33/CIV/2, 20 February 2019, para.45.

[350] Schabas, *supra* note 133, p.182.

[351] *Id*.

[352] *Id*., p.185.

[353] *See e.g.,* Ntoubandi, *supra* note 200, p.206: "It may be useful to draw a distinction between the persons most responsible for international crimes and lesser offenders. The former i.e., planners, leaders, and those committing the most notorious crimes should be criminally prosecuted and punished, whereas the latter offenders can be dealt with through truth commissions and conditional amnesties."

participation in, international crimes. It should be recalled that the first two cases before the ICTY concerned accused persons who were a detention guard, Duško Tadić;[354] and a militia soldier, Dražen Erdemović.[355] Both were low in the chain of command and relatively insignificant personalities in the conflict. The requirement in the ICTY rules that indictments focus only on the "most responsible"[356] was only added in 2004 in the context of its completion strategy.[357] Moreover, this very argument – that only the most senior leaders should be prosecuted – was rejected outright by the ICC Appeals Chamber, which held that "individuals who are not at the very top of an organization may still carry considerable influence and commit, or generate the widespread commission of, very serious crimes" and that "the deterrent effect of the Court is highest if no category of perpetrators is *per se* excluded from potentially being brought before the Court.[358] In that decision, the Appeals Chamber overturned a decision of the Pre-Trial Chamber not to issue an arrest warrant for Bosco Ntaganda because he was not senior enough in the Congolese rebel group, the UPC/FPLC. In 2019, Ntaganda was convicted of war crimes and crimes against humanity and sentenced to 30 years in prison.[359]

Incorporating the victim perspective

From the standpoint of a victim, distinguishing between an "international crime" (which is not deserving of amnesty) and an "ordinary" crime (which should be), is a difficult argument to understand and to sell. In Schabas' view, there is no logical basis in international human rights law for distinguishing between the rights of a victim of ordinary murder, and murder classified as a crime against humanity. He asks why should the legal qualification of a

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[354] ICTY, *Prosecutor v Tadić*, Sentencing Judgement, 14 July 1997, para.60: "His relative unimportance is made clear by the steps taken by the local Bosnian Serb authorities to call him up as an ordinary soldier in the ongoing conflict."

[355] ICTY, *Prosecutor v Erdemović,* Sentencing Judgement, 29 November 1996, para.93: "The Trial Chamber also observes that in his closing statement the Prosecutor affirmed that "Mr. Erdemović, a low-ranking member of the Bosnian Serb army, followed orders."

[356] ICTY, Rules of Procedure and Evidence, Rule 28(A): "On receipt of an indictment for review from the Prosecutor, the Registrar shall consult with the President. The President shall refer the matter to the Bureau which shall determine whether the indictment, prima facie, concentrates on one or more of the most senior leaders suspected of being most responsible for crimes within the jurisdiction of the Tribunal."

[357] UNSC Resolution 1534, S/RES/1534, 26 Marcy 2004, para.5: "*Calls* on each Tribunal, in reviewing and confirming any new indictments, to ensure that any such indictments concentrate on the most senior leaders suspected of being most responsible for crimes within the jurisdiction of the relevant Tribunal as set out in resolution 1503 (2003)."

[358] ICC, *Situation in the Democratic Republic of the Congo*, 'Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled "Decision on the Prosecutor's Application for Warrants of Arrest, Article 58"', 13 July 2006, paras.73-77.

[359] ICC, *Prosecutor v Ntaganda*, Sentencing Judgement, 7 November 2019.

crime have any significance or impact on their ability to achieve redress?[360] On the other hand, if victims have a right to truth, Freeman persuasively argues that they should also have the right to forget, to at least to choose not to look back, and that it is possible that societies may choose to rebuild themselves as much on account of what they are able to overlook, as what they are able to forgive.[361] Opposing amnesty on the basis of law alone would be the "worst sort of legalism".[362]

"Accountable" amnesties

Trumbull submits that the "optimal" amnesty is one that ends hostilities, but also holds criminals accountable (although, not necessarily *criminally* accountable) for their actions, ensures that they are unable to commit serious human rights abuses in the future, and is the result of victims' desire to seek reconciliation or restorative justice.[363] He offers a "balancing test", whereby rather than simply outlawing amnesties as a rule, the UN should determine, on a case-by-case basis, whether an amnesty accommodates the competing interests of justice by examining: (1) the process by which the amnesty was enacted; (2) the substance of the amnesty legislation; and (3) the domestic and international circumstances.[364] In applying this test, the UN could decipher whether the process was democratic, informed, favoured by the populace, the extent of victim participation, the level of accountability, and if amnesty was necessitated to end the conflict.[365]

Balancing rights and needs of a post-conflict society

In considering when and how to prosecute, there is an argument that states emerging from conflict should be entitled to balance the rights of victims against broader social priorities, such as economic recovery and democratic revival. Schabas contends that any human rights norm must be normally balanced against other norms. He suggests that if amnesty is the price to be paid for ending a conflict, should this not be a relative factor that might outweigh or limit

[360] Schabas, *supra* note 133, p.185.

[361] Freeman, *supra* note 4, p.6.

[362] *Id*., p.9.

[363] Trumbull, *supra* note 311 at 320.

[364] *Id*., at 322.

[365] *Id.,* at 322-326.

the rights of victims of that conflict?[366] Schabas queries if rights such as the right to self-representation, as set out in article 14(3) of the ICCPR, can be qualified by international criminal tribunals and subject to reasonable limitations, then why are rights to reparation and remedy not subject to limitation?[367] States should arguably be permitted to take into account limited resource considerations, and that states have a duty to ensure all fundamental rights such as economic and social rights are fulfilled.[368] With regard to the stark choice faced by post-conflict countries, namely the choice between an amnestied peace or accountable civil instability, the final report of the Sierra Leone Truth and Reconciliation Commission states as follows:

> "Accordingly, those who argue that peace cannot be bartered in exchange for justice, under any circumstances, must be prepared to justify the likely prolongation of an armed conflict. Amnesties may be undesirable in many cases. Indeed, there are examples of abusive amnesties proclaimed by dictators in the dying days of tyrannical regimes. The Commission also recognises the principle that it is generally desirable to prosecute perpetrators of serious human rights abuses, particularly when they ascend to the level of gravity of crimes against humanity. However, amnesties should not be excluded entirely from the mechanisms available to those attempting to negotiate a cessation of hostilities after periods of brutal armed conflict. Disallowing amnesty in all cases would be to deny the reality of violent conflict and the urgent need to bring such strife and suffering to an end.
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> 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 at the time of writing, has returned Sierra Leoneans to a context in which they need not fear daily violence and atrocity.[369]

This view, of states emerging from conflict who choose to prioritise amnesty over accountability, is rarely considered worthy of serious consideration. In the age of accountability, there seems to be no flexibility. Nevertheless, this view is one that policymakers should take serious note of. It is often suggested that amnesties with some degree of accountability, as in South Africa, might be acceptable under international law.[370] But as Schabas notes, it is difficult to construct a theory of "good versus bad" amnesties. He argues

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[366] Schabas, *supra* note 133, p.186.

[367] *Id*.

[368] *Id*.

[369] *Witness to Truth: Report of the Sierra Leone Truth and Reconciliation Commission* (Freetown, 2004), Vol. 3B, Chapter 6, paras.11-12.

[370] *See e.g.,* Mallinder, *supra* note 18, p.251: "[t]he policy of targeted prosecutions at the international level for those who are most responsible could complement national amnesty processes for lower-level offenders in conjunction with mechanisms such as lustration and truth commissions to hold these individuals responsible without prosecuting them."

that it may be necessary, in certain circumstances, to support a full and unequivocal amnesty in order to end armed conflict.[371] According to Schabas, prolonged conflict and human rights violations will result from a rigid application of the so-called prohibition on amnesty, which, in his view, is not desirable.[372] Similarly, Jalloh argues that it would be unwise to formulate a blanket rule that excludes entirely the potential availability of amnesties where neither side is winning the war, and the commission of atrocities would otherwise continue.[373] In the northern Ugandan context, Principal Legal Officer to the Amnesty Commission, explained to me what he considered to be a rational justification for amnesty – a tool to end the war:

> "Although many people may not acknowledge it, but we helped to end the war. Many would-be fighters found this was a way out. And that it was easier to go and ask for, to give up arms, and not go, because why should a person give up arms if he is going to prison? Between me and you, why should I give up arms if I am going to be charged with treason, be sentenced and maybe hanged? We still have the death penalty in Uganda. Why should I give up arms. Why not fight to the bitter end. And if I'm fighting to the bitter end, I am killing people, people are dying. So, of course it is a double-edged sword and sometimes I also have to struggle with the idea of amnesty. Is it a good thing, is it a bad thing? But when you think about it so deeply, you are saving lives.
>
> […]
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> If you can save lives by shutting one eye, because amnesty is saying that though you have harmed us so badly, but for the sake of peace, we shall forgive you. And I said, amnesty after all these 18 years, I've been head of the legal department here, I have formed an opinion that amnesty is usually given when you have failed to defeat the enemy completely, or if you think that many people are dying as a result of the conflict. And if you can use that amnesty to solve the problem, then I think we didn't do a bad thing. So, I still believe that amnesty can still be used to end rebellion. It's an evil, but as I said it has been described as a necessary evil, because you are looking at, it's a price that you have to pay for peace. The other alternative would be fight up to the bitter end, and let thousands and thousands of people die, either as a result of direct fighting, or starvation."[374]

The practice of employing amnesties continues to be an attractive and efficient means of resolving and ending conflict. Schabas states that sometimes, peace will only be attainable if justice is sacrificed, and that too much justice might well imperil peace.[375]An exchange between Senegal and the Committee against Torture is very instructive in this regard. In 2013,

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[371] Schabas, *supra* note 133, p.188.

[372] *Id*.

[373] Jalloh, *supra* note 238, p.303.

[374] Interview with Nathan Twinomugisha, 14 December 2018, Kampala.

[375] Schabas, *supra* note 133, p.198.

the Committee stated the following in relation to amnesty laws that had been passed in the aftermath of conflict in the Casamance region of the country in the early 1990s:

> "The Committee is concerned about the State party's justification of amnesty laws in relation to the situation in Casamance on the grounds that they are vital for the restoration of peace. […] the Committee considers that amnesties or other impediments which preclude prompt and fair prosecution and punishment of perpetrators of torture or ill-treatment violate the principle of non-derogability of the prohibition of torture. They would constitute an intolerable obstacle for victims seeking redress, and would contribute to a climate of impunity. In view of this, the Committee urges the State party to repeal any amnesty for torture or ill-treatment and to provide it with detailed information on the redress granted to torture victims in Casamance.[376]

In its fourth periodic report in 2017, Senegal pushed back, underlining that the amnesties were necessary to restore and maintain peace in the region:

> "Senegal fully endorses the Committee's view that amnesties violate the principle of the non-derogability of the prohibition of torture and contribute to a climate of impunity. However, it invites the Committee to take account of the fact that the amnesty laws that were the subject of the Committee's General Comment No. 2 were intended only to restore peace in Casamance and to put an end to a situation that was conducive to massive human rights violations. It should also be noted that although the amnesty law in Senegal bars criminal prosecution and quashes any sentences handed down, it does not eradicate material facts or their civil consequences. Victims retain the option to refer their case to the civil courts in order to obtain a settlement that will grant them just satisfaction."[377]

It is arguably difficult for policymakers to justify a rigid application of the law, where the continuation of conflict is the most likely outcome. For people who are suffering in the midst of war and terror, amnesties that end such conflict are not always viewed with such complete immorality.[378] Osiel states that when it comes to assessing the state-level experience with amnesty, "selection bias" among academics is a significant problem.[379] He notes that countries that have positive experiences of the use of amnesty, such as Spain and El Salvador, have been ignored. As Freeman notes, this is particularly troubling in the context of ascertaining the state of customary international law, where norms are deciphered on the basis of state practice.[380] Distorted accounts of state practice can lead to inaccurate legal conclusions.[381]

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[376] UN Committee against Torture, Concluding observations on the third periodic report of Senegal, adopted by the Committee at its forty-ninth session (29 October–23 November 2012), UN Doc. CAT/C/SEN/CO/3*, 17 January 2013, para.9.

[377] UN Committee against Torture, Fourth periodic report submitted by Senegal, UN Doc. CAT/C/SEN/4, 16 March 2017, para.119.

[378] Freeman, *supra* note 4, p.23.

[379] Mark Osiel, 'Modes of Participation in Mass Atrocity', *Cornell Journal of International Law*, Vol. 38, Issue 3 (2005) 793-822 at 811.

[380] Freeman, *supra* note 4, p.27.

[381] *Id*.

2.7 Conclusion

This chapter has briefly charted the evolution of amnesty through history and recent state practice. In reviewing the major treaty conventions and caselaw that have interpreted the obligations to investigate and prosecute serious crimes, it is clear that obligations to prosecute violations occurring in internal armed conflict in particular, are not absolute. For state parties of the ICC, however, they would now appear be expected to prosecute crimes contained in the Rome Statute, unless they can convince judges that a conditional "accountable" amnesty satisfies the complementarity test. While the Rome Statute may not impose express legal duties to prosecute on state parties, by ratifying the Statute a state party nevertheless has indicated its intent to prosecute such crimes where they occur on their territory. A failure to prosecute does not result in a violation of the Statute per se, but rather a failure to live up to the implied obligations to hold perpetrators criminally accountable. More generally, courts and policymakers should more actively consider that certain treaty obligations contain permissive and discretionary duties to prosecute, rather than absolute ones. Scholarly opinion surveyed above also supports the conclusion that an international customary norm to prohibit amnesty has not yet crystallized. In this thesis, I intend to further contribute to this "anti-amnesty norm" debate, by providing an in-depth analysis of the experience of one particular state with amnesty – the Republic of Uganda. By assessing the impact of amnesty in Uganda, it will provide an important example of state practice, that will in turn inform the wider "anti-amnesty norm" debate. The following chapter examines Uganda's recent history of conflict between the government and the LRA, and how a blanket amnesty became a critical part of ending the civil war that saw the commission of war crimes and crimes against humanity.

3 Amnesty in Uganda

3.1 Introduction

To better understand the context into which amnesty came into being in Uganda, this chapter will first recall the country's experience of political violence and the underlying ethnic motivations associated with transition in Uganda, to lay the contextual foundation for a deeper analysis of amnesty as a response to the most recent episode of conflict. The chapter will then move to discuss the background to the conflict between the LRA and the government, and analyse the social and political motivations for utilising amnesty as a primary response to end the war. To do this, the parliamentary debates are analysed in detail. Thereafter, the chapter moves to examine the core legislation, the *Amnesty Act 2000*, exploring the key provisions which granted amnesty. The role and activities of the body implementing the amnesty regime, the Amnesty Commission, will then be examined, including available statistics regarding the number of amnesty recipients. The chapter will then consider domestic views of amnesty that are present in existing literature, concluding with an assessment of the *Amnesty Act's* compatibility with international law. This chapter therefore falls under step 2 and 3 of Skaar et al's 4-step impact assessment framework adopted in this thesis. To recall, step 2 seeks to analyse the establishment of the transitional justice mechanism at issue, while step 3 seeks to analyse its implementation. Both steps 2 and 3 are undertaken in this chapter with respect to amensyt in Uganda.

3.2 Historical Context

The origins of political violence in northern Uganda are deep, complex, and rooted in regional and tribal dynamics that still shape political discourse today. These roots of regional division can be traced back to the pre-colonial period, when inter-tribal violence over power and territory was commonplace. During the colonial period, these divisions were manipulated and further exacerbated under British administration. Post-independence, they have become entrenched, with every political transition characterized by ethnically motivated violence. A brief charting of this inter-ethnic strife is essential to understanding the LRA conflict in northern Uganda, and the subsequent responses to end it.

The largest ethnic grouping in northern Uganda is the Acholi, who form part of the Nilotic group of Luo-speaking tribes, who some four centuries ago moved south from the Bahr-

el-Ghazal region of the Sudan.[1] The Langi tribe is located to the east of the modern Acholi sub-region.[2] Other neighbouring tribes include the Iteso, Alur and the Madi. The various traditional histories of these tribes and clans contain numerous accounts of inter-tribal and inter-clan warfare.[3] In modern times, there has been a significant history of social and economic division between northern and southern Uganda. This social division was cultivated by the British colonial administration, which mainly recruited civil servants from the south and soldiers from the north, entrenching the myth that labelled the Acholi as militaristic and war-like.[4] Colonial policy placed more emphasis on the economic development of the southern part of Uganda, which was designated for cash crops and industrial zones. Northern Uganda, the home of the Acholi people, together with other ethnic groups such as the Lango, Teso and the Alur peoples, were designated as labour reserve.[5] This led to the formation of lasting negative stereotypical views of the Acholi as being backward and primitive.[6] Otunnu posits that it was the manipulation of pre-existing differences that "impeded the emergence of a Ugandan nationalism and generated ethnic, religious and regional divisions that were to contribute in later years to instability and political violence".[7]

Atkinson cautions against a reductionist view of ethnicity in Ugandan politics. He argues that ethnic differences did not alone cause political struggle in Uganda. Rather, ethnic identities were used as "tools or weapons", to generate political support by "demonizing the other".[8] Negative stereotypes of political and military opponents were often cast in ethnic or regional terms and propagated as "essential truths" about entire regions. According to Atkinson, every post-colonial administration has deployed such ethnic weaponry and continually stoked regional differences.[9] Upon gaining independence in 1962, Uganda's first leaders institutionalized and maintained patterns of north-south ethnic polarization. The first president of Uganda, Edward Muteesa (1963-1966), was violently removed by Milton Obote (1966-71),

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[1] John Milner Gray, 'Acholi History, 1860-1901 – Part I,' *Uganda Journal*, Vol. 15, Issue 2 (1951) 121-140 at 121.

[2] *Id.,* at 122.

[3] *Id*., at 137.

[4] Ogenga Otunnu, 'Causes and Consequences of the War in Acholiland' in Okello Lucima (Ed), *Accord: Protracted Conflict, Elusive Peace: Initiatives to end the violence in northern Uganda* (Conciliation Resources, 2002), pp.11-12.

[5] *Id*.

[6] Sverker Finnström, 'Wars of the Past and War in the Present: The Lord's Resistance Movement/Army in Uganda', *Africa,* Vol. 76, Issue 2 (2006) 200-220 at 204.

[7] Otunnu, *supra* note 4, p.11.

[8] Ron Atkinson, *The Roots of Ethnicity, Origins of the Acholi of Uganda before 1800,* 'Afterword: A Perspective on the Last Thirty Years' (Kampala: Fountain Publishers, 2010), p.277.

[9] *Id*.

who became dependent on the military to sustain his regime. Obote heavily recruited and promoted members from his own Lango ethnic group into the national army, thus ethnically politicizing its ranks.[10]

Ever since Obote's removal of Muteesa, Uganda has experienced multiple uprisings, *coup d'état* and violent political transitions. Obote's army commander was the notorious Idi Amin, a long-serving member of the colonial army from the minority Kakwa ethnic group from the West Nile region.[11] In January 1971, Amin removed Obote in a military coup, going on to violently purge the Acholi and Lango officers from the army ranks. Uganda then endured seven years of a brutal Amin dictatorship (1971-77), where human rights violations were routine and infamously cruel.[12] An attempt by Amin to occupy part of Tanzania resulted in his removal by Tanzanian forces in 1978, paving the way for the short-lived presidencies of Yusuf Lule (1979), who was promptly dismissed by an interim legislature, and Godfrey Binaisa (1979-1980), forcibly removed by another military coup that ultimately led to the disputed election of Milton Obote for his second term in office (1980-1985).[13] It was this disputed election that was the fuel for Yoweri Museveni's five-year bush war that sought to overthrow what was labelled as an illegitimate Obote government. Museveni led the National Resistance Army ("NRA"), composed of mainly ethnic Banyankore and Baganda recruits from western and central Uganda, as well as Tutsi refugees from Rwanda.[14] Ethnic labels were also a tool of the NRA's war, which, despite advocating for the "de-ethnicisation" of politics, pejoratively referred to military opponents as northerners, Nilotes (Lango and Acholi), or as *Bacholi* or *Abacholi*.[15]

Frustration amongst the Acholi officer corps of the national army, then entitled the Ugandan National Liberation Army ("UNLA"), led to General Tito Okello overthrowing Obote in 1985, barely reigning for six months before Museveni's NRA marched on Kampala, taking power in 1986.[16] For the first time, socio-economic, political and military powers were all concentrated in the south. When Uganda held its first democratic elections under the NRM

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[10] *Id*., p.275.

[11] Atkinson, *supra* note 8, p.276.

[12] *See generally* Martin Jameson, *Idi Amin and Uganda, An Annotated Bibliography* (Greenwood Press, 1992).

[13] Atkinson, *supra* note 8, p.277-278.

[14] *Id*., p.279.

[15] *Id*., p.280.

[16] *See generally* Pecos Kutesa, *Uganda's Revolution 1979-1986: How I Saw It* (Fountain Publishers, 2006); Ogennu Otunnu, *Crisis of Legitimacy and Political Violence in Uganda, 1979 to 2016* (Palgrave, 2017), Chapter 4.

regime ten years later in 1996, Museveni linked his candidacy back to the NRM bush war, which was widely understood as a war to end northern domination and misrule.[17]

3.3 The War in Northern Uganda (1986-2006)

As one bush war was ending in the south, another was beginning in the north. It would ravage the region for the next 20 years, leaving thousands of civilians dead and injured. Many more hundreds of thousands were internally displaced into hunger and misery. Economic and social structures fell apart, while cultural norms and practices were enfeebled in the midst of a brutal and protracted armed conflict. The north-south socio-economic divide hardened further during this period, with the south growing more prosperous, while the north disintegrated into an impoverishing war, the effects of which the region is still coming to terms with today.

As the remnants of Tito Okello's UNLA army escaped northwards in 1986, Museveni's NRA pursued them, and began committing human rights abuses in northern Uganda on the pretext of crushing rebellion. The abuses included the murder of civilians, rape, pillaging of livestock and the destruction of property.[18] Former UNLA soldiers went into hiding, while others took up arms. Those who decided to fight formed a group that became known as the Uganda People's Democratic Army ("UPDA"), which led an insurgency in northern Uganda for two years, before signing a peace deal in June 1988.[19] The members of the UPDA benefitted from an amnesty under the Amnesty Statute of 1987.

Around this period, a young woman called Alice Auma, or Alice Lakwena (meaning "messenger" in Acholi) formed a group called The Holy Spirit Movement ("HSM"). Initially an egalitarian and non-violent movement, Lakwena claimed to possess spiritual powers, believing that the holy spirit told her to fight against the government and protect the Acholi people.[20] Lakwena drew significant support from within the Acholi community, mobilizing Acholi youth to fight the NRA. A mixture of Christian, spiritual and military characteristics combined to produce an initially effective guerrilla force, whose bizarre tactics included

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[17] Atkinson, *supra* note 8, p.293.

[18] *See e.g.*, Justice and Reconciliation Project, *Occupation and Carnage: Recounting Atrocities Committed by the NRA's 35th Battalion in Namokora Sub-County in August 1986,* Field Note XIX (March 2014).

[19] Caroline Lamwaka, *The Raging Storm, A Reporter's Inside Account of the Northern Uganda War, 1986-2005* (Fountain, 2016), pp.137-138.

[20] *See generally* Heike Behrend, *Alice Lakwena and the Holy Spirits: War in Northern Uganda, 1986-99* (Ohio University Press, 2000); Tim Allen, 'Understanding Alice: Uganda's Holy Spirit Movement in Context,' *Africa* Vol. 61, Issue 3 (1991) 370-399.

deploying naked attackers smeared with shea nut oil, while chanting Christian hymns and holding stones they believed would protect them in battle.[21] It was reported that in one exchange near Kitgum in late 1986, NRA soldiers were terrified at the sight of the HSM fighters, and simply ran away in horror.[22] HSM's early successes were short-lived, however, and in October 1987 they were routed by the NRA about 100 kilometres north of Kampala. Alice fled to Kenya, where it is believed she died in 2006.[23]

With HSM's forces defeated and Alice in exile in Kenya, a reputed cousin and follower of Alice, Joseph Kony, reassembled the remnants of the HSM into what invariably became known as the Lord's Resistance Army, the Lord's Resistance Movement, or simply "The Holy".[24] The LRA grew as an effective rebel force in the late 1980s, initially focusing its armed campaign on government forces. However, it soon began attacking civilians as part of its *modus operandi.*[25] The LRA engaged in mass abduction of young children as well as adults to sustain itself as a military group.[26] It also intentionally attacked the civilian population as punishment for their perceived support of the NRM government through killing, raping, mutilating, destroying property and pillaging.[27] What began as a political and military struggle in a neglected region on behalf of the Acholi, tragically transformed into a war that ironically targeted the very people the LRA's struggle sought to represent and liberate from decades of social tyranny. Neighbouring communities and tribes, in particular the Langi and the Iteso, also suffered immensely during the conflict.[28]

Often labelled in popular culture and in the media in simplistic terms as the group that "seeks to rule Uganda by the Ten Commandments",[29] the LRA was, at its core, a complex

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[21] Allen, *Id.*, at 372.
[22] *Id*.

[23] Atkinson, *supra* note 8, p.287.

[24] Many former LRA fighters refer to the LRA as "The Holy", a reference to its predecessor, the Holy Spirit Movement. *See* Kristof Titeca, 'The Spiritual Order of the LRA', in Tim Allen & Koen Vlassenroot (Eds), *The Lord's Resistance Army, Between Myth and Reality* (Zed Books, 2010), Chapter 3.

[25] Rudy Doom & Koen Vlassenroot, 'Kony's Message: A New Koine? The Lord's Resistance Army in Northern Uganda', *African Affairs,* Vol. 98, Issue 390 (1999) 5-36 at 24.

[26] *See e.g.*, Human Rights Watch, *Stolen Children. Abduction and Recruitment in Northern Uganda* (March 2003); Phoung Pham, Patrick Vinck & Eric Stover, 'The Lord's Resistance Army and Forced Conscription in Northern Uganda', *Human Rights Quarterly* Vol. 30, Issue 2 (2008) 404-411; Christopher Blattman & Jeannine Annan, 'On the nature and causes of LRA abduction: what the abductees say', in Allen & Koen Vlassenroot, *supra* note 24, Chapter 7.

[27] *Id*., at 27.

[28] *See e.g.,* Justice and Reconciliation Project, *The Day They Came: Recounting the LRA's Invasion of Teso Sub-Region Through Obalanga Sub-County in 2003*, Field Note XIV (January 2012).

[29] *See e.g.*, BBC, 'Joseph Kony: Profile of the LRA leader', 8 March 2012.

political movement that sought to correct long-term systemic neglect of northern Uganda as a region, and of the Acholi as a people. As Finnström notes, the dominant narrative of the conflict is that the LRA are a brutal armed group with no comprehensible political agenda. However, this was not the case. In the mid 1990s, the LRA circulated sophisticated political manifestos and policy documents that contained progressive political objectives in areas such as agriculture, economics, health and education. As stated in its 1999 manifesto, its core objective was to overthrow the ruling Museveni government, to install "multi-party democracy" and improve the rights of the Acholi people.[30] Much of the literature on the conflict in northern Uganda focuses on the crimes perpetrated by the LRA without noting the crimes committed by the state forces, the UPDF, which has been involved in several campaigns of discriminatory violence. In 1991, it launched "Operation North" which focused on destroying perceived local support for the LRA.[31] During this campaign, the UPDF essentially closed off the region, conducting mass screening of civilians to root out rebels and collaborators, and committed numerous massacres, rapes and the looting of property.[32]

For over two decades, the LRA engaged in a prolonged armed campaign against the government forces, and committed a widespread and systematic attack on the civilian population.[33] Thousands of men, women and children were abducted and forced to commit crimes against civilians.[34] Women and girls were sexually enslaved and forced to become "bush wives" to LRA fighters.[35] Notorious attacks on civilians included the April 1995 attack on Atiak where over 300 civilians were killed;[36] the abduction of 139 girls from Aboke Primary

[30] Sverker Finnström, *Living in Bad Surroundings* (Duke University Press, 2008), p.248.

[31] Frank Van Acker, 'Uganda and the Lord's Resistance Army: The New Order No One Wanted,' *African Affairs,* Vol.103, Issue 412 (2004) 335-357 at 351.

[32] Atkinson, *supra* note 8, p.291.

[33] The violations perpetrated on the civilian population are summarized in a report compiled by the United Nations Office of the High Commissioner for Human Rights, *The Dust Has Not Yet Settled, Victims' Views on the Right to Remedy and Reparation, A Report from Northern Uganda* (2011), pp.37-57. (Hereafter, "*The Dust Has Not Yet Settled*")

[34] On the abduction of children, *see* the references in note 26, *supra*. For a narrative account, *see* Opiyo Oloya, *Child to Soldier: Stories from Joseph Kony's Lord's Resistance Army* (University of Toronto Press, 2013).

[35] Much has been written about the abduction and experiences of women and girls in the LRA. *See e.g.*, Erin Baines, 'Forced Marriage as a Political Project', Sexual Rules and Relations in the Lord's Resistance Army', *Journal of Peace Research*, Vol. 51, Issue 3 (2014) 405-417; Evelyn Amony, *I Am Evelyn Amony, Reclaiming my life from the Lord's Resistance Army* (University of Wisconsin Press, 2015); Teddy Atim, Dyan Mazurana & Anastasia Marshak, 'Women survivors and their children born of wartime sexual violence in northern Uganda', *Disasters,* Vol. 42, Issue 1 (2018) 61-78.

[36] Justice and Reconciliation Project, *Remembering the Atiak Massacre, April 20th 1995*, Field Note IV (April 2007).

School in 1996, many of whom were sexually enslaved for years afterwards;[37] and the massacre of civilians in Mucwini[38] in 2002, and Barlonyo[39] in 2004.

From around 1996, in an attempt to restore security in the region, and as a strategy to defeat the LRA, the government mandated that the local population be moved to internally displaced people ("IDP") camps, or what were initially referred to as "protected villages".[40] Branch writes that not all movement was voluntary, as the UPDF employed coercive methods to force people to move to the camps. He states that he majority of the Acholi were intimidated and forced by the UPDF to leave their villages, with the army killing civilians and burning properties in response to non-compliance.[41] The conditions in these camps were deplorable, with the World Health Organisation estimating in 2005 that the conditions were causing in excess of 1,000 deaths a week.[42] The camps were subject to routine attack by the LRA, who came in search of supplies, abductees, and to attack and punish civilians for not supporting the LRA cause.[43] The prolonged existence in the IDP camps deeply eroded the cultural and social norms of the ethnic groups in northern Uganda, and has severely damaged the region's economy.[44]

The conflict itself was characterized by periods of intensity, hiatus and numerous attempts at peace negotiations. It was artificially prolonged by material support from the Sudanese government to the LRA in the form of weapons, uniforms and supplies.[45] This proxy support was in response to the Ugandan government's support for the Sudan People's Liberation Army, who were waging an armed rebellion against the Khartoum government with the aim of winning independence for South Sudan.[46] Periodic attempts to end the conflict

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[37] *See* Els De Temmerman, *Aboke Girls: Children Abducted in Northern Uganda* (Fountain, 2001).

[38] Justice and Reconciliation Project, *Massacre in Mucwini*, Field Note VIII (November 2008).

[39] Justice and Reconciliation Project, *Kill Every Living Thing: The Barlonyo Massacre*, Field Note IX (February 2009).

[40] United Nations High Commissioner for Refugees, *A Time Between, Moving on from Internal Displacement in Northern Uganda* (2010), p.4.

[41] Adam Branch, *Displacing Human Rights, War and Intervention in Northern Uganda* (Oxford University Press, 2011), p.92.

[42] World Health Organisation & Ugandan Ministry of Health, *Health and Mortality Survey Among Internally Displaced Persons in Gulu, Kitgum and Pader Districts, Northern Uganda* (July 2005), p.35.

[43] Van Acker, *supra* note 31.

[44] *See generally* Finnström, *supra* note 30, chapter 4.

[45] Mareike Schomerus, *The Lord's Resistance Army in Sudan: A History and Overview* (Small Arms Survey, September 2007), pp.24-27.

[46] *Id*.

through mediation failed, notably in 1994 and 1999.[47] After extensive campaigning by advocacy and community groups, and aware that the UPDF could not defeat the LRA in a prolonged bush war, the government passed the *Amnesty Act 2000*, discussed in further detail below, which offered amnesty to all those engaged in rebellion.[48]

In 2002, the UPDF launched "Operation Iron Fist", attacking LRA bases in Southern Sudan.[49] Intended to deliver a "final blow" to the LRA's campaign, Operation Iron Fist instead unleashed a further period of brutal conflict and insecurity in northern Uganda.[50] According to the World Food Programme, between 2002-2004, the number of internally displaced people in northern Uganda doubled to 1.7 million people.[51] Controversially, in 2004, Uganda referred the situation in Uganda to the ICC, resulting in five arrest warrants being issued in 2005 for Joseph Kony and four of his deputies: Vincent Otti, Rask Lukwiya, Okot Odhiambo and Dominic Ongwen. As discussed in more detail below,[52] this intervention was criticised by some quarters as derailing ongoing peace efforts. Others argue that ICC intervention in fact expedited the negotiating process, in bringing the LRA to the table. It ultimately proved to be the main obstacle for Kony's agreement, as the warrants could not be negotiated away.[53] In August 2006, with the help of the mediation from the semi-autonomous Government of South Sudan and Riek Machar, the LRA began negotiations with the Ugandan government, leading to the signing of the Cessation of Hostilities Agreement and the beginning of the Juba peace talks.[54] As the talks progressed, notwithstanding a number of setbacks in 2007, the parties managed to sign a number of agenda items including on issues such as on accountability and reconciliation.[55] Despite these advances, the talks began to unravel amid rising tension and internal divisions, which led to Joseph Kony executing his deputy, Vincent Otti.[56] Kony ultimately refused to sign the Juba Agreement, seemingly over his dissatisfaction with regard

[47] Billie O'Kadameri, 'LRA/Government negotiations 1993-1994', in Lucima, *supra* note 4,

[48] *See* section 3.6 *infra*.

[49] Atkinson, *supra* note 8, pp.301-302.

[50] Chris Dolan, *Social Torture, The case of northern Uganda 1986-2006* (Berghahn, 2009), pp.54-55.

[51] World Food Programme, *Annual Report* (2004), p.19.

[52] *See* section 4.2 "The Intervention of the International Criminal Court".

[53] Phil Clark, 'The International Criminal Court's Impact on Peacebuilding in Africa' in Terence McNamee and Monde Muyangwa (eds), *The State of Peacebuilding in Africa: Lessons Learned for Policymakers and Practitioners* (Springer 2021).

[54] *See generally* Ron Atkinson, 'The realists in Juba'? An analysis of the Juba peace talks' in Allen & Koen Vlassenroot, *supra* note 24, pp.205-222.

[55] *See* Agreement on Accountability and Reconciliation between Government of the Republic of Uganda and the Lord's Resistance Army Movement, Juba, Sudan (29 June 2007).

[56] Francis Kwera, 'Deputy of Uganda's rebel LRA executed: deserter', *Reuters*, 30 November 2007,

the role of traditional and legal proceedings that he and his membership were to face, as well as the outstanding ICC warrants.[57]

Despite further attempts to persuade Kony to sign the Juba agreement, a final deadline from Machar to Kony to sign the Juba Peace Agreement expired on 30 November 2008.[58] The UPDF then launched "Operation Lightning Thunder", attacking LRA positions in Garamba National Park, DRC. Kony received word that the attack was to commence and ordered the evacuation of the LRA base. The operation itself was ill-executed, with no leading commanders being killed or captured.[59] The LRA escaped into the jungle, going on to cause havoc for the civilian population of the eastern DRC,[60] before later moving to the Central African Republic where it continued its pattern of attacking and abducting civilians.[61] Despite being reportedly down to a number of hundred fighters with increasing numbers of defections,[62] and pursued by a multi-national force with the help of US special forces,[63] the LRA continues to pose a significant risk to the civilian population in the region.[64]

3.4 The Call for Amnesty

As the 1990s progressed, it became clear the poorly resourced government troops could not militarily defeat the LRA, an effective guerrilla group that continually reinforced its ranks with abductees. In the late 1990s, many religious and community leaders in the north led the call for the creation of amnesty as a means to bring an end the LRA conflict. The leading religious advocacy group was the Acholi Religious Leaders Peace Initiative ("ARLPI"), which included leaders from each main religious denomination. Cultural leaders also joined the call

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[57] *New Vision*, 'Rebel chief refuses to sign peace deal', 10 April 2008.

[58] Ronald Atkinson, 'From Uganda to the Congo and Beyond, Pursuing the Lord's Resistance Army' (Institute of Peace, 2009), p.13.

[59] *Id.,* pp.13-16.

[60] *See e.g.*, Human Rights Watch, 'The Christmas Massacres, LRA Attacks on Civilians in Northern Congo', February 2009; United Nations, 'Report of the Secretary-General on the situation of children and armed conflict affected by the Lord's Resistance Army', UN Doc. S/2012/365, 25 May 2012.

[61] *See, for example,* BBC, 'LRA rebels seize children in Central African Republic', 3 March 2016. *See generally*, the statistics collated by the organisation LRA Crisis Tracker: https://www.lracrisistracker.com// (accessed 17 January 2021).

[62] Ledio Cakaj, 'Joseph Kony and mutiny in the Lord's Resistance Army', *The New Yorker*, 3 October 2015.

[63] Ledio Cakaj & Kristof Titeca, 'Bye-bye Kony? The Lord's Resistance Army after the US-Ugandan withdrawal', *Foreign Affairs*, 31 May 2017.

[64] United Nations, 'Report of the Secretary-General on the situation in Central Africa and the activities of the United Nations Regional Office for Central Africa', UN Doc. S/2020/463, 29 May 2020, paras. 24-25, noting over 50 civilian abductions by the LRA in March 2020 alone.

for amnesty. It was argued that offering forgiveness to LRA fighters would persuade them to lay down their arms. ARLPI began its campaign on 8 March 1998 in a meeting with President Museveni when it presented a memorandum entitled "A Call for Peace and End to Bloodshed in Acholiland". In this document, ARLPI emphasised "forgiveness and reconciliation [as] the centrepiece of the campaign for peaceful approach to the conflict".[65] One of the members of ARLPI, Archbishop John Baptist Odama ARLPI, explained to me their early approach:

> "So, we did lobby for it, or advocate for it. And when we were now presenting it to the parliament, through the Speaker, we sought the support and advice of the lawmakers, the MPs. So we put our heads together, and this was formulated and presented to the Speaker, which later was proposed in the parliament. It didn't take long, it took a very short time. Yeah. So, we saw the value of it. It was very close to the *mato oput*. And we thought, through that way, many of these rebels would come out."[66]

Sheik Musa Khalil also explained to me they advocated for an amnesty to be extend to all, including the leadership of the LRA:

> "Our position was on the rebellion because the competition between the fighters were just like two elephants fighting, and the grass are the people who are suffering […] Even the founder himself, of the Lord's Resistance Army, Joseph Kony. Our advocacy was he be included and enjoy the amnesty, and all the top commanders in the Lord's Resistance Army. For us, we were seeing thorough the Acholi rich values of culture, cultural values that talk about *mato oput*, we felt it very important that they all be forgiven."[67]

According to Khalil, President Museveni attended a meeting in Gulu together with other local cultural and religious leaders. As he was reluctant to extend a possible amnesty to Kony, Museveni asked the attendees if that was what they truly wanted:

> "By that time, the meeting was held in the council hall of Gulu, where the whole masses were invited and the president asked and talked very tough on Lord's Resistance Army leader, Joseph Kony. He should face justice because of killing, maiming, abducting. And the President asked the people in the end after he talked about his feeling of Kony not to benefit from the amnesty. He the President then asked the people of Acholi, what do they say, should Kony also benefit from the amnesty? The whole hall, the community in the hall said yes. He asked three times. Then he the President said, I can remember very well, that who am I then, if all of you are saying forgive him, and it benefits from the amnesty, I think, according to your culture, adding to the voice of the religious leaders, I agree. Amnesty is now for all."[68]

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[65] Gilbert Khadiagala, 'The Role of the Acholi Religious Leaders Peace Initiative (ARLPI) in Peace Building in Northern Uganda' (USAID, 2001), Case Study Two, p.4.

[66] Interview with Archbishop John Baptist Odama, 3 December 2018, Gulu.

[67] Interview with Sheikh Musa Khalil, 5 December 2018, Gulu.

[68] *Id.*

ARLPI continued to campaign strongly in favour of amnesty, arguing that the new amnesty law should provide blanket forgiveness for all conflict-related crimes.[69] The Uganda Human Rights Commission was also an active proponent of an amnesty law and viewed it as a pragmatic solution to the conflict.[70]

3.5 Debating Amnesty

In 1998, the Attorney General began to draft an amnesty bill and held consultative meetings with community, religious and political leaders in the northern region. This earlier draft was based on the Amnesty Statute of 1987 which contained a provision that expressly excluded "those who committed acts of genocide, murder, kidnapping with intent to murder, rape and defilement would not be exonerated". This provision, were it to be repeated in the new amnesty law, would have exempted large numbers of rebels from the amnesty.[71] During the consultative meetings, there were calls for government to introduce a "blanket amnesty law" and for traditional justice processes to be used to help LRA fighters reintegrate.[72] Local support for an amnesty was significant, and rooted in a recognition that many LRA combatants were forcefully abducted as children.[73]

A draft amnesty bill was brought before parliament in September 1999 by the Internal Affairs Minister, Edward Rugumayo.[74] Later, in November 1999, the bill was put to parliament for substantive debate. During the second reading of the bill, the Vice-Chairperson of the Committee on Defence and Internal Affairs, Lt. Col. Mudoola, outlined the purpose of the legislation. The bill was intended to create a legal framework to end rebel activities, pardon and resettle reporters and foster reconciliation.[75] He stated that the committee proposed that a blanket amnesty law be enacted, covering "all crimes committed during the course of the

[69] Khadiagala, *supra* note 65, p.8. *See also* Acholi Religious Leaders Peace Initiative, 'Hope in the Storm, Experience of ARLPI in Conflict Resolution of the Northern Ugandan Armed Conflict', a paper by Baker Rev. Macleord Baker Ochola II, Vice Chairperson of ARLPI (15 April 2004): "[t]he granting of a blanket amnesty to all former rebels who came back wilfully came back without prosecution was our input in relation to the Acholi's conflict resolution approach." Copy on file with author.

[70] Louise Mallinder, 'Uganda at a Crossroads: Narrowing the Amnesty?', Working Paper No.1 from *Beyond Legalism, Amnesties, Transition and Criminal Justice* (Queens University Belfast, 2009), p.20.

[71] *Id*.

[72] *The Daily Monitor*, 'The Acholi want to forgive', 29 October 1998.

[73] Lorna McGregor, 'ICC Monitoring and Outreach Programme: First Outreach Report' (International Bar Association, 2006), pp.16-17.

[74] *New Vision,* 'Uganda; Rugumayo Tales Amnesty Bill', 14 September 1999.

[75] Hansard, Uganda Parliamentary Debates, 30 November 1999, contribution of Lt. Col. Mudoola. Copy on file with author.

insurgency".[76] Col. Mudoola was clear as to the scope of the proposed amnesty law being put to parliament:

> "The committee proposes that a *blanket amnesty law* be enacted, covering *all crimes* committed during the course of the insurgency."[77]
>
> "Everybody, *even Kony himself* can benefit from this amnesty."[78]
>
> "The government is willing to forgive and forget what *atrocities* rebels have committed."[79] (emphasis added)

No ambiguity is to be found in these excerpts. Members of Parliament ("MPs") were expressly informed that they are to debate a law that provides "blanket amnesty" for all conflict-related crimes, including "atrocities." In the debate that follows, this understanding is clearly apparent in the various contributions from the floor, both in expressing concerns as to the proposed blanket nature of the law, but also from those pleading for forgiveness and allowing the north to begin the process of reconciliation. MPs who expressed deep reservations still supported the bill, mindful of the bigger goals at stake, namely peace, reconciliation, and a possible end to a brutal conflict. A review of these political exchanges is both illuminating and instructive, as they reveal what was the clear intent of the legislature: to enact a law that granted blanket amnesty for all conflict-related conduct, including serious crimes against civilians. Notably, UPDF soldiers were deemed not suitable for inclusion in the proposed amnesty regime, as other laws covered their conduct,[80] despite some calls for their inclusion in the bill so that government soldiers who committed crimes could also benefit from amnesty.[81]

On the core question of amnesty, there were diverging views present in the debate. Toskin Bartile, MP for Kongasis County, was concerned that the amnesty would be "abused" by some applicants, and that it may precipitate a "wave of conflict" among the local population.[82] Another MP retorted that "it would be wrong for this House to refuse amnesty on the basis that we fear it will be abused, because we will be shutting out those who were truly contrite and those who have repented."[83] Patrick Okumu-Ringa, MP for Padyere County, did

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[76] *Id.*

[77] *Id.*

[78] *Id.*, 2 December 1999, contribution of Lt. Col. Mudoola.

[79] *Id.*

[80] *Id.*

[81] *Id.*, contribution of Byanyima Winnie (Mbarara Municipality).

[82] *Id.*, contribution of Toskin Bartile (Kongasis County).

[83] *Id.*, contribution of Nyai Dick (Ayivu County).

not think those who committed "heinous crimes" should be protected, and that there should be a distinction between crimes against the state, and serious crimes against individuals.[84] Yet, he still supported the bill to support reconciliation efforts. There was recognition by others that many of those fighting with the LRA were abducted and "sucked into war through no choice of their own", and that they should be deserving of amnesty.[85] Regarding local views of a blanket amnesty, Baku Raphael, MP for West Moyo County in the West Nile region, an area affected by both LRA and West Nile Bank Front insurgencies, stated that her constituents were in favour of blanket forgiveness:

> "When the consultations on this Amnesty Bill were going on, the people of Moyo came out very clearly saying that, in order to achieve peace in Uganda, the amnesty, which should be offered, should be a blanket amnesty. They supported the position that the people who have taken arms against the Government should be forgiven, even for the crimes they committed outside or within the war efforts. The original Bill which was proposed by Government excluded heinous crimes from being forgiven. But my people came out very strongly to say that incentive be given for people who might have acted illegally or who have committed crimes in course of prosecuting the war."[86]

However, MPs from the affected region also noted the emotional difficulty attached to amnesty for victims in particular. Obedmoth Gerald, Youth MP for the Northern region, asked how victims might react to the idea that their torturers would be amnestied:

> "I feel it would be very difficult to sit with somebody who has killed my mother or a brother or somebody close to me. What are you going to do to this generation of people whose buttocks, breasts and lips have been cut and are still alive, and yet they are supposed to live with these very people who committed those atrocities? These are very difficult questions which the Government must address before these rebels can easily come back and be accepted by the communities they have tortured."[87]

Yet, a recurring theme in the parliamentary debate was the importance of forgiveness – MPs recognised the moral difficulty this bill posed and asked their fellow colleagues to forgive. Mwaka Victoria, MP for Luwero, recalled the particular situation of young children forced to commit unspeakable acts against others:

> "I now want to comment on the young boys who were abducted and forced to commit atrocities against their will. These are young boys who were abducted, taken, trained for a week or so, and then used as shields. They were ordered to chop off peoples' heads. So, inside, they know they are killers when actually they were doing it against their will, because they were helpless,

[84] *Id*., contribution of Patrick Okumu-Ringa (Padyere County).

[85] *Id*., contribution of Byanyima Winnie (Mbarara Municipality).

[86] *Id*., contribution of Baku Raphael (West Moyo County).

[87] *Id*., contribution of Obedmoth Gerald (Youth Representative, Northern region).

> they were forced to fight on behalf of the old people. I beg that these boys be given special treatment, like the *kadogos* were treated after the liberation war."[88]

As the debate progressed, it was clear that the members of parliament understood the proposed amnesty to forgive serious crimes committed against civilians, not merely the act of "rebellion". The Minister for Security, Murulu Mukasa stated this unequivocally: "[T]he whole point of the Amnesty law is for people to be forgiven and when they come back, they settle down and there is no further prosecution or witch-hunting because of their past activities."[89] This reality was also conveyed to the local population, as other MPs recounted their consultations in their constituencies. When consulting the local population in Atiak on the proposed amnesty, Owiny Dollo (who is now the Chief Justice of Uganda), then MP for Agago County, was challenged by an elderly man who lost two sons during a notorious LRA massacre, but who was persuaded by a younger amputee to see the benefit in forgiveness. The anecdote is worth relaying in full, as it encapsulates the complex agony that amnesty posed for victims – forgiveness in exchange for peace:

> "I led Members of the Acholi Parliamentary Group to tour the Acholi countryside, specifically on the issue of amnesty and forgiveness. I will give you our experience in one home town in Gulu District called Atiak. I believe no Ugandan, who is a Member of Parliament today, has never heard of Atiak. We all know what happened in Atiak and its residents in April 1995; massacre. We went there to ask and plead with our people to accept to forgive our own children so that we can bring an end to this evil. An elderly man, somewhere in his 60s, stood up after we had spoken and he said God had given him three male children. He had lost two, he was only remaining with one, and for us to ask him to forgive those who have made two of his children perish was asking too much of him. He found it impossible to forgive the perpetrators of his tragedy. We were at a loss!
>
> Soon after, a boy, who could have been anywhere between 14 to 15 years - I have his name in a note-book of mine in some place - raised his hand, he walks with the aid of a crutch because he lost his right leg in a land mine explosion. Some of these things sound like a story from some novel, no; those people are alive today and anybody can go and confirm. The boy raised his hand and said 'see me, you people of Atiak, I am young, I have been deprived of what I should have gone through with full life, but I am saying if forgiving the people who made me lose one of my legs will be bring peace to Acholi land, I will be the first person to forgive them.' This was a young boy of 14 saying 'if it will bring peace, if it will bring stability?' - and let me now add that, I think he wanted to say if it could bring sanity to our society, he would be the first to grant pardon, even if he knew who planted that land mine.
>
> Before we left Atiak, this old man came back and spoke in front of the others, he said that he had been touched by what the young man had said. Because people also asked him 'but if this madness continues, how can you rest assured that your remaining son will not also be abducted?' He came back and said if it will save the life of his remaining son, he would also genuinely forgive.
>
> I am asking you, hon. Members of Parliament, leaders of this country, do we speak for the people of Uganda, do we speak for our suffering people? Can we today pay back for what they have given us to make us come here and speak on their behalf? Can we all stand up in unanimity

[88] *Id.*, contribution of Mwaka Victoria (Women's Representative, Luwero).

[89] *Id.*, contribution of Muruli Musaka (Minister for Security).

> and say that it does not require any courage to fight, to hurt and to injure, but it requires a lot of courage to forgive!
>
> Some of us have been put in positions where we have had to make decisions whether to forgive or not. Let me say this; the most difficult thing you can do or you can be asked to do is to genuinely forgive. But I have not known anything more rewarding than forgiveness. It is a difficult decision, but there is nothing more satisfying than to forgive and to pardon those who have harmed you."[90]

Similarly, another MP recalled the words of one young girl, maimed by the LRA, who said "if forgiveness and amnesty means that my lips will be the only lips to be cut, then I would forgive the rebels and allow them to come."[91] Importantly, that the proposed blanket amnesty law would have serious consequences for Uganda's international treaty obligations was openly recognised by government officials. Yet, knowing this, the cabinet decided to press ahead with the bill because of the broad public support it received. The Minister for Ethics and Integrity, Miriam Matembe, stated the following:

> "I would like to inform the hon. Members that some of us actually had some doubts as to whether a Blanket Amnesty was good because we were thinking of violation of the human rights of other people. We were thinking of international laws to which we are parties and we were quite sceptical but when Cabinet decided to carry out a survey and went around and got the people's views, we all bowed to the people's wishes, and therefore we did bring this law and I wholly support it here."[92]

Ultimately, advocates for amnesty argued that by forgiving the perpetrators, it would open the door for reconciliation and sustainable peace in the region. Ongom Abednego, an MP in the Acholi Parliamentary Group, relayed the predominant views of his constituents in Omoro County (the home area of Joseph Kony) whom he said were ready and willing to forgive:

> "[p]eople are willing to forgive. It is this forgiveness which must be portrayed, particularly to those who are forced to enter into this rebellion. They were forced to commit atrocities which they did not want to commit but because they created this animosity between the population and them, they will definitely be nervous about responding to this amnesty thing unless we go out there, sell it to them. Let them know that definitely, they are going to be forgiven."[93]

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[90] *Id*., contribution of Owiny Dollo (Agago County).

[91] *Id*., contribution of Dr. Okulo Epak (Oyam South).

[92] *Id*., contribution of Miriam Matembe (Minister for Ethics and Integrity).

[93] *Id.*, 1 December 1999, contribution of Ongom Abednego (Omoro County).

During the debate, one MP queried whether this amnesty from the state would also prevent individuals taking civil cases against former rebels for injuries incurred. The Attorney General, Bart Katureebe, who was present in parliament, replied:

> 'The answer is no Mr. Speaker. The civil actions [are] not amnestied. What is being amnestied are *crimes* that have been committed by the individuals.'[94] (emphasis added)

This contribution from Katureebe, then Attorney General and the government's senior legal adviser, is significant. As Katureebe went on to become Chief Justice and author of the Supreme Court judgement in the *Kwoyelo* case, where he takes a very different and contrary view on the scope of amnesty, which is discussed in detail in chapter 4.[95] Taking into account the above excerpts, it is manifestly clear from the committee proposing the bill to parliament, to the contributions from the MPs on the floor, and the view of the Attorney General, that the scope of the proposed amnesty law extended *beyond* mere participation in armed rebellion against the state. It was intended by the legislature to be a much broader blanket of forgiveness, encompassing acts of criminality that were committed during that very rebellion. The amnesty bill nevertheless offered a workable solution for rebels of any group to lay down their arms and reintegrate back into their communities. According to Amnesty Commissioner, Bruhan Ganyana Miiro, because the majority of fighters in the LRA were abducted children and women, there was simply "no moral or legal justification for prosecuting this group of people".[96] The bill was passed by members of a reportedly sparsely attended parliament on 7 December 1999, and came into force in January 2000.[97]

3.6 Amnesty Act 2000

Beginning with the preamble, this section analyses the key provisions of the *Amnesty Act 2000.* Reconciliation was a key goal of the act, and featured prominently in the preamble, which states:

> **AND WHEREAS** it is the expressed desire of the people of Uganda to end armed hostilities, ***reconcile with those who have caused suffering*** and rebuild their communities;

[94] *Id*., 2 December 1999, contribution of Bart Katureebe (Attorney General).

[95] *See* section 4.6 of this thesis.

[96] Bruhan Ganyana Miiro, *Amnesty and Peace Building in Uganda* (Bugambi, 2015), p.36.

[97] *New Vision*, 'Amnesty Bill Passed', 8 December 1999.

> **AND WHEREAS** it is the desire and determination of the Government ***to genuinely implement its policy of reconciliation in order to establish peace***, security and tranquillity throughout the whole country.[98] (emphasis added)

The reference to reconciliation is important, as it represents a clear intention that the act was to reconcile victims with rebels for suffering they caused, *i.e*., harm incurred beyond simply fighting the government forces. Indeed, one MP asked that the title of the act be renamed the "Amnesty and Reconciliation Act", an amendment which was not subsequently adopted.[99] On the purpose of the legislation, Nathan Twinomugisha, Principal Legal Officer in the Amnesty Commission, states that "the purpose of the Amnesty Law is to pursue a peaceful end to conflict through reconciliation, underpinned by a legal guarantee of non-prosecution for offences related to insurgency without fear of retribution or revenge."[100] Reconciliation was also a key message from religious leaders who championed amnesty. Reverend John Waligo, chairman of the interfaith group, stated: "All the people in the conflict area should reconcile with the returnees and the media should highlight the Amnesty Act […] The community is forgiving those who killed their people and the government is saying that it will not prosecute those who committed atrocities."[101] Section 3 of the Act then sets out the parameters of amnesty:

> 1) An Amnesty is declared in respect of any Ugandan who has at any time since the 26th day of January, 1986 engaged in or is engaging in war or armed rebellion against the government of the Republic of Uganda by –
>
> a) actual participation in combat;
> b) collaborating with the perpetrators of the war or armed rebellion;
> c) committing any other crime in the furtherance of the war or armed rebellion; or
> d) assisting or aiding the conduct or prosecution of the war or armed rebellion.
>
> 2) A person referred to under subsection (1) shall not be prosecuted or subjected to any form of punishment for the participation in the war or rebellion for any crime committed in the cause of the war or armed rebellion.[102]

There is a clear division of conduct in this provision, all of which is open to amnesty. First, there is a distinction made with respect to "participating in combat", which can readily be defined as the act of military rebellion against the state. The second is "collaborating or assisting" the rebellion, which is undoubtedly aimed at the civilian support the LRA received

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[98] *Amnesty Act 2000*, Preamble.

[99] In requesting that the word "reconciliation" not be inserted into the act's title, Minister for Internal Affairs, Prof. Edward Rugumayo, stated that "reconciliation is an emotional, spiritual experience for which we do not legislate." Hansard, *supra* note 29, contribution of Prof. Edward Rugumayo, on 2 December 1999.

[100] Ganyana Miiro, *supra* note 96, p.8.

[101] *Id*., p.54.

[102] *Amnesty Act 2000*, s.3.

from segments of the civilian population that were sympathetic to their cause, and who sometimes assisted the LRA, for example by providing supplies and local intelligence on UPDF movements. The third and decidedly ambiguous category of conduct, "committing any crime in furtherance of war or armed rebellion" gives rise to definitional difficulty. As to what kind of conduct fell under this third extended category, the legislation does not provide any guidance. Perhaps this ambiguity was the deliberate intention of the drafters, a latent recognition that rebels committed other crimes during the war, but stopping short of expressly defining the nature of such criminality.

Nevertheless, as the parliamentary debates demonstrate, "committing any other crime in the furtherance of the war or armed rebellion" was understood to cover *any* conduct that might be related to the armed conflict, including potentially serious violations of human rights. If there was any lingering doubt about this contention, then it is further instructive to examine the criteria adopted by the Amnesty Commission, the body mandated under the act to implement the amnesty regime. One of its Commissioners, Bruhan Ganyana Miiro, writes:

> "[i]t was explained to the rebels that whatever crime they had committed, including murder, abduction, rape, looting, engaging slave wives, maiming, torture […] was to be forgiven. [103]

Furthermore, in explaining the scope of amnesty, the Amnesty Commission Handbook, which guides its staff in the implementation of their mandate, clearly states: "A blanket amnesty is granted to any Ugandan involved in insurgency. No offences are excluded from amnesty."[104] Moreover, no distinction is made between levels of responsibility or rank – the amnesty applies equally to all members of a rebel group, regardless of their rank.[105] Nathan Twinomugisha, Principal Legal Officer at the Amnesty Commission, explained to me his understanding of the Act:

> "When the act was passed, it was very interesting, they said everybody should benefit from this law. Whether it would be top commanders, or the abductees, or the young people who were forced into rebellion. All of them, the law covered them, and at that moment, it was what we would call blanket amnesty. It wouldn't look at how serious the crime was, we looked at whether a person actually sought to abandon rebellion, pursue peace, and then we would grant amnesty to ever came out of the bush, and sought forgiveness and agreed to abandon rebellion. It covered nearly all the crimes, let it be war crimes, even acts that would amount to crimes against humanity, mass murders, all of it would be covered.

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[103] Ganyana Miiro, *supra* note 96, p.133.

[104] Amnesty Commission, *An Act of Forgiveness – A Guide to the Amnesty Act 2000, 2002, & 2006 as amended* (Kampala, 2009), p.6. Copy on file with author.

[105] Cecily Rose, 'Looking Beyond Amnesty and Traditional Justice and Reconciliation Mechanisms in Northern Uganda: A Proposal for Truth-Telling and Reparations', *Boston College Third World Law Journal,* Vol. 28, Issue 2 (2008) 345-400 at 353.

> […]
>
> It was brought out in the heat of rebellion, and when you look at it, you can see it was sort of, made to be for a short time, to cure a big problem that was on table at that time. And, so it wasn't very well defined and so it was left mostly for us, at the Amnesty Commission. At that time, no test case was put before the courts to help us interpret the law. And so, for us, we interpreted it like we saw it at the Amnesty Commission. And we started saying yes, it's blanket."[106]

Thus, if not in law, then certainly in practice, the *Amnesty Act* amounted to a blanket amnesty not just for participating in rebellion, but also for serious criminality associated with that same rebellion.

Section 4 of the Act outlined the steps to be taken when applying for amnesty:

1) A reporter shall be taken to be granted the amnesty declared under section 3 if the reporter:
    a) reports to the nearest Army or Police Unit, a Chief, a member of the Executive Committee of a local government unit, a magistrate or a religious leader within the locality;
    b) renounces and abandons involvement in the war or armed rebellion;
    c) surrenders at any such place or to any such authority or person any weapons in his or her possession; and
    d) is issued with a Certificate of Amnesty as shall be prescribed in regulations to be made by the Minister.[107]

According to survey data from the Amnesty Commission, most reporters escaped from the LRA, with only 6% receiving amnesty following capture.[108] For those who defected, over half of the reporters went directly to a UPDF barracks, a third reported to an NGO reception centre, and just under a tenth went to a local council representative.[109] The legislation also makes provision for individuals who, at the time, charged with or were detained for conflict-related offences to declare their renunciation of violence to either a prison officer or the judge or magistrate presiding in their case.[110] The Act requires the Director of Public Prosecutions to "investigate the cases of all persons charged with or held in custody for criminal offences and [...] take steps to cause to be released all persons involved in such cases who qualify for grant

[106] Interview with Nathan Twinomugisha, Principal Legal Officer to the Amnesty Commission, 14 December 2018, Kampala.

[107] *Amnesty Act 2000*, s.4(1). In addition, s.4(2) also provides that a person in detention may also apply for amnesty by informing the responsible prison officer or magistrate.

[108] Multi-Country Demobilization and Reintegration Program, 'The Status of LRA Reporters', MDRP Dissemination Note No. 2 (February-March 2008) (hereafter, "MRDP Report"), p.2.

[109] *Id.*

[110] *Amnesty Act 2000*, s.4(5).

of amnesty", if those individuals renounce their violent actions.[111]

Following the passing of the *Amnesty Act*, members of the Amnesty Commission visited prisons in Uganda to inform prisoners of their rights. This resulted in several prisoners, including some who had been sentenced to death, benefitting from the amnesty.[112] The Commission regularly held radio shows that broadcasted the amnesty message. These included Radio Okapi in the DRC, Mega FM from Gulu and Arua One in West Nile.[113] During the war, messages of forgiveness were also broadcasted on a daily basis on the *Dwog Cen Paco* ("Come Back Home") radio show on Mega FM in Gulu, the most widely listened-to radio station in northern Uganda at the time. Recently returned LRA fighters would speak on air and encourage those listening in the bush to return home, offering their own examples of safe return as proof that nothing sinister would happen to them, including facing prosecution.[114] In a May 2005 survey by the Amnesty Commission, two-thirds of the amnesty applicants said they had heard about the amnesty process on the radio.[115] The amnesty application form required that a number of questions be answered of the reporter, including the group they belonged to and their rank, whether they were abducted or not, and the time spent in the bush.[116] Question no. 47 on the form asks: "Have you committed offence against anybody in Uganda? (An Offence not pardoned by the Amnesty Act)."[117] Given that amnesty in Uganda was effectively a blanket one, it is unclear how much of a role this question played in the decision to grant amnesty or not, if any. On the ground, the Amnesty Commission staff in the regional offices who were issuing amnesty certificates were specifically trained *not* to exclude any crimes from the purview of amnesty. According to Bernard Festo, former Amnesty Commission Programme Officer in the Gulu office: "It covered for all the atrocities made while in the bush. It covered all."[118] Festo also explained that for those who were denied amnesty, the main reasons were not because of any crimes committed, but because the applicant was deemed not to have been a member of a rebel group.[119]

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[111] *Id*., s.4(3).

[112] Mallinder, *supra* note 70, p.26.

[113] Ganyana Miiro, *supra* note 96, p.70.

[114] *See* Scott Ross, 'Encouraging Rebel Demobilization by Radio in Uganda and the D.R. Congo: The Case of "Come Home" Messaging,' *African Studies Review*, Vol. 59, No. 1 (2016) 33-55 at 39.

[115] MRDP Report, *supra* note 108, pp.1-2.

[116] Amnesty Commission, Amnesty Application Form. Copy on file with author.

[117] *Id*.

[118] Interview with Bernard Festo, Programme Officer, Amnesty Commission Gulu Office, Gulu, 20 September 2018.

[119] *Id*.

3.6.1 Amnesty (Amendment) Act 2002

The Act was amended two years later with the passing of the *Amnesty (Amendment) Act 2002*, which amended section 6 to provide that if after receiving an amnesty certificate a person commits another act falling within section 3 of the 2000 Act (relating to crimes of war or armed rebellion), they cannot then be granted amnesty for that act and will be liable for prosecution, although *not* for the acts which were previously amnestied.[120] The *Amnesty (Amendment) Act 2002* does, however, provide some leeway to the Amnesty Commission by permitting the Commission to grant amnesty to such re-offenders if it deems that their crimes were committed in "exceptional circumstances", such as being under duress.[121]

A case in point concerns two former LRA commanders, Sunday Otto and Richard Odong "Kau", who originally received amnesty in 2003, but then returned to the bush. They later defected from LRA in November 2007, and were issued with amnesty certificates to "reinstate and revalidate" their previous amnesties. [122] The Amnesty Commission Chairman, Justice Peter Onega, stated that under the *Amnesty (Amendment) Act 2002*, the two former combatants qualified for a second amnesty under the "exceptional circumstances" condition, as they had helped the commission to persuade more rebels to surrender and had been "executing this mission on behalf of the commission and the government when they had been abducted again by the LRA rebels".[123]

3.6.2 Amnesty (Amendment) Act 2006

The *Amnesty Act* was amended again in 2006, ostensibly to correct the legal deficiencies identified above, and bring the act in line with Uganda's obligations under international law and the recent issuance of ICC arrest warrants. It gave the Minister for Internal Affairs the power to expressly declare named individuals to be ineligible for amnesty. The newly amended section 2 of the 2000 Act now read as follows:

> "Notwithstanding the provisions of section 2 of the Act a person shall not be eligible for the grant of amnesty if he or she is declared not eligible by the Minister [of Internal Affairs] by the statutory instrument made with the approval of Parliament."[124]

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[120] *Amnesty (Amendment) Act 2002*, s.6A(1).

[121] *Amnesty (Amendment) Act 2002*, s.6A(3).

[122] *New Vision*, 'Ex-LRA men get Amnesty', 21 January 2008.

[123] *Id*.

[124] *Amnesty (Amendment) Act 2006*, s.2A.

This amendment is significant in that it is a recognition that the *Amnesty Act* was indeed a blanket amnesty, and that action was needed to ensure that some persons could be held criminally accountable by making them exempt.[125] However, the amendment did not make reference to any criteria by which the Minister might declare someone ineligible. In 2010, the Minister of Internal Affairs asked parliament to exclude four LRA fighters under this amendment: Joseph Kony, Dominic Ongwen, Okot Odhiambo and Thomas Kwoyelo. However, this was motion defeated in parliament due to apparent procedural irregularities and insufficient information.[126] And so, in effect, the amnesty law remained a blanket one.

3.7 The Amnesty Commission

The Amnesty Commission is the body created under the legislation to implement the provisions of the Act. Part III outlines its structure, specifying that is to be headed by a High Court Justice, along with six commissioners who are to be persons of "high moral integrity".[127] Under the Secretary are the Principal Legal Officer, Principal Public Relations Officer, and Principal Accountant.[128] Project and field staff were located in offices located in Kampala, Mbale in the east, Kitgum, Gulu, Arua in the north, and Kasese in the west.[129] Section 8 of the Act outlines the responsibilities and mandate of the Commission:

> 1. to monitor programmes of –
>   (i) demobilization;
>   (ii) reintegration; and
>   (iii) resettlement of reporters;
> 2. to co-ordinate a programme of sensitization of the general public on the amnesty law;
> 3. to consider and promote appropriate reconciliation mechanisms in the affected areas;
> 4. to promote dialogue and reconciliation within the spirit of this Act;
> 5. to perform any other function that is associated or connected with the execution of the functions stipulated in this Act.[130]

Mallinder notes that the combination of amnesty administration, together with a mandate for reconciliation and reintegration, was unusual, but had the potential to provide an efficient

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[125] This was even the view of the Chairman of the Amnesty Commission, Justice Onega. Commenting on the 2006 amendment to the *Amnesty Act*, he said: "Why such names have not been submitted to the commission, I don't know. At the moment we offer blanket amnesty to all individuals who abandon and denounce rebellion against government." *Daily Monitor*, 'Amnesty boss speaks out on LRA commanders', 31 January 2008.

[126] Sarah Nouwen, *Complementarity in the Line of Fire, The Catalysing Effects of the International Criminal Court in Uganda and Sudan* (Cambridge University Press, 2013), p.215.

[127] *Amnesty Act 2000*, s.7.

[128] Ganyana Miiro, *supra* note 96, p.62.

[129] Ganyana Miiro, *supra* note 96, p.58.

[130] *Amnesty Act 2000*, s.8.

mechanism for responding to the needs of former combatants.[131] Section 13 of the Act also established a Demobilization and Resettlement Team ("DRT"), which outlines its mandate:

> The functions of the DRT shall be to draw programmes for –
> (a) de-commissioning of arms;
> (b) demobilization;
> (c) re-settlement; and
> (d) reintegration of reporters.

In June 2000, the Amnesty Commissioners were sworn in and the commissioners began work in July.[132] It took over a year for the members of the DRT to be appointed and even longer for regional offices to be established.[133] According to Commissioner Ganyana Miiro, the main responsibility of the Amnesty Commission was to monitor these DRT programmes, to coordinate sensitization and promote appropriate reconciliation mechanisms.[134] The Commissioners were ultimately responsible for overall management, including overseeing the financial affairs and liaising with development partners.[135] The DRTs effectively represented the Amnesty Commission at the regional level, with offices in Central, Western, Eastern, Gulu, Kitgum and West-Nile regions.[136] The choice of these locations made on the basis of the intensity of rebel activities in a particular geographical area. LRA returnees were mainly processed in the Gulu Kitgum, Arua and Mbale offices.[137] This is contrast to the western region, which had just one office in Kasese. The ADF was the only significant armed group operating in the West, mainly carrying out raids from cross the border from its DRC bases.[138]

[131] Mallinder, *supra* note 70, p.28.

[132] *Id*., *citing to The Daily Monitor*, John Muto, 'Govt peace commission starts work', 11 July 2000.

[133] *Id*., *citing to* Barney Afako, 'Promoting Reconciliation: A Brief Review of the Amnesty Process in Uganda' (Report) (November 2002), p.3.

[134] Ganyana Miiro, *supra* note 96, p.55.

[135] *Id*., pp.57-58.

[136] *Id*., p.58.

[137] *Id*., p.59

[138] *Id*.

Figure 3 - Amnesty Commission Gulu Office, September 2018

Each regional Amnesty Commission office was headed by one DRT official whose role was to implement the mandate of the Commission. It was essential for the DRT official to connect with local government leaders, including the Resident District Commissioner, District Police Commissioner, cultural and religious leaders.[139] Good working relationships with these figures were considered essential, as they played a significant role in advocating for amnesty, and were often the first point of contact for rebels escaping the bush.[140] DRTs were also responsible for engaging with local NGOs and other international agencies and bodies operating in their areas.[141] Furthermore, DRT members had a responsibility to keep in contact with reporters who have received amnesty. They usually kept a database with biographical and social information. This was deemed important from the point of view of tracking a reporter, ensuring they were reintegrating back into their community.[142]

According to Commissioner Ganyana Miiro, to implement the reintegration phase effectively, the DRT member needed to be aware of the local and cultural context in a reporter's community and have "a degree of political awareness".[143] Creating links with the local business community was also deemed necessary, to provide job opportunities to reporters.[144] Local and

[139] *Id.*

[140] *Id.*

[141] *Id.*, p.60.

[142] *Id.*

[143] *Id.*, p.61.

[144] *Id.*

international partners became essential to the Amnesty Commission carrying out its mandate. For example, the Commission worked closely with the UPDF and UN peacekeeping forces in the DRC to process defecting LRA combatants.[145] Local NGOs such as Gulu Support the Children Organisation (GUSCO), Rachele Rehabilitation Centre, international relief agencies such as World Vision and CARITAS, and Save the Children each operated "reception centers" which provided crucial rehabilitation, counselling and re-settlement support to returnees upon their return from the bush.[146] International organisations such as the World Bank, UNICEF, United Nations Development Programme, the African Union and the International Organization for Migration also provided technical and financial support to the Amnesty Commission, as well as the Irish Embassy.[147] In the early years of its operation, the Amnesty Commission struggled to implement its mandate due to a severe lack of funding. By 2005, approximately 11,200 reporters had yet to receive a resettlement package.[148] In 2005, the World Bank provided $4.2 million, which enabled the Amnesty Commission to formally launch its Disarmament, Demobilisation and Reintegration ("DDR") programme.[149] A further grant of $4.86 million was provided in 2008.[150] The initial short lifespan of six months for the *Amnesty Act*, and subsequent short statutory renewals of 1-2 years made financial planning and management a difficult and uncertain exercise for the Amnesty Commission.[151] Crucially, this also hindered the Commission's ability to implement long-term reintegration programmes.[152] Ganyana Miiro is of the view that the Commission needs to be put on a more permanent statutory footing, and that social and economic programmes need to be provided by the government in order to meaningfully implement on the Commission's reintegration mandate.[153]

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[145] *Id*.

[146] *Id*., p.66.

[147] *Id*., p.64. In 2004, the Irish government donated $65,000 to the Amnesty Commission to finance the repatriation of rebels from the West Nile Bank Front, and to set up a liaison office in Beni, DRC. *See Id*., p.94.

[148] Rose, *supra* note 105 at 356.

[149] Mallinder, *supra* note 70, p.29.

[150] Ganyana Miiro, *supra* note 96, p.64.

[151] *Id*., p.88.

[152] *Id*., p.89.

[153] *Id*., p.90.

3.8 Resettlement

Apart from the demobilisation and granting of amnesty certificates, monitoring programmes of resettlement was intended to be a major part of the Amnesty Commission's mandate. However, in practice, this aspect was poorly implemented, and the Commission was heavily dependent on NGOs to fill the gaps in resources and ensuring resettlement. Ganyana Miiro states that before given an amnesty certificate, reporters underwent a re-orientation course in order to prepare them for return to civilian life.[154] Although, it is not clear how many reporters underwent such a programme. Every recipient of amnesty was to receive a standard resettlement or reinsertion package from the Commission, which in theory, should have contained the following:

- 263,000 Ugandan Shillings[155] (about 70 USD)
- 1 mattress
- 2 saucepans
- 3 blankets
- 1 basin
- 3 hoes
- 2 cups
- 2 plates
- 5kg bag of bean seeds
- 5kg bag of maize seeds[156]

The package was designed to assist reporters to support themselves upon returning home. It was to be granted to all applicants equally, although for children, the package was sometimes given to their parents or guardians.[157] The programme was also intended to be retroactive and could apply to eligible ex-combatants who had received amnesty since the enactment of the *Amnesty Act 2000*.[158] In many cases, the reinsertion package came months or years after an abductee's return, while some have not received any package at all.[159] According to Bernard

[154] *Id*., p.71.

[155] The amount varies according to different sources, with some quoting as high 350,000 Ugandan Shillings. (about 100 USD) *See* International Crisis Group, 'Building a Comprehensive Peace Strategy for Northern Uganda', Africa Briefing No. 27 (23 June 2005), p.8.

[156] Ganyana Miiro, *supra* note 96, p.72.

[157] Mallinder, *supra* note 70, p.30.

[158] *Id*.

[159] Christopher Blattman & Jeannie Annan, 'Child combatants in northern Uganda: Reintegration myths and realities', in Robert Muggah (Ed), *Security and Post-Conflict Reconstruction: Dealing with Fighters in the Aftermath of War* (Routledge, 2008), pp.103-126 at p.115.

Festo, Programme Officer with the Amnesty Commission Gulu Office, the packages effectively stopped being distributed in 2008, due to a lack of funding.[160] Ganyana Miiro recognises that many felt the package to be inadequate, considering abductees lived in the bush for years and returned to no home or land to farm.[161] The package was "one-size-fits-all", and did not take into account a reporter's individual circumstances. For example, those abducted as children returned as adults with no education or life skills. Girls who were subjected to sexual slavery in the bush returned with children born in the bush, and were stigmatized by their communities for producing children outside of traditional marriages.[162] Research with female reporters has found that the reinsertion package did not consider the extra challenges associated with returning with children born of forced marriage: "Whether female or male, with dependents or without, the reinsertion package has been the same. To a mother who returned with three children born in captivity, this package fell short of facilitating a meaningful resettlement."[163] By the time the World Bank-funded Multi-Country Demobilization and Reintegration Program programme in Uganda closed on 30 June 2007, 16,256 individuals had been demobilised, and reinsertion support had been provided to 14,816 individuals.[164] Further funding came from the World Bank in April 2008, with reintegration programmes also forming part of the government's Peace, Recovery and Development Plan for Northern Uganda.[165]

Mallinder notes the tension that was involved in giving such packages to former rebels, many of whom were responsible for crimes against civilians, who never received any form of compensation from the government.[166] The monetary aspect was seen by some victim communities as "a reward to perpetrators."[167] Principal Legal Officer to the Amnesty Commission, Nathan Twinomugisha, explained how the Commission was acutely aware of

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[160] Interview with Bernard Festo, Programme Officer with the Amnesty Commission Gulu Office, 20 September 2018, Gulu.

[161] Ganyana Miiro, *supra* note 96, p.80.

[162] *See* Atim et al, *supra* note 35. *See also* Myriam Denov & Atim Angelor Lakor, 'When war is better than peace: The post conflict realities of children born of wartime rape in northern Uganda', *Child Abuse & Neglect*, Vol. 65 (2017) 255-265; Myriam Denov & Anais Cadieux Van Vliet, 'Children born of wartime rape on fatherhood: Grappling with violence, accountability, and forgiveness in postwar northern Uganda', *Peace and Conflict: Journal of Peace Psychology* (2020) Advance online publication.

[163] Justice and Reconciliation Project, 'Who forgives whom? Northern Uganda Grassroots views on the Amnesty Act' (June 2012) (Hereafter, "JRP Amnesty Report"), p.7.

[164] International Crisis Group, *supra* 155.

[165] Government of Uganda, 'Peace, Recovery and Development Plan' (September 2007) p.102.

[166] Mallinder, *supra* note 70, p.28.

[167] JRP Amnesty Report, p.3: "To some participants, amnesty meant giving tangible support—through the reinsertion packages—to persons returning from rebel activity. It has been largely viewed by many community members as a reward to perpetrators."

this perception, but that a balance needed to be struck between assisting returnees without it being seen as a substantial reward for criminality:

> "Remember these are people who have hurt others, some of them killed, and them they come with packages. It can be very counter-productive. The best thing is to give them very little, the minimum, so they are not better than the people. […] You should not be seen to be rewarding but it should be seen just to help them. Again the debate is you cannot take naked people to society without even transport. So give them little transport, maybe a blanket, mattress, and they don't look so much better than the community they were attacking. So it's a delicate thing, this package."[168]

According to Blattman and Annan, a number of practical issues also plagued the pay-out of the reinsertion packages. They consider that the lines between combatants and non-combatants are blurry because of the nature of the recruitment and abduction, with most abductions being quite short in length. An abductee who stayed one month in the bush, would get the same level of assistance as someone who stayed ten years.[169] They argue that targeting combatants as a group was counter-productive because of its stigmatizing effect. Instead, in their view targeting all war-affected youth based on well-identified needs would have been more effective and less stigmatizing.[170]

Programme initiatives for reporters designed to help reintegrate into society were often implemented in a haphazard fashion and were dependent on periodic funding from external sources. The Amnesty Commission worked closely with a number of development partners on the ground in an attempt to connect reporters with reintegration programmes. They included World Vision, CARE Uganda, the ICRC and Child Fund International.[171] Reporters were reintegrating within their communities but still faced many challenges, a including lack of educational and income-generation support. Many who were trained in agricultural or vocational skills, were not given the practical tools to subsequently use those skills, with access to land being a major obstacle among reporters.[172] The Amnesty Commission also implemented a programme known as Information Counselling and Referral Services ("ICRS"), a system intended to identify educational and economic opportunities and refer reporters to them.[173] Medical support, including psychosocial support, was also to be provided. In 2009,

[168] Interview with Nathan Twinomugisha, 14 December 2018, Kampala.

[169] Blattman & Annan, *supra* note 159.

[170] *Id*., pp.122-123.

[171] Mallinder, *supra* note 70, p.29.

[172] Ganyana Miiro, *supra* note 96, p.87.

[173] *Id*., p.83.

ICRS had interacted with 1,462 reporters (against a target of 16,000),[174] but only 113 of these were children, *i.e.*, aged between 12-18.[175] By the end of 2011, the ICRS referral had made a total of 3,655 referrals of reports to socio-economic training opportunities and services. Of these, 2,705 (74%) related to agriculture, 456 for health and psycho-social support (12%), 153 (4%) for vocational training and 62 (2%) for business training.[176] Further funding provided by the Ugandan government's Peace, Recovery and Development Plan allowed for 716 reporters to be trained in activities such as agriculture, metal works, tailoring, carpentry, hair-dressing, bicycle repair and bricklaying, with 120,000 Ugandan Shillings (about $35) of seed capital being provided to each beneficiary.[177]

The Amnesty Commission sought to fulfil its mandate to sensitise the community to the amnesty and promote dialogue on reconciliation through organizing public meetings, workshops, community events and meeting potential reporters to sensitize them about the advantages of reporting for amnesty.[178] In addition, the Commission worked with family and community members to promote social reintegration through traditional reconciliation and welcoming ceremonies, although the extent and regularity of this reconciliatory advocacy has not been documented by the Commission.[179] Ganyana Miiro records that the Commission did facilitate four traditional cleansing ceremonies in cooperation with *Ker Kwaro Acholi*, the umbrella group of Acholi traditional leaders, during which hundreds of LRA returnees were cleansed.[180] Bernard Festo, Programme Officer with the Amnesty Commission Gulu Office, also recounted one group cleansing ceremony involving high-ranking LRA rebel Caesar Acellam, which was financially supported by the Commission.[181] However, research suggests that once a returnee was granted an amnesty certificate and resettled, the Commission did not contact them again or conduct any follow-up monitoring to see how they were doing in the community.[182] Ganyana Miiro provides data on the number of community dialogue and

[174] *Id*., p.84.

[175] *Id*., p.98.

[176] *Id*., p.99.

[177] *Id*., pp.104-106.

[178] *Id*., p.85.

[179] Interview with Nathan Twinomugisha, Principal Legal Officer for the Amnesty Commission, Kampala, 14 December 2018.

[180] Ganyana Miiro, *supra* note 96, p.85.

[181] Interview with Bernard Festo, 20 September 2018.

[182] Tim Allen & Marieke Schomerus, *A Hard Homecoming: Lessons Learned from the Reception Center Process in Northern Uganda* (Management Systems International, 2006), p.67.

reconciliation events the Commission undertook in the year 2009, with 11 events being held across northern Uganda, involving 2,304 attendees.[183]

The practical step of resettlement was perhaps the easier aspect of demobilizing reporters. Amnesty certificate in hand, reporters were usually transported to their home community with the help of the reception centre organisations such as GUSCO or World Vision. Reintegration, on the other hand, is much deeper and long-term social phenomenon that is harder to gauge. Reintegration depends on dynamics of the family and the community to which reporters return as well as the traits of the community.[184] Finn carried out a qualitative study of 23 reporters across northern Uganda to discover what were the "drivers" of reintegration and identify distinguishing features of successful reintegration amongst reporters.[185] The study found that most of the reporters were welcomed by the community on their return. This acceptance was largely based on "positive understandings that reporters do not constitute a notable threat to the peace and security of the community."[186] According to Finn, there are key structures and processes which positively and negatively influence the reintegration of reporters including: (i) kinship networks; (ii) access to family assets and credit; (iii) diversification of livelihood strategies particularly outside agriculture; (iv) access to credit; (v) educational attainment, and (vi) human capital.[187]

With respect to the availability of kinship and family networks, if a reporter has access to these, they can provide immediate material support and access to family assets like land.[188] In turn, access to land enables reporters to engage in subsistence agriculture and the potential to sell produce to generate income.[189] According to Finn, access to productive assets such as land allowed reporters to avoid what the most prevalent form of stigma: being labelled poor because they don't have the opportunity to generate income.[190] Kinship networks can also help shape the community reaction upon a reporter's return.[191]

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[183] Ganyana Miiro, *supra* note 96, p.100. Ganyana Miiro's data does not make clear the ratio between reporters and community members attending the reconciliation events.

[184] Anthony Finn, *The Drivers of Reporter Reintegration in Northern Uganda* (World Bank, 2012) (Hereafter, "Drivers of Reintegration Report"), p.7.

[185] *Id*.

[186] *Id*., p.15.

[187] *Id*., p.19.

[188] *Id*.

[189] *Id*., p.14.

[190] *Id*., p.15.

[191] *Id*., p.19

Interestingly, for the reporters in Finn's study, there appeared to be "no correlation between participating in traditional or religious ceremonies on return and the level of acceptance by the community."[192] Instead, most reporters were positively welcomed by the community and those who experienced difficulties "did so in the context of economic stigma or in the case of female reporters, stigma as a result of having children born while in captivity."[193] Indeed, gender was "a significant influence on reintegration because female reporters faced far more reintegration challenges based on cultural and traditional gender dynamics" and that those with children born in captivity endured "extreme stigmatization, psychological and physical violence including assault and threats of death.[194] Among the main factors that caused this stigmatization were, *inter alia,* the perceived economic burden to the family of supporting the reporter and their children, and the perceived cultural obstacle of accepting children of a non-patriarchal bloodline into the family.[195] The challenges that women and children "born of war" face in reintegrating to their home communities has been well documented elsewhere in the literature. Research with former "bush wives" reveal experiences of systemic stigmatisation both from their own families and in the wider community.[196] Because of their personal history, they are seen as not suitable for re-marriage and can be socially marginalised. Children born in captivity are subjected to taunts and face social ostracization, often labelled as "Kony's children".[197] Access to land is also difficult, because they do not have any identifiable patrilineal heritage.[198] Female reporters also tend to experience increased levels of gender-based violence, both from partners and family members, resulting in high levels of family separations.[199] Nathan Twinomugisha, Principal Legal Officer to the Amnesty Commission explained the logistical and social challenges inherent in the resettlement process, which was hindered by a lack of resources:

> "Now resettlement is a very deep thing. You are to resettle close to 30,000 people. And this needs an individual touch. You have to take a person to the community, preach this, see that he's accepted, see that there is no revenge, see that he has resources, see that he has work, see that his children, see that his parents, like the children, the girls who came with kids who were

[192] *Id*., p.15.

[193] *Id*.

[194] *Id*., p.20.

[195] *Id*.

[196] Grace Akello, 'Reintegration of Amnestied LRA Ex-Combatants and Survivors' Resistance Acts in Acholiland, Northern Uganda, *International Journal of Transitional Justice*, Vol. 13, Issue 2 (2019) 249–267.

[197] Teddy Atim, Dyan Mazurana & Anastasia Marshak, 'Women survivors and their children born of wartime sexual violence in northern Uganda', *Disasters,* Vol. 42, Issue 1 (2018) 61-78.

[198] Erin Baines & Camille Oliveira, 'Securing the Future: Transformative Justice and "Children Born of War", *Social and Legal Studies* (August 2020) Advance online article.

[199] *See generally* Holly Porter, *After Rape, Violence, Justice and Social Harmony in Uganda* (Cambridge University Press, 2016).

> rejected sometimes in the north, because they used to call them Kony's kids. Now, resettling that person in their community, even in her own family, you come with a stranger. A child born in captivity. Resettling is a very, very deep thing. It's a serious matter, where I think we should have done our best, even we should have done better, but where we didn't do very well because we didn't have resources."[200]

The Amnesty Commission faced a number of operational challenges throughout its existence, including sourcing funding for its operations. According to Ganyana Miiro, the Commission suffered from yeas of inadequate funding and, as a consequence, it always had a backlog of reporters who were unable to receive resettlement packages in a timely manner.[201] Delays in financial reporting from DRTs and in contracting consultants were other common problems.[202] Ganyana Miiro states that because the Commission's lifespan initially diminished its perception among partners and donors, affecting its capacity to undertake long term programmes.[203] The broad mandate of the Commission, which also included reintegration and demobilization, was in hindsight, too broad a mandate for it to discharge efficiently and meaningfully.[204] A more permanent role and comprehensive strategy to finally demobilize the LRA and ADF is required.[205]

3.9 Amnesty Figures

Approximately 27,000 people have received amnesty under the 2000 Act.[206] Although the Act was intended to primarily target and benefit the LRA, members of other rebel groups also benefited from the amnesty. The other three main groups were the Uganda National Rescue Front II ("UNRF II"), the West Nile Bank Front ("WNBF") and the Allied Democratic Forces ("ADF").[207] The original UNRF came into being following the retreat of Idi Amin's army soldiers to their home region in the north-west, the West-Nile area.[208] There, they formed the Former Uganda National Army ("FUNA"). FUNA later split into two smaller rebel groups,

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[200] Interview with Nathan Twinomugisha, 14 December 2018, Kampala.

[201] Ganyana Miiro, *supra* note 96, p.89.

[202] *Id*., p.87

[203] *Id*., p.89.

[204] *Id*.

[205] *Id*.

[206] *New Vision*, 'Over 27,000 former rebels granted amnesty', 22 March 2019.

[207] *Id*.

[208] Refugee Law Project, 'Negotiating Peace: Resolution of Conflicts in Uganda's West Nile Region,' Working Paper No. 12 (June 2004), p.5.

with Juma Oris forming the WNBF and Moses Ali, the UNRF.[209] When the UNRF entered into peace negotiations with Museveni's NRM government in 1986, Ali Bamuze broke away to form "UNRF II".[210] They fought on a manifesto of social injustice and sought to remove the NRM from power. In 2002, local leaders sought to end the conflict through a negotiated settlement.[211] An agreement was subsequently signed in December 2002, with over 2,500 UNRF II soldiers receiving amnesty in a mass ceremony.[212] The Amnesty Commission had what Ganyana Miiro refers to as a supervisory role in the peace negotiations, which were mediated by the Amnesty Commission Chairman, Justice Onega.[213] The WNBF was the other offspring of FUNA that sought to overthrow the government. Based in the Arua region, in the 1990s attacks on government forces were frequent, and the group also resorted to abducting civilians.[214] Following a government offensive in 1997, the WNBF was virtually defeated.[215] In 2003, hundreds of WNBF fighters defected and applied for amnesty following prolonged negotiations.[216]

The ADF was formed in 1995 and has its roots in militant Islamism in the Rwenzori region in western Uganda,[217] with their professed goal being to overthrow the government and create an Islamic state.[218] Between 1995-2000, the ADF carried out numerous attacks causing hundreds of civilian casualties, before the UPDF pushed them into the DRC, where they continued to engage in running battles.[219] By 2014, their numbers were significantly diminished as a result of defections and joint UPDF-DRC military offensives.[220] Their leader, Jamil Mukulu, is currently on trial before the International Crimes Division of the High Court

[209] *Id*., p.7.

[210] *Id*., p.12.

[211] *See generally* Artur Bognur & Dieter Neubert, 'Negotiated Peace, Denied Justice? The Case of West Nile (Northern Uganda)', *Africa Spectrum,* Vol. 48, Issue 3 (2013) 55-84.

[212] 'Peace Agreement between the Government of the Republic of Uganda and The Ugandan National Rescue Front II,' 24 December 2002. Available here: https://peacemaker.un.org/uganda-yumbe-agreement2002 (accessed 18 January 2021).

[213] Ganyana Miiro, *supra* note 96, p.71.

[214] Refugee Law Project, *supra* note 208, p.15.

[215] *Id*., p.20.

[216] Ganyana Miiro, *supra* note 96, p.113.

[217] *See generally* Kristof Titeca & Daniel Fahey, 'The Many Faces of a Rebel Group: The Allied Democratic Forces in the Democratic Republic of Congo', *International Affairs*, Vol. 92, Issue 5 (2016) 1189-1206.

[218] UN Security Council, 'Final Report of the Group of Experts on the Democratic Republic of the Congo', UN Doc. S/2014/42, 23 January 2014, para.74.

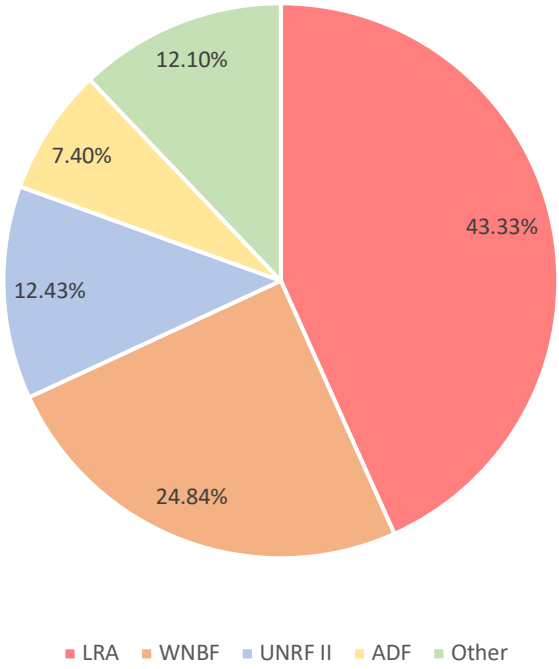
[219] Titeca & Fahey, *supra* note 217 at 1195.

[220] *Id*.

on charges of terrorism.[221] However, the ADF continues to carry out attacks on civilians and remains an active security threat along the Uganda-DRC border.[222]

The chart and corresponding table below contain the most detailed breakdown of the number of amnesty reporters per rebel group that is available. Representing the figures from 2011 as published by Ganyana Miiro,[223] of the 26,154 recorded to have received amnesty, 95% were from the four main rebel groups, *i.e.,* the LRA, UNRF II, WNBF and the ADF. The current total of amnesty recipients is approximately 27,000 at the time of writing in January 2021 – an increase of about 900 on the 2011 figure.[224] Thus, while the figures below might appear dated, given the relatively small increase between the years 2011-2021, it can be assumed the breakdown below is broadly similar today, and still represents an accurate picture of amnesty recipients.

Fig. 3.1 Amnesty recipients per rebel group



[221] *The Observer*, 'ADF rebel leader Jamil Mukulu, 37 others committed for trial', 18 September 2019.

[222] *Daily Monitor*, 'ADF rebels kill 19 in eastern Congo', 31 October 2020.

[223] Ganyana Miiro, *supra* note 96, p.77.

[224] *New Vision*, 'Over 27,000 former rebels granted amnesty', 22 March 2019.

Table 3.1 – Breakdown per rebel group (2011)

Lord's Resistance Army	12,908	43.33%
West Nile Bank Front	6,499	24.84%
Uganda National Rescue Front II	3,252	12.43%
Allied Democratic Forces	1,936	7.40%
Uganda People's Army	438	1.67%
Uganda National Freedom Movement	163	0.62%
FOBA/NOM	227	0.87%
NALU	198	0.76%
Not specified	187	0.71%
FOBA/UPA	70	0.27%
People's Redemption Movement	68	0.26%
Holy Spirit Movement	41	0.18%
Ugandan People's Democratic Army	37	0.14%
Ugandan National Liberation Front	36	0.14%
Ugandan Federal Democratic Front	23	0.09%
Uganda Freedom Movement	21	0.08%
Action Restore Peace	20	0.08%
Citizen Army	6	0.02%
Former Uganda National Army	6	0.02%
National Freedom Army	5	0.02%
Ugandan Democratic Alliance/Front	5	0.02%
Ugandan National Liberation Army	4	0.02%
Ugandan Salvation Army	3	0.01%
Total	**26,153**[225]	

[225] As recorded by Ganyana Miiro, *supra* note 96, p.77.

Table 3.2 – Regional breakdown of 4 main rebel groups (LRA, WBNF, ADF & UNRF II (2011):

Central region	1,123
West Nile region	7,222
Northern region (Gulu)	5,163
Northern region (Kitgum)	8,616
Western region	1,697
Eastern region	1,174
Total	**24,995**[226]

As noted above, these figures represent the makeup of amnesty recipients from 2011. Figures reported by the Amnesty Commission in 2019[227] reveal only a slight increase in the numbers of amnesty recipients in two of the four main rebel groups, as the next table shows.

Table 3.3 – Amnesty figures between the years 2011-2019 for the four main rebel groups

Group	2011	2019	Increase
LRA	12,908	13,291	383
WNBF	6,499	6,500	1
UNRF II	3,252	3,252	-
ADF	1,936	2,315	379

That only 383 LRA rebels officially received amnesty between 2011-2019 is perhaps surprisingly low, given the regular reporting of defections during this period.[228] It would suggest that not all returnees and defectors are coming into contact with the Amnesty Commission, not only during the period above, but more generally since amnesty came into being. For example, by 2006, almost 27,000 children and young adults had passed through the various reception centres that were processing and rehabilitating children and young adults

[226] As recorded by Ganyana Miiro, *supra* note 96, p.79.

[227] The 2019 figures are taken from the following report: *New Vision*, 'Over 27,000 former rebels granted amnesty', 22 March 2019.

[228] For example, in one mass cleansing ceremony in 2015, 84 returnees received amnesty certificates. *See* Uganda Radio Network, 'Top LRA Commander, Returnees Undergo Ritual Cleansing,' 9 March 2015.

abducted by the LRA.[229] Yet, just over 13,000 LRA-related amnesty certificates have been issued to date. Indeed, the Amnesty Commission has been criticised for not raising sufficient awareness of the amnesty among returning combatants. This argument is based on findings that the number of combatants officially applying for amnesty under-represents the true number that have returned "from the bush", particularly since many of the LRA combatants are children. Research by Allen and Schomerus found that only 25% of abducted persons who passed through formal reception centres after leaving the bush received amnesty cards, applied for amnesty, or had even heard of the Amnesty Commission.[230] Therefore, there are likely many more thousands in the community who would be eligible both for amnesty and the resettlement package.

3.10 Local Views on Amnesty

Perceptions on the efficacy of the Ugandan amnesty process to date are wide-ranging and are dependent on the perceived objectives of the process.[231] In the years since amnesty has been in operation, several surveys and studies have been conducted which have indicated divergent opinions on amnesty. However, despite the large amount of literature on transitional justice interventions in Uganda, and with ex-combatants in particular, there has been notably little empirical research ascertaining the views of both the community and amnesty recipients on the efficacy and social value of the amnesty process itself. The existing literature on these aspects of amnesty is to be found in a mixture of quantitative population-based surveys,[232]

[229] Tim Allen & Marieke Schomerus, *A Hard Homecoming: Lessons Learned from the Reception Center Process in Northern Uganda* (Management Systems International, 2006), p.40.

[230] *Id*., p.37.

[231] Mallinder, *supra* note 70, p.31.

[232] Phuong Pham, Patrick Vinck, Marieke Wierda, Eric Stover & Adrian di Giovanni, *Forgotten Voices: A Population-Based Survey of Attitudes about Peace and Justice in Northern Uganda* (International Center for Transitional Justice & Berkley Human Rights Centre, 2005) (Hereafter, referred to as "Forgotten Voices Report"); Phuong Pham, Patrick Vinck, Marieke Wierda, Eric Stover, Andrew Moss & Richard Bailey, *When the War Ends: A Population-Based Survey of Attitudes about Peace, Justice and Social Reconstruction in Northern Uganda* (International Center for Transitional Justice & Berkley Human Rights Centre, 2007) (Hereafter referred to as "When the War Ends Report"); Phuong Pham & Patrick Vinck, *Transitioning to Peace: A Population-Based Survey on Attitudes About Social Reconstruction and Justice in Northern Uganda* (Berkley Human Rights Centre, 2010) (Hereafter referred to as "Transitioning to Peace Report").

academic reports,[233] NGO reports,[234] UN reports,[235] World Bank reports,[236] and multi-faith group reports.[237] However, this literature does not offer an in-depth appraisal of amnesty as a transitional justice mechanism. This is a significant gap in the literature on transitional justice in northern Uganda. Ganyana Miiro's 2015 book[238] is a commendable work on the Amnesty Commission in Uganda, but it is not a rigorous academic analysis and the book does not survey the views of the public or those who received amnesty. The existing literature on local perceptions of amnesty, which my fieldwork seeks to significantly contribute to,[239] is surveyed in this section.

Views of the community

Research carried out by Berkley University early in the life of amnesty's operation reveals strong community support for the process, but with a desire that accountability options be pursued for the LRA's top commanders. In their 2005 quantitative research, 65% of respondents supported the amnesty process for LRA members.[240] However, only 4% said that amnesties should be granted unconditionally, with over 70% of the view that some form of acknowledgement should be required of all those granted amnesty, such as an apology or a confession of wrongdoing.[241] Among those who opposed amnesty, 47% said Kony and his top

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[233] Allen & Schomerus, *supra* note 229; Zachary Lomo & Lucy Hovil, *Behind the Violence, the War in Northern Uganda* (Institute for Security Studies, 2004).

[234] Refugee Law Project, *Whose Justice? Perceptions of Uganda's Amnesty Act 2000: The Potential for Conflict Resolution and Long-Term Reconciliation*, Working Paper No. 15 (February 2005) (Hereafter, referred to as "RLP Amnesty Report"); *Peace First, Justice Later: Traditional Justice in Northern Uganda,* Working Paper No. 17 (July 2005) (Hereafter, referred to as "RLP Traditional Justice Report"); Justice and Reconciliation Project, *Who Forgives Whom? Northern Uganda Grassroots Views on the Amnesty Act*, Policy Brief (June 2012) (Hereafter, referred to as "JRP Amnesty Report").

[235] United Nations Office of the High Commissioner for Human Rights, *Making Peace Our Own, Victims' Perceptions of Accountability, Reconciliation and Transitional Justice in Northern Uganda* (2007) (Hereafter, "Making Peace Our Own Report").

[236] Drivers of Reintegration Report, *supra* note 184; Anthony Finn *et al*., Transitional Demobilization and Reintegration Program, *Uganda Demobilization and Reintegration Project, The Beneficiary Assessment* (World Bank, 2012).

[237] Acholi Religious Leaders Peace Initiative, *Seventy Times Seven*, *The Implementation and Impact of the Amnesty Law in Acholi* (2002); Muslim Centre for Justice & Law, *A Qualitative Assessment on the Effectiveness of the Amnesty Commission in Rehabilitating and Reintegrating of Former Violent Offenders, A focus on ex-offenders (WBNF, UNRF I, UNRF II and ADF) as well as the extent to which Muslim civil society has played a complementary role in these efforts*, Research Report (2017) (Hereafter, referred to as "MCJL Amnesty Report").

[238] Ganyana Miiro, *supra* note 96.

[239] *See* chapter 6 of this thesis.

[240] Forgotten Voices Report, *supra* note 232, p.5.

[241] *Id*.

commanders should not receive amnesty,[242] while 8% of the respondents said that anyone who is guilty of crimes should not be amnestied at all.[243] Notably, a high 79% of respondents said they would welcome amnestied persons from the lower-ranking LRA members back into their communities.[244] When asked if they would prefer either "peace with amnesty" or "peace with trials and punishment", 53% chose "peace with trials and punishment."[245] This indicates a slight contradiction in responses between a simultaneous high support for amnesty on the one hand, and support for accountability on the other. The report's authors considered it may be that respondents viewed amnesty mainly as an instrument for reintegrating combatants who are their own children, rather than as immunity from criminal prosecution.[246] The research also revealed a difference in attitude between regions and ethnicities. Respondents from non-Acholi districts (Lango and Teso) were twice as likely to want "peace with trials and punishment" (61%) than "peace with amnesty" (39%).[247] This data supports the anecdotal narrative that non-Acholi (*i.e.*, the Langi and the Iteso) lean towards pro-accountability in their views when it comes to LRA crimes.

Interestingly, this last statistic changed significantly a few years later when the Berkeley Human Rights Centre researchers carried out additional research in 2007. When respondents were asked if they favoured "peace with amnesty" or "peace with trials", a high 80% of respondents chose "peace with amnesty."[248] The authors opine that this shift in opinion may well have been influenced by the Juba peace talks which were ongoing at the time, and increased local sentiment that ICC intervention was decreasing the chances for a peaceful settlement.[249] There were still similar differences of opinion between Acholi and non-Acholi regions. For example, in Teso only 59 % chose "peace with amnesty" and 41% chose "peace with trials."[250] Consistent with the 2005 figure, a high 65% said that those who are granted amnesty should apologize in return for receiving it.[251] On the basis of the 2005 and 2007 reports, the authors concluded that "most believe that amnesty is necessary for the rank and

[242] *Id.*, p.28.

[243] *Id.*, p.28.

[244] *Id.*, p.29.

[245] *Id.*, p.33

[246] *Id.*, p.40.

[247] *Id.*, p.33.

[248] When the War Ends Report, *supra* note 232, p.47.

[249] *Id.*, p.47.

[250] *Id.*, p.37.

[251] *Id.*, p.42.

file, since they were forcibly conscripted, and that prosecution is more appropriate for some of the LRA leaders."[252]

Further research by the same authors in 2011 – now eleven years after amnesty's inception – conducted by the same authors but this time under the guise of the Harvard Humanitarian Initiative, reveal consistent support for amnesty as the foremost mechanism to ending the conflict in northern Uganda. When given the option of four transitional justice mechanisms, namely amnesty for perpetrators, prosecution of perpetrators, a truth commission, or traditional ceremonies, the highest percentage of respondents favoured peace with amnesty (45%) over peace with a truth-seeking mechanism (32%), peace with trials (15%), and peace with traditional ceremonies (8%).[253] Berkley and HHI's data thus reveals strong and consistent local support for amnesty across a 6-year period.

In addition to the quantitative fieldwork carried out by the Berkley Human Rights Centre and HHI, extensive qualitative fieldwork research was carried out by the Refugee Law Project ("RLP") in 2005, which also revealed strong local support for the amnesty process amongst the broader community. Support for amnesty was seen as "overwhelming" and cited as "the greatest hope for resolving the conflict."[254] There was emphasis on the moral and cultural importance of forgiveness through amnesty, particularly for children who were abducted into the rebellion. One local leader was quoted as saying "this amnesty, we support it because we requested it so our children can come back home."[255] Another civilian interviewed said that amnesty "rhymes with our cultural system" because serious social transgressions are resolved through dialogue and forgiveness.[256] Amnesty was therefore seen as being "like the Acholi culture."[257] This corresponds with the research findings of Hovil and Lomo, who also point to strong public support for amnesty, connecting it to culturally engrained values emphasising both forgiveness and offering compensation for wrongdoing.[258]

RLP carried out in-depth research with communities in Kasese and West Nile, where the ADF and WBNF rebellions were most active. In Kasese, there was strong support for

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[252] *Id*., p.42.

[253] Transitioning to Peace Report, *supra* note 232, p.41.

[254] RLP Amnesty Report, *supra* note 234, p.9.

[255] *Id*.

[256] *Id*., p.10.

[257] *Id*., p.10.

[258] Lomo & Hovil, *supra* note 233, p.64.

amnesty as it facilitated an end to conflict, although the authors noted that acceptance was generally contingent on the communities being sensitised on amnesty and for some form of dialogue between the returning ex-combatant and the community.[259] As one local government official opined, "[I]f we don't forgive the rebels, they will come in and cut off a second leg. If amnesty wasn't there, there would be no security."[260] There was some notable hostility towards reporters at various times, particularly around the issue of assistance given to them by the Amnesty Commission which resulted in public shaming and stigmatisation.[261] In West Nile, there was similarly strong support for the amnesty process, which was viewed locally as an essential tool to the ending the WNBF's insurgency and returning abducted persons. One community member stated that "amnesty creates the incentives for communities to have peace and forgive them. What we lost is another challenge. We swallowed much in the name of peace." [262]

RLP's research also revealed strong sentiments of resentment with regard to the resettlement package given to reporters, which some community members view with disdain, as they have not received any form of compensation or reparations. One woman from the West Nile region said "[t]hose boys actually terrorised the whole region when they were in the bush. But I am happy they are back and we are staying together with them. But since those boys have been paid by amnesty they should also pay the damages that they caused here. We have not been compensated."[263]

In contrast to the research by Berkley Human Rights Centre, a majority of those interviewed by RLP in northern Uganda said that if Kony was to come out voluntarily and it meant an end to conflict, he should be granted amnesty.[264] In the view of the report's authors, this desire for long-term stability "outweighs the demands of modern justice as articulated in international law."[265] However, a sizeable minority of RLP's informants believed Kony was not morally entitled to amnesty, with one former forced LRA wife stating that "amnesty is not

[259] RLP Amnesty Report, *supra* note 234, p.13.

[260] *Id*., p.23.

[261] *Id*., p.14.

[262] *Id*., p.16.

[263] *Id*., p.18.

[264] *Id*., p.23.

[265] *Id*., p.24.

relevant to Kony as a person because he has done so much damage in Acholiland. He has spoiled futures. He needs to be punished."[266]

Further qualitative research by RLP in 2007 revealed consistent support for the amnesty process, which was seen as an essential tool for the ending the conflict. Community members viewed it as a means not only of allowing abducted persons to return home, but by ending conflict, displaced persons could also leave IDP camps and return home.[267] Yet for some, amnesty needed to operate in tandem with culturally appropriate methods of conflict resolution, such as an apology and compensation through the medium of traditional ceremonies such as *mato oput*.[268] The lack of accountability inherent in the amnesty process was also a source of anger among the general public, who were uncomfortable at the sight of senior LRA commanders now walking free in their communities.[269] RLP's research concluded that while there was widespread support for amnesty as a means to end the conflict, there were more divergent views as to what should happen after amnesty is granted, and that further processes were needed to ensure genuine reintegration in the longer term.[270]

Further research conducted in 2012 by the Justice and Reconciliation Project ("JRP") reveals slightly more nuanced community views. By this time, with the military conflict over since 2006, amnesty was no longer seen as an urgent means to end the conflict, yet there was still strong local support for the continuation of the amnesty process, in particular to allow remaining abducted persons to return home.[271] JRP's research revealed a general consensus that the *Amnesty Act* needed amending, specifically that senior LRA commanders accused of serious crimes be ineligible for amnesty.[272] There was also a strong desire across different communities that with the granting of amnesty should come disclosure of some kind, and that a process of dialogue to establish the truth be facilitated between perpetrators and victims.[273] According to one participant, "the Amnesty Act has left out the victims. We're seeing that the perpetrators are enjoying life, while we're suffering."[274] There was also disappointment among the communities interviewed that the amnesty process did not facilitate any process of

[266] *Id*., p.24.

[267] RLP Traditional Justice Report, *supra* note 234, p.31.

[268] *Id*., p.33.

[269] *Id*., p.34.

[270] *Id*.

[271] JRP Amnesty Report, *supra* note 234, p.4.

[272] *Id*.

[273] *Id*.

[274] *Id*.

reconciliation, with the unconditional granting of amnesty effectively side-lining victims and impeding local acts of forgiveness.[275] Some viewed the reinsertion packages given to ex-combatants as "a reward for a job well done".[276] This sentiment was explained by Archbishop Odama in the following terms:

> "Certainly, they had some complaints. Because they were saying, why are they given? Is it are they being rewarded or what is this, because they could not understand. And the connection between the amnesty with package. It was as if they were being rewarded for the crimes they committed. Generally, the public was not comfortable about it. Although for us, as religious leaders, we were really encouraging, in a way, all that would take to get these people off from there, back at home. It was actually what we were supporting."[277]

Similarly, in research conducted by the Justice, Law and Order Sector ("JLOS"), also in 2012, community members observed that the granting of amnesty was an "exclusive relationship between the reporter and the government." In order for the reporters to be welcomed back to their communities, truth-telling by the perpetrator was necessary, with a request of forgiveness to the community. According to JLOS, the failure to involve communities has resulted in a lack of reintegration of reporters.[278]

Public moments of confessional dialogue between perpetrators and the community were rare, ad hoc and often spontaneous. Where they did happen, they were mostly welcomed by the community. For example, senior LRA commander, Kenneth Banya, apologised publicly to communities in Pader and Teso, where he previously abducted children and killed civilians.[279] Understandably, this prompted some angry reactions from victims' families, but also an acceptance of the fact that he was given amnesty, something which ultimately promoted social cohesion. One community leader in Amuria was quoted as saying "Banya was a person who came back and confessed his deeds – murder and maiming of people in Teso and other areas. We felt grieved but people have to forgive him since he was a beneficiary of amnesty."[280] This suggests that amnesty was often a reluctant choice for the community, and challenges to

[275] *Id*., p.5.

[276] *Id*.

[277] Interview with Archbishop John Baptist Odama, 3 December 2018, Gulu.

[278] Justice, Law and Order Sector, *The Amnesty Law (2000) Issues Paper – Review by the Transitional Justice Working Group* (April 2012) (Hereafter, "JLOS Amnesty Report") p.7.

[279] Making Peace Our Own Report, supra note 235, p.30.

[280] *Id*.

a certain degree the notion that forgiveness is "a primordial aspect" of Acholi society, something it is often represented to be in the literature.[281]

Research in 2007 by the Office of the High Commissioner for Human Rights ("OHCHR"), led by Phil Clark, reveals more varied views of amnesty amongst communities in northern Uganda. The assumption that the Acholi have "a natural affinity for amnesty" is not borne out by their findings, as there remained a desire for accountability across the north.[282] Acholi respondents were generally more supportive of the use of amnesty than the Langi or Iteso, likely because more Acholi have loved ones who have committed crimes and wish to see them reintegrated quickly into the community.[283] But at the same time, Acholi respondents also expressed dismay with the current amnesty process because of its failure to offer compensation to victims and provide the promised reintegration packages to returned ex-combatants.[284] OHCHR's research suggests that amnesty is perhaps motivated more by pragmatic considerations, including a desire to see abductees return home from the bush.[285] Similar to Berkley's findings above, the dual victim-perpetrator identity that returnees carry resulted in complex and sometimes contradictory perspectives on accountability, as some respondents in all sub-regions stated that both amnesty and prosecution were necessary responses to the harms they had suffered.[286] However, a clear view was discernible, across different communities and regions, that respondents wished to distinguish between different levels of perpetrators and crimes, seeing amnesty as appropriate for low-level perpetrators, especially abductees, while prosecution was appropriate for high-level perpetrators. This nuance, according to the report's authors, was "lost" in the debate on transitional justice in northern Uganda.[287]

Views of amnesty recipients

In the early years of amnesty's operation, among returning ex-combatants there was some confusion about the concept of amnesty, it's meaning and practical effect. Research by Allen and Schomerus in 2006 revealed that legal immunity was hardly ever mentioned when

[281] *Id*.

[282] *Id*., p.48.

[283] *Id*.

[284] *Id*., p.49.

[285] *Id*.

[286] *Id*.

[287] *Id*.

former rebels were asked what amnesty meant.[288] Instead, many equated amnesty with the resettlement package, with most of their interviewees having not received the package.[289] Because of the poor resourcing, implementation and coordination of the amnesty process, Allen & Schomerus considered that the amnesty process "lacked local credibility" among returnees, and that "its existence was not sufficient to convince returnees that a life outside the LRA would be more promising than one with the rebels."[290] In the beginning, there was also mixed messaging coming from the government which raised doubts among rebels about the genuine nature of the amnesty being offered. Contradictory statements from President Museveni, for example that amnesty would not be given to senior commanders, caused confusion and anxiety among returnees.[291] However, despite the seeming reluctance of some former combatants to apply for amnesty, a 2005 Amnesty Commission survey found that of former combatants who had applied for amnesty, an extraordinary 99% said amnesty conditions fully met their expectations.[292] Furthermore, in a 2006 survey LRA returnees described the availability of amnesty as the single most important "pull factor" in their decision to leave the bush as they believed it would provide immunity and a reasonable standard of living.[293]

Existing research with former WBNF combatants also points to a positive view of amnesty, as it facilitated a return to their home communities. As one WBNF ex-combatant told RLP: "Amnesty is a good thing. It has helped us to reconcile with the government and also advised us to come home."[294] Another WBNF combatant said "it was good when amnesty came to us. We were happy. But the next step was this disease called money – all the money from the donors – we want it to be for everyone. But it is almost a year and we have got nothing."[295] For many WBNF combatants interviewed by RLP, the resettlement package became the primary focus of the amnesty process, and appeared to be hindering reintegration efforts.[296] Similarly, ADF recipients of amnesty interviewed by RLP complained of not receiving timely or any assistance from the Amnesty Commission or the government, with a sense among many

[288] Allen & Schomerus, *supra* note 229, p.38.

[289] *Id*., p.38.

[290] *Id*., p.63.

[291] Lomo & Hovil, *supra* note 233, p.64.

[292] Multi-Country Demobilization Programme, 'The Status of LRA Reporters', Dissemination Note (February-March 2008) (Hereafter referred to as "MDRP Dissemination Note"), p.2.

[293] Conciliation Resources, Quaker Peace & Social Witness, 'Coming Home: Understanding why commanders of the Lord's Resistance Army choose to return to a civilian life' (2006), p.10.

[294] RLP Amnesty Report, *supra* note 234, p.16.

[295] *Id*.

[296] *Id*.

ADF fighters that they had been lured out of the bush on false pretences.[297] Other research conducted by the Muslim Centre for Justice and Law with amnesty recipients from the WBNF, ADF and UNRF II groups revealed strong discontent with Amnesty Commission for failing to provide the resettlement packages. One ex-ADF rebel stated that it was only the "high-level" commanders that received the packages.[298] One important point made by a former UNRF II rebel, was that because many of his fellow rebels were engaged in a form of Islamic militarism, amnesty needed to be combined with programs of de-radicalisation to prevent recidivism.[299] Amnesty alone was insufficient. Indeed, for some ADF reporters the process of reintegration failed completely because they had "no prospects" in their home villages, and they returned to active combat.[300]

The RLP report considered that the "essence" of amnesty, *i.e.*, legal and social forgiveness, was being overshadowed by the issue of financial gain, and produced what one ex-combatant called "a selfish peace."[301] Because of the bitterness over the inconsistent payment of the resettlement package, the issue had, in the view of RLP, created divisions "not only between the communities and former combatants, but also between the various ex-combatants themselves."[302] The irregular disbursement of the reinsertion package is also borne out in other research. In research conducted by Finn *et al*., when asked specifically about monetary payments from the Amnesty Commission as part of reinsertion assistance, 52.8% of LRA reporters responded they did not receive any, with 99.4% of WNBF reporters, 20.6% of ADF reporters and 27.9% of UNRF reporters also not receiving any package.[303] Notably, 68.9% of female reporters, 58.1% of male reporters and 57.4% of disabled reporters stated that their expectations were not met and a rehabilitative process that they were expecting was not provided to them.[304]

In addition, from a moral point standpoint, a sizeable number of former combatants who had been abducted into rebellion viewed the granting of amnesty to them as unnecessary, and to a certain extent, insulting. For those who were forced to fight unwillingly, they felt they

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[297] *Id*., p.15.

[298] MCJL Amnesty Report, *supra* note 237, p.15.

[299] *Id*., p.20.

[300] *Id*., p.22.

[301] RLP Amnesty Report, *supra* note 234, p.18.

[302] *Id*.

[303] Anthony Finn *et al*., Transitional Demobilization and Reintegration Program, *Uganda Demobilization and Reintegration Project, Beneficiary Assessment* (World Bank, 2012) p.90.

[304] *Id*.

had nothing to apologise for. One formerly abducted woman interviewed by JRP said she had rejected the offer of amnesty: "When I was given the amnesty application form, I said, 'NO! I didn't pick any gun to fight against the government."[305] Instead, some respondents felt the people who needed to ask for forgiveness were those in power who failed to protect them during the war. As such, some were of the view that the amnesty process regrettably "demonized" abductees.[306]

An important finding in Finn's study with 23 reporters from the four main rebel groups is that respondents stated that amnesty was *not* a driver of reintegration, and that it was *not* of any particular significance or utility to them.[307] A prime motivator for applying for amnesty was to receive the reinsertion package, as it enabled them to establish themselves economically in the community.[308] Surprisingly, amnesty was perceived as not being very instrumental for reporters, despite it being a cornerstone of the DDR process as it provided immunity from prosecution.[309] Understandably, the reporters in Finn's study were "more focused on the day-to-day challenges of carving out a living and dealing with reintegration challenges than the systemic implications of amnesty."[310]

The above documented views from both the community and amnesty recipients reveal much nuance and complexity. Serious shortcomings, both substantively and practically, are evident in the amnesty and resettlement process. However, a majority view can be discerned that amnesty was seen as a positive response to ending the war, despite the many problems with regard to reinsertion packages and catering for victims' reparative needs in the wider community. The fact remains that many in the community saw amnesty as a "reward to perpetrators" – perpetrators of serious crimes. What does this mean for the Amnesty Act's compatibility with both national and international law? The next section discusses this in detail.

3.11 Compatibility with National and International Law

From the time of amnesty's inception in the year 2000, it was widely acknowledged and indeed conceded by many, that Uganda's amnesty regime was in tension and conflicted with

[305] JRP Amnesty Report, p.7.

[306] *Id*.

[307] Drivers of Reintegration Report, *supra* note 184, p.24.

[308] *Id*.

[309] *Id*.

[310] *Id*.

both its domestic and international legal obligations. Domestically, chapter IV of the 1995 Ugandan Constitution protects the right to life[311] and respect for human dignity and protection from inhuman treatment.[312] It is the duty of the State to ensure these rights are protected. However, the power of the Amnesty Commission to confer immunity ostensibly denied victims the right to seek reparation and justice for crimes committed.[313] Uganda has also domesticated the Rome Statue through the *International Criminal Court Act 2010*, while the *Geneva Conventions Act 1964* criminalizes "grave breaches" of international law.[314] Both acts are premised on the obligation to investigate, prosecute and punish serious crimes including war crimes, crimes against humanity and genocide.[315] Government actors, including cabinet ministers in the parliamentary debates[316] the Attorney General,[317] the Justice Law and Order Sector[318] and lawyers for the State in the *Kwoyelo* case,[319] were all of the firm understanding that the *Amnesty Act 2000* effectively prevented prosecution for acts that would otherwise fall under the purview of these and other acts, including regular offences under the *Penal Code Act 1950*. It was plainly acknowledged that the *Amnesty Act* "resulted in a general amnesty whereby no offences were excluded" and was "both a *de jure* and *de facto* blanket amnesty".[320]

Moreover, the *Amnesty Act* also appeared to conflict with many of Uganda's international obligations. Uganda is a party to the Genocide Convention, as well as the four Geneva Conventions, that each mandate the prosecution of genocide and grave breaches respectively.[321] In June 2002, Uganda ratified the Rome Statue that established the International Criminal Court, thus obligating it to investigate and prosecute international

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311 Constitution of the Republic of Uganda (1995), article 22.

312 *Id*., article 24.

313 *Id*., article 50.

314 Although Uganda is a party to the 1977 Additional Protocols, to date there has been no legislation domesticating them.

315 As the ICC Act 2010 can only facilitate the prosecution of crimes from 2010 onwards, it would appear the legislation cannot be used to prosecute crimes committed during the civil war. However, for an alternative interpretation, *see* the argument presented in section 4.6.5 of this thesis. Nevertheless, the ICC Act 2010 stands in contradiction to the Amnesty Act 2000. The latter would appear to permit an individual to avoid the prosecutorial scrutiny of the former.

316 *See* section 3.5 *supra* on the parliamentary debates and the understanding of MPs and cabinet ministers as to the ambit and effect of the amnesty legislation.

317 *Id*.

318 JLOS Amnesty Report, *supra* note 278, p.8: "By absolving perpetrators of criminal responsibility for serious crimes, victims are denied any form of justice or reparation. As such, the Amnesty law, in effect, prevents the State from fulfilling its duty to pursue justice for serious crimes or to provide a remedy to the victims."

319 *See* section 4.6 *infra*, on the State's arguments in the *Kwoyelo* Supreme Court case.

320 JLOS Amnesty Report, *supra* note 278, p.3 & 6.

321 *See* section 2.5.1 for an overview of these treaty obligations.

crimes that fall under its jurisdiction, in line with the principle of complementarity.[322] Uganda has ratified all of the core international human rights treaties.[323] For example, article 2 of the ICCPR imposes an obligation on the state to investigate, prosecute and punish violations of human rights, and to provide an effective remedy.[324] The right to an effective remedy in the context of armed conflict is likewise contained in the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law,[325] and the Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity,[326] which also provides that "amnesties and other measures of clemency shall be without effect with respect to the victims' right to reparation."[327] Relatedly, amnesties are also said to violate the "right to truth" as they can inhibit the revelation of truth for victims of crimes and their families.[328]

Uganda has also ratified regional treaties that impose certain human rights obligations, such as the African Charter on Human and People's Rights, and its protocol on the Rights of Women in Africa, also known as the "Maputo Protocol".[329] The Maputo Protocol commits State Parties to protecting civilians including women during armed conflict, and ensuring perpetrators of war crimes and crimes against humanity are "brought to justice before a competent criminal jurisdiction."[330] Similarly, article 2(c) of Convention on the Elimination of All Forms of Discrimination Against Women requires states to "establish legal protection of the rights of women on an equal basis with men and ensuring through competent national

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[322] Rome Statue, article 17.

[323] *E.g.,* International Covenant on Civil and Political Rights (ratified 21 June 1995); International Covenant on Economic, Social and Cultural Rights (ratified 21 January 1987); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment (ratified 3 November 1986); Convention on the Elimination of all forms of Discrimination Against Women (ratified 22 July 1985).

[324] *See e.g.*, Article 2.3 (a) of the ICCPR: "Each State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an **effective remedy**, notwithstanding that the violation has been committed by persons acting in an official capacity."

[325] UN General Assembly, UN Doc. A/RES/60/147, 20 March 2006, para.3(c)-(d): "(c) Provide those who claim to be victims of a human rights or humanitarian law violation with equal and effective access to justice, as described below, irrespective of who may ultimately be the bearer of responsibility for the violation; and (d) Provide effective remedies to victims, including reparation […].

[326] UN Commission on Human Rights, Report of the independent expert to update the Set of principles to combat impunity, Diane Orentlicher, UN Doc. E/CN.4/2005/102/Add.1, 8 February 2005, Principle 32.

[327] *Id.*, Principle 24(b).

[328] UN Office for the High Commissioner for Human Rights, 'A Study on the Right to Truth', UN Doc. E/CN.4/2006/91, paras.45 & 60.

[329] Uganda ratified the African Charter on Human and Peoples' Rights on 10 May 1986, and the Maputo Protocol on the Rights of Women in Africa on 22 July 2010.

[330] Maputo Protocol on the Rights of Women in Africa, adopted 11 July 2003, entry into force 25 November 2005, article 11.

tribunals and other public institutions the effective protection of women against any act of discrimination."[331] All of these treaties impose a series of obligations on Uganda with regard to protecting human rights and ensuring accountability for crimes that may occur in conflict. Although, as discussed above,[332] scholarly opinion suggests that the prosecutorial obligations for crimes committed in internal armed conflict are permissive in nature, and not absolute.

Uganda is also a party to a number of regional instruments that seek to protect the rights of victims of sexual crime. These include the Pact on Security, Stability and Development in the Great Lakes Region developed at the International Conference on the Great Lakes Region, which entered into force in June 2008, and incorporates the Protocol on the Prevention and Suppression of Sexual Violence Against Women and Children.[333] This Protocol seeks to establish a legal framework whereby member states undertake to prosecute and punish perpetrators of sexual violence in the Great Lakes Region.[334] Moreover, the UN Security Council has adopted ten resolutions on women, peace and security, which promote the rights of women in post-conflict situations.[335] With regard to amnesty, Resolution 1820 states that "rape and other forms of sexual violence can constitute a war crime, crime against humanity or a constituent act with respect to genocide and stresses the need for the exclusion of sexual violence crimes from amnesty provisions in the context of conflict resolution processes."[336] It calls upon member states to comply with their obligations to prosecute perpetrators of sexual violence, ensuring that all victims, particularly women and girls, have equal protection under the law and equal access to justice.[337]

Civil society, both internationally and within Uganda, has regularly stated that the *Amnesty Act* was not in conformity with international law. The International Centre for Transitional Justice has stated that the *Amnesty Act* "extends broad exemption from prosecution

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[331] Convention on the Elimination of All Forms of Discrimination against Women, Adopted and opened for signature, ratification and accession by General Assembly resolution 34/180 of 18 December 1979, entry into force 3 September 1981, article 2(c).

[332] *See* section 2.6 of this thesis.

[333] International Conference on the Great Lakes Region, Pact on Security, Stability and Development in the Great Lakes Region, 15 December 2006, article 11: "The Member States undertake, in accordance with the Protocol on the Prevention and Suppression of Violence Against Women and Children, to combat sexual violence against women and children through preventing, criminalizing and punishing acts of sexual violence, both in times of peace and in times of war, in accordance with national laws and international criminal law."

[334] International Conference on the Great Lakes Region, Protocol on the Prevention and Suppression of Sexual Violence Against Women and Children, 30 November 2006, article 2(1)-(2).

[335] UNSC Resolutions 1325 (2000), 1820 (2008), 1888 (2008), 1889 (2009), 1960 (2010), 2106 (2013), 2122 (2013), 2242 (2015), 2467 (2019) and 2493 (2019).

[336] UNSC Resolution 1820, UN Doc. S/RES/1820, 19 June 2008, para.4.

[337] *Id*.

to perpetrators of serious crimes and gross human rights abuses" and "should be repealed or amended to exclude individuals who bear responsibility for the commission of international crimes."[338] Amnesty International[339] and Human Rights Watch[340] both rejected the idea of amnesties for international crimes committed by senior LRA leaders. The Ugandan Victims Foundation, a coalition of local NGOs working on human rights and victims issues, stated in 2012 that the *Amnesty Act* needed to be reformed and amended so as to remove the possibility that serious international crimes could continue to be amnestied.[341] Moreover, the UN Office for the High Commissioner for Human Rights stated in 2012 that the *Amnesty Act* operated in clear violation of Uganda's international obligations, as the blanket nature of the act made it "incompatible with international standards by seeking to extend amnesty to any individual who has renounced rebellion irrespective of the crimes committed."[342] OHCHR stated what everyone knew to be the practical reality, that the *Amnesty Act* had been interpreted to "cover any crimes that are related to the armed conflict, including serious violations of human rights and humanitarian law", and that this was "a clear violation of the State's international legal obligation to prosecute and punish perpetrators of the most serious crimes of concern to the international community as a whole."[343] Because of this conflict, OHCHR proposed that the Act be amended to exclude international crimes, and that conditional amnesties be introduced for lesser crimes.[344]

Yet, it would seem that all of the above actors and observers, both in government and in civil society, domestic and international bodies, were apparently mistaken as to the legal nature of the *Amnesty Act 2000*. As described in detail in below, the *Kwoyelo* Supreme Court Judgement in 2015 clarified the ambit of the *Amnesty Act 2000*, holding that the Act never intended to amnesty serious crimes against civilians – only acts "in furtherance of rebellion".[345] Thus, in the view of the Supreme Court, the Act did not conflict with the Ugandan constitution or Uganda's international legal obligations – a holding that belies the clear intent of the

[338] International Centre for Transitional Justice, 'Pursuing Accountability for Serious Crimes in Uganda's Courts, Reflections on the Thomas Kwoyelo Case' (January 2015), p.8.

[339] Amnesty International, 'Amnesty International calls for an effective alternative to impunity', Press Statement, 4 August 2006.

[340] Human Rights Watch, 'Uganda: No Amnesty for Atrocities', Press Statement, 27 July 2006.

[341] Uganda Victims Foundation, 'Position Statement on Relevance and Modalities of Amnesty Law in the Post Conflict Situation in Uganda' (August 2012), p.3.

[342] UN Office of the High Commissioner for Human Rights, 'UN Position on Uganda's Amnesty Act, 2000 – Submission to the Hon. Minister for Internal Affairs' (May 2012), p.11.

[343] *Id*.

[344] *Id*., p.17.

[345] *See* section 4.6 of this thesis for discussion of this judgement.

legislature, and ignores the practical implementation of the Act on the ground for 15 years prior to the ruling.

Yet, amnesty was meant to be only parts of a broader transitional process in Uganda, as envisioned in the Agreement on Accountability and Reconciliation agreed in Juba, its Annexure, and as described in the National Transitional Justice Policy ("TJ Policy"), which after years of debate and consultation was finally approved by the government in June 2019.[346] The TJ Policy proposes to formalise the use of traditional justice mechanisms, create a national truth-telling process, and to begin a process of reparations for victims.[347] With regard to amnesty, the TJ policy acknowledges its legal deficiencies. It states as follows: "Although amnesty played a role in the pacification of Uganda, it had inherent justice and accountability issues."[348] These issues included a lack of attention to the special needs of returning women and children, and the perception that "the government facilitated the reintegration of perpetrators at the expense of their victims, who continue to have no livelihood options."[349]

Notably, the TJ policy states that the amnesty law "did not take into account the nature of the crimes committed by perpetrators, require the perpetrators to confess to the atrocities/crimes they committed or apologize."[350] Because of this "lack of alignment to transitional justice mechanisms", blanket amnesty was seen as "a threat to peace and stability."[351] The TJ policy states that amnesty should instead be considered as "an accountability tool to promote justice, peace reconciliation."[352] Therefore, going forward, the TJ Policy recommends that "there will be no blanket amnesty and Government shall encourage those amnestied to participate in truth seeking and traditional justice processes."[353] Nathan Twinomugisha, Principal Legal Officer to the Amnesty Commission explained that he was personally opposed to making amnesty conditional on truth telling:

> "Truth-telling is good, but it can, in a country like ours, it can be counterproductive. […] And in a community like ours, you start saying I am the one who did this, did this, are we ready for the repercussions? Are we ready for the revenge that might come out? Are we ready, might it light fires that we may fail to extinguish? Might it be, you know, I always describe it as ghosts which have already slept. They are already, people who believe in ghosts, they say they come, they have

[346] Ministry of Internal Affairs, *National Transitional Justice Policy* (June 2019).

[347] *Id*., pp.18-20.

[348] *Id*., p.13.

[349] *Id*., p.14.

[350] *Id*.

[351] *Id*., p.14.

[352] *Id*.

[353] *Id*., p.19.

> already settled, they have forgotten, now you are waking them up. Won't they swallow us? I think this truth telling should be very-well debated and thought out. If we don't handle it carefully, it will result in another war."[354]

For any future use of amnesty, the TJ Policy makes three key recommendations: first, any future use of amnesty should be given on a conditional basis in return for participation in truth-telling processes.[355] Second, any future amnesty should not be given for international crimes, and third, children should *not* be part of any future amnesty process.[356] In a sense, these policy recommendations come far too late to be meaningful. The war is over, and the vast majority of LRA rebels have returned home. Making future amnesty conditional may deter future defections, rather than encourage them. Nathan Twinomugisha was also sceptical about the credibility of this proposal:

> "Where are the new people? We don't have a serious rebellion now. The people they are targeting are the people we gave amnesty. Now, supposing they refuse. What are you going to do? Amnesty is already given. So, what is the rationale of this truth for amnesty? They are talking about people we have already granted forgiveness. So, supposing they say they don't want to come, are you going to subpoena them, and say come? Supposing they say no. It's another trial?"[357]

Twinomugisha was also of the view that to create a law to legislation for amnesties for crimes that have yet to be committed would be legally problematic. In his view, it might also send a message to the few remaining in the bush that they are free to continue committing crimes and that you need to do upon return is participate in truth-telling. In May 2019, the legislative life of the *Amnesty A*ct ended, as the *Amnesty Act* expired once more.[358] There is currently no indication of any further extension or amendment of the Act. But expiry did not stop the Amnesty Commission from issuing amnesty certificates during periods where the Act previously lapsed (e.g., between May 2015 – May 2017),[359] even as recently as November 2020.[360] These amnesty certificates would appear to have no legal basis. With the LRA conflict effectively over, legislating for a new conditional amnesty for a small number of remaining fighters would appear to be disproportionate and possibly counter-productive. However, it may

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[354] Interview with Nathan Twinomugisha, 14 December 2018, Kampala.

[355] Ministry of Internal Affairs, *National Transitional Justice Policy* (June 2019), p.19.

[356] *Id*.

[357] Interview with Nathan Twinomugisha, 14 December 2018, Kampala.

[358] *See Amnesty Act* (*Extension of Expiry Period) Instrument, 2017, Statutory Instruments No. 28*, *Uganda Gazette*, 22 May 2017, which extended the *Amnesty Act* until 25 May 2019.

[359] Two LRA returnees, Bosco Kilama and Simon Peter Ochora, were publicly given amnesty certificates upon their defection in April 2017, one month before the Act was renewed following its lapse in 2015. *See* Uganda Radio Network, 'Uganda Amnesty Commission Issues Postdated Certificates', 26 April 2017.

[360] NTV Uganda, 'Amnesty Commission clears 30 former LRA', 20 November 2020.

well serve a purpose for other rebel groups who remain much more active, such as the ADF. What is clear, though, is that the government is alive to the fact that future amnesties must be more receptive to victims' rights and must avoid possible incompatibility with Uganda's international legal obligations.

3.12 Conclusion

This chapter has recounted the birth of amnesty in Uganda as a response to the conflict between the government and the LRA. From the beginning of its life, amnesty clearly held broad public support across northern Uganda, despite its imperfections and a cultural desire for accountability of some form. Amnesty was seen as the morally correct response to a brutal conflict that affected so many vulnerable and innocent victims of all ages, particularly children. The Amnesty Commission suffered from a significant and systemic lack of resources. This plagued its ability to disburse reinsertion packages timely and fairly, and to meaningfully implement its mandate to sensitise reporters and their communities, and importantly, to monitor their reintegration back into their communities and promote reconciliation initiatives. In hindsight, the Amnesty Commission's mandate was perhaps overly ambitious, considering the breath of the security and development challenges facing northern Uganda. The scale of the challenge was simply enormous, with development agencies having to assist with many aspects of the amnesty and demobilization process.

The blanket amnesty that the legislation offered meant that many rebels were, in effect, granted amnesty for serious crimes, including international crimes. But, everyone knew this: the government, the Amnesty Commission, civil society and other stakeholders. This was the price understood worth paying to end the conflict. In addition, amnesty was also impacted – and arguably undermined by – belated efforts at criminal accountability. In 2004, the Ugandan government made a state referral to the ICC, thus inviting investigation by the Office of the Prosecutor. Peace began to clash with justice. Some years later, in 2011, Uganda also commenced domestic efforts at prosecuting LRA crimes, when Thomas Kwoyelo was arrested and charged. This was to ultimately set the stage for a battle in the courts between amnesty and accountability. The next chapter discusses this prosecutorial "turn" in northern Uganda, and the effects this had on the integrity of the amnesty project.

4 The Prosecutorial Turn

4.1 Introduction

In attempting to overcome the civil war, Uganda provided a fascinating example of just one of many states grappling with the complex realities of the *peace versus justice* dilemma – whether to choose the path of accountability at the potential expense of reconciliation and social cohesion, or to abandon justice in the hope of ensuring a lasting, peaceful transition after conflict.[1] "Justice" has different meanings for different societies. In Uganda, and for the Acholi people in particular, justice doesn't automatically mean the criminal kind, but instead focuses on apology and reparation for harm suffered.[2] As has been noted by many, the Manichean choice between peace and justice is not necessarily as stark, and depending on local conditions, both paths may be pursued in parallel with each other.[3] Indeed, the United Nations encourages the use of both judicial and non-judicial responses in transitional settings.[4] Criminal prosecutions are seen as an integral component of the Transitional Justice "toolbox",[5] a normative attempt to re-construct and reinforce the rule of law in a domain where it has been diminished or destroyed altogether. The Nuremburg Tribunal, created to prosecute leading members of the Nazi regime for crimes against peace and humanity, is hailed as a landmark moment in the normative shift to accountability for those who commit serious violations of human rights.[6]

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[1] *See generally* Chandra Lekha Siriam & Suren Pillay, *Peace versus Justice – The Dilemma of Transitional Justice in Africa* (University of KwaZulu Natal, 2009).

[2] *See* Sarah Nouwen & Wouter Werner, 'Monopolizing Global Justice: International Criminal Law as Challenge to Human Diversity', *Journal of International Criminal Justice*, Vol.13, Issue 1 (2015) 157-176.

[3] One example is Sierra Leone, which established a Truth and Reconciliation as well as the hybrid Special Court for Sierra Leone following its civil war. *See* William Schabas, 'Conjoined Twins of Transitional Justice? The Sierra Leone Truth Commission and the Special Court', *Journal of International Criminal Justice,* Vol. 2, Issue 4 (2004) 1082-1099.

[4] Guidance Note of the Secretary General, United Nations Approach to Transitional Justice, March 2010, p.2. In Burundi, a United Nations Assessment Mission recommended the establishment of both a national Truth Commission as well as a Special Criminal Chamber within the Burundian court system, to try those accused of serious violations of human rights, namely genocide, war crimes and crimes against humanity. The provision of amnesty for vaguely defined "political crimes" in the 2000 Arusha Peace Agreement would not delimit the jurisdiction of the envisaged special criminal chamber. *See* Letter dated 11 March 2005 from the Secretary-General addressed to the President of the Security Council, UN Doc. S/2005/158, 11 March 2005.

[5] Dustin Sharp, 'Emancipating Transitional Justice from the Bonds of the Paradigmatic Transition', *International Journal of Transitional Justice*, Vol. 9, Issue 1 (2015) 150–169.

[6] Ruti Teitel, 'The Universal and the Particular in International Criminal Justice', *Columbia Human Rights Law Review,* Vol. 30 (1999) 285-303 at 287.

The peace versus justice debate is one that rages in the field of transitional justice. Is punishment a backward-looking exercise in retribution or an expression of the renewal of the rule of law?[7] As Teitel notes, the central dilemma that is intrinsic to transition is how to move beyond illiberal rule, and to what extent this shift can be guided by the conventional notions of the rule of law and principles of individual responsibility.[8] The exercise of criminal justice in particular, is thought to best undo past injustice, and advance the normative transformation of these crimes towards a rule of law system.[9] Difficult questions are also raised when the level of criminality is so extreme that it "explodes the limits of the law", as Hannah Arendt considered in the context of the Holocaust.[10] Since Nuremburg, the criminal law has been the "dominant regulatory mechanism" to deal with such extreme inhumanity.[11] For crimes that have "shocked the conscience of humanity", international judicial institutions such as the ICC have become empowered to adjudicate responsibility because of their egregious nature, threats to regional peace and security, or because national institutions are unable to prosecute those responsible.[12] However, following the internationalization of atrocity crimes came a subsequent nationalization through a notable rise in domestic jurisdictions invoking statutory powers of universal jurisdiction, prosecuting international crimes in national courts.[13]

The "justice cascade", as coined by Skikkink,[14] manifested in a number of international and hybrid judicial bodies being created in the 1990s. The International Criminal Tribunal for the former Yugoslavia, set up in the midst of bloody inter-ethnic armed conflict in the Balkans, had the dual goal of both criminal accountability on one hand, and restoring peace on the other.[15] The International Criminal Tribunal for Rwanda, set up in the aftermath of the 1994

[7] Ruti Teitel, 'Transitional Justice: Post-War Legacies', *Cardozo Law Review,* Vol. 27, Issue 4 (2006) 1615-1631 at 1620.

[8] *Id*., at 1616.

[9] *Id*.

[10] Hannah Arendt, *Letter to Karl Jaspers*, *Correspondence, 1926-1969* (University of Michigan, 1992), p.54.

[11] Mark Drumbl, *Atrocity, Punishment and International Law* (Cambridge University Press, 2007), p.3.

[12] *Id*., p.6.

[13] *See* Roger O'Keefe, 'Universal Jurisdiction, Clarifying the Basic Concept', *Journal of International Criminal Justice*, Vol. 2, Issue 3 (2004) 735-760; For an overview of recent domestic cases exercising universal jurisdiction, *see* Trial International, *Evidentiary Challenges in Universal Jurisdiction Cases, Universal Jurisdiction Annual Review* (2019).

[14] Skikkink, *supra* note 192.

[15] UN Doc. UN/Res/827, 25 May 1993: "*Convinced* that in the particular circumstances of the former Yugoslavia the establishment as an ad hoc measure by the Council of an international tribunal and the **prosecution of persons responsible** for serious violations of international humanitarian law would enable this aim to be achieved and would **contribute to the restoration and maintenance of peace**." (emphasis added)

genocide, had the same goals, but also intended to promote national reconciliation.[16] Hybrid tribunals were also formed to address the aftermaths of internal conflicts in East Timor,[17] Sierra Leone[18] and the legacy of the Khmer Rouge regime in Cambodia.[19] These tribunals have made significant contributions to international criminal jurisprudence, but their deeper social legacies are perhaps less clear. They have brought accountability and created detailed historical records of crimes, but their contributions to broader processes of reconciliation and peace is not yet evident. In the former Yugoslavia, it has been argued that the tribunal's work has actually contributed to the further polarization of inter-ethnic relations.[20]

Some scholars question the dogmatic acceptance of prosecutorial responses to mass atrocity, arguing that it is not always the most appropriate method of promoting accountability. Drumbl argues that "the prevailing paradigm of prosecution and incarceration squeezes out the complexity and dissensus central to meaningful processes of justice and reconciliation."[21] In this vein, the international justice cascade has been counterbalanced to a degree by national responses that sometimes choose to avoid the path of criminal accountability, opting instead for truth and amnesty over the difficult prospect of retributive sanction. As discussed in chapter three, in the year 2000 the state of Uganda passed a landmark *Amnesty Act*, granting immunity from prosecution to all those who "renounced rebellion." However, after three years of blanket amnesty in Uganda, the Ugandan government sent an historic referral letter to The Hague, inviting the Prosecutor of the ICC to investigate. This staggered transitional approach may be termed what scholars have referred to as the "peace first, justice later" approach, in that in a given transition setting, non-judicial mechanisms of ending conflict are prioritized - or "sequenced" - ahead of traditional criminal accountability processes.[22] However, the Ugandan

[16] UN Doc. S/RES/955, 8 November 1994: "*Convinced* that in the particular circumstances of Rwanda, the **prosecution of persons responsible** for serious violations of international humanitarian law would enable this aim to be achieved and **would contribute to the process of national reconciliation and to the restoration and maintenance of peace**." (emphasis added)

[17] Regulation No. 2000/11 on the organization of courts in East Timor, UN Doc. UNTAET/REG/2000/11, 6 March 2000.

[18] Agreement between the United Nations and the Government of Sierra Leone on the establishment of a Special Court for Sierra Leone, 16 January 2002.

[19] Agreement between the United Nations and the Royal Government of Cambodia concerning the prosecution under Cambodian Law of crimes committed during the period of Democratic Kampuchea, 6 June 2003.

[20] *See e.g.* Victor Peskin, 'Croatia's Homeland War, the Battles Over Victor's Justice and the Legacy of the ICTY', in Carsten Stahn *et al*. (Eds) *Legacies of the International Criminal Tribunal for the Former Yugoslavia, a Multidisciplinary Approach* (Oxford University Press, 2020).

[21] Drumbl, *supra* note 11, p.10.

[22] Ahmad Nader Nadery, 'Peace or Justice? Transitional Justice in Afghanistan', *International Journal of Transitional Justice*, Vol. 1, Issue 1 (2007) 173–179 at 174.

referral does not appear to be one of sensitive sequencing, and has been labelled by some as an act of political manipulation on the part of Ugandan President, Yoweri Museveni.[23]

The intervention of the ICC fundamentally changed the dynamics of the of the conflict and the parties' response to it. The referral initially caused consternation among local leaders and was seen as jeopardizing prospects of a peaceful settlement. The referral set in train an accountability process that was to have a direct impact on peace negotiations, shaping the draft Juba Peace Agreement to include accountability mechanisms, prompting Uganda to create new judicial structures, and ultimately resulted in prosecutions of two LRA commanders: Thomas Kwoyelo in Uganda, and Dominic Ongwen in The Hague. That Uganda's amnesty clashed with this prosecutorial turn was obvious to many, and it represented a moral and legal quandary that the Supreme Court ultimately had to decisively confront in 2015. This chapter charts the prosecutorial turn in Uganda, examining the intervention of the ICC, the Ongwen and Kwoyelo cases, and analyses in-depth the *Kwoyelo* Supreme Court Judgement of 2015. It will be argued that this judgement redefines the prevailing meaning of amnesty as heretofore understood by all stakeholders in the north, with potentially far-reaching social and legal consequences for post-conflict Uganda.

This chapter falls under step 1 of Skaar et al's 4-step impact assessment framework which concerns analysis of the contextual parameters within which a transitional justice mechanism operated. As amnesty clashed with the prosecutorial turn, this chapter provides crucial context and considers to what extent this turn affected the integrity of the amnesty project.

4.2 The Intervention of the International Criminal Court

Uganda became a state party to the Rome Statute on 14 June 2002, a treaty which entered into force on 7 July 2002. On 16 December 2003, Uganda became the first state to "refer" itself to the ICC under articles 13(a) and 14 of the Statute.[24] This referral was controversially announced in a joint press conference between the Chief Prosecutor, Luis Moreno Ocampo and President Yoweri Museveni on 29 January 2004, an event that has consistently been raised as

[23] Adam Branch, 'Uganda's Civil War and the Politics of ICC Intervention', *Ethics and International Affairs*, Vol. 21, Issue 2 (2007).

[24] *See* Payam Akhavan, 'The Lord's Resistance Army Case: Uganda's Submission of the First State Referral to the International Criminal Court,' *American Journal of International Law,* Vol. 99, Issue 2 (2005) 403-421. Article 14(1) of the Rome Statute states: A State Party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed requesting the Prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes.

undermining the impartiality of the Office of the Prosecutor ("OTP") investigation.[25] Initially framed by the government in its referral letter as the "Situation concerning the Lord's Resistance Army", it stated that despite being willing and able to prosecute, it was unable to make any arrests, and was now turning to the court "in the hope that justice will be done for the countless victims."[26] The situation was subsequently referred to by the OTP as the "Situation in Uganda", an important change of vocabulary that recognizes the ICC may exercise jurisdiction over *any* crime that may have been committed, regardless of the affiliation of the perpetrator.[27]

The OTP began investigations in July 2004 and one year later, applied to the Pre-Trial Chamber to issue five arrest warrants, which were unsealed on 13 October 2005. The five indictees were Joseph Kony, the leader of the LRA, his deputy Vincent Otti, together with commanders Raska Lukwiya, Okot Odhiambo and Dominic Ongwen. The warrants listed various counts of war crimes and crimes against humanity such as murder, pillaging, enslavement, conscription and use of child soldiers in hostilities, and sexual and gender-based crimes.[28] Proceedings against Lukwiya[29] and Odhiambo[30] were later terminated after their deaths were confirmed following forensic testing of their exhumed remains. Vincent Otti was allegedly executed upon Kony's orders in October 2007, who apparently grew mistrustful of him.[31] The warrant against Otti remains in place, however, as his death has not been forensically confirmed. Ongwen was arrested in 2015 and is currently on trial in the Hague,[32] but Kony remains at large, and is believed to be located in a remote area of south-western Sudan.[33]

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[25] Tim Allen, *Trial Justice, The International Criminal Court and the Lord's Resistance Army* (Zed Books, 2006, p.96.

[26] Referral Letter from Government of Uganda to the Office of the Prosecutor, 16 December 2003 (Copy on file with author).

[27] ICC, Office of the Prosecutor, *Report on the activities performed during the first three years (June 2003-2006),* 12 September 2006, para.25: "The Office informed the Government of Uganda that, in compliance with its obligations of impartiality, the Office would interpret the referral to include all crimes committed in Northern Uganda. The Office then analysed the gravity of crimes allegedly committed by different groups in Northern Uganda and found that the crimes allegedly committed by the LRA were of higher gravity than alleged crimes committed by any other group."

[28] ICC, *Prosecutor* v. *Kony et. al*, Case Information Sheet (April 2018). Available here: https://www.icc-cpi.int/CaseInformationSheets/KonyEtAlEng.pdf (accessed 19 January 2021).

[29] ICC, *Prosecutor* v. *Kony et. al*, Pre-Trial Chamber II, 'Decision to Terminate the Proceedings Against Raska Lukwiya', 11 July 2007.

[30] ICC, *Prosecutor* v. *Kony et. al*, Pre-Trial Chamber II, 'Decision terminating proceedings against Okot Odhiambo', 10 September 2015.

[31] Francis Kwera, 'Deputy of Uganda's rebel LRA executed: deserter', *Reuters*, 30 November 2007.

[32] *See* section 4.4 for a discussion of the *Ongwen* case.

[33] Invisible Children, *LRA Crisis Tracker - 2017 Annual Brief* (February 2018), p.8.

The decision of the OTP to investigate the conflict in northern Uganda has been controversial both domestically and internationally. It drew accusations that the Court was being manipulated by Uganda in its war against the LRA.[34] Inviting a process of criminal accountability also posed a real risk to a peaceful and negotiated resolution of the conflict. Indeed, so troubled were local leaders at this prosect that a delegation of cultural and religious figures travelled to The Hague in March 2005 to advocate for the warrants to be withdrawn.[35] At the time, Ocampo said the intervention improved the political situation by placing pressure on the Sudanese government to stop supporting the LRA, causing them to relocate to Garamba National Park in the DRC, and ultimately into peace negotiations with the Ugandan government.[36] Although the arrest warrants coincided with the LRA's participation in peace talks, the connection between the two events is not clear, particularly since the LRA had previously participated in talks in 1994 and 2004.[37] While there was evidence that LRA criminality significantly decreased in the months following the unsealing of the arrest warrants,[38] LRA atrocities would later resume outside of Uganda in the DRC.[39]

Notably, the OTP never openly considered that to proceed with the prosecutions would be against the "interests of justice", a clause stipulated in article 53(2) of the Rome Statute that allows the Prosecutor to consider whether to proceed with an investigation would be in the interests of justice. Such an investigation may be discontinued with the authorisation of the Pre-Trial Chamber. As discussed in chapter 2,[40] if ever there was a situation that merited invocation of the interests of justice, the Ugandan situation was probably it: a fragile security situation, delicate peace talks ongoing, mass amnesty on the ground, public disapproval of ICC intervention and the strong possibility for further violence if cases proceeded – all of these factors could have grounded an application under article 53(2) of the Statute. However, in 2007 the OTP released a policy paper arguing that where crimes within the jurisdiction of the court are committed, there is a "presumption in favour of prosecution", arguing there is a difference

[34] Phil Clark, *Distant Justice, The Impact of the International Criminal Court on African Politics* (Cambridge University Press, 2019, pp.69-70.

[35] *Daily Monitor*, 'Acholi Leaders in the Hague over Kony case', 16 March 2005; *See also* ICC, Office of the Prosecutor, 'Statements by the ICC Chief Prosecutor and the Visiting Delegation of Acholi Leaders from Northern Uganda', Press Release, 18 March 2005.

[36] Louise Mallinder, 'Uganda at a Crossroads: Narrowing the Amnesty?', Working Paper No.1 from *Beyond Legalism, Amnesties, Transition and Criminal Justice* (Queens University Belfast, 2009), p.36.

[37] *Id*., p.37.

[38] ICC, *Prosecutor v Kony et. al*., 'Submission of Information on the status of the execution of the warrants of arrest in the Situation in Uganda, 6 October 2006, para.11.

[39] Human Rights Watch, 'LRA slaughters 620 in Christmas Massacres', 17 January 2009.

[40] *See* section 2.5.3 for in-depth discussion of the "interests of justice".

between the "interests of justice" and the "interests of peace", with the latter being the mandate of other institutions.[41] Reliance on this latter dichotomy of interests was somewhat unconvincing and is not really explained. Indeed, the interests of justice and peace are not necessarily opposable. The Situation in Uganda was specifically referred to in this policy paper, but there is no indication that the OTP ever considered the withdrawal of arrest warrants to be in interests of justice.[42] Ocampo previously stated that "conflict resolution must be compatible with the Rome Statute, so that peace and justice can work effectively together."[43] More recently, his successor Fatou Bensouda has pointedly stated that the function of the court is "not a peace-making one",[44] but yet has also stated that "sustainable peace and reconciliation are built on the stabilizing pillar of justice."[45] Arguably, the interests of peace and justice are inextricably linked, and attempts to artificially separate the two do not appear to be of much utility.

In the context of the Juba peace negotiations, a number of anti-ICC arguments advanced by scholars are very much debatable. For example, Branch argues that by criminalising the LRA leadership, the arrest warrants denied the rebels "the possibility of political relevance", and ICC intervention "reduces the deep internal political crisis of the Acholi to a simple division between the criminal LRA and innocent civilians.[46] However, this view pre-supposes that the LRA were actually legitimate political representatives of the Acholi people, which is not credible. While Branch considers that ICC intervention automatically "de-legitimized" the LRA, they still retained enough political agency to partake in peace talks and their delegation signed up to a number of sub-agreements, including the Agreement on Accountably and Reconciliation, which is discussed in the next section. Moreover, according to Branch, ICC intervention cleared the way for the Ugandan army's "militarism" in the name of enforcing international law.[47] However, the military campaign against the LRA was ongoing for almost 20 years prior to ICC intervention.

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[41] ICC, Office of the Prosecutor, *Policy Paper on the Interests of Justice* (September 2007), p.1.

[42] *Id*., p.4: "The situation of Uganda has perhaps attracted the most attention, given the attempts by various parties to resolve the conflict between the Government of Uganda and the LRA. This situation demonstrates well the exceptional nature of the provision on the interests of justice as well as the differences between this concept and the interests of peace."

[43] Luis Moreno-Ocampo, "Building a Future on Peace and Justice", Speech delivered at Nuremberg, 24 June 2007.

[44] Fatou Bensouda, 'Reflections on Peace and Justice in the 21st Century: A Perspective from the International Criminal Court', Speech delivered at Oxford University, 24 October 2017.

[45] Fatou Bensouda, Media Press Statement, Khartoum, Sudan, 20 October 2020.

[46] Branch, *supra* note 23 at 191.

[47] *Id*., at 184.

Ultimately, peace talks between the government and the LRA collapsed, in large part because the Ugandan government did not have the ability to withdraw the ICC arrest warrants.[48] While the threat of prosecution arguably brought an abrupt peace, it may have ultimately served to entrench conflict and instability in the wider region. Kony did not sign the final peace agreement, and the LRA withdrew to the DRC, and later deeper into the Central African Republic, only to continue committing crimes against civilians. Schabas opines that if international justice is brought to bear on situations such as northern Uganda to promote peace, it should be ready to stand down when prosecution becomes an obstacle to the achievement of a lasting peace.[49] Others, like the Chief Prosecutor, would argue that to withdraw the charges would betray the search for justice. Schabas responds by saying that those who advocate this position should be prepared to answer for the alternative: a possible return to conflict because of the inability of the peacemakers to promise rebels leaders that if they lay down their arms they will not be prosecuted.[50] He refers to the "double-cross" by Nigeria in reneging on its asylum agreement with Charles Taylor, which, in his view, will have the enduring effect of removing the implement of amnesty from the toolbox of the African peacemaker.[51]

The OTP investigation in northern Uganda has also received widespread criticism for being biased, in not bringing forward any charges against members of state forces, the UPDF.[52] The OTP initially stated that the alleged crimes of the UPDF were not of "sufficient gravity" to warrant investigation,[53] and latterly has stated that it does not have sufficient evidence to ground an arrest warrant.[54] This perceived lack of impartiality has arguably damaged the ICC's legitimacy among the local population,[55] not least because the OTP is heavily reliant on government cooperation to facilitate its investigation and secure access to witnesses.[56] Research with victims across the north points to UPDF responsibility for serious human rights violations, as well as generally failing to properly protect the community from LRA attacks

[48] Clark, *supra* note 34, pp.216-217.

[49] William Schabas, *Unimaginable Atrocities, Justice Politics and Rights at the War Crimes Tribunals* (Oxford University Press, 2012), p.196.

[50] *Id.*

[51] *Id.*, p.197.

[52] *See e.g.*, Branch, *supra* note 23; Clark, *supra* note 34, p.81.

[53] Press Statement by Luis Moreno Ocampo, 24 October 2005: "In Uganda, the criterion for selection of the first case was gravity. We analyzed the gravity of all crimes in Northern Uganda committed by all groups -- the LRA, the UPDF and other forces. Our investigations indicated that the crimes committed by the LRA were of dramatically higher gravity. We therefore started with an investigation of the LRA."

[54] *Acholi Times*, 'No Evidence against UPDF, says ICC', 2 May 2016.

[55] *International Justice Monitor*, 'Community members react to ICC witness' testimony that he did not know of atrocities by Uganda government soldiers', 23 October 2017.

[56] Clark, *supra* note 34, p.71.

during the conflict. Documented UPDF violations include the torture of civilians, the rape of women and men,[57] the conscription of children as soldiers[58] and effecting the largescale displacement of civilians in to IDP camps in order to counter the LRA security threat.[59] The lack of accountability and reparation for these human rights violations, either domestically or internationally, is the cause of much antipathy amongst the local population.[60]

4.3 Agreement on Accountability and Reconciliation

Although Kony never signed what became to be referred to as the "comprehensive peace agreement", a number of sub-agreements were signed by the LRA delegation. In the Agreement on Accountability and Reconciliation ("A&R Agreement"), which was signed by the parties on 29 June 2007, there were clear commitments to criminal accountability processes.[61] Specifically, the A&R Agreement stated that "formal criminal and civil justice measures shall be applied to any individual who is alleged to have committed serious crimes or human rights violations in the course of the conflict."[62] On 19 February 2008, the parties signed an Annexure to the A&R Agreement, which provided a detailed framework for the latter's implementation.[63] In addition to criminal prosecutions, the A&R Agreement lays out a wide range of transitional justice measures, including traditional justice mechanisms, truth seeking, reconciliation, rehabilitation of offenders and reparations. The parties committed to promoting "legal arrangements consisting of formal and non-formal measures for ensuring justice and reconciliation[64] and the promotion of traditional mechanisms.[65] It is notable that the

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[57] Phillip Schulz, 'Displacement from gendered personhood: sexual violence and masculinities in northern Uganda', *International Affairs*, Vol. 95, Issue 5 (2018) 1109-1118.

[58] *See e.g*. UN Office of the High Commissioner for Human Rights, *The Dust Has Not Yet Settled, Victims' Views on the Right to Remedy and Reparation', A Report from the Greater North of Uganda* (2011) (Hereafter, "Dust Has Not Yet Settled Report"), p.42, 48.

[59] *Id*., p.50; *See generally* Chris Dolan, *Social Torture, The case of northern Uganda 1986-2006* (Berghahn, 2009).

[60] *Id*., pp.71-75; *See also* Justice and Reconciliation Project, 'Paying Back What Belongs To Us – Victims' Groups in Northern Uganda and their Quest for Reparations,' Field Note XVI (October 2012).

[61] Preamble, 'Agreement on Accountability and Reconciliation between Government of the Republic of Uganda and the Lord's Resistance Army Movement', Juba, South Sudan, 29 June 2007 (Hereafter referred to as the "A&R Agreement"). Available here: https://peacemaker.un.org/uganda-accountability-reconciliation2007 (accessed 19 January 2021). *See further* Pål Wrange, 'The Agreement and the Annexure on Accountability and Reconciliation between the Government of Uganda and the Lord's Resistance Army/Movement – A Legal and Pragmatic Commentary', *Uganda Living Law Journal,* Vol. 6 (2008) 42-128.

[62] A&R Agreement, para.4.1.

[63] Annexure to the Agreement on Accountability and Reconciliation, 19 February 2008. Available here: https://peacemaker.un.org/uganda-annex-accountability2008 (accessed 19 January 2021).

[64] *Id*., para.2.1.

[65] *Id*., para.3.1.

A&R Agreement did not expressly refer to amnesty, but implicitly endorses amnesty that has already been granted:

> "Where a person has already been subjected to proceedings or *exempted from liability for any crime or civil acts or omissions,* or has been subjected to accountability or reconciliation proceedings *for any conduct in the course of the conflict*, that person shall not be subjected to any other proceedings with respect to that conduct."[66]

The A&R Agreement outlines general principles for the conduct of accountability proceedings, including the right of the accused to "a fair hearing and due process",[67] and that individuals should be "encouraged" to take responsibility for their actions. It further stipulates that where individuals cooperate with the justice mechanisms by, for example, confessing their actions, this should be taken into account when imposing sentences or sanctions.[68]Amendment of the *Amnesty Act* was also expressly foreseen in the A&R Agreement, "in order to bring it into conformity with the principles of this Agreement,"[69] although no further amendments were made beyond those already contained in the 2002 and 2006 Amendment Acts.[70] The A&R Agreement also provided for the creation of a special division of the High Court, "to try individuals who have committed serious crimes during the conflict",[71] a clear recognition and intention by the parties that prosecution of serious human rights abuses were expected. A special investigative unit was to be set up in the Director of Public Prosecutions, focusing on those responsible for grave breaches of the Geneva Conventions.[72] The International Crimes Division ("ICD") of the High Court was formally created in 2011, and has faced significant institutional and resource challenges, which have slowed its work.[73] To date, it has held only one conflict-related case, that against Thomas Kwoyelo, a case which is discussed in detail in section 4.5, below.

The A&R Agreement also stated that the parties shall promote "traditional justice processes, alternative sentences, reparations, and any other formal institutions or

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[66] *Id*., para.3.10.

[67] *Id*., paras.3.3-3.4.

[68] *Id*., para.3.6.

[69] *Id*., para.14.3.

[70] *See* sections 3.6.1 & 3.6.2 of this thesis.

[71] Annexure to the A&R Agreement, *supra* note 63, para.7.

[72] *Id*., paras.10-14.

[73] *See generally* Human Rights Watch, 'Justice for Serious Crimes before National Courts, Uganda's International Crimes Division' (January 2012).

mechanisms".[74] Traditional justice mechanisms representing each affected community in northern Uganda were referred to, namely *Culo Kwor* which is the practice of compensating for homicide in the Acholi and Lango cultures. *Mato Oput* is the commonly cited Acholi reconciliation ritual, *Kayo Cuk* is practiced by the Langi, *Ailuc* by the Iteso and *Tonu ci Koka* by the Madi community.[75] The A&R Agreement also envisaged the creation of truth-seeking mechanisms,[76] with the Annexure explaining that such a mechanism would "inquire into human rights violation committed during the conflict", hold public hearings, make recommendations for appropriate reparations and publish its findings in a document.[77] No truth commission has ever been established, however, despite the strong desire for affected communities for a historical record of the conflict to be created.[78] Similarly, broad promises for reparations were also included in the A&R Agreement, but have not materialised in the form of concrete government programmes. Reparative measures envisaged in the A&R Agreement were "rehabilitation; restitution; compensation; guarantees of non-recurrence and other symbolic measures such as apologies, memorials and commemorations".[79] Ultimately, left unsigned, the A&R Agreement was simply a policy document, a statement of political and legislative intent by two negotiating parties. It is not a legally binding document, and it did not form part of a final, comprehensive peace agreement between the LRA and the Ugandan government. As such, both the A&R Agreement and its Annexure were, perhaps intentionally, left vague in many respects, and short on practical and logistical details. For example, there was no direction on how traditional mechanisms were to be constituted, implemented and most crucially – funded. The A&R Agreement was also silent on the process of determining who might be eligible for such rituals, and who should face trial, for example those who might be deemed "most responsible." Yet, with the collapse of the Juba talks, for years afterwards there was no formal or indeed informal accountability in northern Uganda. However, the belated prosecution of two LRA commanders, Thomas Kwoyelo and Dominic Ongwen was to reignite the peace versus justice debate in northern Uganda. The Ongwen case and the victim-perpetrator debate that permeates it will be analysed first, followed by an in-depth examination of the Kwoyelo case, and the judicial clash with amnesty that ended up in the Supreme Court

[74] A&R Agreement, *supra* note 61, para.5.3.

[75] *Id*., para.1.

[76] *Id*., para.8.3.

[77] Annexure to the A&R Agreement, *supra* note 63, para.4.

[78] Dust Has Not Yet Settled Report, *supra* note 58, p.64.

[79] A&R Agreement, *supra* note 61, para.9.1.

4.4 The Case of Dominic Ongwen

On 6 January 2015, Dominic Ongwen surrendered to Seleka rebel forces in the Central African Republic ("CAR") and was then handed over to US Special Forces.[80] The CAR authorities subsequently facilitated his transfer to the Hague, Netherlands where he made his first appearance in court on 26 January 2015. The case against Ongwen is fraught with moral dilemma and has attracted much public and academic commentary because of his personal history. This is because Dominic Ongwen was himself abducted into the LRA as a young boy and was undoubtedly subjected to the same brutal indoctrination that was typically endured by thousands of other LRA abductees. Yet, he rose through the ranks to become an effective military operative and commander of the "Sinia Brigade" within the LRA. Erin Baines defines him as a "complex political perpetrator", noting the moral argument advanced by some that because of his abduction and upbringing in the LRA, it is morally unacceptable to now prosecute him.[81] Drumbl questions the suitability of a criminal trial for someone in Ongwen's position, arguing that the decision to put him on trial has deprived him of his victimhood, in an arbitrary way.[82] Similarly, Branch considers it unlikely that any form of justice will be attainable through the prosecution of a victim-perpetrator like Ongwen.[83] Meanwhile, research with victims of Ongwen's alleged crimes reveal strong support for the judicial process, and a longing for accountability and appropriate reparation.[84] Upon his surrender, Dominic Ongwen himself acknowledged his past wrongdoing:

> "Each of us sin in words, deeds, and thoughts. Each of us sin in different ways. If I committed a crime through war, I am sorry. In my mind, I thought war was the best thing. Even up to now, I dream about war every night. But if they don't want to forgive me, I leave it in their hands. I have become like a lice, which you remove from your hair or waist and kill without any resistance."[85]

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[80] *The Guardian*, 'Senior Lord's Resistance Army commander surrenders to US troops', 7 January 2015.

[81] Erin Baines, 'Complicating Victims and Perpetrators in Uganda: On Dominic Ongwen', Justice and Reconciliation Project Field Note No. 7 (2008).

[82] Mark Drumbl, 'Victims who victimise', *London Review of International Law,* Vol. 4, Issue 2 (2016) 217-246 at 242.

[83] Adam Branch, 'Dominic Ongwen on Trial: The ICC's African Dilemmas', *International Journal of Transitional Justice*, Vol. 11, Issue 1 (2017) 30-49 at 33.

[84] *See e.g.* Matilde Gawronski & Lino Owor Ogora, 'A renewed momentum for Trial Justice? Perceptions of Conflict Affected Communities in Northern Uganda in the run up to the Dominic Ongwen and Thomas Kwoyelo Trials', Foundation for Justice and Development Initiatives (January 2017).

[85] Andrew Green, 'To forgive a warlord', *Foreign Policy*, 6 February 2015.' A video of this interview with is available here: NTV Uganda, 'Ongwen arrives at the ICC', 17 January 2015: https://www.youtube.com/watch?v=BYP5X1aTkMQ (accessed 19 January 2021).

New Charges

The 2005 warrant of arrest against Dominic Ongwen contained only 7 counts of war crimes and crimes against humanity, namely: murder, cruel treatment, pillaging, enslavement, other inhumane acts, and attacking the civilian population.[86] Furthermore, the counts concerned just one incident – a single attack on Lukodi IDP camp in Gulu District on 19 May 2004. Shortly after Ongwen was arrested, the OTP requested additional time to reanimate what was effectively a dormant case, and to investigate other possible criminal conduct by Ongwen, with a view to potentially adding more charges against him.[87] Following further re-investigation, which included the extraordinary preservation of testimony from Ongwen's former "forced wives" because of their vulnerability,[88] he was sent forward for trial on a total of 70 counts.[89] The charges relate to persecutory attacks on four separate IDP camps at Pajule, Odek, Lukodi and Abok. During these four attacks, over 200 civilians were killed, others beaten and tortured, homes destroyed, food and property pillaged, and civilians enslaved and conscripted into the ranks of the LRA. Ongwen is also charged with the conscription and use in hostilities of children under the age of 15, and sexual and gender-based crimes ("SGBC") committed by both Ongwen personally and his subordinates in the Sinia Brigade, of which he was the commander.[90] He is alleged to personally have personally committed crimes of rape, sexual slavery, forced marriage and forced pregnancy against seven different women.[91]

A renewed Peace versus Justice debate

Dominic Ongwen's arrest in 2015 reignited the peace versus justice debate that had begun ten years earlier. In general, public opinion in northern Uganda has been divided on what form of justice he should face.[92] The Acholi Religious Leaders Peace Initiative ("ARLPI"), an influential body that shapes public opinion in northern Uganda, argued upon his arrest that Ongwen "should not be punished twice", and should instead be allowed to return home and

[86] ICC, *Prosecutor v Kony et. al,* 'Warrant of Arrest for Dominic Ongwen', 8 July 2005.

[87] ICC, *Prosecutor v Ongwen,* Public redacted version of 'Prosecution's Application for Postponement of the Confirmation of Charges Hearing', 10 February 2015.

[88] *See further* Paul Bradfield, 'Preserving Vulnerable evidence at the International Criminal Court – the Article 56 Milestone in Ongwen', *International Criminal Law Review*, Vol. 19, Issue 3 (2019) 373-411.

[89] ICC, *Prosecutor v Dominic Ongwen*, 'Decision on the confirmation of charges against Dominic Ongwen', 23 March 2016 (Hereafter, "*Ongwen* Confirmation Decision").

[90] *Id*., pp.71-104, which stipulates the operative charges for trial.

[91] ICC, *Prosecutor v Ongwen*, Public Redacted Version of 'Prosecution's Closing Brief', 24 February 2020, pp.71-77.

[92] Michaela Wrong, 'Making a murderer in Uganda', *Foreign Policy*, 20 January 2016.

undergo traditional reconciliation ceremonies such as *mato oput*.[93] At least two of Ongwen's former "bush wives" also went public, calling for the charges to be dropped, instead expressing anger at the Ugandan government for failing to protect Ongwen as a child. One former forced wife succinctly summarised the victim-perpetrator narrative as follows: "The government should not have sent Dominic to the ICC because it was the government that failed to protect him. He was abducted and is a victim […] They should have pardoned him and given him amnesty."[94] Some former LRA members have also stated that Ongwen should have received amnesty, like they did.[95] Indeed, in an audio recording purportedly to be the voice of Dominic Ongwen shortly after his surrender, he is heard to call on those remaining in the bush to also defect, saying that "even the President has agreed to forgive me" and that "I am a free man despite the ICC case against me."[96] It would appear that Ongwen may have been initially informed by government representatives that he would be granted amnesty.

Bishop Baker Ochola, a prominent member of the negotiating team during the Juba peace talks and also a member of ARLPI, has advocated vociferously on the side of forgiveness for Dominic Ongwen, stating that he is "a victim of circumstance; so if the world wants to punish him twice, then that is another injustice. What we know is that when LRA abducts a child, the first thing they do to that child is to destroy his/her humanity so that he/she becomes a killing machine in the hands of the LRA".[97] One cultural leader has however noted that because of the serious nature of the crimes alleged, Ongwen may not be suitable for the traditional *mato oput* ceremony. Matthew Otto, of *Ker Kwaro Acholi*, the umbrella association of Acholi cultural leaders, has said: "*Mato Oput* is a very powerful religious and traditional instrument that binds the Acholi people and all those who believe in its philosophy. The position of Ongwen is a little bit outside the consideration and application of *Mato Oput* and thus, we shall have to go The Hague."[98]

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[93] Acholi Religious Leaders Peace Initiative, 'A statement of the position of ARLPI on Dominic Ongwen, former LRA commander', 20 January 2015.

[94] Serginio Roosblad, 'Dominic Ongwen's former wife: Ongwen will be accepted too', *Justicehub.org*, 16 January 2015. *See also*, *The Independent*, 'Ugandan woman forced to marry feared warlord explains why she would welcome him back', 15 December 2015.

[95] *Deutsche Welle,* 'Ugandans react to trial of former LRA warlord at The Hague', 16 January 2017.

[96] *See* NTV Uganda, 'Dominic Ongwen reveals whey he left Joseph Kony', available here: https://www.youtube.com/watch?v=CDiCGf3xDWI (accessed 19 January 2021).

[97] Refugee Law Project, 'Ongwen's Justice Dilemma, Perspectives from Northern Uganda' (January 2015), p.11.

[98] *Id,* p.9.

General sentiments of forgiveness towards Dominic Ongwen can be contrasted with the views of the victims of his alleged crimes. In Lukodi IDP camp in May 2004, it is alleged that Ongwen ordered an attack that led to the deaths of over 40 civilians, with huts set on fire, civilians abducted, and food stolen. There remains a strong desire on the part of victims in Lukodi that Ongwen should face justice and that reparations be given to victims. In the view of one local victim: "If Ongwen were bought to us here, everybody would want to cut a piece of meat from his body for him to feel the pain we went through."[99] To many victims of Ongwen's alleged crimes, justice is understood in terms of potential reparations offered by the Court. They recite their losses and plead for compensation. In Odek, another charged attack where over 60 people died in an attack allegedly led by Ongwen in April 2004, one victim said: "Ongwen's case will enable us as a community to be certain that if there will be fair judgment in future, we will receive reparation."[100] One of the most influential opinion leaders in Acholiland is Rwot David Onen Acana II, the Acholi Paramount Chief. In a notable shift from former statements,[101] and in contrast to the view of religious leaders, in May 2016 Acana called on local people to support the ICC judicial process. Speaking at a memorial service for the Lukodi massacre, he narrated how Ongwen had saved his life during the Juba talks, when Kony threatened to have a visiting peace delegation killed. Despite this, he believed that Dominic Ongwen needed to be held accountable for crimes that he had committed, and called on local people to support the trial.[102] According to one local commentator, Lino Owora Ogora, this statement carries significant weight coming from a traditional leader such as Rwot Acana, and "dispels the widely held belief that many Acholi people do not support the ICC."[103]

The OTP is keenly aware of the situation in which Dominic Ongwen found himself. In referring to their submissions, I remain acutely aware that my positionality as a former Prosecution staff member undoubtedly colours my analysis and opinions. However, I reiterate, as I stated in the Introduction to this thesis, that I continually attempt to temper any bias by ensuring I make reference to and examine diverging views, both within academia, the public sphere, and the opposing *Ongwen* Defence arguments. My prior professional experience as an

[99] Justice and Reconciliation Project, 'Community Perceptions on Dominic Ongwen', Situational Brief (May 2015), p.2.

[100] Refugee Law Project, 'Ongwen's Justice Dilemma, Part II: Ongwen's Confirmation of Charges Hearing: Implications and Way Forward?' (January 2016), p.11.

[101] In April 2005, Rwot Acana "strongly argued against the ICC issuing arrest warrants against the LRA top commanders, because '[it would] not be good for the on-going negotiations with the government". *See* Kasaija Apuuli, 'Amnesty and International Law, The Case of the Lord's Resistance Army Insurgents in Northern Uganda' *African Journal on Conflict Resolution*, Vol. 5, Issue 2 (2005) 33-61 at 53-54.

[102] Lino Owora Ogora, 'Support for ICC Trial for Ongwen is shown at commemoration of Lukodi massacre', *International Justice Monitor*, 24 May 2016.

[103] *Id*.

international criminal Defence lawyer has also trained me to avoid any preconceptions in my assessment of the facts or the law, to step back and view the facts dispassionately.

Legally Assessing a Victim-Perpetrator

The OTP has never disputed that he was likely brutally indoctrinated into the LRA and exposed to extreme brutality himself. However, the OTP's position is that this should not give him a free pass to victimize others. At the opening of the trial in December 2016, Prosecutor Fatou Bensouda directly tackled the victim/perpetrator dilemma. It is worth quoting this passage in full, as it persuasively rebuts the notion advanced by Drumbl, Branch and others, that Ongwen's prosecution is not legally or morally appropriate:

> "Mr President, I want to turn lastly to Dominic Ongwen himself. One aspect of this case is the fact that not only is Ongwen alleged to be the perpetrator of these crimes, he was also a victim. He himself, so he has told the Court, was abducted from his home by an earlier generation of LRA fighters when he was 14 years old. He himself, therefore, must have gone through the trauma of separation from his family, brutalisation by his captors, and initiation into the violence of the LRA way of life. He has been presented as a victim rather than a perpetrator. People following the case against Dominic Ongwen may do so with mixed emotions. They will feel horror and revulsion at what he did but they will also feel sympathy. The evidence of many of the child victims in this case could, in other circumstances, be the story of the accused himself.
>
> The evidence makes it plain that he could be kind. One Prosecution witness has told the Court that generally Dominic Ongwen was a good man who would play and joke with the boys under his command and was loved by everyone. But the same witness told the Court that at a time when she believed she was still too young to get pregnant, Ongwen had forced her to have sex with him and that she knew that she would be beaten if she refused. She also told the Court that she still bore the scars on her breasts from a beating Ongwen had given her when she failed to make his bed.
>
> The reality is that cruel men can do kind things and kind men can do cruel things. A hundred per cent consistency is a rare thing and the phenomenon of perpetrator victims is not restricted to international courts. It is a familiar one in all criminal jurisdictions. Fatherless children in bleak inner cities face brutal and involuntary initiation ordeals into gang life, before themselves taking on a criminal life-style. Child abusers consistently reveal that they have been abused themselves as children. But having suffered victimisation in the past is not a justification or an excuse to victimise others. Each human being must be taken to be endowed with moral responsibility for their actions. And the focus of the ICC criminal process is not on the goodness or the badness of the accused person but on the criminal acts which he or she has committed. We are not here to deny that he was a victim in his youth. We will prove what he did, what he said, and the impacts of those deeds on the many victims. This Court will not decide his goodness or badness, nor whether he deserves sympathy but whether he is guilty of these crimes committed as an adult with which he stands charged."[104]

[104] ICC, *Prosecutor v Ongwen*, Prosecution opening statement, ICC-02/04-01/15-T-26-ENG, 6 December 2016, pp.35-36.

Moreover, Fatou Bensouda went on to point that Ongwen was no ordinary soldier, he rose through the ranks because he was an effective and ruthless commander:

> "Dominic Ongwen became one of the highest-ranking commanders of the LRA. He did so by his enthusiastic adoption of the LRA's violent methods and through demonstrations that he could be more active and more brutal in his methods against the population of northern Uganda than other LRA officers."[105]

Bensouda also stated that Ongwen could have done what thousands of other LRA fighters did – escape the bush and apply for amnesty:

> "As a senior commander Dominic Ongwen had complete operational control over the soldiers under his command. He could at any time simply have ordered that his troops march to the nearest Ugandan army barracks, lay down their arms and surrender. Alternatively, he could have taken the course that so many of the personnel under his control took and made an individual bid for freedom by simply deserting. After all, as the commander, he did not have to fear the brutal canings or peremptory execution which he himself ordered for unsuccessful escapees. He was often separated by several days' or weeks' march from any higher LRA authority. Battalion commanders in his Sinia brigade did indeed escape during this time. Between July 2002 and December of 2005, the Amnesty Commission records show that over 9,000 LRA members surrendered and received amnesty. But Dominic Ongwen did not take that course. Instead, he accepted the power and authority which came with his rank and his appointment. He planned and executed operations which brought misery and death to hundreds of ordinary people and reported the results on the radio with excitement, not regret."[106]

Despite these realities, critics have frequently labelled the prosecution of Ongwen as being morally inappropriate. They argue that a criminal trial cannot be a proper forum for dealing with such a damaged individual, and that such a process could never adequately take into account his complex circumstances.[107] Drumbl contends that the perpetrator of mass atrocity is qualitatively different from the perpetrator of ordinary crime. Mass atrocity, he argues, often flows from "groupthink", making individual participation less deviant and "more of a matter of conforming to a social norm."[108] However, such criticisms point to a misapprehension of the international criminal process, and the legal avenues open to Ongwen as an accused person before the ICC. Ongwen is represented in court by Defence counsel – a Lango who can speak Acholi – that he has personally chosen. In the course of the trial, his lawyers have given formal notice to the court that they seek to rely on specific legal defences that have, in fact, captured the "complexity" of his personal history. Unlike the *ad hoc* tribunals, the legal framework of the ICC, the Rome Statue, expressly provides for a number of defences that may exclude

[105] *Id*., p.37.

[106] *Id*., pp.37-38.

[107] Drumbl, *supra* note 82; Branch, *supra* note 83.

[108] Drumbl, *supra* note 11, p.32.

criminal responsibility.[109] Dominic Ongwen is relying[110] on two such affirmative defences: mental disease or defect under article 31(a)[111] and duress under article 31(d).[112]

At trial, Ongwen's Defence team called numerous expert and lay witnesses in support of these two defences. With regard to mental disease, two Ugandan medical experts were called to testify, Dr Dickens Akena[113] and Prof. Emilio Ovuga.[114] They diagnosed Ongwen with dissociative disorder, dissociate amnesia, post-traumatic stress disorder and obsessive-compulsive disorder, submitting detailed reports to the Chamber.[115] With regard to duress, the Defence called numerous witnesses in support of this Defence. For example, defence witnesses testified at length about the role of spiritualism in the LRA and Acholi culture generally.[116] The Defence even called a witch doctor that practiced traditional medicine.[117] Defence witnesses testified about the circumstances of Ongwen's abduction,[118] the brutal process of LRA indoctrination,[119] and how Kony was believed to be all powerful, a mind-reader with the ability to predict future events.[120] Defence witnesses also testified as to the general atmosphere of fear in the LRA, and how death would often result if escape was attempted, or that one's home community would be "collectively punished" if someone escaped.[121] One of Ongwen's former

[109] The defences available to an accused are described in detail in article 31(1)(a)-(d) of the Statute, but in short, they are mental disease or defect, intoxication, self-defence and duress.

[110] ICC, *Prosecutor v Ongwen*, 'Defence Notification Pursuant to Rule 79(2) and 80(1) of the Rules of Procedure and Evidence', 9 August 2016.

[111] Article 31(1)(a) states: "The person suffers from a mental disease or defect that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law."

[112] Article 31(1)(d) states: "The conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be: (i) Made by other persons; or (ii) Constituted by other circumstances beyond that person's control."

[113] ICC, *Prosecutor v Ongwen*, Testimony of D-41, ICC-02/04-01/15-T-248-Red-ENG, 18 November 2019.

[114] ICC, *Prosecutor v Ongwen*, Testimony of D-42, ICC-02/04-01/15-T-250-Red-ENG, 21 November 2019.

[115] ICC, *Prosecutor v Ongwen*, Public Redacted Version of Defence Closing Brief, 13 March 2020 (Hereafter, "Ongwen Defence Closing Brief"), para.536.

[116] ICC, *Prosecutor v Ongwen*, Testimony of Witness D-111, ICC-02/04-01/15-T-183-ENG, 5 October 2018; and Testimony of Witness Prof. Kristof Titeca, ICC-02/04-01/15-T-197-ENG, 19 November 2018.

[117] ICC, *Prosecutor v Ongwen*, Testimony of Witness D-26, ICC-02/04-01/15-T-191-ENG, 5 November 2018.

[118] ICC, *Prosecutor v Ongwen*, Testimony of Witness D-7, ICC-02/04-01/15-T-193-ENG ET, 8 November 2018.

[119] ICC, *Prosecutor v Ongwen*, Testimony of Witness D-60, ICC-02/04-01/15-T-197-ENG, 19 November 2018.

[120] ICC, *Prosecutor v Ongwen*, Testimony of Witness, D-49, ICC-02/04-01/15-T-243-Red2-ENG, 23 September 2019.

[121] ICC, *Prosecutor v Ongwen*, Testimony of Witness D-118, ICC-02/04-01/15-T-216-Red2-ENG, 21 May 2019.

wives also testified for the Defence, saying how she freely lived with him and that he treated her well.[122] By advancing these two legal defences of mental disease and duress, and calling witnesses in support of them, Ongwen's lawyers had significant scope to shape the narrative of the trial. They had the ability to call witnesses that could speak to any aspect of Dominic Ongwen's life in the LRA, from the time of his abduction right through to his current medical diagnoses. The notion that the trial process could not allow for the "complexities" of Ongwen's life to be examined and revealed, is therefore not accurate and belies the true nature of trial proceedings. Moreover, those who advocate that a trial is not appropriate for a victim-perpetrator such as Ongwen also ignore the fact that Ongwen's defence actually reject the "perpetrator" label:

> "Mr Ongwen is a victim, not a perpetrator. He was abducted as a young child by the LRA and brutalized for almost three decades before he was able to voluntarily surrender to military personnel in the Central African Republic. This case cannot be properly adjudicated without considering his shattered life and the catastrophic effects of his experience in the LRA throughout his childhood and adulthood before his surrender. […]
>
> The Defence reiterates its submissions at the pre-trial and during the trial that Mr Ongwen is a victim and not a victim and perpetrator at the same time. As a result, the Defence urges the Court to disregard the attempt to introduce the victim/perpetrator status through the back door. The Defence reiterates its earlier position that "once a victim always a victim."[123]

Indeed, Ongwen himself has denied all responsibility for the charges against him. At the opening of the trial, he stated: "In the name of God, I deny all these charges in respect to the war in northern Uganda."[124] Ongwen also sought to place the blame on Kony and the LRA:

> "I reiterate it is the LRA who abducted people in northern Uganda. The LRA killed people in northern Uganda. LRA committed atrocities in northern Uganda, and I'm one of the people against whom the LRA committed atrocities. But it's not me, Dominic Ongwen, personally, who is the LRA."[125]

Moreover, the denial of any responsibility by Dominic Ongwen also undermines the argument that Ongwen should instead undergo some form of "traditional justice", including ceremonies such as *mato oput*. This ceremony requires an admission of responsibility, an apology to the victims' family and the offering of compensation. which is usually negotiated.[126] None of these

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[122] ICC, *Prosecutor v Ongwen*, Testimony of Witness D-13, ICC-02/04-01/15-T-244-Red2-ENG, 26 September 2019.

[123] Ongwen Defence Closing Brief, *supra* note 115, paras.12 & 20.

[124] ICC, *Prosecutor v Ongwen*, Prosecution opening statement, ICC-02/04-01/15-T-26-ENG, p.21.

[125] *Id*., p.17.

[126] Liu Institute for Global Issues and Gulu District NGO Forum, *Roco Wati Acoli: Restoring Relations in Acholi-land Traditional Approaches to Reintegration and Justice* (September 2005) ("Hereafter, "Liu Institute Report", pp.57-68.

factors are present in the *Ongwen* case. Dominic Ongwen pleaded not guilty to all of the charges, and chose not to testify and remain silent, which is his legal right.[127] Ongwen could, however, have made an unsworn statement at the close of trial,[128] as other accused persons have done,[129] wherein he could have indicated some level of remorse, apology or indicated an intent to reconcile with the people of northern Uganda. None was made. Yet, in the final paragraph of its Closing Brief, the Ongwen Defence creatively asks the court that in the event he is found guilty, Ongwen should "be placed under the authority of the Acholi justice system to undergo the Mato Oput process of Accountability and Reconciliation as the final sentence for the crimes for which he is convicted."[130]

It remains to be seen if the Defence has adduced sufficient evidence to meet the high thresholds contained in article 31(1)(a) and (d) to establish the defences of mental disease and duress. The Prosecution, who called three medical experts to rebut the Defence arguments, are of the view that Ongwen's mental capacities were not "destroyed" within the meaning of article 31(1)(a), pointing to both consistent witness testimony and intercepted radio evidence that points to coherent and consistent behaviour, without any indicators of serious mental illness.[131] As for duress, the bar is similarly high for the Ongwen defence. They will have to satisfy the judges that his actions were as a result of "imminent death or of continuing or imminent serious bodily harm" and that he acted "necessarily and reasonably" to avoid the threat, and did "not intend to cause a greater harm than the one sought to be avoided." The duress argument was also made in the pre-trial stage of the case, where the Defence argued that the "threat" of duress emanated from the all-powerful leader of the LRA, Joseph Kony who Ongwen lived in constant fear of. The Defence argued that "Dominic was simply surviving in an environment which enslaved him."[132] This resonates with Drumbl's argument that "participation in atrocity becomes a product of conformity and collective action, not delinquency and individual pathology."[133]

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[127] Article 67(1)(g) of the Rome Statute.

[128] Article 67(1)(h) of the Rome Statute: "To make an unsworn oral or written statement in his or her defence."

[129] Germain Katanga, Thomas Lubanga, Bosco Ntaganda and Aimé Kilolo have each made unsworn statements in their respective trials. *See e.g.,* ICC, *Prosecutor v Bemba et al*., 'Decision on Requests to Present Unsworn Statements', 12 May 2016.

[130] Ongwen Defence Closing Brief, *supra* note 115, para.733.

[131] Prosecution Closing Brief, *supra* note 91, pp.174-181.

[132] *Id.*, para.55.

[133] Drumbl, *supra* note 11, p.8.

The Pre-Trial Chamber dismissed these duress arguments, noting that that the "threat" as articulated – the possibility of later disciplinary measures – was not "imminent" as required by article 31(d), holding that "duress is not regulated in a way that would provide blanket immunity to members of criminal organisations which have brutal systems of ensuring discipline as soon as they can establish that their membership was not voluntary."[134] Moreover, the Pre-Trial Chamber noted that the "escapes from the LRA were not rare" and that Dominic Ongwen "could have chosen not to rise in hierarchy and expose himself to increasingly higher responsibility to implement LRA policies."[135] Instead, the available evidence demonstrated that Ongwen "shared the ideology of the LRA, including its brutal and perverted policy with respect to civilians it considered as supporting the government."[136] In the view of the Chamber, Ongwen also failed to satisfy the proportionality requirement of the duress defence – to act reasonably and necessary in the face of the purported threat. In this regard, the Chamber held: "If, *arguendo*, Dominic Ongwen could not have avoided accepting (P-99), (P-101), (P-214), (P-226) or (P-227) as forced wives, he could have avoided raping them, or, at the very least, he could have reduced the brutality of the sexual abuse. Yet, his former so-called "wives" testified they were raped with ruthless regularity."[137] This summary dismissal of the defence arguments on duress – which did not fundamentally change at trial – do not bode well for a successful outcome in the final judgement.

The Legal Absence of Amnesty

While the victim-perpetrator debate has dominated the Ongwen trial, and permeated almost every day of testimony, it is striking that there has been a complete absence of legal debate around amnesty. This is in stark contrast to the amnesty litigation witnessed at other tribunals, like the SCSL, ECCC, and even before the ICC.[138] This may have been a strategic choice, given that Ongwen did not officially receive an amnesty certificate. He was nevertheless eligible to apply for one, even when he was in the custody of Ugandan authorities in CAR awaiting transfer to The Hague. The *Amnesty Act 2000* expressly permits individuals to apply for amnesty outside of the state of Uganda.[139] Notably, Archbishop Odama stated to me that Ongwen told him that, indeed, he wished to receive amnesty:

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[134] *Ongwen* Confirmation Decision, *supra* note 89, para.153.

[135] *Id*., para.154

[136] *Id*.

[137] *Id*., para.155.

[138] *See* section 2.5.3 *supra*.

[139] *Amnesty Act 2000*, s.4(5): "Persons to whom section 3 applies and who are living outside Uganda shall be deemed to have been granted the amnesty if – (a) they renounce all activities described in section 3; and (b)

> "He said now look, Archbishop, those who were the ones arrested me, or captured me to go into the LRA. Now they have amnesty, I should also be given amnesty. He told this to me personally the first time I visited there in the Hague. In the prison. He said we should go and plead for him. But the last time here we talked with him was better. That time he was still agitated and so on. This time, we told him, we said as things are now, we can't go and plead we have amnesty or not have amnesty. You just go on with it. Let things take their course. If the court, in the court, you are proved innocent, ok you will be acquitted. But if you are proved guilty, you will have to accept the consequence of all this."[140]

The consistent international criminal jurisprudence that has rejected amnesty for serious crimes may also have dissuaded such an argument being made by the Ongwen Defence. The absence of discussion around amnesty for Ongwen is however remarkable, given that many Prosecution and Defence witnesses who appeared to testify had themselves received amnesty. Indeed, a common topic for cross-examination were the details on a witness' amnesty certificate, or on their amnesty application form.[141] Instead, the legal emphasis is heavily focused on Ongwen's victimhood, as opposed to any apparent discrimination that he may have suffered through the non-receipt of an amnesty certificate. However, for another LRA fighter named Thomas Kwoyelo, a man of similar background and rank to Ongwen, abducted into the LRA and accused of similarly egregious crimes, the opposite is the case. The debate, both locally and in the courts, has been heavily focused on the issue of amnesty, and his eligibility for it. The following section discusses his case in detail.

4.5 The Case of Thomas Kwoyelo

Like Dominic Ongwen and thousands of others, in 1987 Thomas Kwoyelo was abducted by the LRA as a young boy as he walked to school at the age of 13. He gradually rose through the ranks to become a commander of significant authority.[142] In March 2009, he was captured by the Ugandan People Defence Forces in Garamba National Park, DRC, following Operation

report to any Ugandan diplomatic mission, consulate or any international organisation which has agreed with the Government of Uganda to receive such persons."

[140] Interview with Archbishop John Baptist Odama, 3 December 2018, Gulu.

[141] *See e.g.,* ICC, *Prosecutor v Ongwen,* Testimony of Witness P-252, ICC-02/04-01/15-T-89-Red2-ENG, 20 June 2017, pp.50-58.

[142] According to the DPP, at the time of his arrest Kwoyelo held the rank of Colonel. *Uganda v Thomas Kwoyelo*, Second Amended Indictment, p.26. Copy on file with author.

Lightening Thunder.[143] In June 2009, he was charged with offences under the Penal Code before Gulu Magistrate's Court.[144]

Application for Amnesty

While in detention in Luzira Prison, on 12 January 2010, Kwoyelo declared before the prison officer that he was "renouncing rebellion" and wished to apply for amnesty. The Amnesty Commission wrote to the Director of Public Prosecutions ("DPP"), stating that it "considers him as one who is qualified to benefit from the Amnesty process", and asked for the DPP's certification under ss.3-4 of the act, that Kwoyelo was not being detained for crimes unrelated to the rebellion.[145] Nathan Twinomugisha, Principal Legal Officer at the Amnesty Commission, explained to me how he tried to process Kwoyelo's amnesty application:

> "I was the person who actually went. Because I am the head of the legal department, and. My job is to visit prisons. And on my visit, I find Kwoyelo in Luzira prison. And I enquired whether he was ready to abandon rebellion, ask for forgiveness, and benefit from the amnesty process. And he said yes. So, I sent him forms and he was guided to fill the forms by the prison officials. […] And so Kwoyelo filled the form, and I thought that it was a good idea that this is a big fish that should benefit from the amnesty process. And when we received his application for amnesty saying I give up rebellion, I'm ready to abandon rebellion and benefit from the amnesty process. And so when I received that application I processed it, and one of the things we have to do is, if someone is in prison, then we have to inform the DPP, the Director of Public Prosecutions. And so, as the practice is, if someone is in prison, I wrote to the Director of Public Prosecutions. And the Director of Public Prosecutions said no, we cannot grant amnesty to Kwoyelo."[146]

The DPP did not respond to this letter, and in September 2010, preferred criminal charges against Kwoyelo before the Chief Magistrate's Court at Buganda Road, Kampala.[147] The indictment contained 12 counts of violations of the *Geneva Conventions Act 1964*, an act that domesticated and criminalized "grave breaches" of the Geneva Conventions. He was subsequently committed for trial in the ICD on an amended indictment containing 53 counts.[148] As to why Thomas Kwoyelo was singled out for prosecution, as opposed to other leading LRA figures, it is not entirely clear.[149] Nouwen opines that opportunism, rather than law or policy,

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[143] *Daily Monitor*, 'UPDF captures LRA chief', 4 March 2009.

[144] *New Vision*, 'LRA's Kwoyelo charged with kidnap', 4 June 2009.

[145] Anna Macdonald & Holly Porter, 'The Trial of Thomas Kwoyelo: Opportunity or Spectre? Reflections from the Ground on the First LRA Prosecution', *Africa,* Vol. 86, Issue 4 (2016) 698-722 at 704.

[146] Interview with Nathan Twinomugisha, 14 December 2018, Kampala.

[147] *New Vision,* 'Former LRA commander sent to war court', 6 September 2010.

[148] *New Vision,* 'LRA commander charged with 53 counts', 11 July 2011.

[149] One sub-narrative that exists among local views of the case is that Thomas Kwoyelo is being prosecuted

prompted the prosecution of Kwoyelo.[150] She notes that the decision to prosecute Kwoyelo came at a time when Uganda was hosting the ICC Review Conference in 2010, and the ICD was being put forward as an example of complementarity in action. It needed a case to show the international community that it was a viable institution, in a society that was committed to implementing localized justice.[151]

The Charges Against Kwoyelo

It is worth briefly describing the nature of the criminality that Kwoyelo is alleged to have committed, as it lays the context for addressing the moral and legal question of whether such acts qualify for amnesty at all. The charges against Kwoyelo mainly relate to numerous attacks occurring between 1993-1996 and 2004-2005, with most of the conduct occurring in and around Pabbo sub-county in northern Uganda, which is in fact Thomas Kwoyelo's home area.[152] The indictment alleges, *inter alia*, that during attacks carried out by LRA forces under Kwoyelo's command, civilians were beaten, tortured, forced to carry away looted goods, and many of them murdered. At least one murder is alleged to have been personally committed by Kwoyelo, when he shot a fleeing civilian. Following another attack, it is alleged that Kwoyelo led a group of abductees to the Kilak hills, where he ordered that the younger abductees beat the older abductees to death with clubs and axes.[153] The indictment was later amended to include sexual and gender-based charges, including the allegation that Kwoyelo raped and tortured two abducted women across an eight-year period between 1996-2005.[154]

Local views in northern Uganda on the moral propriety of Kwoyelo's prosecution can vary significantly. Generally, a person's opinion is shaped and influenced by his or her role in the community, and their own experience of LRA criminality. A dominant narrative, one regularly advanced by ARLPI and selected community leaders, is that Kwoyelo, like thousands of others, was abducted as a child into the LRA and therefore lacked moral agency. Because

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because he made a previously reneged on a deal made with the government to surrender in exchange for money. Kwoyelo reportedly kept the money, yet remained in the LRA. *See* Macdonald & Porter, *supra* note 145 at 701, footnote 10.

[150] *See* Sarah Nouwen, *Complementarity in the Line of Fire, The Catalysing Effects of the International Criminal Court in Uganda and Sudan* (Cambridge University Press, 2013), p.221.

[151] *Id*.

[152] *Avocats Sans Frontières*, 'Community Perceptions on the Thomas Kwoyelo Trial and the Need for Community Outreach', (May 2016), p.1.

[153] Second Amended Indictment, p.30.

[154] Third Amended Indictment, counts 84-93. Copy on file with author.

he is both a perpetrator and a victim, he should be forgiven and granted amnesty.[155] Conversely, victims of Kwoyelo's alleged crimes are extremely thirsty for justice. Research conducted in the Pabbo area reveals divergent views on the trial. At one end of the opinion spectrum is a deep contempt for Kwoyelo, with one local leader in Pabbo going as far to say victims "are beyond reconciliation."[156] Some argue that traditional reconciliation processes such as *mato oput*[157] are simply inadequate to deal with acts that were 'outside the moral Acholi jurisdiction of responses to wrongdoing'.[158] Yet, other research points to significant local opinion in Pabbo that Kwoyelo should be granted amnesty just like other former LRA combatants, and be allowed to undergo traditional reconciliation mechanisms.[159]

Litigating Amnesty

During the opening of the case in July 2011 in Gulu, Kwoyelo pleaded not guilty, and proceedings were stayed to allow his counsel to petition the Constitutional Court on the issue of amnesty. There, his lawyers argued that he qualified for amnesty and was being discriminated against, as other LRA commanders of similar rank had been granted amnesty, depriving him of equal protection of the law guaranteed under the Ugandan Constitution.[160] During the oral hearing, the DPP argued, quite remarkably, that the *Amnesty Act* was unconstitutional, and was in contravention of Uganda's international obligations, in that it effectively prevented the prosecution of Kwoyelo. That the state would boldly argue for the invalidity of an act that had granted amnesty to thousands of people was surprising to many but was recognition of the potential legal deficiency of the amnesty regime.[161] In September 2011, the Constitutional Court ruled in Kwoyelo's favour, holding that the act was indeed constitutional, and did not contravene Uganda's international treaty obligations. By not being granted amnesty like thousands of other rebels, the Court held that Kwoyelo had been discriminated against, as the DPP had "failed to furnish any reasonable or objective explanation

[155] Bishop John Baptist Odama of ARLPI has previously said: "As religious leaders, we believe in restorative justice, not punitive. We believe in restoring broken relationships rather than punishing the offenders." *IRIN*, 'Amnesty or Prosecution for War Criminals? 17 May 2012.

[156] Porter & Macdonald, *supra* note 145 at 708.

[157] *See* Liu Institute Report, *supra* note 126.

[158] Porter & Macdonald, *supra* note 145 at 708-710.

[159] Gawronski & Owor Ogora, *supra* note 84, pp.26-27.

[160] Article 21(1) of the Ugandan Constitution states: "All persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal protection of the law."

[161] *See* Nouwen, *supra* note 126, pp.218-219.

why the applicant should be denied equal treatment under the Amnesty Act."[162] The Constitutional Court's ruling to cease the prosecution was not acted upon, despite the High Court later issuing an order of mandamus to release him.[163] The DPP appealed to the Supreme Court, while Kwoyelo remained in Luzira prison.

At the Supreme Court, the DPP essentially re-argued the two points previously advanced at the Constitutional Court. Counsel for the state argued that the act essentially granted amnesty for all war crimes committed by rebels, thus excluding all crimes, including grave breaches, from being prosecuted. This blanket amnesty, it was argued, directly infringed upon the DPP's constitutional powers to institute criminal proceedings.[164] In response, Kwoyelo's lawyers submitted that there are no uniform standards in terms of international state practice that prohibits amnesty, which may be acceptable in times of transition. They cited the landmark *AZAPO* case from South Africa, which permitted amnesty in the post-apartheid context.[165] They also referred to article 6(5) of Additional Protocol II to the Geneva Convention, relied upon in *AZAPO*, which provides that "at the end of hostilities, authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict."[166]

Kwoyelo's lawyers also noted that the 2006 amendment to the *Amnesty Act*, which allowed the Minister to declare ineligible certain persons from receiving amnesty, had not been utilised in Kwoyelo's case. As they did before the Constitutional Court, Kwoyelo's lawyers submitted that he was a victim of discrimination, in that other more senior members of the LRA, including named figures such as Sam Kolo and Kenneth Banya, had received amnesty and were free men. Moreover, counsel for Kwoyelo placed great emphasis on the broader policy motivations behind the passing of the *Amnesty Act*, which was the resolution of a protracted civil war, noting directive 3 of the Constitution which states that "all organs of state and people shall work towards the promotion of national unity, peace and stability, including the establishing of institutions and procedures for the resolution of conflicts." In addition to the legal arguments, Kwoyelo's lawyers also made a moral one that echoed the pleas made by

[162] *Thomas Kwoyelo alias Latoni v. Uganda* (Constitutional Petition No. 36 of 2011(reference)) [2011] UGCC 10, 22 September 2011.

[163] *Kwoyelo Thomas alias Latoni v Attorney General* (High Court of Uganda, Civil Division) HCT-00-CV-MC-0162-2011, 25 January 2012.

[164] See article 120(3) of the Ugandan constitution.

[165] Constitutional Court of South Africa, *The Azanian Peoples Organization et al v The President of South Africa et al*, Case 17/96, 25 July 1996, *See* section 2.4.2 of this thesis for discussion of the *AZAPO* case.

[166] *See* section 2.5.1 of this thesis for an in-depth analysis of the scope of article 6(5) of Additional Protocol II.

advocates of amnesty fifteen years earlier. They argued that denying an abductee amnesty would be 'condemning many souls because they were not responsible for the becoming rebels of the LRA, which is the mischief the *Amnesty Act* intended to cure.'[167]

4.6 Judging Amnesty

In April 2015, the Supreme Court issued a unanimous judgement denying amnesty to Thomas Kwoyelo. Chief Justice Katureebe, previously the Attorney General at the time of the passing of the *Amnesty Act*,[168] issued the Lead Judgement.[169]

4.6.1 The Role of the DPP

With regard to the DPP's powers to prosecute, the Chief Justice held that they were not infringed upon by the act, noting that s.3(3) specifically provided that the DPP must first satisfy itself that a person in custody indeed qualifies for amnesty.[170] Chief Justice Katureebe held that in carrying out his prosecutorial duties, the DPP must necessarily examine all relevant national laws and international treaty obligations, including the *Geneva Conventions Act 1964,* which domestically criminalises grave breaches of those conventions*,* to satisfy himself that the applicant is indeed eligible for amnesty.[171] While this is a textual and persuasive interpretation that lays the foundation for the denial of amnesty that follows, it makes a sweeping assumption that does not reflect the historical reality of amnesty's implementation on the ground. Despite the statutory role it was granted, there is no significant evidence that the DPP played a major oversight role in the amnesty regime, nor is there evidence that the DPP engaged in any meaningful or systematic appraisal of the conduct of LRA rebels who were detained, or who

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[167] These submissions were summarised in the Supreme Court Judgement: *Uganda v Thomas Kwoyelo* (Constitutional Appeal No 01 of 2012) [2015] UGSC 5, 8 April 2015 (Hereafter referred to as the "*Kwoyelo* Judgement"), pp.18-19.

[168] It is notable that at no stage of the proceedings did any parties raise the issue that Chief Justice Katureebe may have had a conflict of interest in deciding the case, having previously served as Attorney General during the passing of the *Amnesty Act*, which he was now required to interpret and rule upon.

[169] Judge Kisaakye also issued a limited separate opinion, where he agreed with the conclusions of Chief Justice Katurebe, but sought to expand on the issue of whether Kwoyelo was discriminated against by not receiving equal treatment under the law.

[170] Section 3(3) of the *Amnesty Act* states:

A reporter to whom subsection (2) applies shall not be released from custody until the Director of Public Prosecutions has certified that he or she is satisfied that—
(a) the person falls within the provisions of section 3; and
(b) he or she is not charged or detained to be prosecuted for any offence not falling under section 3.

[171] *Kwoyelo* Judgement, *supra* note 167, p.27.

came out of the bush to apply for amnesty. This was the day-to day function of the Amnesty Commission. Rather, to the contrary, available information shows that other senior LRA figures that were detained, and in respect of whom a prosecution may well have been anticipated given their seniority, were granted amnesty, some even after Kwoyelo's case began.[172] Others joined the ranks of the UPDF,[173] some of them under coercion,[174] and participated in anti-LRA military operations in the eastern DRC and Central African Republic.

4.6.2 Scope of Amnesty

On the crucial question of the scope of the amnesty provided for by the *Amnesty Act*, Chief Justice Katureebe began his analysis of this pivotal question by referencing the long title of the Act, which outlines its purpose: "An Act to provide amnesty for Ugandans involved in acts of war like nature in various parts of the Country." In the view of the Chief Justice, the target of the Act was "first and foremost people who have participated in acts of war and rebellion. Other matters are only incidental to that primary purpose."[175] Chief Justice Katureebe recalled the wording of section 3, the operative provision that prohibited prosecution "for participation in the war or rebellion or for any crime committed in the furtherance of armed rebellion." He held that the wording of the act was carefully chosen, in that the acts must be "in furtherance of war or rebellion" in order to qualify for amnesty. He further held that the drafters of the law could have easily stated that *any* crimes could have been covered, but this was not the case. Noting that Thomas Kwoyelo is charged with grave breaches of the Geneva Conventions, Chief Justice Katureebe recalled the underlying motivation for codifying these laws of war, which sought:

> "[t]o lay a standard that even during the time of war or armed rebellion, there are certain acts, the sort that outraged the conscious of mankind during World War II, that must never be permitted. These were referred to as the grave breaches of the Conventions. Where they occur, states undertake, as an international obligation, to investigate, arrest, and prosecute the offenders, provided the offenders are accorded fair trial in courts of law."[176]

[172] Former high-ranking LRA commander, Caesar Acellam, who was detained at length by the UPDF following his defection, participated in a public cleansing ceremony in Gulu in March 2015 alongside Amnesty Commission officials, and where his receipt of amnesty was communicated to the public. *See* Uganda Radio Network, 'Top LRA Commander, Returnees Undergo Ritual Cleansing, 9 March 2015.

[173] *IRIN News*, '300 former rebels join national army', 14 July 2004.

[174] Dust Has Not Yet Settled Report, *supra* note 58, p.44.

[175] *Kwoyelo* Judgement, *supra* note 167, p.28.

[176] *Id.*, p.37.

Drawing on article 147 of the Fourth Geneva Convention, which enumerates the acts prohibited against protected persons, Chief Justice Katureebe placed heavy reliance on the words "not justified by military necessity and carried out unlawfully and wantonly."[177] It is these words, he ruled, that the Ugandan legislature must have been aware of when passing the *Amnesty Act*.[178] In what is the decisive passage of the judgment, Chief Justice Katureebe explains why grave breaches cannot be amnestied:

> "[i]t is difficult to see how […] the wilful killing of innocent civilians in their homes when there is no military necessity can be regarded as in furtherance of the war or rebellion […] The Court cannot ignore reports, some well documented, of terrible crimes planned and committed by some people in Northern Uganda against civilians who had nothing to do with government. Those acts, in my view, do not qualify for the grant of amnesty under the Amnesty Act."[179]

In support of this position, the judgement to refers to limited international case law on the non-applicability of amnesties for serious human rights violations. While noting with approval the landmark case of *Barrios Altos*,[180] there was no reference to other more relevant jurisprudence to the case at hand, such as the South African *AZAPO* case, for example. Of course, case law from other courts and tribunals are not binding in the Ugandan domestic legal order and are of persuasive authority only. Yet, Ugandan judiciary have in the past frequently referred to international sources of law when interpreting its own laws and constitutional obligations.[181] Chief Justice Katureebe also refers to the codification of war crimes in article 8 of the Rome Statute, as a further basis to conclude that such acts could not be considered "in furtherance of war or rebellion."[182]

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[177] *Id.*, pp.40-41. Article 147 of the Fourth Geneva Convention states: "Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly."

[178] *Id*., p.40.

[179] *Id*., p.41.

[180] *See* section 2.5.3 of this thesis for discussion of *Barrios Altos*.

[181] *See e.g*., *Attorney General v Susan Kigula & 417 Ors*, Constitutional Appeal No. 03 of 2006, ILDC 1260 [2009], UGSC 6, 21 January 2009, where, in a case concerning the death penalty, the Supreme Court relied upon international instruments such as the Universal Declaration of Human Rights, the ICCPR, the Convention Against Torture, the African Charter on Human and Peoples' Rights, as well as caselaw from the Human Rights Committee.

[182] *Kwoyelo* Judgement, *supra* note 167, pp.42-43.

As discussed in chapter 2,[183] many scholars and policymakers argue that international law does not permit amnesty laws for the most serious crimes and instead imposes a duty on states to prosecute.[184] However, other scholars strongly dispute the customary nature of this anti-amnesty norm. Mallinder and McEvoy are of the view that the absolute duties to prosecute grave breaches, genocide and torture, are not applicable to many modern conflicts, the majority of which are internal armed conflicts.[185] In particular, Mallinder's amnesty database suggests that despite the purported emergence of an "anti-amnesty" norm, examination of state practice reveals that states continue to enact amnesty laws even for the most serious crimes, thus challenging the absolute prohibition of amnesties in internal conflicts.[186] Pointing to the experiences of countries such as Uganda, Mallinder and McEvoy argue that amnesties can help to foster the rebuilding of relationships shattered by mass violence.[187] However, despite this scrutiny on the legal propriety of domestic amnesties, the Supreme Court in *Kwoyelo* did not entertain the possibility that gross violations of human rights could be amnestied in the Ugandan context. Chief Justice Katureebe readily excluded "grave breaches" of the Geneva Conventions from the realm of *Amnesty Act*. The judgement thus adheres to the emerging anti-amnesty jurisprudential norm discussed above – that states should not grant amnesty for international crimes.

In arriving at this conclusion, the reasoning employed gives rise to a number of legal and teleological problems, which are examined in turn below. But more fundamentally, on a human level, I argue that the judgement ultimately re-shapes the meaning of amnesty as heretofore understood by the people of northern Uganda.

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[183] *See* section 2.6 of this thesis.

[184] *See e.g.,* Diane Orentlicher, 'Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime,' *Yale Law Journal* Vol. 100, Issue 8 (1991); United Nations, *Rule-of-Law Tools for Post-Conflict States – Amnesties* (2009), p.45; Guidance Note of the UNSG, *supra* note 4, p.4: "[t]he UN will neither establish nor provide assistance to any tribunal that allows for capital punishment, nor endorse provisions in peace agreements that include amnesties for genocide, war crimes, crimes against humanity, and gross violations of human rights."

[185] Kieran McEvoy & Louise Mallinder, 'Amnesties in Transition: Punishment, Restoration, and the Governance of Mercy', *Journal of Law and Society*, Vol. 39, Issue 3 (2012) 410-440 at 418. *See also* Charles Trumbull, 'Giving Amnesties a Second Chance', *Berkeley Journal of International Law*, Vol. 25, Issue 2 (2007) 283-345.

[186] *See further* the Amnesties, Conflict, and Peace Agreement Database created by Prof. Louise Mallinder here: https://www.peaceagreements.org/amnesties/ (accessed 19 January 2021). *See also* Louise Mallinder, *Amnesty, Human Rights and Political Transitions: Bridging the Peace and Justice Divide* (Hart Publishing, 2008), pp.118-122, which labels the types of crimes in the Amnesty Law Database into four categories: crimes under international law; political crimes; crimes against civilians; and economic crimes.

[187] McEvoy & Mallinder, *supra* note 185 at 419: "[s]ome states continue to support peace negotiations in which amnesties are agreed […] such as the Ugandan amnesty which benefits Lord's Resistance Army (LRA) members. These trends in state practice have encouraged several commentators to question the prohibition of amnesties for crimes against humanity and war crimes in internal conflicts under customary international law." (internal citations omitted)

4.6.3 The Meaning of "Rebellion"

Firstly, the judge imposes a clear binary separation between "acts of rebellion" and "acts of grave criminality", with the latter being excluded from the scope of amnesty.[188] However, in order to be classified as war crimes, the latter *must* be connected to the former. This is the so-called "nexus requirement", an undisputed contextual element of war crimes that the alleged act must be connected to the armed conflict. The nexus need not be a causal link, but the armed conflict must have played a substantial part in the perpetrator's ability to commit the crime, his decision to commit it, the manner in which it was committed or the purpose for which it was committed.[189] While Chief Justice Katureebe emphasizes that grave breaches can never "be in furtherance of rebellion", this overlooks the legal reality that those same breaches must be related to it. This interpretation stands in contrast to jurisprudence that has considered criminal actions to form part of the *modus operandi* of rebellions,[190] while literature has described the crime of rape as a "weapon of war".[191] In addition, whether a given act is in furtherance of an objective, or just simply related to it, is an inherently factual assessment. In this sense, Thomas Kwoyelo's presumption of innocence appears to have been irreparably encroached upon, as factual assessment of conduct is one usually reserved for the trial judge. The denial of amnesty to Kwoyelo creates the perception that such an assessment has already been negatively made against him.

4.6.4 Classifying the Conflict

Secondly, there is a crucial jurisdictional problem that the judgement does not engage with, and that is the nature of the armed conflict and its relationship with the supporting legislation. Chief Justice Katureebe initially states that the conflict in northern Uganda was largely "not of an international character", but then says there were occasions "when it spread out to other neighbouring countries, e.g., Sudan and Democratic Republic of Congo thereby taking on an international character."[192] However, the mere fact that conflict takes place across borders does not internationalize its legal character. It is well established in international

[188] *Kwoyelo* Judgement, *supra* note 167, p.41.

[189] *See e.g.,* ICTY, *Prosecutor v Stakić,* Appeals Judgement, 22 March 2006, para.342; ICC, *Prosecutor v Lubanga*, 'Decision on the Confirmation of Charges', 29 January 2007 (Hereafter referred to as "*Lubanga* Confirmation Decision"), para.287

[190] ICC, *Prosecutor v Bemba*, Trial Judgement, 21 March 2016, para.676: "First, the acts of rape and murder were committed consistent with evidence of a *modus operandi* employed throughout the 2002-2003 CAR Operation: after General Bozizé's rebels had departed an area, MLC soldiers searched 'house-to-house' for remaining rebels, raping civilians, pillaging their belongings, and occasionally killing those who resisted."

[191] *See e.g.,* Anna Maedl, 'Rape as a Weapon of War in the Eastern DRC? The Victims' Perspective', *Human Rights Quarterly*, Vol. 33, Issue 1 (2011) 128–147.

[192] *Kwoyelo* Judgement, *supra* note 167, p.40.

criminal jurisprudence that an international armed conflict exists when two states engage in armed conflict, or in the event of total or partial occupation of the territory of another state.[193] Conflict between a state and non-governmental armed group will only be "internationalized" in the event of "overall control" being exerted over the armed group.[194] "Overall control" may be deemed to exist when a State has a role in organising, coordinating or planning the military actions of the military group, in addition to financing, training and equipping or providing operational support to that group.[195] Available information in the public domain points to significant material support from the Government of Sudan to the LRA in terms of weapons, uniforms, training and supplies, but it does not indicate that this support was ever elevated to the level of "overall control".[196] The conflict can thus be said to be *non*-international in nature. Indeed, this was the conclusion of Pre-Trial Chamber II in its Decision on the Confirmation of Charges in the *Ongwen* case, the charged period of which overlaps with the *Kwoyelo* case.[197] However, in its second amended indictment against Thomas Kwoyelo, the DPP expressly pleaded to the contrary.[198]

Classifying the conflict as non-international has significant legal implications, as all counts on his first indictment charged him only with "grave breaches" under the *Geneva Conventions Act 1964.* International criminal jurisprudence is clear, despite intense academic debate around the issue,[199] that the grave breaches regime applies only to *international* armed

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[193] ICTY, *Prosecutor v Tadić,* Appeals Judgement, 15 July 1999 (Hereafter referred to as "*Tadić* Appeal Judgement"), para.84; *Lubanga* Confirmation Decision, *supra* note 189, para.209.

[194] *Tadić* Appeal Judgement, *Id*., para.137; ICC, *Prosecutor v Lubanga*, Trial Judgement, 14 March 2012 (Hereafter referred to as "*Lubanga* Trial Judgement"), para.541. This is in contrast to the "effective control" test in the jurisprudence of the International Court of Justice. *See* Antonio Cassese, 'The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia', *European Journal of International Law* Vol. 18, Issue 4 (2007) 649-668.

[195] *Lubanga* Trial Judgement, *Id*., para.541.

[196] On the nature of the relationship between the LRA and the Government of Sudan, *see* Mareike Schomerus, 'The Lord's Resistance Army in Sudan: A History and Overview' (Small Arms Survey, September 2007), pp.24-27.

[197] *Ongwen* Confirmation Decision, *supra* note 61, para.61. The charges in the *Ongwen* case relate to the temporal period 1 July 2002 – 31 December 2005, while the charges the *Kwoyelo* related to dates between 1994 – 2005.

[198] Paragraph 1 of the second amended indictment states: "The offences contained and charged in this indictment were committed in the context of an *international armed conflict* that existed in Northern Uganda, Southern Sudan and North Eastern Democratic Republic of Congo between the Lord's Resistance Army rebels (hereinafter referred to as the LRA rebels) w*ith the support of and under the control of the government of Sudan*, fighting against the government of the Republic of Uganda as by law established, between 1987 and 2008." (emphasis added)

[199] *See* Lindsay Moir, 'Grave Breaches and Internal Armed Conflict, *Journal of International Criminal Justice* Vol. 7, Issue 4 (2009) 763-787.

conflicts.[200] Chief Justice Katureebe noted that while Common Article 3 of the conventions prohibits acts committed during a non-international armed conflict, he did not acknowledge the fact that the 1964 Act *did not criminalize* Common Article 3 violations – only grave breaches. As such, much of the first indictment was legally defective – because the absence of an international armed conflict means the grave breaches regime cannot apply, resulting in defective charges – thus, potentially clearing the way (in the absence of any other charges) for the unfettered granting of amnesty. By not recognising the inapplicability of the grave breaches regime to the *Kwoyelo* case, Chief Justice Katureebe's reasoning falls into error.

This lacuna appeared to have been recognized by the DPP, who subsequently filed a second amended indictment that charged Kwoyelo, in the alternative to each grave breach violation, with factually similar corresponding violations of the *Penal Code Act*. For example, the grave breach of wilful killing was charged in the alternative as murder; the taking of hostages was charged in the alternative as kidnap with intent to murder; and extensive destruction of property was charged as robbery with aggravation.[201] On first glance, this might appear to be just a mere technical buttressing of the indictment, but the addition of these alternative charges has a much deeper impact: it severely undermines the mandate of the ICD as a legal institution in post-conflict Uganda. Because if soundest legal framework for prosecuting offences that occurred in the civil war is simply the *Penal Code Act*, then one might question the very need to establish the ICD in the first place. If the DPP is restricted to charging only regular criminal offences, then the ICD is left redundant, at least in terms of exercising its intended jurisdiction and core transitional mandate – to prosecute *international crimes* in the aftermath of the civil war.[202] This is not to say, however, that the ICD is rendered an inactive judicial body. On the contrary, the ICD has recently concluded a complex, multi-accused terrorism case in relation to the 2010 bombings in Kampala.[203] However, this case could equally have been heard in the regular High Court. In other words, the ICD has yet to begin doing the work that was it was primarily created for.

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[200] ICTY, *Prosecutor v Tadić*, 'Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction', Appeals Chamber, 2 October 1995, para.80.

[201] Second Amended Indictment, counts 1-3.

[202] Section 6 of the 2011 Practice Directions of the ICD states that its mandate is to deal with war crimes, crimes against humanity, genocide, terrorism, human trafficking and other international crimes. It should be noted that in terms of complementarity, the ICC Appeals Chamber has clarified that there is no requirement in the Statute for a crime to be prosecuted as an international crime domestically. Rather, what is required is that the crimes prosecuted at the domestic level cover "substantially the same conduct" as those charged by the ICC. *See* ICC, *Prosecutor v Al-Senussi*, 'Judgement on the Appeal of Mr Abdullah AL-Senussi against the Decision of Pre-Trial Chamber I of 11 October 2013 entitled 'Decision on the admissibility of the case against Abdullah Al-Senussi'', Appeals Chamber, 24 July 2014, para.119.

[203] *Uganda v Hussein Hassan Agade & 12 Ors* (Criminal Session Case No. 0001 OF 2010) [2016] UGHC-ICD 1 (26 May 2016). The defendants were charged with offences under the *Anti-Terrorism Act 2002*, and the *Penal Code Act 1950*.

The legal concern over the legal viability of the "grave breaches" charges given the lack of any international armed conflict recently led to the DPP changing its position when it filed a radically transformed third amended indictment against Kwoyelo in January 2017. It now pleads the existence of a *non*-international armed conflict, and has dropped all grave breaches charges in the indictment. The DPP is now no longer relying on the *Geneva Conventions Act 1964*, instead charging Kwoyelo with Penal Code offences, and notably, violations of Common Article 3 of the Geneva Conventions and crimes against humanity.[204] However, this new charging regime does not improve the legal position of the DPP, because as noted above, the *Geneva Conventions Act 1964* - does not criminalize violations of Common Article 3 and has been dropped from the indictment.[205] There presently exists no statute in Uganda that penalizes Common Article 3 violations, with the DPP instead pleading these charges simply as "violations of customary international law".[206] For the ICD to proceed with a trial in the absence of an underlying statutory framework for the alleged customary international offences arguably violates the principle of legality.[207] In its written pre-trial submissions, the DPP boldly argues that customary international law can be directly applicable in the Ugandan legal order, even without any incorporating statute, but cites to extremely limited state practice and jurisprudence in support of this position.[208] Despite these potential defects, the charges were nevertheless confirmed by the Pre-Trial Judge, Justice Susan Okalany,[209] and Kwoyelo's trial commenced in September 2018.[210]

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[204] Third Amended Indictment; *New Vision*, 'Kwoyelo Faces Fresh Charges over LRA', 24 February 2017.

[205] Moreover, scholars note that this article does not contain a duty to prosecute, thus potentially strengthening an argument for the potential applicability of a lawful amnesty for such violations. *See* McEvoy & Mallinder, *supra* note 185 at 418: "The treaty law governing war crimes committed in internal conflicts, namely, Common Article 3 to the Geneva Conventions and Additional Protocol II, creates minimum standards of protection for civilians but contains no duty to prosecute."

[206] Counts 1 and 2 of the Third Amended Indictment simply charge murder as a crime against humanity and violation of Common Article 3 "pursuant to international customary law."

[207] There are many examples of state practice applying universal jurisdiction of serious violations of international humanitarian law, but usually doing so having domesticated such violations into their criminal codes *prior* to any commencement of prosecution. Uganda has not done so with respect to Common Article 3 of the Geneva Conventions. With respect to crimes against humanity, it has only done so in the ICC Act 2010, which, as discussed in section 4.6.5 below, is not being utilised in the *Kwoyelo* case.

[208] DPP Written Submissions, 23 April 2017. Copy on file with author. Among the cases cited by the DPP include one from the European Court of Human Rights: Judgment, *Kononov v Latvia*, Application no. 36376/04, Grand Chamber, 17 May 2010. Paragraph 208 of this judgement states: "In particular, where national law did not provide for the specific characteristics of a war crime, the domestic court could rely on international law as a basis for its reasoning, without infringing the principles of *nullum crimen* and *nulla poena sine lege*."

[209] *International Justice Monitor*, 'Ten Years Later, Ugandan Court Finally Confirms 93 Charges Against Thomas Kwoyelo', 4 September 2018.

[210] *International Justice Monitor*, 'Kwoyelo Trial Commences in Uganda', 25 September 2018.

4.6.5 An Alternative Approach – the ICC Act 2010

Yet this charging quagmire could all have been avoided, as there is other potential legislation with which to firmly ground a prosecution – the *International Criminal Court Act 2010* ("ICC Act"), which domesticated the Rome Statute into Ugandan law. On a strictly positivist interpretation, the ICC Act can only be used to prosecute conduct occurring *after* its enactment in May 2010, thus excluding the likelihood that would ever be used to prosecute any crimes related to the civil war, which ended in 2006. The Ugandan Constitution expressly prohibits the prosecution of conduct that was not criminalized at the time of the offence.[211] However, given that the Rome Statute came into force in July 2002 and that Uganda is a state party since that time, one could make the argument that the ICC Act merely codified customary international law that Uganda had already submitted jurisdiction to in 2002, thus potentially permitting the application of the ICC Act for domestically prosecuting conduct that occurred from July 2002 onwards.[212] Although most of the conduct that Kwoyelo is charged with occurred in the mid-1990s, many charged offences also occurred after 2002. Nevertheless, it would be hard to argue that customary international law was radically different between 1994 and 2002.

Reference may be made to article 15(2) of the ICCPR, to which Uganda is a state party, which states: "Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations." In interpreting the principle of *nullum crimen sine lege*, international criminal jurisprudence holds that it is critical to determine whether the underlying conduct at the time of its commission was punishable. It is the emphasis on conduct, rather than on the specific description of the offence in substantive criminal law, which is of primary relevance. In other words, it must be "foreseeable and accessible to a possible perpetrator that his concrete conduct was punishable."[213] According to Wrange, this interpretation of the ICC Act would not violate Uganda's constitutional prohibition on retroactivity, as the focus is on the established criminal nature of the "act", rather

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[211] The prohibition against retroactive jurisdiction is contained in Uganda's constitution. Article 28(7) of states: "No person shall be charged with or convicted of a criminal offence which is founded on an act or omission that did not at the time it took place constitute a criminal offence."

[212] S.2 of the ICC Act 2010 states: "The purpose of this Act is— (a) to give the force of law in Uganda, to the Statute."

[213] SCSL, *Prosecutor v Norman*, 'Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), *Norman,* Appeals Chamber, 31 May 2004, para.25; ICTY, *Prosecutor v Hadžihasanović,* 'Decision on Joint Challenge to Jurisdiction', Appeals Chamber, 12 November 2002, para.62.

than the "offence".[214] That each "international" crime with which Kwoyelo is charged is also alternatively charged with a factually comparable penal code provision, gives further support to this interpretation. However, Nouwen argues that article 15(2) of the ICCPR does not fulfil the constitutional requirements of a pre-existing criminal offence.[215] In her view, in a state with a dualist approach to the international legal order, the term "a criminal offence in the constitutional provision must be read as a criminal offence under Ugandan law, and not foreign or international law."[216]

It should nonetheless also be recalled that the ad hoc tribunals prosecuted crimes using statutes that were created a number of years after much of the alleged conduct had actually been committed.[217] As the time of the ICTY's conception in 1993, the Secretary General noted that the ICTY statute did not purport to create new crimes, but rather the tribunal was to apply existing rules of international humanitarian law that was already part of customary international law.[218] The principle of *nullum crimen sine lege* was thus not violated. An application of the ICC Act would be based on similar reasoning, and in this author's view, correctly so.

Despite the ICC Act being of potential legal utility, at the time of writing, the ICC Act is not being considered to prosecute Thomas Kwoyelo. Therefore, should the non-statutory, "customary international law" charges later fall away (for example, on appeal) for want of an underlying legislative framework as foreshadowed above, and Kwoyelo ends up facing only Penal Code offences, the following question arises: could such "ordinary" offences continue to be properly defined as "grave crimes" of international concern? If the answer is no, and the "gravity" element is no longer *legally* present, must amnesty then be permitted? Indeed, this appears to have been the express view of prosecutors in the *Kwoyelo* case.[219]

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[214] Pål Wrange, 'The Agreement and the Annexure on Accountability and Reconciliation between the Government of Uganda and the Lord's Resistance Army/Movement – A Legal and Pragmatic Commentary', *Uganda Living Law Journal,* Vol. 6 (2008) 42-128 at 62.

[215] Nouwen, *supra* note 150, p.203.

[216] *Id*.

[217] *See* UNSC Res. 827, UN Doc. S/RES/827, 25 May 1993, establishing the ICTY; and UNSC Res. 855, UN Doc. S/RES/855, 8 November 1994, establishing the ICTR.

[218] United Nations, Report of the Secretary General Pursuant to Paragraph 2 of Security Council Resolution 808, UN Doc. S/25704, 3 May 1993, paras.29 & 34.

[219] One Ugandan prosecutor interviewed by Nouwen in 2010 stated: "Kwoyelo was the first to be charged under the Geneva Conventions. If he had been charged under the laws of Uganda alone, he would have qualified for amnesty." *See* Nouwen, *supra* note 150, p.217.

4.6.6 Re-Defining Amnesty

This brings us back to the crucial issue of defining what conduct falls under the *Amnesty Act*, and what does not. While Chief Justice Katurebe excluded grave breaches of the Geneva Conventions from the realm of amnesty, what actions can be considered to be "in furtherance of rebellion", and therefore deserving of amnesty? Chief Justice Katureebe does not readily explain, but does give an indication later on in the judgement, when addressing Kwoyelo's separate argument of discrimination – that he was denied equal treatment under the law against because other senior LRA commanders were granted amnesty, while he was denied it. Judge Katureebe states:

> "It was very possible to actively participate in the war and rebellion by attacking Government forces, personnel and installations but without ever carrying out the wilful murder of innocent civilians."[220]

This crucial passage reveals the newly shaped contours of amnesty in Uganda: the *military* act of attacking government forces. In other words, the offence of treason.[221] But if it was so simple, then why did the *Amnesty Act* not just stipulate this in clear terms? Recall too that, in the division of conduct in s.3 of the act, discussed above,[222] participating in combat is the first available ground that one can claim amnesty for. Collaborating with rebels is the second, and "any other crime in furtherance of rebellion" is the third, residual category. If non-combat related crimes are not now, in fact, captured by the *Amnesty Act*, then what purpose then, is the residual category of "any other crime in furtherance of rebellion" actually serving? What offences are in fact open to amnesty under this category? The *Kwoyelo* judgement does not provide any guidance on this, and it appears to leave this assessment to the sole discretion of the DPP to decide what offences are eligible for amnesty.[223] If Chief Justice Katureebe had wanted to make clear that it was only attacks on government personnel and institutions that were being amnestied, then he had the perfect opportunity to do so when rose to speak as Attorney General during the parliamentary debate in 1999. But, he did not.[224] Had he done so,

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[220] *Kwoyelo* Judgement, *supra* note 167, p.53.

[221] S.23 of the *Penal Code Act 1950* defines the capital offence of treason as, *inter alia*, "any person who (a) levies war against the government of Uganda", and is punishable by death.

[222] *See* section 3.6 of this thesis.

[223] Chief Justice Katureebe states: "If the DPP was not satisfied that a particular crime was not committed in furtherance or in the cause of the war or rebellion, then he would, in my view, exercise his normal prosecutorial powers to charge such a person with a specific offence under a specified law in Uganda." *Kwoyelo* Judgement, *supra* note 167, p.31.

[224] To recall the then Attorney General Katureebe's contribution to the parliamentary debate when he was asked to clarify what types of act were being amnestied under the proposed Amnesty Act: "The civil actions [are] not amnestied. What is being amnestied are *crimes* that have been committed by the individuals." Hansard, Uganda Parliamentary Debates, 2 December 1999, contribution of Bart Katureebe (Attorney General).

it is likely the Act would not have passed. Moreover, if it was made explicit from the beginning that crimes against civilians were *not* being amnestied, it is likely that many rebels would have not come out of the bush. Archbishop Odama was also of this view, as he explained to me:

> "It was unconditional. Everything. It was unconditional. That was the way they communicated it, unconditional. If they had said, oh, in case you have done anything against the civilians, and so on, you would be, not many would have come out."[225]

Archbishop Odama was also critical of the Supreme Court's "retroactive" reinterpretation of the *Amnesty Act*:

> "They cannot now reason it backwards, retroactively. It cannot work like that. The law was clear, that these people who were willing to come out, and the key thing was "renounce rebellion" against the government."[226]

This restrictive interpretation was never the perceived understanding of amnesty in Uganda. It was not the understanding of the government, MPs,[227] the Amnesty Commission,[228] and certainly not for amnesty recipients and the communities in which they live. While empirical research with amnesty recipients and their associated understanding of the scope of amnesty is limited,[229] in a 2006 survey of former LRA combatants the availability of amnesty was consistently reported as one of the most important pull factors in their decision to come out of the bush, as they "believed that it would guarantee them immunity from prosecution for all their actions while in the LRA, thus helping ensure a reasonable standard of living (*i.e.* they will not be imprisoned) upon their return."[230] This view is reinforced by the fieldwork carried out for this thesis, where the majority of interviewees believed amnesty to cover all crimes committed in the bush.[231] Moreover, during the war, promises of forgiveness were also broadcasted on a daily basis on the *Dwog Cen Paco* ("Come Back Home"). Recently returned LRA combatants would speak on air and encourage those listening in the bush to return home, offering their own examples of safe return as proof that they would not be prosecuted.[232] While

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[225] Interview with Archbishop John Baptist Odama, 3 December 2018, Gulu.

[226] *Id*.

[227] *See* section 3.5 of this thesis for analysis of the parliamentary debates on the *Amnesty Act 2000*.

[228] Amnesty Commission, *An Act of Forgiveness – A Guide to the Amnesty Act 2000, 2002, & 2006 as amended* (Kampala, 2009), p.6: "A blanket amnesty is granted to any Ugandan involved in insurgency. No offences are excluded from amnesty."

[229] For previously documented local views of amnesty, *see* section 3.10 of this thesis.

[230] Conciliation Resources, *Coming Home - Understanding why commanders of the Lord's Resistance Army choose to return to a civilian life* (May 2006), p.10.

[231] *See* section 6.2.1 "Amnesty As Forgiveness".

[232] Scott Ross, 'Encouraging Rebel Demobilization by Radio in Uganda and the D.R. Congo: The Case of 'Come Home' Messaging', *African Studies Review* Vol. 59, Issue 1 (2016) 33-55.

made in good faith in an effort to end the war and encourage defections, with the clear light of the *Kwoyelo* judgment, it seems that these promises were not, in fact, accurate ones.

That amnesty was intended to forgive personal harm, in addition to rebellious conduct, was also the understanding among the affected communities. As discussed earlier,[233] there was broad recognition, not just the Acholi sub-region, but also to the west in Kasese and Arua, which witnessed rebellions by the Allied Democratic Forces and West Nile Bank Front, that many reporters had been abducted and forced to commit atrocities,[234] that amnesty was forgiving these same atrocities, which led to some in the community viewing amnesty as a "reward to perpetrators."[235] Feelings of resentment due to perceived unequal treatment and attention given to returnees over ordinary members of the community are substantial, and have not been ameliorated by any broader processes of truth-telling, perpetrator-victim dialogue or process of reparations.

4.6.7 The Impact of the *Kwoyelo* Judgement

The broader implication of this legal precedent is the *volte-face* it represents in terms of transitional justice policy in post-conflict Uganda. This has both legal and much deeper social implications. If amnesty is now restricted only to adversarial, military conduct, then it potentially leaves thousands of former combatants open to prosecution for other, non-military related conduct, even simple criminal violations of the Penal Code, not to mention the prospect of international crimes. The protective ambit of the standard amnesty certificate is now much more limited than previously believed, not just by those who received them, but ironically, also by those who issued them. Amnesty Commission staff on the ground in northern Uganda also believe that it will dissuade those remaining in the bush to come home.[236]

The probability of any widespread prosecution is extremely unlikely, however, both for political reasons[237] and resource considerations.[238] Nevertheless, this precedent removes the

[233] *See* section 3.10 "Local Views on Amnesty" of this thesis.

[234] Refugee Law Project, *Whose Justice? Perceptions of Uganda's Amnesty Act 2000: The Potential for Conflict Resolution and Long-Term Reconciliation*, Working Paper No. 15 (2005), p.6.

[235] Justice and Reconciliation Project, *Who Forgives Whom? Northern Uganda Grassroots Views on the Amnesty Act*, Policy Brief (2012), p.3.

[236] Interview with Bernard Festo, Amnesty Commission Programme Officer, 20 September 2018, Gulu.

[237] Since 1986, the ruling National Resistance Movement party has gradually increased its electoral support in the Acholi sub-region. Any move to prosecute former LRA combatants *en masse* would no doubt negatively impact upon this increased support.

[238] Like many state institutions in Uganda, the ICD and the DPP suffer from a lack of adequate resources to fulfil their statutory duties. Resource constraints has been cited as a factor in the repeated postponement of the

legal security that amnesty provided to thousands of people, many of whom committed acts of a grievous nature in a coercive environment, often on threat of death, and who returned home following repeated promises from the state that they would not be prosecuted. The potential damage to social cohesion was foreshadowed when the *Amnesty Act* temporarily expired in 2012, before it was subsequently renewed for a further two years.[239] The Committee on Defence and Internal Affairs reported its concern that the DPP was planning to prosecute LRA commanders who had received amnesty certificates, warning that this would "precipitate fear" and that the lapsing of amnesty risked "undermining social reintegration of individuals, community harmony and can create political disenchantment with the Government."[240] Indicators of this social damage caused by this denial of amnesty is evident in the fieldwork conducted for this research, where informants expressed disappointment and anxiety over the issue, feeling that their amnesty certificate had been devalued because if Kwoyelo could be prosecuted, any former rebel could.[241]

The irony for Thomas Kwoyelo is that if according to the Supreme Court, amnesty can lawfully be granted for rebellious military acts, but not criminal ones, then why did the court not affirm the grant of amnesty to him, while sanctioning prosecution for the alleged criminal conduct? Indeed, Chief Justice Katureebe deemed this possibility hypothetically feasible:

> "If a person wages war on Uganda, it is conceivable that the people of Uganda will want that person to come to an amicable settlement of their differences with the Government […] But, in my view, no person must be allowed to kill innocent men, women and children […] The person who commits such crimes may be allowed to be eligible for amnesty for the act of rebellion or waging war on Uganda but he is not, in my view, entitled to amnesty for grave crimes he may have committed."[242]

On this interpretation, Thomas Kwoyelo should have been granted an amnesty certificate for his military acts of rebellion and could still have been committed for a criminal trial. Yet, he was denied amnesty outright. In September 2018, Kwoyelo's trial finally commenced[243] in with a handful of the estimated 130 Prosecution witnesses having testified so far.[244] It continues

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commencement of Thomas Kwoyelo's trial. *See* International Centre for Transitional Justice, 'Victims in the Thomas Kwoyelo case Forced to Wait Longer For Justice', 25 July 2018.

[239] *See Statutory Instrument No. 18 of 2013, The Amnesty Act (Extension of Expiry Period) Instrument 2013*, which renewed part II of the *Amnesty Act 2000*.

[240] Report of the Committee on Defence and Internal Affairs on the Petition on the Lapsing of Part II of the Amnesty Act, 2000 (2013), p.40.

[241] *See* section 6.2.1 "Amnesty As Forgiveness" of this thesis.

[242] *Kwoyelo* Judgement, *supra* note 167, p.63.

[243] *International Justice Monitor*, 'Kwoyelo Trial Commences in Uganda', 25 September 2018.

[244] *International Justice Monitor,* 'Four Witnesses Testify in Kwoyelo Trial; Widow Gives Testimony About Husband's Death', 15 March 2020.

to suffer from resource constraints and adjournments due to Covid-19, drawing criticism from civil society that the ICD's justice is too slow, increasing the already high level of fatigue among participating victims in the case, who eagerly await the prospect of reparations that the ICD is empowered to order.[245]

4.7 Conclusion

The story of the *Ongwen* and *Kwoyelo* cases encapsulate much of the complexity of the transitional justice environment in post-conflict Uganda. Mass forgiveness through amnesty has latterly been disrupted by the prosecution of these two victim-perpetrators abducted into rebellion to become high-level perpetrators of serious crimes. Contesting views as to what should happen, between victims, between communities and between policymakers, were voiced once again in a reignited peace versus justice debate. For the Acholi, trust and the maintenance of social harmony, or *piny maber* (translated as "good surroundings"),[246] is extremely important. For decades, the Acholi felt let down by successive governments. It is arguable that the *Amnesty Act* represented the beginning of a new fabric of trust, however brittle, between a victimized population and a government that in their eyes had little credibility to implement fair justice after a conflict where the people placed as much blame on state forces for both displacing and failing to protect them, as they did on the LRA for committing such unspeakable, inhumane acts.

But the prosecutorial "turn" that began in 2004 with the intervention of the ICC undoubtedly had an initial de-stabilizing effect on the peace process, and undermined the fabric of trust that amnesty engendered in Uganda. The blanket application of amnesty – in practice for any crime no matter how serious – stood in plain contradiction to the parallel ICC accountability process. However, the dormancy of the ICC cases effectively allowed this contradiction to be forgotten, and amnesty continued to be the norm for all returning rebels. With the signing of the Agreement on Accountability and Reconciliation in 2007, there emerged a consensus that accountability was necessary, both formally and through informal, traditional methods. But the amnesty regime, which could have been amended to incorporate

[245] *International Justice Monitor,* 'Civil Society in Uganda Express Mixed Reactions Over Kwoyelo Trial as Proceedings Remain on Hold', 22 June 2020.

[246] *See* Sverker Finnström, *Living in Bad Surroundings* (Duke University Press, 2008), pp.10-11. The poet Okot p'Bitek describes *piny maber* as "when things are normal, the society thriving, facing and overcoming crises." Okot p'Bitek, *Artist the Ruler: essays on art, culture and values* (East African Educational Publishers, 1987), p.27.

such informal mechanisms and make clear who would be excluded from eligibility, continued in its original blanket form.

The *Ongwen* case, while not directly touching on the issue of amnesty, nevertheless adds tension to the reality that his prosecution is contradictory to the mass amnesty that has subsisted for victim-perpetrators like him on the ground. Despite localised opposition to his prosecution, mainly from former rebels and certain religious leaders, there has been a gradual local acceptance of the ICC process, with the approval of the Paramount Chief, Rwot Acana, being very politically significant. The *Kwoyelo* case, which directly litigated the issue of amnesty, has arguably had a corrosive effect on the legacy of amnesty. In clarifying the legal scope of amnesty in Uganda, and precluding its applicability for serious crimes in line with the emerging anti-amnesty legal norm, it nevertheless should be recognized that the *Kwoyelo* Supreme Court Judgement has the potential to undermine the sense of security that amnesty has given to returnees. For victims, however, as noted above, it is to be recalled that many felt amnesty rewarded perpetrators, with victims often referencing the re-settlement package as evidence of unequal treatment. Conversely, therefore, the *Kwoyelo* judgement may serve to improve social trust between the state and victim communities.

Ultimately, the reality is that the *Amnesty Act* led thousands of people down the path of state-sanctioned forgiveness, but the Supreme Court has brought them to a different destination. It is a place where personal harm is not in fact forgiven, only rebellion. This is the new legal reality for over 27,000 holders of amnesty certificates in Uganda. By ensuring Uganda's adherence to international legal standards, the *Kwoyelo* Judgement has re-defined its definition of amnesty, right at the end of its legislative existence.

The *Ongwen* and *Kwoyelo* cases both concern the prosecution of victim-perpetrators. The victim-perpetrator factor to the conflict was a key motivation for the utilisation of amnesty in northern Uganda. The "complexity" of this victimhood has gained increasing recognition in the literature, but less so in the legal and policy responses to armed conflict and mass atrocity. Before ascertaining the direct views of those affected by amnesty in northern Uganda as documented in my fieldwork, in chapter 5 I consider it necessary to further interrogate the concept of "complex victimhood" and situate it in the northern Ugandan context. This will better contextualise the impact assessment enquiry in chapter 6 that forms the heart of this thesis.

5 Complex Victimhood and the LRA

5.1 Introduction

One of the central debates within transitional justice discourse is how best to bring perpetrators to account, be it in the traditional prosecutorial sense,[1] or through some other form of restorative or reconciliatory measure such as a truth-telling process.[2] Core transitional debates also tend to focus on shaping the appropriate mechanism and process, with less focus on those participating. For example, it has been frequently emphasised that proposed responses must be "gender sensitive", or "locally owned."[3] The situation of children in post-conflict settings has also been the subject of much focus, and that any measures directed at them should be age-appropriate and avoid re-victimisation.[4]

Transitional justice discourse is also increasingly questioning what it means to be a "victim".[5] It remains unclear, however, what should happen when an individual, or group of persons, are simultaneously victims *and* perpetrators. The "victim-perpetrator" dilemma is complex and difficult. The discourse surrounding this dilemma in transitional settings is generally underdeveloped and, where it does exist, tends to focus almost exclusively on children, or more specifically, child soldiers.[6] Children are, of course, only one part of the human story in a post-conflict setting. Adult men and women may also fall into the victim-perpetrator category.[7] For example, older men and women may equally be conscripted in the

[1] *See e.g.,* Colleen Murphy, 'Transitional Justice, Retributive Justice and Accountability for Wrongdoing', in Claudio Corradetti, Nir Eiksikovits & Jack Volpe Rotondi (Eds) *Theorizing Transitional Justice* (Routledge, 2016), pp.59-70.

[2] Matiangai Sirleaf, 'Beyond truth and punishment in transitional justice', *Virginia Journal of International Law,* Vol. 54 (2013) 223-294; Kerry Clamp & Jonathan Doak, 'More than words: Restorative justice concepts in transitional justice settings', *International Criminal Law Review,* Vol. 12, Issue 3 (2012) 339-360.

[3] United Nations, Report of the Secretary-General, *The rule of law and transitional justice in conflict and post-conflict societies*, UN Doc. S/2004/616, 23 August 2004, paras.17 & 35.

[4] *Id*., para.36.

[5] Kieran McEvoy & Kirsten McConnachie, 'Victims and Transitional Justice: Voice, Agency and Blame', *Social & Legal Studies,* Vol. 22, Issue 4 (2013) 489–513; Chandra Lekha Sriram, Jemima García-Godos, Johanna Herman & Olga Martin-Ortega (Eds), *Transitional Justice and Peacebuilding on the Ground, Victims and Ex-Combatants* (Routledge, 2013).

[6] *See generally* Myriam Denov, *Child Soldiers, Sierra Leone's Revolutionary United Front* (Cambridge University Press, 2010); Mark Drumbl, *Reimagining Child Soldiers in International Law and Policy* (Oxford University Press, 2012).

[7] On adult male victim-perpetrators in World War II, *see* Mark Drumbl, 'Victims who victimise', *London Review of International Law,* Vol. 4, Issue 2 (2016) 217-246. On adult female victim-perpetrators in Sierra Leone, *see* Chris Coulter, *Bush Wives and Girl Soldiers, Women's Lives Through War and Peace in Sierra Leone* (Cornell University Press, 2011).

midst of conflict, victimised, and go on to commit crimes. Victimised children may likewise grow into adult perpetrators, as the case of LRA commander, Dominic Ongwen, exemplifies.[8]

While the victim-perpetrator is not a dilemma restricted by age, it has been predominantly portrayed as a juvenile problem. This incongruity is nevertheless acknowledged here, because given the nature of the northern Ugandan conflict, amnesty was seen as the morally appropriate response to reintegrate thousands of abducted children and adolescents. Therefore, this chapter will consequently focus on the juvenile "victim-perpetrator", as opposed to older forms. Before traversing the literature in this area, it is important to also recall that the victim-perpetrator phenomenon is not unique to conflict settings, but is a common feature of modern societies. Indeed, the association between victimisation and offending has long been documented by the criminology and sociology fields – what is referred to as the "victim-offender overlap".[9] There is a rich body of empirical work that has documented the links between victimisation and subsequent offending behaviour. For example, research has found that victimised youth are likely to engage in delinquent behaviour and criminal gang behaviour,[10] those who commit intimate partner violence are likely to have themselves been victimised,[11] and imprisoned persons are also likely to have been victimised or experienced violence.[12]

In grappling with this victim-perpetrator dilemma, this chapter will proceed to first examine the discourse of complex victimhood, followed by a discussion of juvenile agency in conflict. Moving from there, the chapter will examine how juvenile perpetrators have principally been addressed in transitional settings, both from restorative and retributive justice perspectives. Finally, the chapter offers an in-depth examination of the northern Ugandan context, and argues that, in the circumstances, amnesty was an appropriate response to the victim-perpetrator dilemma in that specific context. However, the amnesty process was deficient in many practical aspects, and its implementation was in fundamental tension with

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[8] *See* Erin Baines, 'Complex Political Perpetrators, Reflections on Dominic Ongwen', *Journal of Modern African Studies,* Vol. 47, Issue 2 (2008) 163-191,

[9] *See generally* Janet Lauritsen *et al*., 'The link between offending and victimization among adolescents', *Criminology,* Vol. 29, Issue 1 (1991) 265-292; Wesley Jennings *et al*., 'A Longitudinal Assessment of the Victim-Offender Overlap', *Journal of Interpersonal Violence*, Vol. 25, Issue 12 (2010) 2147-2174; Wesley Jennings *et al*., 'On the overlap between victimization and offending: A review of the literature', *Aggression and Violent behavior* Vol. 17, Issue 1 (2012) 16-26.

[10] Mark Berg *et al*., 'The victim–offender overlap in context: Examining the role of neighbourhood street culture', *Criminology* Vol. 50, Issue 2 (2012) 359-390.

[11] Marie Tillyer & Emily Wright, 'Intimate partner violence and the victim-offender overlap', *Journal of Research in Crime and Delinquency*, Vol. 51, Issue 1 (2014) 29-55.

[12] Elisa Toman, 'The Victim–Offender Overlap Behind Bars: Linking Prison Misconduct and Victimization', *Justice Quarterly,* Vol. 36, Issue 2 (2019) 350-382.

local cultural norms that place emphasis on apology and reparation, something that amnesty did not provide for. This chapter therefore falls under step 1 of Skaar et al's 4-step impact assessment framework, which seeks to analyse the contextual parameters within which a given mechanism operated. As the concept of complex victimhood was a key motiviation for the enactment of amnesty in Uganda, as the parliamentary debates demonstrate, it becomes prudent to deeper explore this victim-perpetrator dilemma and situate it in the northern Ugandan context.

International human rights law does not preclude the prosecution of minors but does recommend a child-friendly approach, with an emphasis on diversion and rehabilitation. The UN Convention on the Rights of the Child permits the arrest and detention of children,[13] but does not set a minimum age of criminal responsibility. International humanitarian law likewise does not stipulate any limit, except to prohibit the death penalty for those under 18.[14] The 1985 UN Standard Minimum Rules for the Administration of Juvenile Justice proposes that the age "shall not be fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity."[15] The UN Committee on the Rights of the Child ("UN-CRC") encourages a minimum age of criminal responsibility of not below 14 years, and has commended states that have risen the minimum age to 16 years.[16] The UN-CRC also affirms that "diversion should be the preferred manner of dealing with children in the majority of cases"[17] and that states should use non-custodial measures where possible, to ensure that "deprivation of liberty is used only as a measure of last resort and for the shortest appropriate period of time."[18] Similarly, the Council of Europe's guidelines on child-friendly justice recommends that "alternatives to judicial proceedings such as mediation, diversion and alternative dispute resolution should be encouraged whenever these may best serve the child's best interests."[19]

[13] Convention on the Rights of the Child Adopted and opened for signature, ratification and accession by General Assembly Resolution 44/25 of 20 November 1989, entry into force 2 September 1990, article 37(b).

[14] *E.g.*, Fourth Geneva Convention, article 68; Additional Protocol I, article 77(5).

[15] United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Hereafter the "Beijing Rules"), Adopted by General Assembly resolution 40/33 of 29 November 1985, rule 4.1.

[16] UN Committee on the Rights of the Child, General Comment No. 24 (2019) on children's rights in the justice system, UN Doc. CRC/GC/24, 18 September 2019, para.22.

[17] *Id.*, para.16.

[18] *Id.*, para.73. *See also* paras.85-88.

[19] Council of Europe, Guidelines of the Committee of Ministers of the Council of Europe on Child-friendly Justice (2011), para.19.

With regard to children who participate in armed conflict and commit crimes, in its recent General Comment No. 24 the UN-CRC recognised the particular nature of their victimisation and coerced offending:

> 98. When under the control of such groups, children may become victims of multiple forms of violations, such as conscription; military training; being used in hostilities and/or terrorist acts, including suicide attacks; being forced to carry out executions; being used as human shields; abduction; sale; trafficking; sexual exploitation; child marriage; being used for the transport or sale of drugs; or being exploited to carry out dangerous tasks, such as spying, conducting surveillance, guarding checkpoints, conducting patrols or transporting military equipment. It has been reported that non-State armed groups and those designated as terrorist groups also force children to commit acts of violence against their own families or within their own communities to demonstrate loyalty and to discourage future defection.[20]

The UN-CRC also recalled UN Security Council Resolution 2427 (2018) which emphasized that:

> "[c]hildren who had been recruited in violation of applicable international law by armed forces and armed groups and were accused of having committed crimes during armed conflicts should be treated primarily as victims of violations of international law."[21]

The UNSC also urged Member States to consider non-judicial measures as alternatives to prosecution and detention that were focused on reintegration.[22] Where children are further processed by the justice system, the UN-CRC urges that the legal rights of the child be respected and upheld in line with the UN Convention on the Rights of the Child.[23] Notably, the UN's Integrated Disarmament, Demobilization and Reintegration Standards discourages prosecution of children for crimes committed while associated with armed groups, and instead recommends a restorative approach.[24] Similarly, General Comment on Article 22 of the African Charter on the Welfare and Rights of the Child does state that where there is evidence a child has committed crimes during conflict, non-judicial accountability should be the appropriate response:

> Children should not be detained or prosecuted solely for their participation in armed conflict or mere membership in armed groups, including groups designated as terrorist. If there is evidence that a child has committed a criminal offense, State Parties should treat them in accordance with international juvenile justice standards – notably ensuring that detention is a last resort and is used for shortest appropriate period of time; that children are detained separately from adults; that they have access to legal counsel; that the best interests of the child is the primary consideration, and that rehabilitation and reintegration into society are prioritized […]

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[20] *Supra* note 17, para.98.

[21] *Id*., para.100, *referring to* UN Doc. S/RES/2427, 9 July 2018, para.20.

[22] *Id*.

[23] Convention on the Rights of the Child Adopted and opened for signature, ratification and accession by General Assembly Resolution 44/25 of 20 November 1989, entry into force 2 September 1990, articles 37 & 40.

[24] United Nations Integrated Disarmament, Demobilization and Reintegration Standards Guidelines (2006), Chapter.5.30, para.5.8.

> Wherever possible, diversion measures, restorative justice programmes and the use of non-coercive treatment and education programmes shall be used as alternatives to judicial proceedings, and restorative justice must be sought. If children are detained, they are entitled to age-appropriate and gender sensitive treatment including appropriate food and medical treatment, and access to education.[25]

With regard to the role of women in serious violence, this has been under-examined both in judicial settings and in the literature. There are, however, some notable examples of women being held accountable for the commission of international crimes. Biljana Plavšić plead guilty to the crime of persecution at the ICTY,[26] while Pauline Nyiramasuhuko was convicted of genocide at the ICTR.[27] Proceedings against two women at the ECCC didn't ultimately proceed,[28] while the ICC awaits the transfer of its first female indictee, Simone Gbagbo, accused of crimes against humanity.[29] Women have also been held accountable in local mechanisms. For example, over 96,000 women were sentenced in the Rwandan *gacaca* courts, representing 9% of the total amount convicted.[30] There is also a nascent but growing body of literature that is beginning to critically examine the role of women in committing serious crimes.[31]

Conflict in recent years has seen increasing focus on the use of children as forced combatants in armed conflict, with the United Nations system recommending various policy and protection responses needed to tackle the problem.[32] International NGOs also advocate for

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[25] African Committee of Experts on the Rights and Welfare of the Child, 'General Comment on Article 22 of the African Charter on the Welfare and Rights of the Child: Children in Situations of Conflict' (September 2020), para.59.

[26] ICTY, *Prosecutor v Plavšić*, Sentencing Judgement, 27 February 2003.

[27] ICTR, *Prosecutor v. Nyiramasuhuko et al*, Trial Judgement, 14 July 2011.

[28] Proceedings against Ieng Tirth (*Case 002*) were terminated as she was found unfit to stand trial in 2015. The case against Im Chaem (*Case 004/1*) was dismissed by the Co-Investigating Judges in 2017, as she was deemed not to be among those "most responsible". *See* ECCC, *Case 004/1*, Closing Order (Reasons), 10 July 2017.

[29] ICC, *Prosecutor v Simone Gbagbo*, 'Warrant of Arrest for Simone Gbagbo', 29 February 2012.

[30] Suzannah Linton, 'Women Accused of International Crimes: A Trans-Disciplinary Inquiry and Methodology', *Criminal Law Forum*, Vol. 27, Issue 2 (2016) 159-226 at 163; *See further* Nicole Hogg, 'Women's participation in the Rwandan genocide: mothers or monsters?', *International Review of the Red Cross*, Vol. 92, Issue 877 (2010) 69-102.

[31] *See e.g.,* Mark Drumbl, 'She Makes Me Ashamed to Be a Woman: The Genocide Conviction of Pauline Nyiramasuhuko, 2011', *Michigan Journal of International Law*, Vol. 35 (2012) 559-604; Alette Smeulers, 'Female Perpetrators: Ordinary or Extra-ordinary Women?', *International Criminal Law Review*, Vol. 15, Issue 2 (2015) 207-253; Natalie Hodgson, 'Gender Justice or Gendered Justice? Female Defendants in International Criminal Tribunals', *Feminist Legal Studies*, Vol. 25, Issue 3 (2017) 337-357; Alessandra Zaldivar-Giuffredi, 'Simone Gbagbo: First Lady of Cote D'Ivoire, First Woman Indicted by the International Criminal Court, One among Many Female Perpetrators of Crimes against Humanity', *ILSA Journal of International & Comparative Law*, Vol. 25, Issue 1 (2018) 1-32.

[32] *See e.g.* UNSC Resolution, UN Doc. S/RES/2427, 9 July 2018 (providing a framework for mainstreaming protection, rights, well-being and empowerment of children throughout the conflict cycle); Statement by the President of the Security Council, UN Doc. S/PRST/2020/3, 12 February 2020 (stressing the need for a broad conflict prevention strategy that addresses the causes of conflict in order to protect children); UN General

an end to the practice and for certain international human rights standards to be applied when dealing with this particular cohort of victim-perpetrators post-conflict.[33]

To ground this discussion, it is perhaps helpful to delineate the contours of what it means to be a "child soldier", as definitions and practice has varied. The substantive definition has evolved over time, while the cut-off age differs between what international criminal law stipulates (15 years), and what soft-law documents and the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict recommend (18 years). In 1997, the Cape Town Principles defined a child soldier as "any person under 18 years of age who is part of any kind of regular or irregular armed force or armed group in any capacity, including but not limited to cooks, porters, messengers and anyone accompanying such groups, other than family members."[34] The Paris Principles adopted a similar definition ten years later, instead using more nuanced language of "association":

> "[a] child associated with an armed force or armed group refers to any person below 18 years of age who is or who has been recruited or used by an armed force or armed group in any capacity, including but not limited to children, boys and girls, used as fighters, cooks, porters, messengers, spies or for sexual purposes. It does not only refer to a child who is taking or has taken a direct part in hostilities."[35]

This broad definition of "use" has essentially been adopted in international criminal jurisprudence.[36] The UN Convention on the Rights of the Child refers to the age of 15 as the cut-off point for recruitment into a state's armed forces, with article 38(3) stating: "[S]tates Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces."[37] However, the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict considers the age of 18 to be more appropriate.[38] Article 1 states that "[S]tates Parties shall take all feasible measures to ensure

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Assembly, Report of the Special Representative of the Secretary-General for Children and Armed Conflict, UN Doc. A/74/249, 29 July 2019 (calling upon Member States to continue supporting the implementation of action plans and other commitments aimed at strengthening the protection of children in armed conflict).

[33] *See e.g.*, Child Soldiers International, *Annual Report 2017-18* (September 2018); War Child, *Annual Report 2019* (2020).

[34] Cape Town Principles and Best Practices – Adopted at the Symposium on the Prevention of Recruitment of Children into the Armed Forces and on Demobilisation and Social Reintegration of Child Soldiers in Africa (30 April 1997), p.1.

[35] The Paris Principles – Principles and Guidelines on Children Associated with Armed Conflict (February 2007), para.2.1.

[36] ICC, *Prosecutor v Lubanga*, Trial Judgement, 14 March 2012 (Hereafter referred to as "*Lubanga* Trial Judgement"), paras.619-631; SCSL, *Prosecutor v Brima et al.,* Trial Judgement, 20 June 2007, para.737.

[37] Convention on the Rights of the Child, *supra* note 23, article 38(3).

[38] Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, Adopted by General Assembly resolution A/RES/54/263 of 25 May 2000, entry into force 12 February 2002, Preamble: "*Convinced* that an optional protocol to the Convention that raises the age of possible

that members of their armed forces who have not attained the age of 18 years do not take a direct part in hostilities.[39] However, article 4 states "[A]rmed groups that are distinct from the armed forces of a State should not, under any circumstances, recruit or use in hostilities persons under the age of 18 years.[40] Although, this position is not in line with the most recent codification of international law, which criminalises the enlistment, conscription and use of children in armed forces under the age of 15 – not 18.[41] Nevertheless, states emerging from conflict are attempting to adhere to these best practices, such as adopting action plans to demobilize children from state forces and non-state armed groups alike.[42] However, implementing such practices where conflict is ongoing remains a significant challenge for states.[43] With this contextual grounding, the concept of complex victimhood will first be considered.

5.2 The Discourse of Complex Victimhood

The image of the "ideal victim" denotes images of a person who is innocent, passive and vulnerable.[44] This stands in contrast to the typical perpetrator, who is labelled as dangerous and malevolent.[45] Simplistic categories of "victim" and "perpetrator" are therefore each assigned a moral value, with "victims" frequently associated with the words "pure" and "innocent", and perpetrators with "evil".[46] In his work, *The Drowned and the Saved*, Primo Levi used the phrase

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recruitment of persons into armed forces and their participation in hostilities will contribute effectively to the implementation of the principle that the best interests of the child."

[39] *Id*., article 1.

[40] *Id*., article 4.

[41] *See e.g*., Additional Protocol I, article 77(2); Rome Statute, article 8(2)(b)(xxvi) and (e)(vii).

[42] UN Committee on the Rights of the Child, Concluding Observations on the second periodic report of the Central African Republic, UN Doc. CRC/C/CAF/CO/2, 8 March 2017, para.66: "The Committee welcomes the measures taken by the State party to protect children's rights during armed conflict, including the commitment not to recruit children and to release those recruited as part of the Brazzaville peace agreements."

[43] UN Committee on the Rights of the Child, Concluding Observations on the fifth periodic report of the Syrian Arab Republic, UN Doc. CRC/C/SYR/CO/5, 6 March 2019, para.49(b): "The Committee is gravely concerned about […] the recruitment and use of children in hostilities, including children under the age of 15, some as young as 4 years old, and children of foreign origin, by armed groups and, on some occasions, by the armed forces of the State and affiliated militias."

[44] Elizabeth Stanley, 'Responding to State Institutional Violence,' *British Journal of Criminology*, Vol. 55, Issue 6 (2015) 1149-1167 at 1153.

[45] Anne-Marie McAlinden, 'Deconstructing Victim and Offender Identities in Discourses on Child Sexual Abuse: Hierarchies, Blame and the Good/Evil Dialectic', *British Journal of Criminology*, Vol. 54, Issue 2 (2014) 180-198 at 188.

[46] Erin Baines, 'Complex Political Perpetrators, Reflections on Dominic Ongwen', *Journal of Modern African Studies,* Vol. 47, Issue 2 (2008) 163-191 at 177.

the "gray zone" to describe the blurred moral status occupied by persons who are simultaneously victims and perpetrators. Describing the role that subordinated Jewish officials played in the maintenance and implementation of the Nazi concentration camp machinery, Levi wrote that these "*Kapo*" officials operated in "a gray zone, poorly defined, where the two camps of masters and servants both diverge and converge. This gray zone possesses and incredibly complicated internal structure and contains within itself enough to confuse our need to judge."[47] Arendt also drew attention to the role played by the *Judenrat*, assigning to them a degree of moral responsibility for their participation in the holocaust, which controversially challenged the broader victim discourse that followed the genocide.[48]

Articulating Complexity

In conflict, the binary between "victim" and "perpetrator" is often blurred to the point where making that distinction is neither morally appropriate nor useful, particularly in terms of formulating a practical, policy response. Rather than a "taxonomy" of good victims and bad perpetrators, the situation is instead considered more nuanced and *complex*.[49] Because, as Smyth notes, "those who have participated in violence of the past, particularly those who have killed and injured others, themselves lay claim to victimhood."[50] In her seminal work, Bouris developed the concept of the "complex political victim", a victim who paradoxically supports the discourse of their very victimization:

> "The complex political victim can be understood as a victim who knowingly and purposefully supports certain discourses that contribute to the space of her political victimization. This is neither because she wants to be victimized, nor because she has "given up hope" and resorted to supporting these discourses because of a lack of better options, nor because she has made a "rational choice" to support this discourse. Rather, the complex political victim supports these propitious discourses because they construct her identity in other ways beyond the identity of a victim."[51]

Given the prevalence of this complex reality for many victims of conflict, embracing this concept would, according to Bouris, afford an opportunity to move away from the "unrealistic and ineffective dialectic of innocence and responsibility in recognizing and responding to

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[47] Primo Levi, *The Drowned and the Saved* (Simon & Schuster, 1988), p.31.

[48] Hannah Arendt, *Eichmann in Jerusalem, A Report on the Banality of Evil* (Viking Press, 1964), p.117

[49] Tristan Anne Borer, 'A Taxonomy of Victims and Perpetrators: Human Rights and Reconciliation in South Africa', *Human Rights Quarterly*, Vol 25, Issue 4 (2003) 1088-1116.

[50] Marie Smyth, 'Putting the Past in Its Place: Issues of Victimhood and Reconciliation in Northern Ireland's Peace Process', in Nigel Biggar (Ed), *Burying the Past: Making Peace and Doing Justice after Civil Conflict* (Georgetown University Press, 2003), p.127.

[51] Erica Bouris, *Complex Political Victims* (Kumarian Press, 2007), p.84.

victims."[52] In order to recognise complex political victims, Bouris states that the international community must abandon the familiar set of images as the sole means of recognizing complex political victims, such as "women and children" or "innocents", as many legitimate complex victims would consequently be overlooked.[53] Furthermore, complex victims must be assisted regardless of whether that individual fits the familiar image of a victim.[54] According to Jankowitz, the concept of the complex victim "challenges the notion that an individual or group is bound to a singular role in relation to violence, arguing instead that human experience produces diverse patterns of victimisation and responsibility and that individuals thus hold multiple identities."[55] However, she cautions that by advocating for a more expansive understanding of victimhood, the discussion risks becoming "overly relativistic" and the term victim risks losing its "heuristic value".[56] Moreover, another area of concern that Jankowitz raises is that by allowing for more complex understandings of victims, it opens the door to cynical claims that those who perpetrated harm will identify as a "victim" to diminish their own responsibility.[57]

Currently, transitional justice mechanisms are not suited to recognizing and assisting complex political victims. Truth commissions expect participants to fall into the "totalizing mantle of victim" in order to participate.[58] A complex political victim is "a subject whose victimization is but one component of a diverse self, yet many of the institutions and practices of peacebuilding are premised on the notion of a singular, simplistic subject who is either wholly a victim, or not at all."[59] The rigid definition of "victim" in international criminal law would appear to support this view.[60] In her examination of victim participation at the ECCC, Bernath found that about 10% of participating victims, known as "civil parties", were actually former cadres in the Khmer Rouge regime.[61] This led to actors in the ECCC such as staff members and lawyers differentiating between victims, using terms like "real victims" (*i.e.*,

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[52] *Id*., p.87.

[53] *Id*., pp.88-89.

[54] *Id*., p.89.

[55] Sarah Jankowitz, *The Order of Victimhood, Violence, Hierarch and Building Peace in Northern Ireland* (Palgrave, 2018), p.85.

[56] *Id*., pp.91-92.

[57] *Id*., p.92.

[58] Bouris, *supra* note 51, p.89.

[59] *Id*.

[60] Rule 85 of the ICC Rules of Procedure and Evidence states: (a) "Victims" means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court.

[61] Julie Bernath, 'Complex Political Victims' in the Aftermath of Mass Atrocity: Reflections on the Khmer Rouge Tribunal in Cambodia', *International Journal of Transitional Justice*, Vol. 10, Issue 1 (2016) 46–66.

civilians who suffered harm) who were legitimate victims, versus "KR victims" (*i.e.*, cadres in the regime who suffered harm) whose victim status was diminished or questionable.[62] Bernath recounts the view of one ECCC staff who viewed one civil party as a "bad victim" because they were clearly "part perpetrator, part victim."[63] Thus, while formally included in the process, Bernath considered that complex political victims were nevertheless excluded as their complexity and experiences were not meaningfully recognised in the trial process.[64]

Re-Thinking "Faultless" Complexity

The global discourse around child soldiers generally eschews such complexity, however, and primarily portrays them as vulnerable victims, devoid of agency and responsibility. Initiation can involve forced violence, sometimes against their own families and communities.[65] The harm endured can be both physical and psychological. They may be beaten, enslaved and subjected to sexual and gender-based violence. Sexual violence has generally been understood to affect mainly women, but the prevalence of male sexual victimisation in conflict is increasingly being acknowledged, particularly in northern Uganda.[66]

As mentioned above, the UNSC considers that children should be treated primarily as victims of offences against international law, a view also contained in the Paris Principles.[67] Scholars also reinforce this idea, with McMahon writing that child soldiers are seen as having a "diminished capacity for morally responsible agency and who act in conditions that further diminish their personal responsibility for their action in war."[68] In policy and human rights discourse, a number of victim images associated with child soldiers are discernible. Drumbl states that child soldiers are painted as "instruments of war, forced to fight and kill, and manipulated by others".[69] This narrative portrays them as a "faultless passive victim".[70]

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[62] *Id*., at 60.

[63] *Id*., at 61.

[64] *Id*.

[65] Michael Wessels, *Child Soldiers: From Violence to Protection* (Harvard University Press, 2006), pp.59-60.

[66] *See generally* Philipp Schulz, *Male Survivors of Wartime Sexual Violence, Perspectives from Northern Uganda* (University of California Press, 2020); Ingrid Elliott, Coleen Kivlahan & Yahya Rahhal, 'Bridging the Gap Between the Reality of Male Sexual Violence and Access to Justice and Accountability', *Journal of International Criminal Justice*, Vol. 18, Issue 2 (2020) 469–498.

[67] Paris Principles, *supra* note 35, paras.3.6-3.7.

[68] Jeff McMahon, 'Child Soldiers, The Ethical Perspective' in Scott Gates & Simon Reich (Eds) *Child Soldiers in the Age of Fractured States* (University of Pittsburgh Press, 2009), p.34.

[69] Romeo Dallaire, *They Fight Like soldiers, They Die Like Children* (Hutchinson Press, 2010), pp.3 & 12.

[70] Drumbl, *supra* note **Error! Bookmark not defined.**, p.7.

Similarly, Dallaire considers that child soldiers are seen as having been coerced into fighting and compelled to commit atrocities, lacking any volition or developed concept of justice.[71]

This faultless passive victim images is, according to Drumbl, "unduly reductive" and belies varied and individual experiences.[72] The imagery spins what he calls a "legal fiction".[73] Affected communities do not always readily accept the faultless victim narrative, particularly in respect of children who have committed atrocities.[74] Wessels writes that "a 15 year old boy carrying an automatic rifle and travelling with a military group might be viewed as a child by international human rights observers but […] as a young adult by people in a rural African village."[75] The discourse of victimhood is also visible on the ground, where it can conflict with local understandings of maturity and responsibility. In Sierra Leone, Shepler observed that NGOs informed communities that those under 18 were not criminally responsible, which was a "newly imported idea" for locals.[76] She writes that beliefs about childhood are based on a modern ideology that sees children as innocent.[77] Child soldiers can subsequently adopt a "discourse of abdicated responsibility" as a result.[78] In Mozambique, Schafer similarly noted that assumptions of victimhood informed interventions on the ground. Notably, her research subjects did not see themselves as innocent and co-opted into the civil war.[79] Young men in Mozambique who are mature enough to partake in economically productive activities, are seen as potentially legitimate perpetrators of violence, even if they are under 18 years.[80] The passive victim image can also have adverse consequences. According to Steinl, it can leave children frozen within the sole identity of victimhood and disempowers them from future decision

[71] Dallaire, *supra* note 69, p.3.

[72] *Id*., p.11.

[73] *Id*., p.19.

[74] *Id*., p.22.

[75] Wessels, *supra* note 65, p.5.

[76] Susan Shepler, 'Global Discourses of Youth and Reintegrating Child Soldiers in Sierra Leone, *Journal of Human Rights,* Vol, 4, Issue 2 (2006) 197-211.

[77] Susan Shepler, 'The Social and Cultural Context of Child Soldiering in Sierra Leone', PRIO-sponsored Workshop on Techniques of Violence in Civil War, Oslo (August 2004), p.2.

[78] Shepler, *supra* note 76 at 199.

[79] Jessica Schafer, 'The Use of Patriarchal Imagery in the Civil War in Mozambique and Its Implications for the Reintegration of Child Soldiers', in Jo Boyden & Joanna de Berry (Eds.), *Children and Youth on the Front Line*, *Ethnography, Armed Conflict and Displacement* (Berghahn, 2004), p.90.

[80] *Id*., p.88.

making.[81] It ignores their own individual reasons for becoming a child soldier, particularly where participation was voluntary or motivated by a political or personal cause.[82]

The faultless passive victim image of child perpetrators was present in the findings of two landmark truth commissions mandated to uncover the truth of their respective internal conflicts, Liberia and Sierra Leone. The final report of the Liberian Truth and Reconciliation Commission ("TRC") stated that children should not be held accountable for their actions, stating that "children are neither culpable nor responsible for acts of violations of human rights laws, humanitarian rights law violations, war crimes or egregious violation of domestic criminal law […] and as such they are exempt and protected from prosecution of any kind or form without limitation."[83] The TRC was therefore of the view that children were entitled to a "general amnesty".[84] However, in 2004, while noting the pressing reintegration needs of child soldiers following the civil war, the UN-CRC was also recommending wider reform of the juvenile justice system in Liberia to include, for example, special juvenile courts and trained judges.[85] The most recent Concluding Observations on Liberia also recommend a "a holistic approach to addressing the problem of juvenile crime […] using more alternative measures to detention such as mediation, probation, counselling, community service or suspended sentences, wherever possible."[86]

In a similar vein to its Liberian counterpart, the final Sierra Leonean TRC report concluded that children under 18 could not comprehend their actions during the conflict, stating that "armed groups deliberately engineered children into becoming perpetrators, forcing them to commit atrocities or themselves be killed. Once they committed the violations, there was almost no way of turning back."[87] Drumbl notes the contradiction in the report's conclusion that children had no choice when participating in the conflict, contrasting it with other testimony of children who told the TRC they volunteered out of social and economic

[81] Leonie Steinl, *Child Soldiers as Agents of War and Peace, A Restorative Transitional Justice Approach to Accountability for Crimes Under International Law* (Springer, 2017), p.27.

[82] *Id.*

[83] Republic of Liberia Truth and Reconciliation Commission, *Consolidated Final Report* (2009), Vol. II (Hereafter, "Liberian TRC Final Report"), p.266.

[84] *Id.*, p.288.

[85] UN Committee on the Rights of the Child, Concluding Observations: Liberia, UN Doc. CRC/C/15/Add.2361, July 2004.

[86] UN Committee on the Rights of the Child, Concluding Observations: Liberia, UN Doc. CRC/C/LBR/CO/2-4, 13 December 2012, para.84.

[87] Sierra Leone Truth and Reconciliation Commission, *Witness to Truth, Report of the Sierra Leone Truth and Reconciliation Commission* (Freetown, 2004), Volume 3.B, Chapter 4 (Hereafter, "Sierra Leone TRC Report"), para.207.

motivation.[88] Although forced recruitment of children was pervasive, a significant number of children also voluntarily enlisted to achieve monetary gain and social advancement among their peers and communities.[89] Despite this, the TRC report rejected the notion of agency as children "do not have the ability or the capacity to 'volunteer'. Simply put, they have no choice."[90] However, a few years later in 2008, the UN-CRC was urging wider reform of the administration of juvenile justice in Sierra Leone, to include for example, alternative sanctions for juvenile offenders and that any detention should be as short as possible,[91] a view reiterated in the most recent concluding observations in 2016.[92]

The scholarly criticisms of the "passive victim image" is perhaps not a fair representation of the policy position actually being advanced by bodies within the UN system, for example. While there has been repeated emphasis that children who partake in armed conflict should be treated "primarily as victims", this does not equate to a recommendation for impunity. For example, one of the core messages being advanced by the UN-CRC's recent General Comment No. 24 is that children should be diverted away from formal legal systems to alternative, non-judicial methods. Importantly, as part of any diversion, a key condition is the acceptance of any responsibility for any wrongdoing:

> "The Committee emphasizes the following:
>
> > (a) Diversion should be used only when there is compelling evidence that the child committed the alleged offence, that he or she freely and voluntarily admits responsibility, without intimidation or pressure, and that the admission will not be used against the child in any subsequent legal proceeding."[93]

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Indeed, the General Comment also recognises that "where serious offences are committed by children, measures proportionate to the circumstances of the offender and to the gravity of the offence may be considered," but should be for the "shortest appropriate period of time" and in the best interests of the child.[94] Moreover, the UN-CRC regularly encourages states to enhance and improve the administration of their juvenile justice systems, for example by providing legal

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[88] Drumbl, *supra* note **Error! Bookmark not defined.**, p.184.

[89] Megan MacKenzie, *Female Soldiers in Sierra Leone: Sex, Security and Post-conflict Development* (NYU Press, 2015), p.62: "the voluntary participation of women and girls traditionally male-dominated activities such as war can no longer be overlooked."

[90] Sierra Leone TRC Report, *supra* note 87, para.234.

[91] UN Committee on the Rights of the Child, Concluding Observations: Sierra Leone, UN Doc. CRC/C/SLE/CO/2, 20 June 2008, para.77.

[92] UN Committee on the Rights of the Child, Concluding observations on the combined third to fifth periodic reports of Sierra Leone, 1 November 2016, UN Doc. CRC/C/SLE/CO/3-5, para.39.

[93] UN Committee on the Rights of the Child, General Comment No. 24, *supra* note 17, para.18.

[94] *Id*., paras.76-77.

aid to children in conflict with the law,[95] and by putting in place child-friendly structures such as special judges, non-custodial sentences,[96] access to rehabilitative services, and if detention is unavoidable, that children be detained apart from adults.[97]

Broadening Understandings of Complex Victims

The development of the complex victimhood discourse enriches our understanding of what it means to be a victim-perpetrator, particularly in post-conflict situations. It cautions against applying rigid, pre-conceived approaches to remedying harm, and prompts states and policymakers to reconsider more restorative and purposive responses to perpetrators of atrocity. Rather than instilling a discourse of abdication, the broad policy approach to juvenile offenders in particular recommends diversion and alternative sanctions that promote their rehabilitation. Such non-judicial approaches are more amenable to addressing the complexity of someone who finds themselves caught in that "gray zone".

In the northern Ugandan context, abduction and conscription into the LRA was the norm. But over time, many LRA abductees were able to exercise a degree of complex agency in their daily lives. Upon their return, abductees are typically confronted with a number of difficult questions that challenge the extent of their agency:

> "What does it mean to bear the child of a man responsible for endless suffering?
> How do you make sense of the non-choice of being asked to kill someone or be killed?
> What is it to stay alive all those years, to long for home, only to return there to be asked why didn't you return sooner?"[98]

According to Baines, this is the space between victim and perpetrator: "It is a realm of uncharted ethics in which common sense is made senseless and moral precepts guiding human relations are exposed as constructed, not fixed. The categories of victim and perpetrator are

[95] UN Committee on the Rights of the Child, Concluding Observations on the fifth periodic report of the Syrian Arab Republic, UN Doc. CRC/C/SYR/CO/5, 6 March 2019, para.55.

[96] UN Committee on the Rights of the Child, Concluding observations on the combined fifth to seventh periodic reports of Angola, UN Doc. CRC/C/AGO/CO/5-7, 27 June 2018, para.38.

[97] UN Committee on the Rights of the Child, Concluding Observations on the combines third and fourth periodic reports of Mozambique, UN Doc. CRC/C/MOZ/CO/3-4, 27 November 2019, para.47.

[98] Erin Baines, *Buried in the Heart, Women, Complex Victimhood and the War in Northern Uganda* (Cambridge University Press, 2017), p.7

unmoored."[99] The exercise of agency can often characterise and further complicate the identity of victim-perpetrators. It is to the concept of agency that the chapter now turns.

5.3 Complex Agency

Agency can be described as the individual capacity to act or refrain from carrying out a given act.[100] The extent of agency available to an individual can be affected by their social environment, gendered hierarchies and their age.[101] With regard to children in armed groups, the limited exercise of agency may be apparent at different times, for example at the point of conscription/enlistment, during their time with the group, or upon their departure/escape. However, such agency is complicated, if not obviated, by their social environment and the conditions that prevail in the armed group.

Where voluntary enlistment of children is indicated, poverty, family protection and social advancement are among the main reasons that lead to children joining an armed group.[102] Even where recruitment might ostensibly be voluntary, consent is often undermined by an environment characterised by poverty and familial pressure. This was recognised by Radhika Coomaraswamy, former UN Special Representative for Children and Armed Conflict, in her expert testimony in the *Lubanga* case:

> "The recruitment and enlisting of children in [the] DRC is not always based on abduction and the brute use of force. It also takes place in the context of poverty, ethnic rivalry and ideological motivation. Many children, especially orphans, join armed groups for survival to put food in their stomachs. Others do so to defend their ethnic group or tribe and still others because armed militia leaders are the only seemingly glamorous role models they know. They are sometimes encouraged by parents and elders and are seen as defenders of their family and community."[103]

These factors arguably complicate the validity of the agency exercised in joining an armed group. Each conflict setting has its own dynamics and contextual reasons for why juveniles join armed groups. Research with child soldiers in the DRC revealed that 34% joined for

[99] *Id*.

[100] Timothy Williams, 'Agency, Responsibility and Culpability: The Complexity of Roles and Self-representations of Perpetrators', *Journal of Perpetrator Research* (2018) 39-64 at 42.

[101] *Id*.

[102] Drumbl, *supra* note **Error! Bookmark not defined.**, p.62.

[103] Testimony of Expert Witness Radhika Coomaraswamy, as cited in the *Lubanga* Trial Judgement, *supra* note 36, para.611.

material reasons, 21% for ideological reasons and 10% out of revenge.[104] In the *Lubanga* case, a number of child soldier witnesses testified how they voluntarily joined Thomas Lubanga's rebel group.[105] In Liberia, Utas writes that although forced conscription was prevalent, most young combatants joined "out of free will."[106] Impoverished rural youth were presented with an opportunity to fight to remove the perceived corrupt, urban elite.

Once in the armed group, agency may be further indicated by the resilience required not just to survive on a daily basis, but also by the actions by children in the midst of conflict itself.[107] Even in situations where the circumstances of a child joining a rebel group are brutally forced, such as abduction, degrees of agency can develop over time. In a study of rebel groups in Angola and Mozambique, Honwana argues that while children and youth had little power to disobey outright orders given to them, but exercised some degrees of agency. Honwana refers to this as "tactical" agency: "tactics are complex actions that involve calculation of advantage but arise from vulnerability".[108] Although most of Honwana's research subjects were forced into armed groups, she did not consider them to be "empty vessels" coerced into violence. Rather, they made informed choices based on their individual circumstances.[109]

According to Steinl, the faultless passive victim image denies children both positive and negative agency. In its positive form, children can be considered to be productive citizens in society, participate in conflict resolution mechanisms and make reasoned, informed choices.[110] On the other hand, negative agency refers to the ability of children to commit wrongful acts. Steinl argues that neither dimension is available to them.[111] Boyden and de Berry argue that "children and adolescents can be very active in defining their own allegiances during conflict, as well as their own strategies for coping and survival." As a result, they consider that the "prevailing dichotomy between adult as active perpetrator and child as passive victim needs

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[104] Radhika Coomaraswamy, 'Child Soldiers, Root Causes and UN Initiatives', Paper presented at the University of Michigan (February 2009), as cited by Drumbl, *supra* note **Error! Bookmark not defined.**, p.64.

[105] *See e.g.*, *Lubanga* Trial Judgement, *supra* note 36, para.272 that refers to the testimony of witness P-0011: "he said during his evidence that when his studies were interrupted during the war, in addition to digging for gold, he voluntarily signed up for military service with the UPC, and that he was not enlisted by force but went voluntarily."

[106] Mats Utas, 'Fluid Research Fields: Studying Excombatant Youth in the Aftermath of the Liberian Civil War', in *Children and Youth on the Front Line*, *supra* note 79, p.214.

[107] Wessels, *supra* note 65, p.4.

[108] Alcinda Honwana, *Child Soldiers in Africa* (University of Pennsylvania Press, 2006), p.73.

[109] *Id*.

[110] Steinl, *supra* note 81, p.34

[111] *Id*.

challenging."[112] Fisher notes that young perpetrators in armed groups "are, in fact, agents who can, although from a position of great weakness, make decisions, evaluate actions and their effects." Because of this, Fisher argues, "the actions of child soldiers do not all invite great condemnation; nor do all demand reprieve for their actions."[113] Even in coercive environments, research indicates that children can retain the ability to make some choices.[114] Some of the reasons that children might choose to commit human rights abuses are the need to survive, obedience, and the normalization of violence.[115] Local communities may also view children and young adolescents as individuals with choices and agency, and therefore accountable for their actions.

Post-conflict communities and societies often struggle to adequately address questions of accountability with respect to juvenile perpetrators. Complex agency is itself complex to deal with and navigate. Once demobilized and out of conflict, transitional justice discourse considers that juvenile offending is best addressed through traditional and restorative-based measures that encourage rehabilitation. Through such mechanisms, the nature of their complex agency can be explored through dialogue, truth-telling and mediating an appropriate response. It is this restorative domain that the chapter next considers.

5.4 Restorative Justice

This section explores the notion of restorative justice and the connection with complex juvenile perpetrators. It will first set out how the concept of "restorative justice" is situated within transitional justice discourse. From there, the section moves to discuss the interaction of children with the two most prominent restorative responses, truth commissions and traditional processes.

In essence, restorative justice aims at repairing the harm caused by another, and to "restore" the victim to their previous position, whether by materially compensating them, or

[112] Jo Boyden & Joanna de Berry, 'Introduction', in *Children and Youth on the Front Line*, *supra* note 79, p.(xv).

[113] Kirsten Fisher, *Transitional Justice for Child Soldiers, Accountability and Reconstruction in Post-Conflict Contexts* (Springer, 2013), p.83.

[114] Wessels, *supra* note 65, p.73.

[115] *Id*., pp.79-80.

through some other form of alternative compensatory action, such as apologising.[116] Restorative processes are considered to be "victim-centred", and provide a dialogical forum for truth-telling, confession, accountability and reconciliation between the victim and the perpetrator.[117] The effects can extend beyond the individual and are thought to have broader communal benefits. Llewllyn and Philpott refer to the concept as a "relational theory of justice",[118] occurring in what McCold labels a "community of care", where all stakeholders affected by the harm may be involved to agree upon a resolution that reaffirms respect for each other, and for the broader social order.[119]

Increasingly used in domestic settings as a diversionary method for dealing with juveniles who transgress the law, restorative mechanisms also form part of the transitional justice "toolbox". In transitional settings, restorative justice has the ability to shift from the isolated incidents to collective ones, addressing both.[120] Clamp notes the difficulty associated with restorative practices and victim-perpetrators, as individuals may fluctuate between these roles over time.[121] Restorative justice mechanisms can nevertheless provide the flexibility for the victimisation of offenders and the agency of victims to be discussed openly.[122] As restorative mechanisms are inherently participatory, victims and perpetrators are not passive, but instead actively involved.

Drumbl advocates for a model of "circumscribed action" when dealing with juvenile perpetrators.[123] This approach allows for "deeper procedural inquiry into the specific histories and experiences".[124] He argues that child perpetrators should be placed on a "contextual continuum". At one end, where he states the majority are located, there is an absence of moral responsibility. At the other end, are those who elect to commit acts of violence and

[116] Daniel Van Ness & Karen Strong, *Restoring Justice, An Introduction to Restorative Justice* (Routledge 2014), p.24.

[117] Howard Zehr, *Changing Lenses, A New Focus for Crime and Justice* (Herald Press, 1990), pp.191-200.

[118] Jennifer Llewllyn and Daniel Philpott (Eds), 'Restorative Justice and Reconciliation, Twin Frameworks for Peacebuilding', in *Restorative Justice, Reconciliation and Peacebuilding* (Oxford University Press, 2014), p.17.

[119] Paul McCold, 'Paradigm Muddle, The Threat to Restorative Justice Posed by Its Merger with Community Justice', *Contemporary Justice Review,* Vol. 7, Issue 4 (2004), 13-35 at 20.

[120] Steinl, *supra* note 81, p.314.

[121] Kerry Clamp (Ed), *Restorative Justice in Transition* (Routledge, 2014), p.23.

[122] Priscilla Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions* (Routledge, 2010), p.211.

[123] Drumbl, *supra* note **Error! Bookmark not defined.**, p.24.

[124] *Id*., p.99.

"demonstrate considerable volition."[125] He advances a holistic, restorative agenda to deal with such victim-perpetrators. For example, this model of circumscribed action would include a qualified amnesty, one granted in return for participation in truth telling or traditional ceremonies.[126]

A restorative justice approach arguably facilitates the investigation of what Veale refers to as "identity transformations" that children undergo during conflict, particularly where they have been in the bush for extensive periods, and where community reintegration in the absence of acknowledgment and reparation is unlikely to be achieved.[127] At the same time, Veale states that a judgement on developmental and psychological capability to participate in a restorative justice initiative must be individually assessed, and be culturally grounded in local understandings of childhood.[128]

Truth-Telling

Truth commissions enable a society to confront its past through the establishment of a body which is empowered to hear the testimony of victims, perpetrators, and the general public, to document a period of illiberal rule or insecurity, during which human rights abuses occurred.[129] Typically, such bodies issue a report outlining its findings and sometimes issuing recommendations for further action. The South African TRC expressly excluded the possibility for persons under 18 to give testimony or give statements, on the advice of child experts.[130] Although, the TRC did hold special hearings on children's issues. Pigou criticises this decision as a missed opportunity to explore children's experience of resistance and survival, and "their involvement of perpetrators of violence and the complex relationship between victimhood and perpetration."[131] Many children participated in the fight against apartheid, and thus were also

[125] *Id*., p.82.

[126] *Id*., p.178.

[127] Angela Veale, 'The criminal responsibility of minors? Contributions from Psychology', in Karin Arts & Vesselin Popovski (Eds.), *International Criminal Accountability and the Rights of Children* (Asser Press, 2006), p.106.

[128] *Id*., p.108.

[129] Hayner, *supra* note 122, p.11.

[130] Piers Pigou, 'Children and the South African Truth and Reconciliation Commission', in Sharanjeet Parmar *et al* (Eds.), *Children and Transitional Justice, Truth-Telling, Accountability and Reconciliation* (Harvard University Press, 2010), pp.115-158 at p.122.

[131] *Id*., p.130.

victims of abuses committed by the regime.[132] Notably, the final TRC report on the special hearings for children noted that "many saw themselves not as victims, but as soldiers or freedom fighters."[133] In contrast, the Sierra Leonean TRC did involve children in statement taking in closed hearings, with over 300 children coming forward to participate to give anonymous statements in closed hearings.[134] The procedure considered all children neutrally as witnesses, and deliberately removed from the statement form the section that would ordinarily contain details of any crimes committed by the applicant.[135] The final report of the Sierra Leone TRC contained accounts of how children committed serious human rights abuses during the conflict, but noted that children were forced into assuming "dual identities" of both victim and perpetrator.[136] The potential three-dimensional perspective of child soldiers as victims, witnesses and perpetrators was rejected in favour of a two-dimensional one as child soldiers as victims and witnesses alone.[137]

The Liberian TRC, which examined the country's history of conflict between 1979-2003, also involved children in the process. Children gave statements and testimony to the TRC, which held a number of special children's hearings.[138] The hearings consisted of public panel discussions involving children and TRC commissioners, and private confidential hearings.[139] In its final report, the Liberian TRC acknowledged the violence committed by children, noting that children were "routinely coerced and manipulated by commanders to commit brutal acts in violation of international law", and "found themselves to be both victims and perpetrators."[140] The Liberian TRC was of the view that because "children are neither culpable nor responsible for their actions during time of war", they should be excluded from all forms of punishment, including "prosecution, civil liability or public sanctions".[141] Despite this conclusion, the report noted the fact that children expressed a desire for local reconciliation

[132] Truth and Reconciliation Commission of South Africa, *Final Report* (1998), Vol. 4, pp.250-251.

[133] *Id*.

[134] Phillip Cook & Cheryl Heykoop, 'Child Participation in the Sierra Leonean Truth and Reconciliation Commission: Considering the Broader Cultural Context', in *Children and Transitional Justice*, *supra* note 130, pp.159-192 at p.171.

[135] *Id*., p.179.

[136] Sierra Leone TRC Report, *supra* note 87, Vol. 3.B, Chapter 4, para.225.

[137] Drumbl, *supra* note **Error! Bookmark not defined.**, p.185.

[138] Theo Sowa, 'Children and the Liberian Truth and Reconciliation Commission', in *Children and Transitional Justice*, *supra* note 130, pp.193-230 at pp.213-214.

[139] *Id*., p.216.

[140] Liberian TRC Final Report, *supra* note 83, Vol. II, p.294.

[141] *Id*., p.280.

and processes of forgiveness for the wrongs they committed.[142] According to Drumbl, while the Sierra Leonean and Liberian TRCs broke new ground in their inclusion of children and discussion of their actions, their methodologies "thinned the completeness of the truths" and the "wholeness of the reconciliation they encouraged."[143] Nevertheless, the practice of the Sierra Leonean and Liberian TRCs shows that the participation of children in truth-telling is not only possible, but arguably is essential for a transitional society to fully address the complexities of its past, by making documentation as comprehensive and as inclusive as possible.

Traditional Approaches

Traditional Justice can best be described as practices derived from cultural and local tradition, used to resolve disputes between individuals and communities.[144] The concept has increasingly been recognised as playing an important informal role in promoting healing and reintegration in the aftermath of conflict.[145] In African settings in particular, culturally appropriate methods of restoration and reintegration have been employed in the aftermath of atrocity.[146] Such customary or traditional ceremonies can be a mechanism for dialogue between the perpetrator and the community, to further facilitate forgiveness, acknowledgment and modes of reparation. Such endogenous mechanisms tend to be future-oriented, actualizing justice through the making of amends,[147] and promote collective healing.[148]

However, the active participation of children in traditional processed has been widely considered in the literature. Where it has been highlighted, the emphasis is not always on "justice" in an accountability sense, but rather to cleanse or reconcile the child with the broader community. In Sierra Leone, ceremonies for children were employed, which Denov noted

[142] *Id*., p.256.

[143] Drumbl, *supra* note **Error! Bookmark not defined.**, p.187.

[144] *See generally* Rosalind Shaw, Lars Waldrof & Pierre Hazan (Eds.), *Localizing Transitional Justice, Interventions After Mass Atrocity* (Stanford University Press, 2010); Cynthia Horne, 'Reconstructing 'Traditional' Justice from the outside in: Transitional Justice in Aceh and East Timor', *Journal of Peacebuilding & Development*, Vol. 9, Issue 2 (2014)17-32.

[145] UNSG Rule of Law Report, *supra* note 4, para.36.

[146] *See* Phil Clark, *Gacaca Courts, Post-Genocide Justice and Reconciliation in Rwanda* (Oxford University Press, 2010); Jordan Nowotny, 'The limits of post-genocide justice in Rwanda: assessing gacaca from the perspective of survivors', *Contemporary Justice Review*, Vol, 23, Issue 4 (2020) 401-429.

[147] Drumbl, *supra* note **Error! Bookmark not defined.**, p.188.

[148] Wessels, *supra* note 65, p.151.

prompted a sense of acceptance for the participating children.[149] The rituals were referred to as the "cooling of the heart", and intended to restore the child's relationship with their community, both spiritually and socially.[150] Traditional ceremonies were also used in Mozambique, involving spiritual mediums to cleanse the perpetrator and facilitate atonement.[151] In contrast, in Rwanda *gacaca* was a village-based mechanism of retributive justice implemented to try thousands of persons who participated in the 1994 genocide.[152] It was modelled on an historic form of village dispute resolution, transformed into a localised tribunal with lay judges. The *gacaca* legislation stipulated that those aged 14 and above could be prosecuted but would receive lesser sentences than adults.[153] In theory, those under 14 would be automatically sent to rehabilitation centres. However, Barret notes that by the time juvenile offenders came to trial, years passed, and they had now become adults, leading to inconsistent sentencing, while a number of defendants under 14 were still tried in some localities despite its prohibition.[154]

Restorative practices routinely place emphasis on the perpetrator seeking forgiveness, the acknowledgment of harm incurred, and an acceptance of responsibility. As such, restorative justice mechanisms that facilitate dialogue arguably offers a more comfortable space for a juvenile who may be situated in that "gray zone", somewhere between a victim and a perpetrator.[155] But what happens when society deems there to be no gray zone, and criminal accountability must occur? The next section considers the possible criminal accountability of complex juvenile perpetrators.

5.5 Retributive Justice

The tragic reality is that during armed conflict children and adolescents often commit unspeakable acts of atrocity that may reach the threshold of international crimes, such as war crimes, for example. Many do so out of desperation, to survive the coercive environment in

[149] Denov, *supra* note **Error! Bookmark not defined.**, p.169.

[150] Rosalind Shaw, 'Rethinking Truth and Reconciliation Commissions, Lessons from Sierra Leone' (United States Institute of Peace, 2005), p.9

[151] Drumbl, *supra* note **Error! Bookmark not defined.**, p.191.

[152] *See* the works cited in note 146, *supra*. *See further* Bert Ingelaere, *Inside Rwanda's Gacaca Courts, Seeking Justice After Genocide* (University of Wisconsin Press, 2016).

[153] Government of Rwanda, Organic Law 40/2000 of 26 January 2001, article 74.

[154] Jastine Barrett, 'Rwanda's Responses, in Law, Policy and Practice, to Child *Génocidaires'*, in *Child Perpetrators on Trial: Insights from Post-Genocide Rwanda* (Cambridge University Press, 2019), p.105.

[155] Luke Moffett, 'Reparations for 'Guilty Victims': Navigating Complex Identities of Victim-Perpetrators in Reparation Mechanisms', *International Journal of Transitional Justice,* Vol. 10, Issue 1 (2016) 146-167.

which they find themselves. This section shall first consider what international criminal law standards say on this issue, before reviewing the experience of one hybrid international court that attempted to hold children judicially accountable, the Special Court for Sierra Leone.

International Criminal Law Standards

Historically, the practice of international criminal law has been to consistently exclude those under 18 from criminal jurisdiction. The Nuremburg and Tokyo tribunals did not prosecute any minors. One French case does record the prosecution of two teenage girls for receiving stolen goods, a war crime under French municipal law.[156] Successive conventions such as the Geneva and Genocide Conventions do not mention the prospect of prosecuting minors.[157] Although the statutes of the ICTY and ICTR left open the possibility due to the absence of a minimum age limit of criminal responsibility, no minor was ever charged. The Rome Statute of the ICC expressly rejects the possibility, however, with article 26 stating that it shall have no jurisdiction over persons aged under 18. Rome Statute delegates apparently had concerns over resource constraints, and that crimes committed by child perpetrators would never meet the gravity threshold.[158] Drumbl argues that this provision ultimately contributes to the "imagery of faultlessness, passivity and victimhood."[159] This is because frequent and erroneous reliance is made on this provision for the authority that minors cannot be held legally responsible for serious crimes.[160] However, the reality is that this provision merely delineates the court's personal jurisdiction, rather than the scope of international customary law generally regarding the minimum age of criminal responsibility. However, one of the ICC's sister courts, the Special Court for Sierra Leone, did have a lower age limit of responsibility at 15 years, the experience of which is examined below.

Juvenile Perpetrators at the Special Court for Sierra Leone

In Sierra Leone, thousands of children participated in the 1991-2002 conflict that raged between the Revolutionary United Front, the Armed Forced Revolutionary Council and the

[156] Drumbl, *supra* note **Error! Bookmark not defined.**, p.117.

[157] Roger Clark & Otto Triffterer, 'Article 26, Exclusion of jurisdiction of persons over 18', in Otto Triffterer & Kai Ambos (Eds), *The Rome Statute of the International Criminal Court, A Commentary* (Bloomsbury, 2016, p.771.

[158] Drumbl, *supra* note **Error! Bookmark not defined.**, p.120.

[159] *Id*., p.122.

[160] *See e.g*. the passage from the Liberian TRC at note 140, *supra*.

Civil Defence Forces.[161] Many of the worst crimes, including notorious mutilations, were carried out by teenagers. Notably, extensive consultations with local communities across the country revealed a preference for retributive punishment for these acts.[162] In the year 2000, UN Secretary General Kofi Annan submitted a draft statute for the creation of the hybrid Special Court for Sierra Leone.[163] This new hybrid court was tasked with prosecuting those "most responsible" for various enumerated war crimes and crimes against humanity. In determining those most responsible, the Chief Prosecutor would be permitted to look at persons who committed crimes between 15 and 18 years of age, who were to be defined as "juvenile offenders".[164] Addressing this "moral dilemma", the UNSG's report noted that the government of Sierra Leone clearly wished "to see a process of judicial accountability for child combatants presumed responsible for the crimes" and that "it was said that the people of Sierra Leone would not look kindly upon a court which failed to bring to justice children who committed crimes of that nature and spared them the judicial process of accountability."[165] In contrast, international NGOs working in the area of child care and rehabilitation strenuously objected to the proposal, because in their view it would endanger prospects for rehabilitation.[166]

Regarding those who were deemed "most responsible", the UN Secretary General concluded that "in view of the most horrific aspects of the child combatants in Sierra Leone, the employment of this term would not necessarily exclude persons of young age from the jurisdiction of the Court."[167] Despite facilitating prosecutorial justice, the draft statute contained notably promoted restorative responses and rehabilitative language. At all stages of the proceedings, any juvenile offender would be treated "with dignity and a sense of worth, taking into account his or her young age and the desirability of promoting his or her rehabilitation, reintegration into and assumption of a constructive role in society."[168] In the course of trial, a juvenile offender was to be considered for release on remand, and during trial

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[161] *See generally* Denov, *supra* note **Error! Bookmark not defined.**; Susan Shepler, *Childhood Deployed: Remaking Child Soldiers in Sierra Leone* (NYU Press, 2014).

[162] Max du Plessis, 'Children under International Criminal Law', *African Security Review,* Vol. 13, Issue 2 (2004) 103-111 at 109.

[163] Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone*,* U.N. Doc. S/2000/915, 6 October 2000 (Hereafter, "UNSG Sierra Leone Report").

[164] *Id*., Draft Statute, p.23, article 7(2): "At all stages of the proceedings, including investigation, prosecution and adjudication, an accused below the age of 18 (hereinafter "a juvenile offender") shall be treated with dignity and a sense of worth, taking into account his or her young age and the desirability of promoting his or her rehabilitation, reintegration into and assumption of a constructive role in society."

[165] *Id*., para.35.

[166] *Id*.

[167] *Id.*, para.36.

[168] *Id.*, Draft Statute, article 7(2).

may benefit from the assistance of a parent or legal guardian and have their identity withheld.[169] Ultimate judgement, referred to as the "disposition", would have involved the provision of care guidance and supervision orders, community service orders, counselling, foster care, and, as appropriate, any programmes of disarmament, demobilization and reintegration or programmes of child protection agencies.[170] According to the UN Secretary General, this approach struck "an appropriate balance between all conflicting interests and provided the necessary guarantees of juvenile justice."[171]

The final wording of the statute included express language that no person under 15 could be prosecuted, but the court could still exercise jurisdiction over persons aged 15-18, with non-custodial, restorative measures being the only sanctions available.[172] The Statute therefore was thus aligned with international juvenile justice standards, discussed above, that place emphasise alternative sanctions if formal accountability processes must occur.[173] In his report, the UN Secretary General stated that although the children of Sierra Leone may be among those who have committed the worst crimes, they are to be regarded "first and foremost as victims".[174] The prosecution of children would however send a "moral-education message",[175] but as Amman notes, communicating that message in underdeveloped societies is another task altogether.[176]

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[169] *Id.*, article 7(3)(a), (d) & (e).

[170] *Id.*, article 7(3)(f).

[171] *Id.*, para.38.

[172] Letter dated 12 January 2001 from the Secretary-General addressed to the President of the Security Council, U.N. Doc. S/2001/40, 12 January 2001, paras.7-8. The final wording adopted in the SCSL statute for article 7 was as follows:

"1. The Special Court shall have no jurisdiction over any person who was under the age of 15 at the time of the alleged commission of the crime. Should any person who was at the time of the alleged commission of the crime between 15 and 18 years of age come before the Court, he or she shall be treated with dignity and a sense of worth, taking into account his or her young age and the desirability of promoting his or her rehabilitation, reintegration into and assumption of a constructive role in society, and in accordance with international human rights standards, in particular the rights of the child.

2. In the disposition of a case against a juvenile offender, the Special Court shall order any of the following: care guidance and supervision orders, community service orders, counselling, foster care, correctional, educational and vocational training programmes, approved schools and, as appropriate, any programmes of disarmament, demobilization and reintegration or programmes of child protection agencies."

[173] *See* African Committee of Experts on the Rights and Welfare of the Child, 'General Comment on Article 22 of the African Charter on the Welfare and Rights of the Child: Children in Situations of Conflict' (September 2020). para.59; UN Committee on the Rights of the Child, General Comment No. 24 (2019) on children's rights in the justice system, UN Doc. CRC/GC/24, 18 September 2019, paras.73, 85-88.

[174] UNSG Sierra Leone Report, *supra* note 164, para.7.

[175] *Id*., para.38.

[176] Diane Amann, 'Calling Children to Account: The Proposal for a Juvenile Chamber in the Special Court for Sierra Leone', *Pepperdine Law Review*, Vol. 29, Issue 1 (2001) 167-185 at 183.

In the end, this debate was rendered moot by the Chief Prosecutor of the SCSL, David Crane. He decided not to prosecute anyone under the age of 18 because, in his view, they were not among those "most responsible".[177] In a press release, Crane stated: "The children of Sierra Leone have suffered enough both as victims and perpetrators. I am not interested in prosecuting children. I want to prosecute the people who forced thousands of children to commit unspeakable crimes."[178] Despite the public desire for accountability, the SCSL provisions in relation to juvenile justice were never utilised. Yet, Amman notes that in societies such as Sierra Leone, responsibility is assumed from an early age and understandings of maturity differs between culture.[179] She has argued that prosecuting juveniles would in fact have contributed to reconciliation in Sierra Leone, and provided a sense of redress for the victims of the conflict.[180] The provision of court-imposed rehabilitation, as opposed to voluntary participation, was an example of "positive paternalism."[181] In Amman's view, public revelation of children as victims and perpetrators could have fostered the reintegration of child veterans into a society that was wary of them.[182]

More generally, for international criminal justice to be more effective and impartial, Morss suggests a special jurisdictional status for child offenders should be considered. In his view, to excuse responsibility on the basis of chronological age does not assist the project of eradicating a culture of impunity or prevent the re-occurrence of international crimes.[183] Veale argues that it may be in the best interests of former child soldiers and their communities that minors be held accountable, particularly where they were active participants, have committed gross violations, exercised authority and are deemed to be psychologically capable of participating.[184] Similarly, Steinl agrees that accountability to be in the best interests of child soldiers, because accountability promotes integration through the addressing of community fears, anger and desires for redress.[185] Importantly, it also allows the child to confront, and

[177] Special Court for Sierra Leone, Public Affairs Office, 'Special Court Prosecutor Says He Will Not Prosecute Children', Press Release, 2 November 2002.

[178] *Id*.

[179] Amann, *supra* note 176 at 179.

[180] *Id*.

[181] *Id*., at 182.

[182] *Id*., at 184.

[183] John Morss, 'The Status of Child Offenders under International Criminal Justice: Lessons from Sierra Leone', *Deakin Law Review*, Vol. 9, Issue 1 (2004) 213-226 at 226.

[184] Veale, *supra* note 127, p.104.

[185] Steinl, *supra* note 81, p.36.

ameliorate, their personal feelings of guilt and responsibility for violent acts.[186] The procedural and legal basis that the SCSL statute attempted to offer was, on reflection, quite progressive in its formula and the interests it sought to balance. It recognised that the circumstances of the conflict called for accountability, yet ensured that international juvenile justice standards informed its drafting, such as including a restorative sentencing regime. But its formula has not been repeated in other international criminal statutes, like the Rome Statute. While no prosecutions were ultimately brought at the SCSL, it nevertheless offers an important template for future interventions to address the actions of complex victim-perpetrators accused of international crimes.

5.6 Complex Perpetrators in the LRA

The preceding sections examined the discourse of victimhood and the exercise of agency by child soldiers, with a discussion of restorative and retributive responses to wrongdoing. The chapter now situates these themes within the northern Ugandan context. Adopting these same four broad headings, this section first considers the nature of victimisation in the LRA, and second, what it means to be a "complex perpetrator". Third, the documented restorative and retributive responses to the Ugandan civil war will be examined.

Victimisation in the LRA

The LRA was, in essence, an army of abductees. Membership in the rebel group was brutally coerced. While some senior members of the group joined voluntarily, particularly in the early years of the group's existence, the vast majority were forcibly recruited, many of them as children or young adolescents. At its operational height, estimates place the number of children abducted by the LRA between 28,000-33,000.[187] Around one third of all Acholi males and one sixth of females between the ages of 14 and 30 experienced a period of abduction of at least two weeks, with 65% of abductions targeting children and young adolescents.[188] The average length of abduction was 342 days.[189] Children in particular were targeted for

[186] *Id*.

[187] Phoung Pham, Patrick Vinck and Eric Stover, The Lord's Resistance Army and forced conscription in northern Uganda', *Human Rights Quarterly*, Vol. 30, Issue 2 (2008) 404-411 at 410, with reference to the years 1986-2006.

[188] Jeannie Annan, Christopher Blattman & Roger Horton, *The State of Youth and Youth Protection in Northern Uganda, Findings from the Survey for War Affected Youth* (UNICEF, 2006) (Hereafter referred to as the "SWAY Report"), p.51.

[189] Pham *et al*., *supra* note 187 at 407.

recruitment because they "would easily forget about home", and were seen as more easily moulded, indoctrinated and subsumed within the group. They were forced to participate in a rebellion that was not of their choosing.

A typical indoctrination process in the LRA involved the following. A group of newly arrived abductees would be gathered together. One abductee would be selected, usually one who may have attempted to escape soon after abduction. Other abductees would then be forced to beat or kill the failed escapee, as an example to the others. This was done to instil fear in the collective, that death would result if escape was attempted. Severe beating was another common event immediately after abduction. This was "to beat the civilian nature out of the person", and to dissuade any thoughts of escaping in the future. The testimony of one former child soldier in the *Ongwen* case describes this process:

> "When we finished parade we were gathered together and they brought the boy who had earlier been bound and we were told that in the LRA what we really don't want is the issue of escaping, or having to think about home. Whenever you are here forget about home. Whoever tried to escape will be killed. And we are going to show you as an example, we abducted him earlier and he thought he was wise, he refused to stay with us, he escaped thinking we would not find him again. We shall not forgive him. We shall kill him. You will be the ones to kill him. Thereafter the boy was brought and they said we should go and kill him."[190]

Research with abductees conducted by Berkley Human Rights Centre has found that 67% of abductees were beaten upon their abduction, and 15% were forced to kill another person.[191] Other research also reveals similar figures, with 60% of male youth experiencing beatings, and 18% of them forced to kill a civilian.[192] After brutal indoctrination, children would often be militarily trained and expected to take part in the LRA's operations against the UPDF, and to also engage in attacks on civilian IDP camps. During these attacks, civilians would be targeted for more abduction, varying cruel treatment and murder. Food would be food pillaged for use by the LRA, and property destroyed. Throughout the conflict, children played active roles in all of these criminal activities. In addition, young women and girls were also forced to engage in domestic chores, and when they became "of age", were distributed to LRA commanders as forced wives, where they were subjected to exclusive conjugal subjugation and sexual enslavement.[193] To a lesser extent, women and girls also engaged in

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[190] ICC, *Prosecutor v Ongwen,* Testimony of Witness P-0379, ICC-02/04-01/15-T-56-Red2-ENG, 17 March 2017, pp.21-22.

[191] Phoung Pham, Patrick Vinck and Eric Stover**,** *Abducted: The Lord's Resistance Army and Forced Conscription in Northern Uganda* (Berkley Human Rights Centre, 2007) p.19.

[192] SWAY Report, *supra* note 188, p.11.

[193] *See* Baines, *supra* note 35; Amony, *supra* note 35; Khristopher Carlson & Dyan Mazurana, *Forced Marriage within the Lord's Resistance Army, Uganda* (Feinstein International Center, 2008).

military combat and criminal activity, for example by being deployed as "lifters" of pillaged food and possessions following attacks.[194] In addition, recent research with male informants has revealed that men were also sexually victimised during the conflict, principally by government soldiers.[195] Strict rules around sexual conduct in the LRA meant that this phenomenon was not as prevalent, but one study indicates that 10% of males did report sexual violence in the LRA.[196] Thus, abductees were victimised not only through their initial abduction and subsequent enslavement (gendered or otherwise), but were also victimised through their conscription and use in hostilities by the LRA. Bearing this victim status, they then became direct perpetrators in a war that inflicted horrific human suffering. As such, many thousands of LRA abductees now carry the complex label of "victim-perpetrator".

However, the passive victim discourse was prevalent in NGO intervention in northern Uganda. With PTSD such a common phenomenon among abductees, NGOs in Uganda viewed former child soldiers through a "psychological trauma lens".[197] Abductees in reception centres who were told "they were innocent victims", who were not responsible for their actions.[198] Mawson writes that the Acholi definition of a child was "augmented and adapted" to enable a "non-punitive approach to justice", a process which occurred through NGOs, rather than Acholi institutions.[199] In the rehabilitation centres, children were informed by counsellors that they were victims and not responsible for the atrocities they committed.[200] Communities were also sensitized with the discourse of innocence.[201] Local leaders also made speeches stating that ex-combatants were victims and needed community support.[202] A more comprehensive

[194] One of the highest-ranking female fighters in the LRA, witness P-0045, testified in the *Ongwen* case. She spoke about being trained in how to use weaponry and engaging the UPDF in battle. *See* ICC, *Prosecutor v Ongwen,* Testimony of Witness P-0045, ICC-02/04-01/15-T-103-Red2-ENG, 12 September 2017, pp.80-81.

[195] *See* Schulz, *supra* note 66.

[196] Kennedy Amone-P'Olak *et al*., 'Sexual violence and general functioning among formerly abducted girls in Northern Uganda: the mediating roles of stigma and community relations--the WAYS study', *BMC Public Health*, Vol.16 (2016) 1-10 at 3.

[197] Christopher Blattman & Jeannie Annan, 'Child combatants in northern Uganda: Reintegration myths and realities', in Robert Muggah (Ed), *Security and Post-Conflict Reconstruction: Dealing with Fighters in the Aftermath of War* (Routledge, 2008), pp.103-126 at p.111.

[198] Ben Mergelsberg, 'Between two worlds: former LRA soldiers in northern Uganda', in Tim Allen & Koen Vlassenroot (Eds), *The Lord's Resistance Army, Between Myth and Reality* (Zed Books, 2010), pp.156-176 at p.165.

[199] Andrew Mawson, 'Children, Impunity and Justice: Some Dilemmas from Northern Uganda,' in *Children and Youth on the Front Line*, *supra* note 79, pp.130-144 at pp.130-131.

[200] Grace Akello, Annemiek Richters & Ria Reis, 'Reintegration of former child soldiers in northern Uganda: coming to terms with children's agency and accountability,' *Intervention*, Vol. 4, Issue 3 (2006) 229-243 at 233.

[201] Jeannie Annan, Moriah Brier & Filder Aryemo, 'From "Rebel" to "Returnee": Daily Life and Reintegration for Young Soldiers in Northern Uganda,' *Journal of Adolescent Research*, Vol. 24, Issue 6 (2009) 639-667 at 643.

[202] Akello *et al*., *supra* note 200.

rehabilitation would have meant informing child soldiers about the implications of their actions in the bush, and counselling them to engage with the community to seek forgiveness.[203] Akello's research with returned children in northern Uganda found that they were often stigmatized and mistreated by the community, subjected to verbal and physical harassment because of their rebel history.[204]

Perpetration in the LRA

The nature of criminal perpetration in the LRA is well documented. Widespread human rights abuses occurred, inflicting unspeakable suffering on the population.[205] The conflict was notoriously characterised by the chronic abduction of young children and brutal attacks on civilians. The victim-perpetrator dilemma is one that defines the conflict. It has also been encapsulated in the *Ongwen* case at the ICC, where it has been raised as an explicit exculpatory issue by the defence. As previously discussed,[206] Ongwen contends that he should not be held criminally accountable because legally valid defences arise due to his direct victimisation, namely mental disease and duress. Notably, however, his defence team actually reject the victim-perpetrator label, submitting that:

> "Mr Ongwen is a victim, not a perpetrator. He was abducted as a young child by the LRA and brutalized for almost three decades before he was able to voluntarily surrender to military personnel in the Central African Republic. This case cannot be properly adjudicated without considering his shattered life and the catastrophic effects of his experience in the LRA throughout his childhood and adulthood before his surrender.
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> […]
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> The Defence submits that the claim of Mr Ongwen remaining a willing partner in the commission of crimes committed by the LRA after attaining the age of 18 is wrong. Mr Ongwen remained a victim and his victimhood continued well after the statutory age of 18.[207]

While Ongwen himself has chosen not to testify, the court has nevertheless heard harrowing testimony from former LRA child soldiers who served under his command. The trial

[203] Grace Akello, 'The Impact of the Paris Principles on Reintegration Processes for Former Child Soldiers in Northern Uganda,' *Annals of Psychiatry and Mental Health*, Vol. 3, Issue 5 (2015) 1038 -1045 at 1041.

[204] Akello *et al*., *supra* note 200 at 234.

[205] *See e.g.* the violations of human rights documented in UN Office of the High Commissioner for Human Rights, *The Dust Has Not Yet Settled, Victims' Views on the Right to Remedy and Reparation', A Report from the Greater North of Uganda* (2011).

[206] *See* section 4.4 "The Case of Dominic Ongwen" of this thesis.

[207] Defence Closing Brief, *supra* note 115, paras.12, 21.

record contains many emblematic examples of how children in the LRA were simultaneously victims and perpetrators. Former child soldiers testified how they were abducted and brutally indoctrinated, routinely participating in attacks on IDP camps where civilians were targeted. One former child soldier described how he participated in an attack on Lukodi IDP camp outside Gulu, where civilians were burned alive in their homes.[208] Another testified how he was forced to kill another boy with a wooden club shortly after the attack on Odek IDP camp.[209] The testimony of one particular witness, P-252, a young boy abducted into Ongwen's group in April 2004, encapsulated the experiential trauma endured by victim-perpetrators in the LRA:

> "There was an elderly man that was abducted from an area known as Opit. At the time people were in the camps, but it was in the Opit area. He was abducted while herding his cattle. He was abducted with his cattle. He had one bull. He was brought in the evening. They asked me to kill him. The old man started crying. He asked, "Why are you killing me? Why are you killing me?" One of the soldiers came and hit his chest with the butt of the gun. They tied his hands behind his back. They started chopping logs at that particular time. The log was as long as my arm and they told me to start beating this person. They stood by while watching, while I was beating him. I started beating the old man. I beat him very severely. They wanted me to beat him until I cracked his skull completely. So I beat -- I beat the old man exactly in the manner that they wanted me to beat him. There was blood and brains splashing on my face. I was covered in blood and brains. When I stopped beating, when I stopped beating the man, I had lost all strength. I would move backwards because when I was, when I was abducted from school, when I came back home from school I was in primary 4. My parents were very proud of me, they were very proud of my studies, they pay my school fees knowing they are not wasting their money. I saw things in the bush and all those things have completely traumatised me. The things that I did in the bush have completely traumatised me."[210]

This witness, like thousands of others, received an amnesty certificate when he escaped from the bush in mid-2004. In Uganda, the net effect of the amnesty project has been to immunize all recipients such as witness P-252, through the granting of a blanket amnesty. No admission of criminal conduct was required by P-252, before or since. Following his escape and a period of time in a reception centre, he simply returned home to his village without any material or psychosocial assistance. Moral and legal dilemmas such as whether victim-perpetrators such as witness P-252 should be held accountable for their actions, be it in the formal or informal sense, were not really engaged with on a policy level in northern Uganda. Despite reconciliation being a key goal of amnesty in Uganda, the *Amnesty Act* did not legislate for truth-telling or any reconciliation processes. Envisioned mechanisms in the Agreement on Accountability and Reconciliation never manifested in any meaningful way. The difficult

[208] ICC, *Prosecutor v Ongwen,* Testimony of Witness P-0406, ICC-02/04-01/15-T-154-Red2-ENG, 19 February 2018, p.56: "What I saw was some people who are pushed inside and they are locked inside and the house set on fire."

[209] ICC, *Prosecutor v Ongwen,* Testimony of Witness P-0410, ICC-02/04-01/15-T-151-Red2-ENG, 31 January 2018, p.50: "When we were on our way back, I was forced into killing one person, a young boy."

[210] ICC, *Prosecutor v Ongwen*, Testimony of Witness P-0252, ICC-02/04-01/15-T-87-Red2-ENG, 16 June 2017, pp.70-71.

question of how victim-perpetrators should be addressed in a transitional, post-conflict environment, was thus not confronted in any substantive manner.

Agency in the LRA

In the LRA, membership was almost uniformly coerced. Abduction was the norm. However, the SWAY report noted that for some, agency became a reality over time. It reported that "nearly half of abductees became willing recruits, at least for a time […] 40 percent felt like an important member of the group, and 44 percent report having felt "allegiance" to Kony at some time."[211] The respondents in the SWAY report suggested "loyalty and dependability is at first a protective mechanism, but as time passes the goals and objectives of the LRA can be internalized."[212] For those that remained in the LRA for a long time, the authors state "they do exercise some agency, perhaps a great degree."[213] Drumbl writes that such findings are at odds with established perceptions of child soldiers in the LRA, which paints them as incapable victims, and highlights the variation of abductee experiences in the rebel group.[214]

In research conducted by Akello *et al*., former combatants "commonly disclosed that they did not feel like innocent victims." In some instances, they described how an abductee could have been set free, but they made the choice to kill them instead. This gave them "the feeling of acting independently."[215] Similarly, research by Mergelsberg also challenges the passive victim precept in the Ugandan context: "The view of helpless children without agency in what has happened to them often does not correspond to their actual experiences. Passive victims on first sight, they turned out during my fieldwork to be active survivors with a good sense of why they were fighting."[216] Notably, enslaved women in the LRA would also exercise considerable degrees of "political" agency, such as standing up to their forced husbands and influencing the dynamics of power around them.[217] Baines challenges the narrative of powerlessness that surrounds women in the LRA, pointing to the fact that women routinely occupied positions of social power within the group, often inflicting harm on others and

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[211] SWAY Report, *supra* note 188, p.60.

[212] *Id*.

[213] Blattman & Annan, *supra* note 159, p.115.

[214] Drumbl, *supra* note **Error! Bookmark not defined.**, p.69.

[215] Akello *et al*., *supra* note 200 at 236.

[216] Mergelsberg, *supra* note 198, pp.156-157.

[217] *See* Erin Baines, '"Today, I Want to Speak Out the Truth": Victim Agency, Responsibility, and Transitional Justice', *International Political Sociology*, Vol. 9, Issue 4 (2015) 316–332.

exercising significant political agency. For example, she reveals that the social dynamics between the "originals" (the women in the LRA from the group's inception) and the more recent young abductees, which involved the exercise of social control by the "originals" and the infliction of physical and mental harm.[218] In the context of forced marriage, young men exercised considerable degrees of agency in how they ran their household, and often developed strong social relationships with other men, their wives and the children they fathered in the bush.[219] These realities prompt a broadening and re-thinking of the victim-perpetrator binary in the LRA context.

Prosecuting Victim-Perpetrators in Uganda

The post-conflict reality for LRA victim-perpetrators has been unconditional amnesty. However, in 2002, Ugandan prosecutors charged two boys, aged 14 and 16, who were forcibly abducted into the LRA and who surrendered voluntarily to the state forces, with the crime of treason.[220] There was, however, no indication that the boys were complicit in any crimes against civilians. In a letter to the Minister for Justice, Human Rights Watch wrote, "children are inherently different from adults, and lack an adult's maturity and judgment. In the context of the northern Uganda conflict, where children are routinely forcibly abducted, severely brutalized and compelled to participate in acts of violence, they are rarely autonomous actors."[221] Following this letter, the boys were subsequently allowed to apply for amnesty in 2003.[222] For years, this was the only known attempted prosecution of any juvenile LRA abductees, and can be considered an aberration in the context of the overall transitional process of mass amnesty. However, the victim-perpetrator dilemma would subsequently resurface with the prosecution of Thomas Kwoyelo, but particularly in the trial Dominic Ongwen.

As discussed in Chapter 4,[223] Dominic Ongwen was abducted as a child into the LRA and rose through the ranks to become a leading LRA commander. Investigation into his conduct resulted in the issuance of a warrant for his arrest, and he is currently on trial at the ICC. He faces 70 counts of various war crimes and crimes against humanity committed by his

[218] Erin Baines, *Buried in the Heart, Women, Complex Victimhood and the War in Northern Uganda* (Cambridge University Press, 2017), chapter 3.

[219] Omer Aijazi & Erin Baines, 'Relationality, Culpability and Consent in Wartime: Men's Experiences of Forced Marriage', *International Journal of Transitional Justice*, Vol. 11, Issue 3 (2017) 463–483.

[220] *New Vision*, 'Rights Body Wants Treason Case Against Boys Dropped', 5 March 2003.

[221] Human Rights Watch, 'Letter to Minister of Justice', 19 February 2003.

[222] *Id*.

[223] *See* section 4.4 of this thesis.

troops during attacks on IDP camps, charges of conscripting and using child soldiers, and personally committing the crimes of rape, forced marriage and sexual slavery, among other charges.[224] Erin Baines uses the concept of "complex political perpetrator" to describe a generation of victims in settings of chronic crisis who adapt to their violent settings to survive.[225] In labelling Ongwen as an example of such a complex political perpetrator, Baines acknowledges that he made certain choices to commit crimes and that where there is agency, there must be responsibility.[226] However, she says that his accountability is mitigated by circumstances which led to his victim status.[227] Baines writes that Ongwen possessed varied agency and the ability to disobey orders, be compassionate, but also terribly cruel. This allowed him to "navigate the complex terrain of the LRA to exercise agency."[228] Drumbl considers that the prosecution of Ongwen exposes fissures in the ICC framework, and renders the historical narrative incomplete, as it could not hear evidence of his conduct from before he was 18.[229] As described above,[230] this view is misinformed and incorrect, because the Defence have in fact called witnesses to testify about that very period, including the very day of his abduction. At the confirmation of charges hearing, the Defence made implicit reference to the passive victim discourse, viewing as contradictory its non-applicability to Dominic Ongwen's personal situation:

> Your Honours, it is argued that it is disingenuous to only recognize the immense suffering of child soldiers and the impact their experiences have on them as victims in one breath while in the other breath rejecting the same arguments in relation to Dominic. Dominic was clearly subjected to the same treatment in violation of international humanitarian and human rights law. Importantly, against his own fundamental rights. But to suggest that any threats that were posed ever dissipated the Defence suggests that that assertion is erroneous. The very threats and fears under which Dominic lived never dissipated when one remained in the hands of the Lord's Resistance Army. It is the Defence's submission that Dominic remained under that same threat and imminent bodily harm, not only at the time of his abduction, but even as he rose among the ranks.[231]

In such an environment as that which existed in the LRA, Ongwen's lawyers argued that there was no personal agency, and therefore no criminal liability:

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[224] *See generally* ICC, *Prosecutor v Dominic Ongwen*, 'Decision on the confirmation of charges against Dominic Ongwen', 23 March 2016.

[225] Baines, *supra* note 46 at 180.

[226] *Id*., at 182.

[227] *Id*., at 180-181.

[228] *Id*., at 173.

[229] Drumbl, *supra* note **Error! Bookmark not defined.**, p.91.

[230] *See* section 4.4 of this thesis.

[231] ICC, *Prosecutor v Dominic Ongwen*, ICC-02/04-01/15-T-23-Red2-ENG, 26 January 2016, p.5.

> The Defence contends that criminal liability requires voluntary conduct. With choice comes responsibility for one's actions. One cannot, however, be properly or justly punished for charges based on conduct absent any realistic choice.[232]
>
> […]
>
> It is argued that there were no options for Dominic but to survive in an environment which he has known since he was nine and a half years old. That environment which stripped his childhood placed him under threat. It is on this basis that any alleged criminal responsibility must be excluded on the basis of duress.[233]

In response, the Prosecution has argued that there comes a time when one takes responsibility for their own actions. As described in detail in chapter 4,[234] the Prosecution states that duress cannot legally be argued in such a blanket fashion, in that the nature of the duress presented by Ongwen (*i.e.*, the perceived threat of future punishment by Kony) fails to meet the requirement of imminence contained in article 31(d) of the Rome Statute, It also fails on the proportionality requirement (*i.e.*, that Ongwen acted "reasonably and necessary" in the face of the duress he experienced when the alleged crimes occurred). The trial record is replete with testimonial evidence of Ongwen exercising significant authority and personal agency, further undermining the second major defence argument – that Ongwen was also suffering from a severe mental disorder that destroyed his ability to know right from wrong. Should Ongwen be convicted, discussion of his "complex victimhood", and the impact this has on his criminal responsibility, will no doubt dominate the sentencing phase under article 76 of the Rome Statute, which follows the issuance of the judgement and allows for further submissions from the parties.[235] It is notable that in the Kwoyelo case, at the commencement of his trial in March 2019, defence lawyers adopted a similar strategy to the Ongwen defence team, arguing that Kwoyelo is not culpable because he was abducted as a child, his victim status overriding any criminal responsibility that may attach to him.[236]

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[232] *Id.*, p.9.

[233] *Id.*, pp.9-10.

[234] *See* section 4.4 of this thesis.

[235] Unlike the *ad hoc* tribunals, ICC practice is to separate the process of conviction and sentence. The latter begins after a judgement is rendered pursuant to article 74(5) of the Statute. For the sentencing phase, article 76(2) allows for further submissions from the parties, oral hearings and even witnesses to be called to assist with the determination of an appropriate sentence.

[236] During the Defence opening statement given by Kwoyelo's lawyer, Caleb Alaka, he stated: "The person being tried is not Joseph Kony, Raska Lukwiya, Okot Odhiambo, Dominic Ongwen, or Otti Vincent who were the leaders of LRA and were indicted for those crimes. Before you is a victim who was not protected but was abducted on his way to school, and the government failed to protect him." *International Justice Monitor*, 'Kwoyelo Trial Continues, Prosecution to Call 130 Witnesses', 14 March 2019.

Restorative Practices in Uganda

In Uganda, traditional ceremonies rooted in the Acholi culture have been utilised to reintegrate former LRA fighters. Estimates vary as to the extent that victim-perpetrators have undergone traditional ceremonies. One survey suggests 19% of abductees have undergone some form of ritual upon returning home,[237] while another states that over half of male abductees have undergone a cleansing ceremony.[238] In Finn's quantitative study with former members of the four main rebel groups that received amnesty, 55% of LRA returnees underwent a traditional ceremony of some kind, 35% of WNBF, 20% of ADF and 15% of UNRF II.[239] But it is not elaborated on what kind of ceremonies these were, and whether they were cleansing or more reconciliatory (involving an apology to victims, for example) in nature. Research with affected communities evinces a large degree of support for such practices, with one survey finding that 57% of local people wished to see ex-LRA fighters participate in traditional ceremonies.[240] However, the implementation of such ceremonies has generally been ad hoc and sporadic.

One of the most commonly cited rituals in northern Uganda is *mato oput* (translate as "the drinking of the bitter root").[241] The ceremony aims at re-establishing relationships between two clans following a killing or serious social transgression.[242] The culmination of the ceremony is the drinking of the juice drawn from the root of the Oput tree, and usually the offering of monetary compensation together with a public apology from the offender. Archbishop Odama explained *mato oput* to me as follows:

> It is to restore the broken relations between the two sides. And the one who is on the offensive normally has to make apology, as a part of the *mato oput* to say when now he is, generally it is also community, it is communal. We say sorry we are sorry on this side to the side offended, to the victim side. And the victim side also accepts that these people are sincere, they are honest. So, we accept, let us to come to there. And then they have the ritual who are having the crushing of the juice of this oput and drink it with some ingredients, kneeling down, I think you know something already about that. And then, if it is between two different tribes, there is a bending of the spear. If that is not there, they will just drink the bitter herbs and then they may exchange

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[237] Joanne Corbin, 'Returning home: Resettlement of formerly abducted children in northern Uganda', *Disasters*, Vol. 32, Issue 2 (2008) 316-335 at 325.

[238] Annan *et al*., *supra* note 201 at 660.

[239] Anthony Finn *et al*., Transitional Demobilization and Reintegration Program, *Uganda Demobilization and Reintegration Project, Beneficiary Assessment* (World Bank, 2012), p.84.

[240] Phuong Pham, Patrick Vinck, Marieke Wierda, Eric Stover, Andrew Moss & Richard Bailey, *When the War Ends: A Population-Based Survey of Attitudes about Peace, Justice and Social Reconstruction in Northern Uganda* (International Center for Transitional Justice & Berkley Human Rights Centre, 2007), p.43.

[241] *See generally* Liu Institute for Global Issues and Gulu District NGO Forum, *Roco Wati Acoli: Restoring Relations in Acholi-land Traditional Approaches to Reintegration and Justice* (September 2005).

[242] Prudence Acirokop, 'The Limits and Potential of *Mato Oput* as a Tool for Reconciliation and Justice', in *Children and Transitional Justice*, *supra* note 130, pp.267-292 at p.277.

> something of animals to be killed and they eat together. And the formalise it by the leaders of the clans, or say from now onwards, there is nothing or for continuing or revenge, this is nothing. So it ends now, by the two sides in a way, accepting each other. Yeah, accepting each other. So it should have gone into the amnesty. But the amnesty remained purely legal, just legal. The aspect of reconciliation was not there.[243]

Traditional ceremonies are also seen as vital to cleanse the perpetrator of what is known as *cen*, something best translated as the "spiritual haunting" of the perpetrator by the deceased victim.[244] Left unaddressed, locals believe *cen* to cause ongoing psychological and health problems for the perpetrator and their wider family.[245] Acirokop writes that stigma can nevertheless often continue even after such ceremonies are performed.[246] A more significant barrier is financial. Most of the children interviewed by Acirokop expressed their desire to participate in *mato oput*, but that a lack of resources proved to be an obstacle, thus undermining its potential as a useful reconciliation tool.[247] Some local people also question the appropriateness of *mato oput* as a response to mass atrocity, something it was never traditionally designed for.[248] Another logistical problem is that the ceremony requires the victim's family be identified and located, a difficult task in a protracted conflict that spread over a large geographical area. Many perpetrators often will not know the identity of their victim. Overall, Acirokop argues that *mato oput* has been generally helpful in restoring the psychological well-being of many children and in reconciling communities, but resource limitations and a lack of central coordination has reduced its beneficial reach.[249] While this procedure is much lauded in the literature as being an appropriate mechanism to address LRA atrocities, Allen considers the promotion of *mato oput* to be part of a "reinvention of traditional justice" by local elites with the help of donors, and lacking in significant local enthusiasm for its use.[250] Of 238 returned LRA abductees interviewed by Allen in 2005, none of them had undergone *mato oput* specifically, but 69 had undergone some form of cleansing ceremony.[251]

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[243] Interview with Archbishop John Baptist Odama, 3 December 2018, Gulu.

[244] Letha Victor & Holly Porter, 'Dirty things: spiritual pollution and life after the Lord's Resistance Army', *Journal of Eastern African Studies*, Vol. 11, Issue 4 (2017) 590-60 at 594.

[245] Acirokop, *supra* note 242.

[246] *Id*., p.283.

[247] *Id*., p.286.

[248] *Id*., p.289.

[249] *Id*., p.292.

[250] *See* Tim Allen, 'Bitter Roots: The Invention of Acholi Traditional Justice in Northern Uganda', in Allen & Vlassenroot, *supra* note 198, pp.242-261.

[251] *Id*., p.251.

Perhaps the most commonly occurring ceremony for returnees in norther Uganda is the "stepping on the egg", or *nyono tongweno.* This ceremony involves a returnee stepping on an egg at the entrance to the family compound.[252] It is best described as a cleansing process, designed to remove bad *cen* and signifies a new beginning for the person.[253] Notably, this ceremony is usually family-led, and doesn't necessarily involve those outside of the immediate family unit, the community at large, or any other victims that the returnee may have harmed. Families and communities welcoming returning combatants home often choose to perform traditional rituals designed to cleanse the person, offering a forum for apology and forgiveness between the perpetrator and the community. Akello suggests that this is indicative of a cultural understanding that accountability is a pre-requisite for communal reintegration and acceptance.[254] She argues that legally framing child soldiers as innocent and traumatised victims prevents an alternative discourse of engagement and dialogue between the returnee and the community.[255] One possibility not widely pursued in northern Uganda was a traditional process of reciprocity, where the returnee offers forgiveness and seeks the support of the community in return.[256]

Data on how returning child perpetrators were treated in northern Uganda provides mixed results. Some research findings point to high levels of community acceptance upon return, while others reveal that stigma and social discrimination is a lasting problem for many.[257] In particular, those suspected of serious criminality can be socially isolated by their community.[258] Akello gives the example of a known child soldier from Kitgum-Matidi who took part in an infamous massacre there in 2005. In that area, the community rejected the "paradigm of innocence and traumatisation" in relation to this particular child. As a result, the child chose to re-settle elsewhere in Gulu town.[259] Bernard Festo, Programme Officer with the Amnesty Commission Gulu Office, recounted how an NGO facilitated the resettlement of one boy who had actually committed crimes within his own community. The boy's father later asked for the boy to be taken back to the reception centre, because he feared the community

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[252] Eric Awich Ochen, 'Traditional Acholi mechanisms for reintegrating Ugandan child abductees', *Anthropology Southern Africa*, Vol. 37, Issue 3 (2014) 239-251.

[253] Victor & Porter, *supra* note 244.

[254] Akello *et al*., *supra* note 200 at 235.

[255] Akello, *supra* note 203 at 1041.

[256] *Id*.

[257] SWAY Report, *supra* note 188, p.66.

[258] Angela Veale & Aki Stavrou, 'Former Lord's Resistance Army child soldier abductees: Explorations of identity in reintegration and reconciliation', *Peace and Conflict: Journal of Peace Psychology,* Vol. 13, Issue 3 (2007) 273–292 at 288.

[259] Akello, *supra* note 203 at 1042.

were going to violently retaliate against both of them. The did not return home and joined the army instead.[260]

The rehabilitative approach of NGOs and their efforts to reintegrate children did not attempt to engage with the needs of the community and their desires for accountability and reparation.[261] Akello *et al.*'s research found that some communities refused to accept the idea that a child soldier could not be held accountable for the crimes the committed, leading to social rejection and discrimination.[262] Children themselves acknowledged they were not free from responsibility for the crimes they committed.[263] Akello argues that "for successful reintegration to take place, children and their communities have to come to terms with the unavoidable change in the status of such children, and to deal with issues of accountability in a way that answers the needs of both the community and the anxieties of the children involved."[264] Other research conducted by Corbin indicates that some abducted children were better accepted by the community when they did not talk about their captivity,[265] contradicting a view often found in transitional justice literature thinking that dialogue is the better approach.[266] Veale and Stavrou, in research with returned children, noted that while many in the community publicly professed forgiveness, privately dealing with impunity was difficult.[267]

5.7 Conclusion

This chapter has highlighted how victimhood can be complicated in the midst of conflict and mass atrocity. The growing discourse of complex victimhood broadens our understanding of victims' experience and causes scholars and policymakers to rethink simple binaries of "victim" and "perpetrator". With complex victimhood, comes complex agency. Transitional justice measures need to be more sensitive to both. As the experience of the TRCs in Sierra Leone and Liberia show, restorative measures implemented in the course of transition to

[260] Interview with Bernard Festo, 20 September 2018, Gulu.

[261] Akello *et al*., *supra* note 200 at 230.

[262] *Id*., at 235.

[263] *Id*., at 240.

[264] *Id*., at 230.

[265] Corbin, *supra* note 237 at 327.

[266] *See e.g*., Jonathan Doak, 'The therapeutic dimension of transitional justice: Emotional repair and victim satisfaction in international trials and truth commissions', *International Criminal Law Review*, Vol. 11, Issue 2 (2012) 263-298.

[267] Veale & Stavrou, *supra* note 258 at 288.

address past harm need to be carefully tailored to ensure that "complex political perpetrators", as termed by Bouris, are recognised, their particular circumstances acknowledged, and allow them to partake in available mechanisms that avoid rigid participation criteria. Any retributive responses for juvenile perpetrators in particular must also endeavour to adhere to international juvenile justice standards, as advanced by the UN-CRC, that place emphasis on diversion, alternative sanctions, rehabilitation and detention only as a last resort.

In northern Uganda, those abducted into the LRA were subjected to the most inhumane victimisation imaginable. Yet, over time, their identities were shaped and changed by their environment. Consequently, because of brutal coercion and adaptive preferences, many abducted victims unwillingly contributed to the violent discourse they were situated within. The conflict thus produced thousands of "complex victim perpetrators" – children, men and women whose victimhood has been complicated by the perpetration of violence and their coerced participation in the rebel machinery that promoted it.

The implementation of a blanket amnesty regime absolved all such complex victim-perpetrators. This legal process was, however, officially recognising the recipient of amnesty as a perpetrator against the state, *i.e.*, a rebel. Its granting does not accord them, even implicitly, victim status, or take into account their prior victimisation. Somewhat ironically, by granting amnesty, it is the state who is forgiving former child soldiers for harm they have supposedly *committed*, rather than addressing the harm they have *endured*. The amnesty process thus did not incorporate, understand or address complex victimhood. There was no dialectic space for this complexity to be addressed, either between the abducted victim and the state, or between the abducted victim and those victimised by them. Traditional responses and ceremonial cleansing were conducted mainly by families, but broader structures to facilitate and promote it were not created in a meaningful and coordinated manner. It has to be acknowledged that in northern Uganda, restorative justice – *i.e.*, the process repairing of harm between the victim and offender – while championed in literature, rarely occurred in practice. Complex victims were not systematically supported to access and participate in traditional restorative ceremonies in their home communities, with the result that ceremonies were ad hoc, sporadic and often resource dependent. Absent culturally appropriate accountability, complex victim-perpetrators in Uganda continue to endure stigma and isolation in communities that long for spiritual closure. Sheik Musa Khalil described this dilemma to me as follows:

> "There are many victims who harboured pain in their heart and there are still many former fighters who received amnesty certificates, but they live with fears. They know they have committed crimes, they know some homes where they have killed, they know that these other people, some will come from the bush and will identify them. They know if counter-accusations start, it will be terrible. So for us as religious leaders we feel that the cultural and religious

> leaders, be given opportunity to use our mosque, our churches, the cultural institution to use their clan leaders, their clan chiefs, the local chiefs down there and in Acholi, the aunts, the aunties are used because it is the aunties who will sit down with their former fighters and ask them slowly have you killed, have you done this? From which side? From which side? And that cannot happen until the last sign of the last step, Joseph Kony comes home. And all the former fighters come home, then that step will happen. Because without truth telling, we are just deceiving ourselves. […] You cannot kill and be quiet and you think you are ok. Never. And whoever kills, don't think it's ok, it's not ok. It's suffering. It's suffering. Because of taking away is fellow human being's life. And one has to be free, it's only through when once he comes out […] Relationships, to be restored, one must undergo a process. And this process must be having forgiveness. Without forgiveness, you cannot do anything."[268]

Recent moves to prosecute leading members of the LRA, Dominic Ongwen and Thomas Kwoyelo, themselves victims, further complicates the situation. While correct in law, these prosecutions go against the practice of mass amnesty, and against the grain of cultural practices of cleansing and forgiveness. But they do serve to send an important message, that someone who commits serious international crimes cannot use their own victimisation to completely exculpate them. Moreover, claims that these processes cannot adequately shed light on their own complex victimhood are misplaced. The ability for the respective defence teams to present evidence, offer witness and expert testimony, provides significant room to shape the narrative, support legal defences and inform the trial and historical record.

However, for most complex victim-perpetrators in Uganda, opportunities to tell their own story, to apologise, to make amends, and receive appropriate rehabilitative attention have remained limited. They remain caught in that "gray zone", amnestied because they were abducted, yet labelled a rebel by the state, unable to meaningfully address both the harm they inflicted, and the harm they endured. The impact of amnesty on these complex perpetrators and their communities has been under-explored in the literature. The next chapter seeks to fill this critical gap, offering an in-depth assessment of amnesty, informed by empirical fieldwork with those most affected.

[268] Interview with Sheikh Musa Khalil, 5 December 2018, Gulu.

6 Impact of Amnesty in Uganda

6.1 Introduction

This chapter presents key perspectives on amnesty and prosecutions from the field, from the areas most affected by the conflict in northern Uganda, the Acholi and Lango sub-regions. The core aim of this thesis is to assess the post-conflict experience of Uganda in addressing mass atrocity through the use of amnesty, and the related impact of prosecutorial measures. In doing so, it becomes essential to listen and analyse the views of those most affected: recipients of amnesty, and the communities in which they live. Despite there being a growing consensus that transitional justice policies must take into account the local context, local communities and actors are rarely consulted to inform the implementation and evaluation of such policies.[1] As Pham and Vinck note, empirical research can "provide precise assessments of communities' needs and perceptions of and attitudes towards peace and justice, as well as systematic and rigorous measurement of the potential and actual impacts of transitional justice mechanisms."[2]

The fieldwork sought to cover the following broad themes:

→ *For recipients of amnesty*:

- How do ex-combatants view and understand the amnesty process?
- Has amnesty facilitated their re-integrated back into their community?
- How do they view moves to prosecute other ex-combatants?

→ *For affected communities:*

- How do communities view and understand the amnesty process?
- Have amnesty facilitated the reintegration of ex-combatants into their communities?
- How do communities view moves to prosecute other ex-combatants?

[1] Phuong Pham & Patrick Vinck, 'Empirical Research and the Assessment of Transitional Justice Mechanisms', *International Journal of Transitional Justice*, Vol. 1 (2007) 231-248 at 232.

[2] *Id.*, at 242.

Figure 4 - Deep in the heart of Gulu District, Northern Uganda, September 2018

In 2018, 20 interviews with recipients of amnesty were conducted, all of them former members of the LRA, exploring the above themes through in-depth qualitative interviews. The gender breakdown was 13 females and 7 males. In addition, 2 focus group interviews with community members (excluding recipients of amnesty) were held out in one village in the Acholi sub-region, Parabongo, and one village in the Lango sub-region, Abia. Key stakeholders involved in the amnesty process were also interviewed, specifically 2 staff members of the Amnesty Commission, Principal Legal Officer Nathan Twinomugisha, Gulu Office Amnesty Programme Officer, Bernard Festo, and 2 leading cultural and religious figures, Archbishop Odama and Sheikh Musa Khalil, both members of the Acholi Religious Peace Initiative.[3]

This chapter represents the fourth step in the conceptual framework put forward by Skaar *et al.* to evaluate the impact of a transitional justice mechanism, which has been adopted in this thesis. To recall the 4 steps in Skaar *et al's* impact assessment model: First, the contextual parameters should be examined, including the nature of the conflict and its

[3] These four individuals consented to their names being published in this thesis and any further publication of this research.

termination. Second, the mechanisms that have been established should be analysed, in particular what are the objectives, scope and provisions. Third, the implementation of the mechanism is examined, *i.e.,* looking at the concrete outputs. The fourth step is the impact assessment, evaluating whether the stated objectives of the mechanism have been achieved, and what the impacts have been on peace and democracy. The methodology of this thesis, and the impact assessment framework that it adopts, is described in detail in sections 1.5 and 1.6.[4] However, at this point is helpful to re-state the impact assessment framework that has been adopted, and how the content of this thesis attempts to fulfil Skaar *et al'*s 4-step impact assessment model:

Step 1 – Contextual parameters of amnesty	**Step 2 – Establishment of amnesty**	**Step 3 – Implementation of amnesty**	**Step 4 – Assessing the impact of amnesty**
• Background to the conflict (Ch. 1) • Clash with international law (Ch. 2) • Prosecutorial turn: Kwoyelo & Ongwen cases (Ch. 4) • Complex victimhood: forgiving victim-perpetrators (Ch. 5)	• Parliamentary Debates (Ch. 3) • *Amnesty Act 2000* (Ch. 3) • Amnesty Commission (Ch. 3)	• Granting of amnesty (Ch. 3) • Amnesty figures (Ch. 3) • Resettlement and promotion of reconciliation (Ch. 3)	• Assessing the four stated objectives: (v) granting of amnesty (vi) resettlement (vii) ending conflict, and (viii) promotion of reconciliation (Ch. 6) • Assessing impact on peace (Ch. 6)

Again, I wish to recognise the limitations of this simplified model, and the limitations inherent in interviewing a small cohort of interviewees. I also recall the literature review in section 1.4 of this thesis, that revealed the disagreement in the field as to whether assessing the impact of transitional justice mechanisms is even a feasible exercise. However, I reiterate here that I consider the above model adopts a reasoned, logical and evidence-based framework for assessing the impact of amnesty in Uganda. We cannot truly know if any Transitional Justice mechanism has "worked" or has been "a success". Questions of legacy will always be contested by scholars and stakeholders.[5] Indeed, certain edicts of transitional justice are continually being

[4] *See* sections 1.5 & 1.6, *supra*.

[5] *See e.g.*, Milena Sterio & Michael Scharf (Eds), *The Legacy of Ad Hoc Tribunals in International Criminal Law, Assessing the ICTY and ICTR's Most Significant Legal Accomplishments* (Cambridge University Press, 2019).

called into question. For example, while it has been argued that criminal trials reinforce the rule of the law, the real deterrent value of the ICC is being re-examined.[6] As to the impact of a given mechanism, scholars can nevertheless make a good-faith, evidence-based assessment, looking to the stated objectives of a mechanism, and ascertaining what has concretely happened on the ground. By doing so, provisional – but not definitive – conclusions can be made as to the impact of a given mechanism.

The four key objectives of the *Amnesty Act 2000*, as discerned in section 1.5 of this thesis, are recalled here, as the fieldwork data discussed below will directly inform to what extent they have been achieved and what has been their impact.

- ***First***, the Act intends to amnesty, or forgive, those who have committed acts of rebellion.
- ***Second***, the Act intends to demobilize and reintegrate former rebels.
- ***Third***, the Act intends to end hostilities to bring peace.
- ***Fourth***, the Act seeks to promote reconciliation between former rebels and the community.

As stated in section 1.5, in addition to measure the above four objectives, the impact on peace will also be examined, but will be confined to an assessment of whether or not hostilities have ended as a result of amnesty. This is for two reasons. First, "peace", as understood in the preamble of the *Amnesty Act*, is a clear reference to the ending of hostilities.[7] Second, measuring peace by reference to the presence or absence of conflict is more readily ascertainable and measurable. The fieldwork can also help to establish whether there is a causative link amnesty and the ending of hostilities. I acknowledge that measuring wider "peace" in post-conflict societies is a very detailed and different exercise, using for example, a

[6] Geoff Dancy, 'Searching for Deterrence at the International Criminal Court', *International Criminal Law Review*, Vol. 17, Issue 4 (2017) 625-655. For example, the Central African Republic descended into violence in 2013 despite the ongoing trial of Jean-Pierre Bemba for crimes against humanity committed in the same country a few years prior, prompting a second state referral to the court. *See* Statement by the ICC Prosecutor, Fatou Bensouda, on the referral of the situation since 1 August 2012 in the Central African Republic, 12 June 2014.

[7] The Preamble to the *Amnesty Act 2000* reads, in relevant part:

"AND WHEREAS it is the expressed desire of the people of Uganda **to end armed hostilities**, reconcile with those who have caused suffering and rebuild their communities;

AND WHEREAS it is the desire and determination of the Government to genuinely implement its policy of reconciliation **in order to establish peace, security and tranquillity** throughout the whole country." (emphasis added)

range of everyday indicators linked to social and economic activities, in addition to security.[8] However, such an exercise would be beyond the scope of this thesis, and the narrow, tailored impact assessment it seeks to apply. Having recalled those limitations, this chapter will first proceed to examine the views of amnesty recipients. Within each fieldwork section, I include a selection of the wall murals in Abia that depict how the war has affected the community there. I do this so that the issues and trauma my informants speak about can be visualised and comprehended in a more visceral sense.

6.2 Views of Amnesty Recipients

6.2.1 Amnesty As Forgiveness

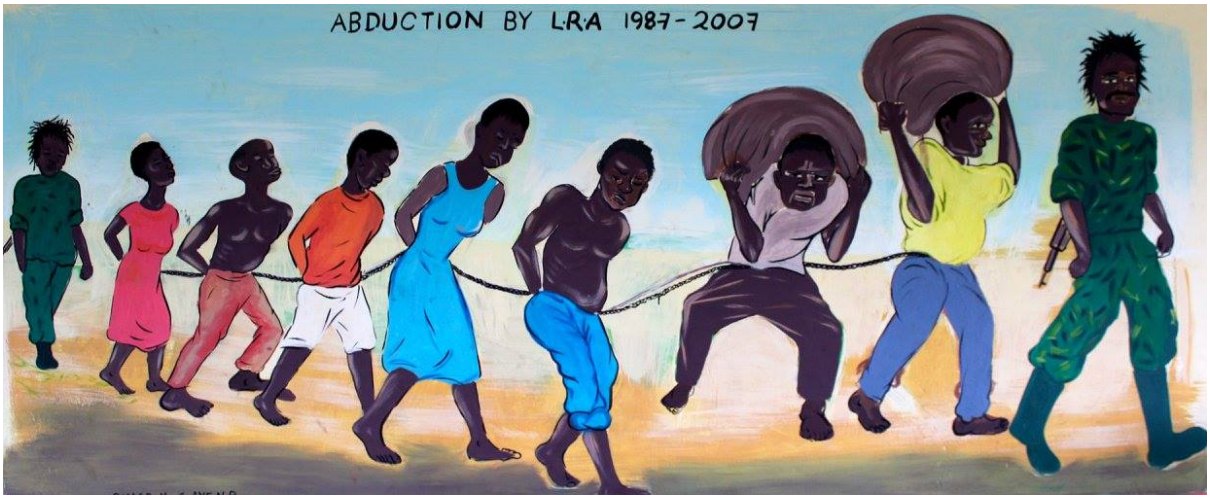

Figure 5 -Wall mural in Abia depicting abduction by the LRA

The majority of the amnesty recipients (hereafter referred to "informants"[9]) considered the general concept of amnesty to be a positive thing, in that it facilitated defection from a brutal and coercive environment without any preconditions. All of the interviewees were abducted as young children or adolescents and forced to participate in the LRA rebellion. During interview, some openly admitted to being forced to commit crimes against civilians and viewed amnesty as a welcome avenue to return home without the threat of punishment. Typically, upon defection or escape, a returnee would be first taken to a rehabilitation centre,

[8] The innovative research of Peter Dixon, Roger McGinty and Pamina Firchow is relevant in this regard. *See e.g.*, Pamina Firchow & Roger MacGinty, 'Measuring Peace: Comparability, Commensurability, and Complementarity Using Bottom-Up Indicators', *International Studies* Vol. 19, Issue 1 (2017) 6-27.
[9] As Finnström does, I use the term "informant" to reflect the sensitive and confidential nature of the material, and to protect the identities of those interviewed. *See* Sverker Finnström, *Living in Bad Surroundings* (Duke University Press, 2008), p.9.

the three main operators being GUSCO (Gulu Support the Children Organization), World Vision (both in Gulu town), and Rachele Rehabilitation Centre (based in Lira). These were NGO-run centers operating independently of the Amnesty Commission, where returnees could spend anywhere between two weeks to 1 year receiving rehabilitative support, which included, *inter alia*, psychological counselling and physical medical treatment. It was at these centers that returnees would typically first interact with officials from the Amnesty Commission, the state body implementing in the amnesty regime. Informants spoke about how they were called one day to receive certificates, without much introduction or explanation as to the process or purpose of the exercise. In my interviews, I spent a significant amount of time speaking with informants about how the concept and purpose of amnesty was communicated to them at the point of receipt. Their understanding and interpretations of amnesty were largely consistent, viewing amnesty as "forgiveness", a "pardon", something "to welcome us home", and to prevent stigma in the community. It was the clear understanding of the majority of informants that amnesty meant *total* forgiveness, morally and legally, for *all* actions while in the bush with the rebels. For example:

> *Amnesty means forgiveness for whatever sin committed, whether purposely or un-purposely*.[10]

> *To my understanding […] the amnesty granted means I have totally been forgiven from all the crimes I have committed in the past*.[11]

Others viewed amnesty as having a more restorative purpose, to assist with reintegration and prevent community stigmatisation:

> *I was told that the amnesty that was being given was to enable me to stay freely in the community, to take away any kind of segregation that the community probably have on them, so that they stay equally with those who were abducted*.[12]

One informant, a woman from rural Palaro, considered amnesty to be forgiveness for the harm she personally endured as a result of her abduction, not for acts she did herself:

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[10] Interview with Informant B, 22 October 2018, Gulu.

[11] Interview with Informant C, 22 September 2018, Gulu.

[12] Interview with Informant E, 23 September 2018, Gulu.

> *According to me, we were being pardoned for the sufferings we went through in captivity*.[13]

The above interpretations of amnesty were conveyed to informants by reception centre workers and Amnesty Commission staff, in particular the local Amnesty Commissioner, Sister Mary Okeh. A small minority of informants did, however, consider amnesty to be more limited in scope, and that serious crimes against civilians were not, in fact, covered by amnesty.

> *Crimes committed to civilians are not being pardoned by amnesty. For example, you look at Ongwen, Ongwen is currently being prosecuted because of those crimes done to civilians. That means they have not forgiven people for the crimes on civilians*.[14]

One informant, a man from outside Gulu town, saw the idea of being "forgiven" as contradictory and disrespectful, because as an abductee, he felt it was the government that needed to seek forgiveness from him, for failing to protect him as a child.

> *On radio, it was clearly said, you are being forgiven, because you have not done anything wrong. But here when I come back, amnesty is saying I am being pardoned. That all I have committed is being taken away, completely withdrawn. I am now free, I have been cleared of those things that I did. It was contradicting the message. This message scared some of the people. I believe some people up to now did not go to fill that form, because of the difference in the message. It should have been the government to apologize to us for failing to protect, but I was abducted from a very open place, close to Seminary there, but I was not protected. But now on return, we are told we are being pardoned for the atrocities you have done, and yet it was the government that failed to protect*.[15]

In the bush, there was much suspicion and LRA propaganda that spread misinformation about amnesty, that it was trap set by the government and prosecution and/or execution would inevitably follow. Many informants referenced the *Dwog Cen Paco* ("Come back home") radio show broadcast on Mega FM, which spread daily messages about amnesty. Recently returned LRA combatants would speak on air and encourage those listening in the bush to return home, offering their own examples of safe return as proof that nothing sinister would happen to them,

[13] Interview with Informant G, 5 December 2018, Palaro.

[14] Interview with Informant F, 4 December 2018, Gulu.

[15] Interview with Informant I, 6 December 2018, Gulu.

including facing prosecution.[16] It is clear that this radio show played a crucial role in promoting amnesty, encouraging defection by senior commanders and abductees alike. Importantly, informants recounted that it was through the radio that they first heard about the existence of amnesty. Also, to them, the message being communicated was clear: amnesty meant total forgiveness:

> *In the message it was being said, those in the bush are being called to come back home, they have been forgiven. There is an amnesty document that is going to be given to them. […] I heard it over the radio. It was one of the commanders called Owino. Also Lacambel from Radio Mega was saying those kids in the bush should come back home because there are so many who are back they are living well, their lives are better. The rest should also return. Nobody should be afraid, there is nothing bad they shall do on them.*[17]

This message was considered by informants to be genuine, and consequently the majority interviewees responded that they believed the granting of an amnesty certificate amounted to complete absolution of all crimes committed during their time with the LRA. Indeed, some interviewees reported that this was the express promise made Amnesty Commission employees during the application process. Both Amnesty staff interviewed confirmed that this was the understanding of the legal scope of amnesty. As the Principal Legal Officer of the Amnesty Commission, Nathan Twinomugisha, told me:

> *It covered nearly all the crimes, let it be war crimes, even acts that would amount to crimes against humanity, mass murders, all of it would be covered […] It was brought out in the heat of rebellion, and when you look at it, you can see it was sort of, made to be for a short time, to cure a big problem that was on table at that time. And, so it wasn't very well defined and so it was left mostly for us, at the Amnesty Commission. At that time, no test case was put before the courts to help us interpret the law. And so, for us, we interpreted it like we saw it at the Amnesty Commission. And we started saying yes, it's blanket.*[18]

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[16] *See further*, Scott Ross, 'Encouraging Rebel Demobilization by Radio in Uganda and the D.R. Congo: The Case of 'Come Home' Messaging', 59 (1) *African Studies Review* (April 2016) 33-55.

[17] Interview with Informant J, 6 December 2018, Gulu.

[18] Interview with Nathan Twinomugisha, Principal Legal Officer, Amnesty Commission, 14 December 2018, Kampala.

The staff implementing the amnesty regime in the field followed this interpretation. Bernard Festo, Program Officer with the Amnesty Commission Gulu Office, confirms this. He states that "every act was considered amnestied." [19] The rationale was to encourage all those remaining in the bush to come home. Archbishop Odama, a key figure in the Acholi Religious Leaders Peace Initiative, a group that lobbied for the creation of the *Amnesty Act*, explains if amnesty was more limited, many rebels would not have returned.[20]

While made in good faith in an effort to end the war and encourage defections, with the clear light of the *Kwoyelo* judgment, it seems that these promises of absolution were not in fact, accurate ones. In my view, this finding is deeply troubling, because it means that the amnesty project was sold (and implemented) on a fundamentally false premise. Amnesty in Uganda is not now, in fact, absolute. Crimes committed against civilians are potentially prosecutable, and amnesty recipients do not appear to be fully aware of this possibility, however remote and unlikely it may be for ex-LRA combatants. This arguably undermines the legacy and goals of amnesty in Uganda, because a transitional justice measure, in any context, should not be deceptive, nor should it be fundamentally re-shaped at the end of the transitional process to the detriment of those it is designed to benefit.

[19] Interview with Bernard Festo, former Program Officer, Amnesty Commission, 20 September 2018, Gulu.

[20] Interview with Archbishop Odama, 3 December 2018, Gulu.

6.2.2 Coming Home – Social and Spiritual Challenges

Figure 6 - Wall mural in Abia depicting victims of an LRA attack in July 2004

Most of the interviewees received their amnesty certificates while they were in so-called "rehabilitation centers". Typically, rehabilitation centers would then facilitate return to the community without any involvement from the Amnesty Commission, whose role in the return process was mainly limited to initial demobilization, registration, issuing amnesty certificates and re-settlement packages.[21] Generally, interviewees expressed dissatisfaction with the Amnesty Commission, in that they did little to facilitate reintegration back into their own community. The reintegrative approach of rehabilitation centers was often ad hoc, inconsistent and varied according to the amount of financial support available at a given time.

Upon receiving amnesty certificates, and when deemed ready to return home by the reception centre, returnees would then be resettled in their home communities. Generally, it was the reception centre who would facilitate the actual logistics of moving home. Officially, it was mandatory for amnesty recipients to receive a standard "resettlement package" from the Amnesty Commission, which typically consisted of a set amount of money, usually 260,000 Ugandan Shillings (around 80 USD), agricultural tools and some domestic items such as a blanket, mattress and a jerry can. However, there was inconsistency reported by interviewees as to what was actually received. Some received the full package, while others received only

[21] Interview with Bernard Festo, former Program Officer, Amnesty Commission, 20 September 2018, Gulu.

part of the package, and some received nothing at all. However, one common sentiment among informants was that the package was plainly insufficient for someone to start civilian life again after years in the bush, given the bleak situations most found themselves in, where many had no access to land or a home, no family members left alive, and sometimes with children to support. As one informant from Gulu said:

> *At the initial stage, when being given a certificate, you are given without any item. Then, later, for those who remain in the reception centres, they were being called and being given 263,000 shillings. That is for reintegrating you. For me, I saw those packages as an abuse. Someone has injuries, some have no house, some has nowhere to go, some has bullets all over the body, and then here you are given somebody 263,000? What for?*[22]

Women who returned alone, and women who returned with children born in the bush, both explained that the amnesty process did not adequately consider their personal circumstances and gender-specific needs into account, noting that a man returning alone was treated the same as a woman returning with children. In this sense, the amnesty process was not gender-sensitive or cognizant of the particular needs of women and children born of rape, in particular. Immediate care needs, and subsequent psychosocial and livelihood support was not factored into the support provided. It was a one-size-fits-all approach. As one woman from Gulu describes:

> *When I received the amnesty package, I was staying in town with my sister, I wasn't home. From home it wasn't easy, because I had lost both my parents. Whatever amnesty gave me just helped her for a short while. Because, when I returned from captivity, I returned with two children plus one in the womb. The one in the womb I gave birth to at World Vision. So, those three children were there, so whatever amnesty gave me was quite little*.[23]

All of the informants explained that the once given their amnesty certificates and packages, there was no subsequent contact from the Amnesty Commission. There was no follow-up to assess reintegration or the subsequent needs of returnees. When asked what other support they would have liked to have receive, many informants desired livelihood support, help with

[22] Interview with Informant I, 6 December 2018, Gulu.

[23] Interview with Informant E, 23 September 2018, Gulu.

accessing land, and assistance with school fees for their children. Informant J, a woman from outside Gulu, returned from the bush with one boy. She describes how, after being trained to use a sowing machine at a reception centre, she was not given any materials to use the skill she learned:

> *I would have loved that this child be supported, because currently I'm incapable of paying this child in school. I would have also loved to have been provided with the materials for the skills I was given in the vocational training, that is tailoring. I should have been given materials, much as I had the machine. I wish I was given the materials for starting up, but I wasn't given*.[24]

Stigma remains an ongoing issue for many. In particular, female interviewees who returned with children born in the bush face significant social barriers from within their community. If the father is not present, and his clan unknown, the children "lack identity" and will be denied access to land in the future. Female informants often described ongoing experiences of stigmatization being suffered by their children in their communities, with labels such as "Kony's children" or "rebel children" often being used by other community members. One woman from Lira explains:

> *It's because they still consider them rebels. And since we returned with them, some of us did not get our parents. We have nowhere to stay. So the only thing they say is to refer to these kids as "rebels"*.[25]

Access to land is a recurring issue for both male and female returnees. Many are denied access to land for farming. In northern Uganda, where subsistence farming is the main source of livelihood, this is a crucial issue. One informant in Lira described how, culturally, land is passed down the patrilineal line. Without knowing where the father of her children is from, it becomes impossible for her children to have access to land to support them in the future.

> *I came back with my two boys. The community, my family, loved the children. But, at some point, when they decided the distribute the land for farming, it became an issue. My brothers were like, they are not giving those two children, two boys, any land for*

[24] Interview with Informant J, 6 December 2018, Gulu.

[25] Interview with Informant R, 11 December 2018, Lira.

farming, because they will help her instead to look for the father of those children so that they take the children back home, to their home, to their father.[26]

Generally, it is apparent that informants living in urban settings experience less discrimination than in rural areas, with some informants moving to town to escape ongoing problems in their home village. A commonly reported issue was "survivor-stigma", *i.e*., whereby people who lost family members tend to blame returned survivors, causing inter-communal conflict.

I got some discrimination when I went back home in Palabek, to stay with my brothers who were already there. I was abducted from Palabek. When I reached Palabek, there were some families whose children were abducted together with me, but unfortunately, they were killed from the bush. So, such families would always keep telling me, "lucky is she who came back alive. Now that ours have been killed, who knows, maybe I am the one who killed them." They would keep telling my children, whenever they go to play with other children, they would tell the children that, supposing you know when children are playing, they keep fighting, and they're like "these bush children, they like disturbing people so much." Such kind of thing discouraged me from living at my home. That's why I had to come back to my sister who was living in town, until when I got a man and married and currently we are settled together in Unyama.[27]

Speaking of "reconciliation" with informants was a difficult task. Traditional Acholi ceremonies to address harm usually involve both the perpetrator and the victim's family or clan.[28] However, most abductees who will have committed crimes in the bush will not know the identity or clan of those they inflict harm upon. *Mato oput*, a commonly cited ceremony that involves the drinking of a bitter plant, was not performed by any of the informants because it involves actually finding the affected family or clan to which the returnee can reconcile with, apologize to, and offer suitable reparation such as monetary compensation. In the context of a returning abductee to their home community, what is a priority for the returnee and the community is not reconciliation as such, but cleansing. The returnee needs to be cleansed of any bad spirts, described locally as *cen*, that may have attached to them as result of their actions in the bush. Cleansing is required not only to purify the returnee's own spirit, but also to prevent

[26] Interview with Informant W, 7 December 2018, Lira.

[27] Interview with Informant E, 23 September 2018, Gulu.

[28] Liu Institute for Global Issues and Gulu District NGO Forum, *Roco Wati Acoli: Restoring Relations in Acholi-land Traditional Approaches to Reintegration and Justice* (September 2005) pp.57-68; Erin Baines, 'The Haunting of Alice: Local Approaches to Justice and Reconciliation in Northern Uganda', *International Journal of Transitional Justice,* Vol.1, Issue 1 (2007) 91-114.

any *cen* from causing spiritual damage to the community at large.[29]

The most frequently reported cleansing ceremony among informants was the *nyono tongweno* ("stepping on the egg") ceremony, where the returnee breaks an egg with their feet to cleanse them of past actions and to begin a new chapter in their lives. The egg symbolizes purity and in breaking it, re-birth. A returnee from outside Gulu described its meaning:

> *When I arrived, they saw him and stopped me from a distance from not entering home. Then, my mother, went and picked an egg and got some spare grass. […] They were wondering, as I was moving in the bush, along the big bushes, probably some evil spirit or bad omen were kind of entering me. They asked me whether I committed something, or had a bloodstain on my hand, or I committed some killing while from the bush. That procedure was to cleanse me*.[30]

Another returnee from Gulu described the ceremony in more detail:

> *For tongweno, it was put in front of the door of my house, and then some water was poured in front of the door from up, then it was pouring down, I was supposed to pass, go inside, step on the egg and then enter inside as the water was pouring down. That is for cleansing. In case, I stepped on any dead person, or killed any person, this will deter the spirit from disturbing me. It is just like a welcome home. It is done to someone who has stayed for so long away from home. Some people were now presuming that I am dead. The fact they saw me alive again, something has to be done to actually cleanse the tears. To take away the bad omen, that kind of thing they thought could have happened to me*.[31]

Another ceremony, variations of which was reported by informants, involved slaughtering a goat and using its intestines to cleanse the surrounding area, and was referred to as *moyo kum* or *aket aket*. As this returnee from Palaro describes:

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[29] Eric Awich Ochen, 'Traditional Acholi mechanisms for reintegrating Ugandan child abductees', *Anthropology Southern Africa*, Vol. 37, Issue 3 (2014) 239-251; Letha Victor & Holly Porter, 'Dirty things: spiritual pollution and life after the Lord's Resistance Army', *Journal of Eastern African Studies*, Vol. 11, Issue 4 (2017) 590-60 at 594.

[30] Interview with Informant C, 22 September 2018, Gulu.

[31] Interview with Informant J, 6 December 2018, Gulu.

> *So the only thing that was done, was the ceremony performed where a goat was killed and then that, the food that is in the process of digestion is also picked and then thrown in all corners of the homestead. That is to scare away, if at all someone, if I killed someone, maybe the spirit of that person is in you, it can scare it away. So they keep on throwing like all corners, all around the compound. It is called aket aket*.[32]

A number of informants that had participated in a traditional ceremony reported a positive change of attitude from the community after its completion. For returnees, amnesty was seen as important to them and their family members, but the receipt of amnesty, in and of itself, had no discernible impact on the attitudes of family community members towards them, with a measure of acceptance coming only through traditional methods. Ceremonies were also typically family-led, with generally little involvement from the broader community. For those that did traditional ceremonies, the Amnesty Commission did not play any role. Indeed, upon the issuance of the amnesty certificate there was generally no further contact with the Amnesty Commission representatives. It is also notable that a number of informants reported that they placed little importance on the role of traditional ceremonies, which tended to be done at the family's request, not the returnee. Some informants instead considered that Christian prayers involving their family was sufficient, and in some cases, indeed preferable to traditional cleansing methods. One returnee from Gulu explains:

> *I called for prayers at my current home, not a ceremony. I called for prayers. I called some of my close relatives, and those at the church where I pray. Then they prayed for both me and my wife, and then the children. That's all I did. It was a thanksgiving prayer, thanking God for keeping them alive. […] Right now, I am ok with everyone, I am free with everyone. Nothing else can prevent anyone, or my family from coming to stay at my place. It is only God who can reconcile people fully. He can actually connect, say, you and me. God can do that, better than the traditional ceremonies*.[33]

Generally, the level and quality of reintegration for returnees is variable. It was apparent that in interview, women reported higher levels of stigma and discrimination than men. Episodes of discrimination were almost entirely verbal, and typically were triggered by incidents involving children, livestock encroaching on neighbours' crops, or negotiating access to family land. Stigma was also higher in rural areas, where perhaps personal details are more easily

[32] Interview with Informant G, 5 December 2018, Palaro.

[33] Interview with Informant I, 6 December 2018, Gulu.

known within smaller communities, compared to more urban settings. That said, informants living in town reported that their neighbours nevertheless knew of their rebel past, but reported little experience of stigma. In terms of daily activities, such as engaging in communal farming, selling goods, and forming relationships, both men and women describe performing these activities without meeting any significant social barriers in their community.

6.2.3 Prosecutions – An Unequal Approach?

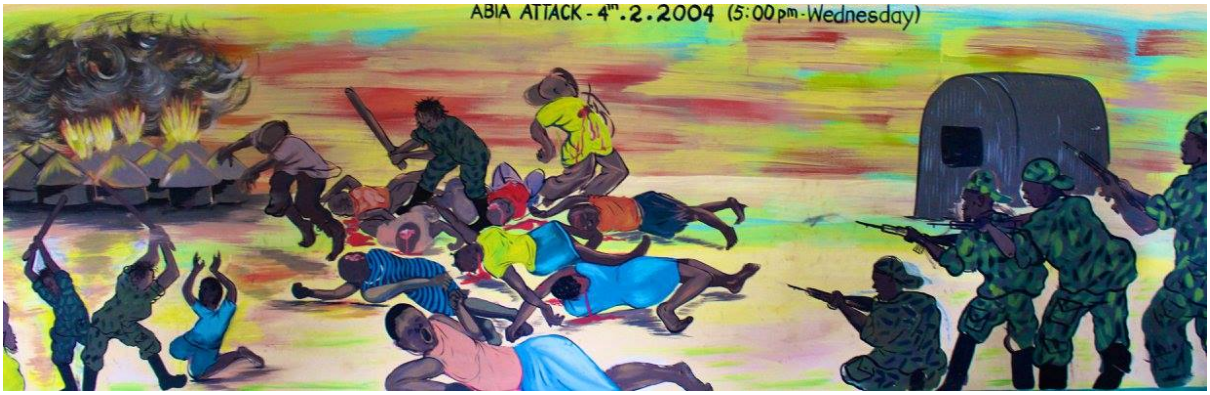

Figure 7 - Wall mural depicting the violence of an LRA attack on Abia in July 2004

Informants reported diverging views on the moral propriety of prosecuting former LRA rebels. When simply asked if all rebels should be entitled to amnesty, the majority answer was yes. For informants, it was a matter of fairness and equal treatment. As one female informant says:

> Y*es, they should be given, just like we have been given, so that everyone is the same*.[34]

Moving onto more in-depth discussion of three leading commanders subject to domestic and international prosecution – Kwoyelo, Ongwen and Kony – the answers become more complex and nuanced. Informant views became more qualified and divided. Three broad viewpoints were discernible. The first cohort, a majority of informants, considered that because Ongwen and Kwoyelo were abducted into the LRA as young children, they too were deserving of amnesty because rebellion was not their choice or "will". They were simply following orders like everyone else in the LRA. For example:

[34] Interview with Informant F, 4 December 2018, Gulu.

Dominic Ongwen should have been given amnesty because he was just abducted. Being a commander, he was forced also to do what he did. For example, Otti Vincent was killed for failing to follow the command.[35]

He (Ongwen) should have been given amnesty, because he was also forced into captivity. Whatever he did from captivity was under pressure, and whatever orders he was giving to the child soldiers, or the people he was commanding, was also out of the force from people from above. When the children are forced to go and commit a certain crime, they do it as worse you had expected. Later on, the blame comes back to you as a leader.[36]

Among this same cohort, a similar and consistent rationale was present in respect of Thomas Kwoyelo:

I also feel he (Kwoyelo) should be forgiven. Because he didn't go willingly. Much as they could have committed atrocities while there, they should be forgiven.[37]

Yes. I stayed with him in one unit. Most people I stayed with them. You know in the bush, when the order comes from above, there is no way which you can deny [...] he should also get amnesty.[38]

Conversely, a second cohort of informants, a minority, considered that these two commanders, Ongwen and Kwoyelo, were deserving of prosecution. Their position of leadership and power, and the serious nature of their alleged crimes, were cited as the two main reasons for why they should be prosecuted. They referenced the fact that both Ongwen and Kwoyelo were not passive agents, but both actively participated in and ordered the mistreatment of civilians:

They are the ones who started the issue of abductions, taking people to the bush. If they had known that this war would not bring any positive impact, they would have released the people they abducted, to come back home. But instead, they said they want to take over the government, leaving people to suffer for nothing.[39]

[35] Interview with Informant D, 22 September 2018, Gulu

[36] Interview with Informant E, 23 September 2018, Gulu.

[37] Interview with Informant J, 6 December 2018, Gulu.

[38] Interview with Informant N, 10 December 2018, Aromo.

[39] Interview with Informant B, 22 September 2018, Gulu.

> *I don't feel bad, because those commanders who held big posts, positions while in captivity, for me I don't feel anything for them. He (Ongwen) deserves to be prosecuted*.[40]

A third discernible viewpoint, one which cut across the two cohorts discussed above, concerns what should be done with the leader of the LRA, Joseph Kony. For the majority of informants, Joseph Kony was seen as the genesis and architect of the war that brought so much suffering and, consequently, was not deserving of amnesty. This view is succinctly summed by an informant from Gulu:

> *To me, there are some people who were abducted innocently, who deserved to receive the amnesty. But a person like Kony, who forced people into the bush, and destroyed people's families, shouldn't get amnesty*.[41]

At the same time, a small number of informants considered that Kony should be entitled to amnesty, not only for reasons of fairness, but also to definitively end the war:

> *Kony should also get amnesty. He is also human. A human can also do bad things. As a human being he should also be forgiven, much as he has done a lot*.[42]

A number of informants expressed concern that because of the prosecutions of Ongwen and Kwoyelo in particular, whose application for amnesty was denied by the Supreme Court, the amnesty granted to some informants had, in their view, been hollowed out, and its protective effect nullified, because if one former abductee can be prosecuted, then anyone can. This prospect, however unlikely it may be, nevertheless left some feeling uneasy and apprehensive for the future. This is a tangible and direct impact of the Supreme Court judgment that sanctioned Kwoyelo's prosecution. As two informants from the Gulu area explained:

> *Yeah, sometimes I have some fear that probably after finishing with their court, they can also come back to us and say, come on, you were there once, and you committed some crimes. You are supposed to be tried*.[43]

[40] Interview with Informant O, 10 December 2018, Aromo.

[41] Interview with Informant C, 22 September 2018, Gulu.

[42] Interview with Informant J, 6 December 2018, Gulu.

[43] Interview with Informant E, 23 September 2018, Gulu.

> *Whenever Kwoyelo is brought for the court sessions, there is heavy deployment, they guard a lot. This makes me feel that even me, any time I can be prosecuted, so I don't feel good about it*.[44]

Others were of the confident view that their certificate prevented prosecution in respect of any acts committed in the bush, in line with what they were told when the certificates were issued. As these informants from the Lira area stated:

> *I have already been given amnesty so I cannot be prosecuted for what happened in captivity. Those crimes committed were not done willingly*.[45]

> *If there was a problem with that certificate, they would have not given to us. They would have taken us straight away to the court. But, these things, I think, can protect me*.[46]

Clearly, with regard to complex issues of forgiveness and retribution, views among returnees are and continue to be variable, nuanced and divided. Yet, as described above, there are discernible majority patterns of pro-amnesty and anti-prosecution sentiment among amnesty recipients.

[44] Interview with Informant F, 4 December 2018, Gulu.

[45] Interview with Informant R, 11 December 2018, Lira.

[46] Interview with Informant N, 10 December 2018, Aromo.

6.3 Views of Community Members

6.3.1 Amnesty – Forgiveness In Return For Peace

Two community focus-group interviews were conducted for this research, one in Lango sub-region in the village of Abia, and one in the Acholi sub-region in the village of Parabongo. This was to assess and compare regional and ethnic attitudes towards amnesty and prosecutions. A common narrative in northern Uganda is that the Langi people are seen as pro-accountability and anti-amnesty, as the LRA rebellion was considered to be an Acholi war, started by the Acholi, and imposed on surrounding regions and ethnicities such as the Langi.[47] Conversely, the narrative goes that the Acholi are seen as more pro-amnesty and anti-accountability, perhaps because the Acholi were, at least in the beginning, more sympathetic to the LRA cause, and also because the Acholi sub-region suffered a higher rate of abduction than other parts of the greater north.[48] Both Parabongo and Abia were the sites of LRA massacres. In Parabongo, 22 people died in an LRA attack in 1996, and many more were wounded and abducted.[49] In Abia, 52 people were killed in an LRA attack in February 2004, and many more wounded after the IDP camp huts were set on fire.[50] The focus group interviews took place metres away from simple yet poignant monuments that stand in memory to these attacks, which are still fresh in the minds of the people living there.

[47] In research conducted in 2005 by Berkley Human Rights Centre, respondents from non-Acholi districts (Lango and Teso) were twice as likely to want "peace with trials and punishment" (61%) than "peace with amnesty" (39%). *See* Phuong Pham, Patrick Vinck, Marieke Wierda, Eric Stover & Adrian di Giovanni, *Forgotten Voices: A Population-Based Survey of Attitudes about Peace and Justice in Northern Uganda* (International Center for Transitional Justice & Berkley Human Rights Centre, 2005), p.33. *See further* section 3.10 of this thesis, for a review of previous research with communities on the issue of amnesty and accountability.

[48] United Nations Office of the High Commissioner for Human Rights, *Making Peace Our Own, Victims' Perceptions of Accountability, Reconciliation and Transitional Justice in Northern Uganda* (2007), p.48: "During focus groups, Acholi respondents were generally more supportive of the use of amnesty in the current conflict than the Langi or Iteso, probably because more Acholi have loved ones who have committed crimes and wish to see them reintegrated quickly into the community."

[49] Jenna Gleave & Lino Owora Ogora, 'Murder Under a Mango Tree – Memorializing the 1996 Massacre at Parabongo Primary School' (Foundation for Justice and Development Initiatives, July 2017).

[50] International Centre for Transitional Justice & Justice and Reconciliation Project, 'We Can't Be Sure Who Killed Us, Memory and Memorialization in Post-Conflict Northern Uganda' (February 2011), pp.10-11.

Figure 8 - Memorial naming 22 victims of the LRA attack on Parabongo in July 1996

In the course of the focus-group interviews, it became apparent that there was little divergence in the views across both communities. While views inevitably varied on certain points, there were more areas of consensus than disagreement between the two communities, particularly on the key topics of who should be entitled to amnesty, and who should be prosecuted. In terms of the basic meaning of amnesty, there was agreement across both communities as to what it essentially meant, and was in line with the understanding of informants:

> *Amnesty means forgiveness between the two fighters.*[51]

> *To me, amnesty is the time for forgiveness between the rebels and the government, to harmonise them and make them live together.*[52]

[51] Male community member, Parabongo focus group, 4 December 2018.

[52] Male community member, Abia focus group, 7 December 2018.

These understandings were drawn mainly from radio broadcasts, with Mega FM again being cited as the most common source of information on amnesty. On the deeper question on the scope of the forgiveness that amnesty granted, there was also common understanding that amnesty was intended to forgive not only rebellion, but also personal harm inflicted in the course of the rebellion, including serious crimes. As one man in Parabongo stated:

> *So amnesty, the forgiveness that the government gave was for the rebels having attacked them, and hurt them, and having attacked these people as government and hurt them*.[53]

Similar views were present in Abia, although not as uniform, with some expressing disagreement on the scope of amnesty:

> *To me, amnesty has not been granted for everything. But, for example, properties were destroyed, children were abducted and never returned, but they were not forgiven for that. Which means amnesty was not granted for everything done*.[54]

Overall, both communities viewed the amnesty as a positive thing, in that it allowed abducted children to return home quickly and efficiently, fostering local forgiveness and effectively ending the war, bringing peace to their areas:

> *We thank the government for forgiving those who returned from captivity. In such a way, it also encourages us to have that heart of forgiveness, upon those who committed atrocities in their community. So, to me, I feel that the government should continue forgiving such people, so that we continue living together with them, so they continue returning home*.[55]

> *Yes, it tried to being peace. Because, the government forgave those people who returned from captivity. In a way, it built a relationship between the government and the community, because the community became happy that the government was able to forgive such children instead of prosecuting them. It kind of brought peace*.[56]

[53] Male community member, Parabongo focus group, 4 December 2018.

[54] Male community member, Abia focus group, 7 December 2018.

[55] Female community member, Parabongo focus group, 4 December 2018.

[56] Male community member, Abia focus group, 7 December 2018.

6.3.2 Receiving Rebels – Rebuilding Community Life

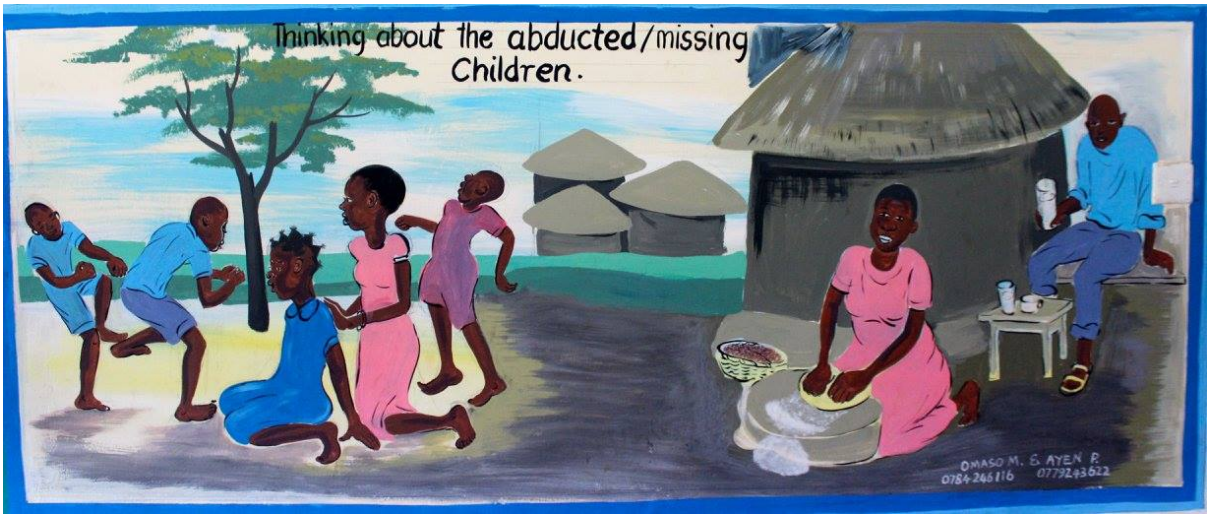

Figure 9 - Wall mural in Abia depicting emotional longing for abducted children

Both sets of communities explained the process involved when abductees would return home. For community members, it was considered essential that in order for a former rebel properly reintegrate, a traditional ceremony should be conducted. Like the informants, they described in similar detail the ceremonies of *nyono tongweno* (stepping on the egg) and *moyo kum* (slaughtering of the goat), or in Lango, *kayo cuk*. As the informants noted, the communities said that the goal of these ceremonies is not to reconcile, but to cleanse the person of "bad spirits" and enable them to start living in freely in the community. When asked what was more important to the community, amnesty or ceremonies, both responded that ceremonies were more important. One woman in Parabongo explained:

> *For me, the issue of rituals is important. Whatever the government gives from there is just to cool that person, or make that person feel at ease. But what matters to me is the performance of the ritual.*[57]

Interviewees explained that true forgiveness comes from the individual and the local community, not in the form a certificate like that issued by the Amnesty Commission. The community in Abia explained that without community cleansing, the value of amnesty was "useless":

[57] Female community member, Parabongo focus group, 4 December 2018.

Because, much as amnesty has been granted to me, and in the community, I have not been forgiven, it is still useless. So, both are important.[58]

To me, performing the rituals is to cleanse the person of the bad thing that the person might have been committing while the person was in captivity. So, it is important as well the forgiveness, which brings the relationship back together.[59]

A man in Abia compellingly explained the distinction between reconciliation (repairing relationships) and amnesty (forgiveness), drawing on the broader inter-tribal conflict narrative between the Acholi and Langi:

To me, amnesty is granting forgiveness for those who went to the bush willingly, to those who returned from the bush willingly, or were just forced back from the bush. But, reconciliation is repairing the damaged relationship, for example, between Acholi and Lango, because in the past people though it was the Acholi as a tribe which were bringing the war, and there later, they realised there were individual people in the bush who were inflicting and bringing problems to the community. So, with reconciliation, it is to repair and bring the two tribes together.[60]

In Abia, the community described a reconciliation ceremony similar to *mato oput* in Acholi, called *kayo cuk*, although they explained that this ceremony had not been done for any returnees that were living in the community, because, as with *mato oput*, it requires the victim and the perpetrator to be identified:

[58] Female community member, Abia focus group, 7 December 2018. Note: this view comes from an amnesty recipient who took part in the community focus group discussion in Abia. As mentioned, it was originally intended that both community focus groups would consist only of community members who did not receive amnesty nor were abducted, to gauge any difference in opinion and allow views to be aired openly without causing offence, reinforcing stigma or retraumatising either cohort. Midway through the Abia discussion, by listening to the answers I discerned that one amnesty recipient was in fact among the group. Rather than disrupt the discussion, and out of respect to the amnesty recipient and the group, I decided to not to mention it and allow the discussion to continue. It would have been highly insensitive and offensive for me to ask anyone to leave at that stage, and I considered it would have had a detrimental effect overall, both on the individual and how the community would view me. However, my prior ethical concerns around the expression of community views with an amnesty recipient present in the group were not borne out on this occasion. The discussion was open, friendly and compassionate. For the remainder of the discussion, I nevertheless remained attentive to the disposition of this particular amnesty recipient, a woman who had returned from the LRA with a child born of rape. I stood ready to cut discussion on any particular topic – and if necessary, the entire meeting – if it was apparent it was causing upset. Being attentive to the particular vulnerabilities of my informants was, in any event, a key aspect of my fieldwork throughout.

[59] Male community member, Abia focus group. 7 December 2018.

[60] Male community member, Abia focus group, 7 December 2018.

> *The process of kayo cuk is between the perpetrator and the victim. They bring both the victim's family and the perpetrator's family together, then they slaughter either a cow, or a goat, whereby they eat together. Then the perpetrator and the victim will come together, give a hug to each other, and that will clearly show that they have come together*.[61]

In terms of assessing integration, interviewees reported varying but largely positive levels of interaction with former rebels and their participation in community life. Questions were posed around the degree of social interaction, communal activities like farming and sharing meals, and inter-marriage. On daily interactions, the level of integration was generally described as positive by both communities, with little stigma being reported, as this man from Parabongo explains:

> *What matters to us always is to involve such a person into the meetings, into the discussion, encouraging them, counselling them, to enable them live as one. That has always worked for us*.[62]

At the same time, some feared former rebels might choose to attack them again:

> *To me, at some point we have to be fearful. […] You never know in the night, the person can just wake up with a bad spirit they've picked from the bush, so the person might harm you. So, at some point, there is that fear*.[63]

Both communities explained how returnees were included in social events, and with regard to farming, they described how returnees would be included in communal farm activities and harvesting, without any conflict with other community members, pointing to a degree of daily acceptance. On marriage, there were some diverging views, but the majority of community members had no issue with their children marrying a returnee, as this man from Parabongo explained:

> *Love is between two people. When such a thing happens, we are free to let our children go and marry such a person. Because, such a person who has returned in their home,*

[61] Male community member, Abia focus group, 7 December 2018.

[62] Male community member, Parabongo focus group, 4 December 2018.

[63] Male community member, Parabongo focus group, 4 December 2018.

they are also getting the teachings, or trainings on how to live with others in the community, so we have no problem with that.[64]

In Parabongo, another man explained that one of Kony's children had returned and inter-married within the community, without any difficulty:

For example, Kony's son has returned from captivity and is staying close, he has married two women in the community and people are not bothered about him. And he is living freely in the community.[65]

At the same time, some expressed reservations about letting their child marry a former rebel:

To me, it kind of presses me to let my child go to such a family, whose son or daughter has worked as a rebel and has returned home. I don't feel at ease. But though, but since love is between two people, you cannot put much pressure on your child. But of course, you have to caution the child.[66]

Notably, for children born in captivity, the community in Parabongo did not articulate any significant social barriers or stigma in respect of these children:

The community are unbothered about it, such children. We are living with them freely. And people have even forgotten about them that they were born in captivity and returned home. As an example, someone even stays close to here, the child has even grown now. She is living freely.[67]

However, in Abia, it was acknowledged by the interviewees that children born in the bush are sometimes treated differently to other children. They can be shunned by other family members and can be the subject of broader stigma by the community because they are seen as "rebel children", a constant reminder of the rebellion from which they were born. Access to land for these children was also recognised to be an ongoing issue:

[64] Male community member, Parabongo focus group, 4 December 2018.

[65] Male community member, Parabongo focus group, 4 December 2018.

[66] Female community member, Parabongo focus group, 4 December 2018.

[67] Female community member, Parabongo focus group. 4 December 2018.

To me, some of them are getting difficulties in living here, because their mothers have come back with them, they don't know where their fathers live. Their fellow children keep stigmatising them. They call them the "children of the rebels", they call them names. Some of them here, who have grown here, they don't give them land to farm. That is a challenge they are meeting in the community.[68]

Most of these children here are not going to school, because they don't have a mother or a father to take care of them, or to pay them in school, provide them health facilities. It is hard, so that is a challenge these children are receiving from the community.[69]

There was some resentment expressed that former rebels received resettlement packages that included monetary compensation, while civilians who endured the existence of IDP camps and constant attacks by the LRA, and lost family members, livestock and property, have to date not received any form of compensation or reparations from the government. The former rebel has thus seen to be "rewarded" for his/her crimes, while the ordinary victim is punished twice by being ignored by the state. This resentment is not directed at the abducted person, however, but at the state. As such, the resettlement package was itself not seen to be a cause of friction between returnees and the community.

[68] Male community member, Abia focus group, 7 December 2018.

[69] Male community member, Abia focus group, 7 December 2018.

6.3.3 Prosecutions – A Just Approach?

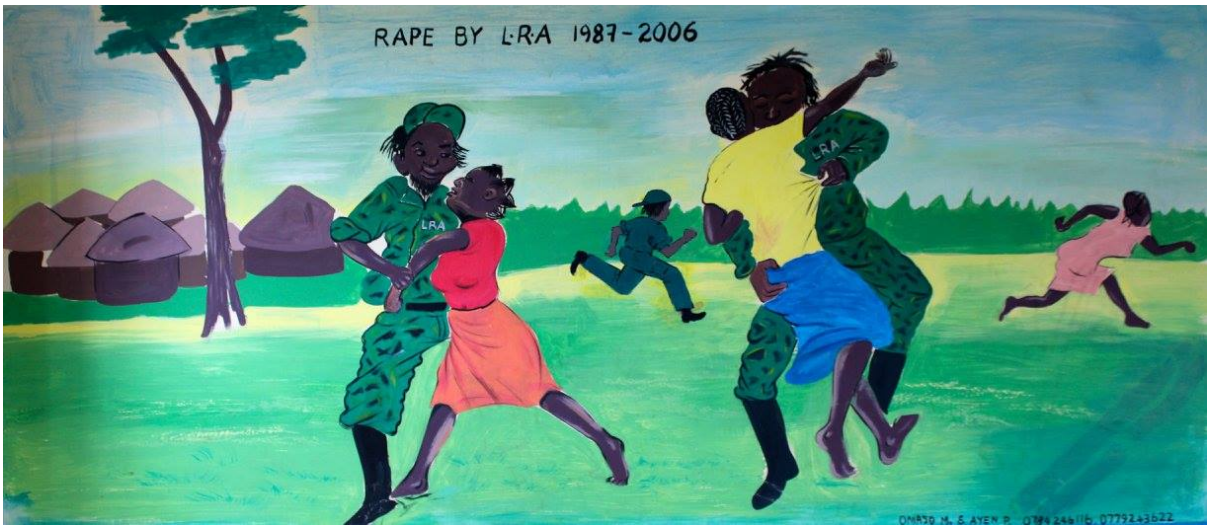

Figure 10 - Wall mural in Abia depicting sexual violence by the LRA

Research in northern Uganda suggests a person's view on prosecutions tends to be shaped by their own experience of LRA criminality, and how such processes impact upon their social environments.[70] If there is direct experience of LRA crimes, there is likely to be a desire for retributive justice. However, the more remote a crime becomes – both personally and geographically – the more amenable the individual may be to non-judicial resolution. For example, one of Dominic Ongwen's former "wives" might advocate for forgiveness,[71] as do some of his former LRA peers,[72] while his direct victims seek justice and reparations.[73] Research also indicates that the Acholi people are generally more supportive of the use of amnesty than the Langi or Iteso, perhaps because more Acholi have loved ones who have

[70] Anna Macdonald & Holly Porter, 'The Trial of Thomas Kwoyelo: Opportunity or Spectre? Reflections from the Ground on the First LRA Prosecution', *Africa,* Vol. 86, Issue 4 (2016) 698-722 at 722: "Responses to the (Kwoyelo) trial have been shaped by people's specific wartime experiences and if or how his prosecution relates to their current circumstances – as well as by the profound value of social harmony and distrust of higher authorities to dispense justice."

[71] Serginio Roosblad, 'Dominic Ongwen's former wife: Ongwen will be accepted too', *Justicehub.org*, 16 January 2015. *See also*, *The Independent*, 'Ugandan woman forced to marry feared warlord explains why she would welcome him back', 15 December 2015.

[72] *Deutsche Welle,* 'Ugandans react to trial of former LRA warlord at The Hague', 16 January 2017. A former LRA commander, Alexander Ochen, is quoted as saying: "I know there has to be justice. But I even prayed that Ongwen receives amnesty."

[73] Justice and Reconciliation Project, 'Community Perceptions on Dominic Ongwen', Situational Brief (May 2015), p.2: "If Ongwen were bought to us here, everybody would want to cut a piece of meat from his body for him to feel the pain we went through."

committed crimes and wish to see them reintegrated quickly into the community.[74] Meanwhile, attitudes among the Iteso reflect more pro-accountability viewpoints.[75]

In addition, for many people in northern Uganda, they feel that the state failed to protect them during the conflict. For some, there is little faith in the state's ability to offer meaningful accountability in the post-conflict period, especially because the state forces were also implicated in committing human rights abuses, particularly forced displacement, mistreatment of civilians in the IDP camps and the stealing of livestock.[76] Prosecuting one side of the conflict has been labelled by as biased and unjust, undermining the social trust that should ordinarily exist between the community and the state.[77]

The communities interviewed were not the subject of the factual allegations in the Kwoyelo or Ongwen cases, and some indifference was evident among interviewees. With no personal connection to the events, there was notably a strong desire for forgiveness in both focus group settings. In Parabongo, the community were strongly in favour of forgiveness for Ongwen and Kwoyelo, with reference to their personal circumstances and abducted children, and the broader goal of sustainable peace:

> *We all agree that Ongwen shouldn't have been prosecuted, because he was abducted as a child. He was listening to the orders from the higher commanders.*[78]

> *We have heard generally about Kwoyelo. Because he is an Acholi from our community. He was as well abducted and taken into captivity. Therefore, he should have been forgiven, rather than prosecuted.*[79]

> *In order for us all to have peace, Dominic Ongwen and Kwoyelo should be set free. The government should forgive them and set them free, so that those that remain in*

[74] United Nations Office of the High Commissioner for Human Rights, *Making Peace Our Own, Victims' Perceptions of Accountability, Reconciliation and Transitional Justice in Northern Uganda* (2007), p.48.

[75] *Id. See* section 3.10 of this thesis where inter-ethnic views on accountability, as documented in prior research, are reviewed and discussed.

[76] Macdonald & Porter, *supra* note 76 at 712: "State-led transitional justice processes, as promoted by donors and JLOS, are often regarded as a red herring because people have a clear, lived understanding of NRM hegemony and its narrative about the war, and because there is virtually no current prospect of the government delivering a fair and comprehensive policy offering financial compensation for people's wartime losses."

[77] Phil Clark, *Distant Justice, The Impact of the International Criminal Court on African Politics* (Cambridge University Press, 2019), p.173.

[78] Female community member, Parabongo focus group, 4 December 2018.

[79] Female community member, Parabongo focus group, 4 December 2018.

> *captivity still as rebels, may be encouraged to come back home so that peace may continue live among people*.[80]

Surprisingly, and in stark contrast to the majority of the returnee informants, the Parabongo community also strongly favoured amnesty for Kony:

> *To me, these people, including Kony, should be forgiven. The court will not really help much, the investigation that will be done, because they took people whose names were already earmarked by ICC, like Kony. To them, they may think they can investigate and find a solution. But to me, as a layperson, I think these people should just be forgiven*.[81]

Another male respondent referenced Kony's spiritual delusions as grounds for his excusal from criminal punishment:

> *Kony did also not go to the bush willingly but was led by the spirit. So, it was those spirits that led him to the bush, that led him to do what he did. So, he deserves forgiveness*.[82]

Of the 10 respondents in Parabongo, 9 favoured amnesty for Kony, with just 1 favouring prosecution. For a community that saw over 20 people massacred and many more abducted by Kony's rebels, this is an extraordinary level of compassion. In Abia, however, the pro-accountability stereotype of the Langi people did come through in their answers on the propriety of prosecuting Ongwen, Kwoyelo and Kony. With respect to Ongwen, respondents were divided on the question of whether he deserved amnesty or prosecution. Outreach and screenings conducted by the ICC in Abia and surrounding areas meant the community were much more informed about the allegations against Ongwen. As they explained:

> *To me, Ongwen shouldn't be forgiven. Because Ongwen knew what is wrong, and what was right. For example, at times, I believe that Kony gave him commands, and in those commands, killing was not included. But Ongwen, because he wanted to look for fame, he went ahead and did the killing. He needs not to be forgiven. I feel bad that I hear Ongwen is being taken good care of, and when his wife was about to give birth, the wife was taken there, to give birth from there. And yet for them, who are the innocent victims,*

[80] Female community member, Parabongo focus group, 4 December 2018.

[81] Male community member, Parabongo focus group, 4 December 2018.

[82] Male community member, Parabongo focus group, 4 December 2018.

are still suffering here. So I don't feel happy, and I feel Ongwen should not be forgiven.[83]

Another respondent referenced the attack on nearby Abok, one of the charged incidents in the Ongwen case:

When Ongwen was killing people in Abok, Ongwen was old enough and he should have forgiven people. But he killed people mercilessly in Abok, so he doesn't deserve to be forgiven.[84]

A contrary view advocating forgiveness for Ongwen was offered by another male attendee, on similar grounds as mentioned in Parabongo, that of his own victim status:

To me, Ongwen can be forgiven depending on his statement. Because seriously, Ongwen was abducted when he was a child and the spirit of committing atrocity was just inflicted unto him when he was a child. You know when you are a child, whatever first training that you are given, is what you go with. So, Ongwen grew up knowing that everything is about killing, killing, killing. Committing bad things. So if he goes up with his statement, the straight statement, he can be forgiven. He can win the case and be forgiven.[85]

With regards to Kwoyelo, there was some indifference among the Abia focus group was to what his fate should be – amnesty or trial. There was also little knowledge of the background to his case and personal circumstances. One man stated that because Kwoyelo came out "willingly", he should be forgiven and granted amnesty. When it was pointed out that Kwoyelo was captured in battle, this answer was qualified:

If he (Kwoyelo) was doing things intentionally, he shouldn't be forgiven.[86]

The majority view in Abia in respect of Kwoyelo was that being a top commander, he knew better and should not be deserving of amnesty:

[83] Male community member, Abia focus group, 7 December 2018,

[84] Male community member, Abia focus group, 7 December 2018.

[85] Male community member, Abia focus group, 7 December 2018.

[86] Male community member, Abia focus group, 7 December 2018.

He was supposed to be among the people who was supposed to show the young children where to come back. Instead, leading the children to commit bad atrocity.[87]

Unsurprisingly, for Joseph Kony, the unanimous view among those interviewed in Abia was that he should be prosecuted. No respondent advocated amnesty for Kony. Notably, there was a sentiment expressed that he prosecuted in Uganda, not the ICC. It was considered that a local trial would bring a greater sense of ownership and involvement in the trial. For Kony to be tried in Uganda would, it would appear, be more cathartic for the local population. On the other hand, it was recognised that a Kony trial at the ICC would potentially bring reparations for communities like Abia as the attack was the subject of prior OTP investigation in 2004. This answer demonstrates a sophisticated level of knowledge as to how ICC proceedings operate, as a result of ongoing outreach by the court:

The people who were supposed to receive amnesty were children who were abducted between the age of 1-17. Those were considered as children. But those who abducted, or went willingly, and they were old enough were not supposed to receive amnesty. Even Kony. We see that, if he comes back, ICC is far for him. They should deal with him within the country here.[88]

I am trying to explain that Kony shouldn't be killed after he is arrested. He should be prosecuted. After the trial, if he is found guilty, he should be imprisoned while the world be able to compensate the people in every community where atrocity was committed. For example, now Dominic Ongwen is being tried. If he is charged, the world will compensate the people in areas where Dominic Ongwen was committing atrocity, but for us, we will not be compensated. But if Kony is tried and charged, the entire community will be compensated by the world because Kony was a general commander.[89]

Overall, the above views evince an interesting regional difference in attitudes that correlates to some degree with prior research with victim communities.[90] Pro-forgiveness sentiment was very evident in Parabongo (Acholi), while views were more divided in Abia (Lango), with notable support for accountability among some respondents. However, it is hard to draw larger

[87] Male community member, Abia focus group, 7 December 2018.

[88] Male community member, Abia focus group, 7 December 2018.

[89] Male community member, Abia focus group, 7 December 2018.

[90] *See* section 3.10 – "Local Views on Amnesty".

conclusions about how people in northern Uganda view the moral propriety of conducting prosecutions. For example, a short distance away from Parabongo are the villages of Lukodi and Odek, also in the Acholi sub-region. I have visited both villages numerous times in my role as Prosecution lawyer for the OTP, holding large village meetings. Both the Odek and Lukodi communities are strongly in favour of the Ongwen trial process. This may well be linked to the prospect of reparations that follows a conviction,[91] but I always found it notable that sentiments of forgiveness or amnesty were never expressed during our outreach meetings. It is likely that some sentiments of forgiveness do exist in Odek and Lukodi, but perhaps people were not comfortable enough to raise the issue in our presence, or in front of the community that was clearly strongly in favour of the process.

6.4 Assessing the Impact of Amnesty in Uganda

On the basis of the fieldwork data above, the chapter now moves to assessing the impact of amnesty in Uganda using the four stated objectives. To recall, they are as follows:

- ***First***, the Act intends to amnesty, or forgive, those who have committed acts of rebellion.
- ***Second***, the Act intends to demobilize and reintegrate former rebels.
- ***Third***, the Act intends to end hostilities to bring peace.
- ***Fourth***, the Act seeks to promote reconciliation between former rebels and the community.

6.4.1 Objective 1: Amnesty

"First, the Act intends to amnesty, or forgive, those who have committed acts of rebellion."

It is clear that by amnestying over 27,000 former rebels, the *Amnesty Act* was able to grant mass forgiveness from the state, in the form of an amnesty certificate which contained a promise of non-prosecution in respect of rebel activities.[92] The fieldwork with informants[93]

[91] Refugee Law Project, 'Ongwen's Justice Dilemma, Part II: Ongwen's Confirmation of Charges Hearing: Implications and Way Forward?' (January 2016), p.11: One Odek community member stated: "Ongwen's case will enable us as a community to be certain that if there will be fair judgment in future, we will receive reparation."

[92] *See* section 3.9 – "Amnesty Figures."

[93] *See* section 6.2.1 – "Amnesty As Forgiveness".

and the communities[94] described above revealed, for the most part, that amnesty was understood as forgiving them for everything they did in the bush. To date, persons who have received amnesty certificates have not subsequently been prosecuted. However, this administrative success has been undermined by the poor implementation of the Amnesty Commission's mandate. As indicated in the fieldwork[95] and prior research,[96] many returnees did not receive resettlement packages. Moreover, the belated narrowing of the amnesty to only cover military rebellion – a result of the *Kwoyelo* Supreme Court judgement – has arguably damaged the integrity of the amnesty project, undermining the sense of security it gave to returnees.[97] There is also a discernible view among informants that they have *nothing to be forgiven for*, as they were abducted and forced into rebellion. Rather, it is the state that should be seeking forgiveness for failing to protect them. Nathan Twinomugisha, Principal Legal Officer to the Amnesty Commission, acknowledged this and expressed his regret that children were labelled as rebels, but also explained that it was done to protect them from any future criminal liability:

> "They didn't need to be forgiven because after all, they didn't go willingly to. The government didn't protect them from being abducted, so it was not their fault. But because we wanted to end the war, because we wanted to give them something, because we wanted to resettle them, we had somehow to document them. And also we are not sure of what might happen to them in future. […] I haven't heard of any limitation for any crime, so supposing some brutal president comes 20 years from now and says oh, there are people who committed atrocities. Trials. So that's why we wanted to protect them. But of course you can say it's a big debate, but for me, that's why I couldn't reconcile, but we took the lesser evil. Because if we didn't give them certificates, we are not sure of what happens."[98]

Despite the likelihood that thousands of returnees who were processed through reception centres were not captured by the amnesty process,[99] the practical objective of granting amnesty to the majority who applied for was, in the administrative sense, realised. However, the degree of forgiveness has been somewhat diminished by the *Kwoyelo* Supreme Court ruling.

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[94] *See* section 6.3.1 – "Amnesty – Forgiveness In Return For Peace".

[95] *See* section 6.2.2 – "Coming Home – Social and Spiritual Challenges".

[96] *See* section 3.10 – "Local Views on Amnesty".

[97] *See* section 4.6.6 – "Re-Defining Amnesty" and section 6.2.3 – "Prosecutions – An Unequal Approach?".

[98] Interview with Nathan Twinomugisha, 14 December 2018, Kampala.

[99] Research by Allen and Schomerus found that only 25% of abducted persons who passed through formal reception centres after leaving the bush received amnesty cards, applied for amnesty, or had even heard of the Amnesty Commission. Tim Allen & Marieke Schomerus, *A Hard Homecoming: Lessons Learned from the Reception Center Process in Northern Uganda* (Management Systems International, 2006), p.37.

6.4.2 Objective 2: Reintegrate

"***Second***, the Act intends to <u>demobilize and reintegrate</u> former rebels."

The initial demobilization was, in most cases, the work of the Ugandan armed forces, and thereafter, local NGOs operating to assist with the returning abductees through the provision of transitional care and psycho-social support in reception centres.[100] As with the granting of the amnesty certificate, the practical act of demobilization was effectual, and in the context of an ongoing conflict and limited resources, NGOs provided a good level of care in the reception centres. However, the Amnesty Commission resources were sparse and hindered the development of consistent operating procedures.[101] The "one-size fits all" resettlement package meant that the gender-specific needs of women and girls were not catered for in the amnesty process, especially those returning with children born of rape.[102] This gender blind spot is an example of what Ní Aoláin refers to as "gender under-enforcement", where the practice of transitional justice fails to take into account the unique needs and issues that women face after conflict. Ní Aoláin argues that:

> "[t]ransitional discourse with an almost exclusive focus on male actors sees only half, albeit the most apparent and visible half, of what is going on. In reality women (and their dependent children) figure disproportionately as victims of conflict and repression, and are amongst the most marginalized people with the least resources who are most in need of enforcement of rights-based liberal norms of equality and autonomy."[103]

Although the settlement package was not framed as reparations – rather as reinsertion assistance – a more transformative approach was necessary, given the particular gendered harms and barriers for women and girls returning home after escape from the LRA.[104] In the view of Ní Aoláin *et al*, such a transformative approach would be:

> "couched in the position that remedies for sexual violence must take into account the pre-existing structural inequalities that women face as a routine and accepted part of their lives in many societies. Women experience vulnerabilities resulting from: express social and employment discrimination; prohibitions on female ownership of and access to real property; limitations on women's access to public space due to insecurity and gender-based movement restrictions; cultural conventions regarding female chastity and honor; health and education

[100] *See* section 3.8 – "Resettlement".

[101] *See* section 3.7 – "The Amnesty Commission".

[102] *See* section 6.2.2 – "Coming Home – Social and Spiritual Challenges".

[103] Fionnuala Ní Aoláin, 'Gendered under-enforcement in the transitional justice context', in Susanne Buckley-Zistel & Ruth Stanley (Eds), *Gender and Transitional Justice* (Springer, 2012) pp.59-87 at p.80. *See also* Fionnuala Ní Aoláin, 'Advancing Feminist Positioning in the Field of Transitional Justice', *International Journal of Transitional Justice* Vol. 6, Issue 2 (2012) 205–228; Christine Bell & Catherine O'Rourke, 'Does Feminism Need a Theory of Transitional Justice? An Introductory Essay', *International Journal of Transitional Justice,* Vol. 1, Issue 1 (2007) 23–44.

[104] *See* section 6.2.2 – "Coming Home – Social and Spiritual Challenges".

> access gaps for women and girls; and the undulating exposure of women to intimate violence across all societies.[105]

Likewise, the amnesty and reintegration process would also have benefited from a "masculinities lens" that holistically engaged with "militarized masculinities as well as with masculine vulnerabilities",[106] in order to ensure gender parity when it came to resettlement and reintegration strategy on the part of the Amnesty Commission. As indicated in the fieldwork[107] and prior research,[108] subsequent reintegration to home communities not a considered, well thought-out process. NGOs typically reinserted returnees back to their home communities in an abrupt fashion, with little to no involvement from the Amnesty Commission. Nathan Twinomugisha considered that one of the biggest shortcomings of the Commission's work was the failure to adequately address the gender-specific needs of women and children returning from the bush:

> "The women, we didn't treat them well. I mean the women were treated the same exactly, like the men. We should have had some gender-sensitivity to treat the women in their own way. […] Of course there were men also went through many other things, but the women have double jeopardy. Double problems. Because you as a man, you may face problems, you may do what, but a woman, what happens to a woman is internal, it's a sore thing, it's destruction. […] We should have something special for children. And women. Children should even have some special treatment. Go back to school, pay school fees and certain things. Completely erase that period. Did it happen, no? Did the women get any special treatment? No. We treated them the same. That's my regret. Resettlement was not done well. We should have followed up these people and found out the cause, what happened, why did they go, was it all about abduction? Did some people go willingly, what were the cause of this. Follow up. So, our follow-up was, of course hampered by resources. We could have done better than this."[109]

As the fieldwork revealed,[110] there was limited sensitisation of receiving communities about the experiences and needs of returnees, often resulting in stigmatisation and poor livelihood outcomes, which for many returnees, continues to this day.[111] While the community focus groups described a good level of inter-personal reintegration for returnees, particularly

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[105] Fionnuala Ní Aoláin, Catherine O'Rourke, & Aisling Swaine, 'Transforming reparations for conflict-related sexual violence: Principles and practice', *Harvard Human Rights Journal*, Vol. 28 (2015) 97-146 at 102.

[106] Phillip Schulz, 'Towards Inclusive Gender in Transitional Justice: Gaps, Blind-Spots and Opportunities', *Journal of Intervention and Statebuilding*, Vol. 14, Issue 5 (2020) 691-710 at 693. *See also* Brandon Hamber, 'There is a Crack in Everything: Problematising Masculinities, Peacebuilding and Transitional Justice', *Human Rights Review* Vol. 17 Issue 1 (2016) 1–25; Diana Haynes, Fionnuala Ní Aoláin & Naomi Cahn, 'Masculinities and Child Soldiers in Post Conflict Societies', *Minnesota Legal Studies Research Paper*, Vol. 10, No. 5 (2011) 2–24.

[107] *See* section 6.2.2 – "Coming Home – Social and Spiritual Challenges".

[108] *See* section 3.8 – "Resettlement".

[109] Interview with Nathan Twinomugisha, 14 December 2018, Kampala.

[110] *See* section 6.2.2 – "Coming Home – Social and Spiritual Challenges".

[111] *Id*.

in the area of marriage,[112] the children of returnees nevertheless still face residual stigma and discrimination, particularly with regard to access to land and inheritance. This caused some fieldwork informants to move away from their rural communities to more urban settings, to escape stigma and seek a more sustainable livelihood.[113] The lack of follow-up assistance from the Amnesty Commission or the responsible NGOs arguably slowed the return to civilian life.

The fieldwork findings reveal a good degree of reintegration in general for those informants interviewed, as they described partaking in social and economic activities such as sharing meals, collective farming and selling goods.[114] The community focus groups also demonstrated a broad level of acceptance for returnees.[115] However, deeper community reintegration has been impeded by stigma, and reduced economic opportunity owing to lost years of education and a lack of access to patrilineal land for women and children born of rape, in particular.[116] While the Amnesty Commission cannot reasonably be criticised for these factors, the admittedly low levels of programmatic intervention in the area of reintegration that could have been implemented by the Amnesty Commission with the help of partners – be it in terms of community sensitization or livelihood supports – has meant that, in my view, the goal of facilitating reintegration was poorly implemented by the Amnesty Commission.

6.4.3 Objective 3: End Hostilities

"Third, the Act intends to <u>end hostilities to bring peace."</u>

In my view, it is clear that the availability of amnesty was one of the main reasons that brought an end to the armed conflict in northern Uganda. Fieldwork informants repeatedly cited amnesty as being the main catalyst for the current state of peace in the north.[117] When

[112] See section 6.3.2 – "Receiving Rebels – Rebuilding Community Life."

[113] *See* section 6.2.2 – "Coming Home – Social and Spiritual Challenges.

[114] *Id*.

[115] *See* section 6.3.2 – "Receiving Rebels – Rebuilding Community Life". *See also* section 3.10 – "Local Views on Amnesty." *See further* the research of Finn in particular, which found a positive degree of reintegration in general among his interviewees. Anthony Finn, *The Drivers of Reporter Reintegration in Northern Uganda* (World Bank, 2012).

[116] *See* section 6.2.2 – "Coming Home – Social and Spiritual Challenges" and for previously documented research that contains similar findings, *see* section 3.10 – "Local Views on Amnesty." *See* in particular, the findings of Akello in this regard. Grace Akello, 'Reintegration of Amnestied LRA Ex-Combatants and Survivors' Resistance Acts in Acholiland, Northern Uganda,' *International Journal of Transitional Justice*, Vol. 13, Issue 2 (2019) 249–267.

[117] *See* section 6.3.1 – "Amnesty – Forgiveness In Return For Peace".

asked if future amnesty were to be made conditional, as is envisaged in the National Transitional Justice Policy, informants stated that remaining rebels would likely not return home and would continue to fight. Admittedly, amnesty did not precipitate an immediate cessation of hostilities. It took a number of years for the state of armed conflict to end, to the point where the LRA left Uganda in 2006. Despite the long passage of time – six years from the passing of the *Amnesty Act* in 2000 to the ending of the war within Uganda's borders in 2006 – the availability of amnesty was the most commonly cited factor for ending the war among informants. It is important to recognise there are varied definitions of what constitutes "peace." A common saying in northern Uganda is that "the guns may be silent, but the conflict continues."[118] This is a reference to a range of residual issues that continue to disrupt social life in northern Uganda as a direct result of the LRA conflict. These include land disputes between families and communities, the breakdown of cultural norms because of displacement, and the high rate of gender-based violence. Such challenges are commonly found in post-conflict and transitional settings.[119] As stated in section 6.1, "peace" is understood here as the presence or absence of hostilities. Importantly, it must be noted that the hostilities did not cease entirely upon the LRA's departure from Uganda, as the group continued fighting and committing atrocities in the DRC and CAR for years afterwards. However, the availability of amnesty did drastically reduce the level of armed conflict by steadily depriving the LRA of countless abductees as well as senior commanders such as Kenneth Banya, Sam Kolo and Caesar Acellam, by facilitating their unconditional defection. When asked if amnesty helped to bring peace to northern Uganda, Archbishop Odama stated:

> "That one I can say yes. At least it brought the end of the war very close. Before the peace talks, it brought peace nearer. It did. Because with that, the great number of the rebels who came out began to weaken those who were still in the bush. Their number weakened that one, so it brought the chance of bringing those who were in the bush to accept also to talk. That was also another indirect contribution towards peace in that sense. I think amnesty, I must say, was a success, if you valued it in terms of the percentage, it was more than half, you could say. It should have been about 60% or something. That was a sort of success. Because it brought out some of the most critical people. That was already something. That was a contribution. To me, I see it like that. I see it like that. So, contribution in terms of peace, yes. Also in terms of enabling the other process of peace talks to be possible. You see, without amnesty, I don't think we would have got people to accept to go for peace talks."[120]

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[118] One victim of the war is quoted as saying: "Victims and survivors still grapple with serious mental health and psychosocial challenges and are unable to engage in productive ventures. For many, the war still continues in their minds despite the guns falling silent." *See The New Humanitarian*, 'How the LRA still haunts northern Uganda, The appearance of an LRA commander at the ICC is stirring old memories', 17 February 2016.

[119] *See e.g.,* Aisling Swaine, *Conflict-Related Violence Against Women, Transforming Transition* (Cambridge University Press, 2015), chapter 6: "Seeing Violence in the Aftermath – What's labelling got to do with it?", examining a "crisis" of gender-based violence in post-conflict Liberia and Timor-Leste. *See also* Monica McWilliams & Fionnuala Ní Aoláin, 'There is a War Going on You Know': Addressing the Complexity of Violence Against Women in Conflicted and Post Conflict Societies', *Transitional Justice Review*, Vol. 1, Issue 2 (2013) 4-44.

[120] Interview with Archbishop John Baptist Odama, 3 December 2018, Gulu.

Over time, amnesty caused hostilities to virtually come to end within Uganda, but armed conflict was instead transferred to neighbouring DRC and CAR. Although this transfer was not necessarily because of amnesty, but rather because of renewed military offensives following the collapse of the Juba peace talks.[121] Thus, amnesty may be considered to have contributed to a reduction in the level of hostilities.

6.4.4 Objective 4: Promote Reconciliation

"Fourth, the Act seeks to promote reconciliation between former rebels and the community."

The mandate of the Amnesty Commission to promote reconciliation was hampered by a lack of resources that meant such promotion was mostly done over the radio on stations such as Mega FM, in order to reach many people with a simple message of encouraging acceptance. The Principal Legal Officer of the Amnesty Commission regretted this aspect had not been given enough attention and resources. Efforts to further this goal were sporadic, and mainly limited to radio shows and infrequent community sensitisation meetings. As Nathan Twinomugisha explained to me:

> "Yes of course we tried, but this is a small organisation with little money. And reconciliation is a big thing. Peacebuilding, if you are to carry out peacebuilding it means you go out, talk to people, hold seminars, hold what, call in experts, but that's money. We're talking of money. We don't go to all of the country talking about peace without money. So, I would say yes, we tried with the resources we had. But did we do a very good job? No. Why didn't we do it? Poverty. We didn't have. […] We did our best but was our best good enough? I wouldn't say. We needed more resources to go out, go to people, try and solve inter-clan conflicts, tribal conflicts, land conflicts, gender-based violence, all those are conflicts. And with a small organisation like ours, with the resources that we have, we can do our best, but it will not be good enough."[122]

Reconciliation itself was never going to be an objective that was going to be tangibly measurable. In the Acholi culture, reconciliation is governed by custom and traditional practices, which place emphasis on public apology and reparation by the perpetrator. As Sheikh Khalil explained to me:

> "In Acholi, if you commit a crime, you must testify to your clans that I've committed. So that the clan meet the other clan and say our son has committed a crime. And after that, when there's

[121] In late 2008, the UPDF's "Operation Lightening Thunder" pushed the LRA further into the DRC after Kony failed to sign the final peace agreement. *See* Ronald Atkinson, 'From Uganda to the Congo and Beyond, Pursuing the Lord's Resistance Army' (Institute of Peace, 2009), p.13.
[122] Interview with Nathan Twinomugisha, 14 December 2018, Kampala.

> acceptance or forgiveness, then that's where reconciliation comes. […] There is the challenge of forgiveness, the steps of reconciliation. If once followed with the guilty person accepts his guilt, and the side of the killed accepts the forgiveness, then reconciliation is done with compensation."[123]

I asked Bernard Festo, Programme Officer with the Amnesty Commission Gulu Office, about the regularity of community sensitization with regard to reconciliation, and he said it was extremely inconsistent due to a lack of resources. The Amnesty Commission would often lack fuel even to attend with NGOs who might be facilitating a resettlement. Where the Commission was able to attend, Festo described the reconciliatory message to the receiving community as follows:

> "The message given to community was that these things happened. Today, it is that reporter whom the community is welcoming back. The next day it may be someone else from that very community, so we should understand. The community members should understand that it wasn't his own making, he was abducted against his will. He went and he was forced to do things and if at all, he wronged anyone from that community, then people should jointly forgive. They should also appreciate that he is back and alive. And the government has forgiven him for whatever he has done, and that's why he is in the community. People should not be stigmatising. They should look at him as any other community member. There should be no segregation, there should be no, you know, neglect in any way. They should actually give him the opportunity also to live like any other community member. So there was that empathy of allowing him to, the reporter to live as any other community member."[124]

However, apart from a limited number of reported collective cleansing ceremonies – which are, by their purpose, not of a reconciliatory nature – the Amnesty Commission played no significant and regular role in promoting or facilitating reconciliation ceremonies such as *mato oput*. Moreover, the occurrence of reconciliation ceremonies such as *mato oput* has not been reported to any significant degree, either in the fieldwork or in the existing literature. Archbishop Odama explained to me how amnesty needed to be complemented with such traditional processes:

> "You see, in the amnesty process, after that acceptance, there really should have been the *mato oput* process, where, well, these people were accepted back, some of them had to step on the eggs, that was ok, But it was not the *mato oput*. So, that should have been added to the amnesty. It should have, so that these people coming back would have really feel we have been fully forgiven, and fully reconciled with the population. This was not, so this part of the *mato oput* system should have been fully implemented. But, the partial thing of stepping on the eggs and so on, those were done. Well, they took it, it is as if we are accepted, but not fully, because the process of *mato oput* was bigger than that."[125]

[123] Interview with Sheikh Musa Khalil, 5 December 2018, Gulu.

[124] Interview with Bernard Festo, Programme Officer with the Amnesty Commission Gulu Office, 20 September 2018, Gulu.

[125] Interview with Archbishop John Baptist Odama, 3 December 2018, Gulu.

Instead, families of returnees carried out their own cleansing ceremonies, designed to cleanse returnees of bad spirits, or *cen*, as a result of their time with the LRA. The goal of these cleansing ceremonies was not to reconcile as such, but to purify the individual and encourage a peaceful return to the home community.[126] As Sheikh Musa Khalil described above, Acholi tradition, reconciliatory ceremonies require physically finding the victim and/or their clan in order to perform a reconciliation ceremony – an unrealistic prospect in a post-conflict context of mass internal displacement. An incongruency in the reconciliation message that may not have been properly considered by the Amnesty Commission was that the core purpose of amnesty was not to reconcile the rebel with their victim, but to reconcile the rebel with the state, through the granting of amnesty. In order for the Commission's promotion of reconciliation to have been ultimately successful, the structures to facilitate and implement subsequent reconciliatory practices such as *mato oput* needed to be in place, in liaison with local cultural leaders such as *Ker Kwaro Acholi*, the umbrella group of cultural leaders in the Acholi sub-region. Thus, there was an absence of reconciliation in the amnesty and reintegration process in general. As Archbishop Odama explained to me:

> "If it is in the context of bringing the victim and the perpetrator together to accept that something wrong was done, and the perpetrator accepts this in front of even the victim, amnesty didn't do that. No. Because amnesty was one way, it was the perpetrator coming in front of the government. Not so much the civilians. It was coming in front of the government to accept I have committed rebellion, I renounce it. Therefore, accept me back as a citizen. This is what happened. But for the case of the civilians, to bring them face to face, where the, what you call the perpetrator coming to say to the civilians, in a way of reconciling them, maybe in isolated cases it may have happened, yeah, in the sense those who were given amnesty, some of them went further to do reconciliation with some of their relatives and so on. That we can say yes, it made some impact in that case. But if purely, amnesty with the government only, the sense of reconciliation in the way we understand it, would be partial. It is only the government with the rebel, in a way who are reconciled, it could be like that. But not with the civilians, you see."[127]

6.4.5 The Impact of the Prosecutorial "Turn"

Having reviewed the performative goals of amnesty, it is also necessary to then consider what has been the impact of the prosecutorial "turn", as demonstrated by the prosecutions of Thomas Kwoyelo and Dominic Ongwen, upon the amnesty project. The fieldwork clearly revealed that informants were left feeling insecure and frightened at the prospect of the prosecutorial "turn".[128] The denial of amnesty to Kwoyelo also unavoidably taints the amnesty

[126] *See* section 6.2.2 "Coming Home – Social and Spiritual Challenges", and section 6.3.2 – "Receiving Rebels – Rebuilding Community Life".

[127] *Id*.

[128] *See* section 6.2.3 – "Prosecutions – An Unequal Approach?"

process as being an inequitable one, a view expressed in the community focus groups.[129] Many of Ongwen and Kwoyelo's peers, themselves implicated in serious crimes, received amnesty and today live as free men.[130] As revealed in the fieldwork, there was a pattern of anti-prosecution sentiment among informants. The move to prosecute Kwoyelo in particular left some informants feeling worried about the prospect of future prosecutions which might subsequently target them.[131] The security given to them in the form of the amnesty certificate has been discernibly undermined as a result. The denial of amnesty to Kwoyelo is, in the eyes of many, an unfair application of the law against him. As Archbishop Odama said to me:

> "Yes, he should have received the amnesty, at least to be honest, I mean to be fair. Because it was still on. Why not give him?"[132]

Similarly, in relation to Kwoyelo, Sheikh Musa Khalil said:

> "As religious leaders, we see fair justice, and fair justice, it means justice for all. If you are granting amnesty, grant for all."[133]

When asked what he thought the impact of Ongwen and Kwoyelo prosecutions would be on amnesty in general, Archbishop Odama stated:

> "In a way now, it has weakened amnesty. Because none of these people have been really considered for amnesty. Which of course would be unfair. If by our principles, we were arguing that time, all of these people should have been given amnesty. So, the ICC says it has prerogative over the others. Even governments and so on, they have prerogative over them. And that makes the case of Ongwen complicated. Similarly now also, the one of Kwoyelo, you see. Of course, they should have been also people given amnesty. Because they were the first people who were abducted. They committed those crimes if any of them under the duress of the LRA command. That's the way I'm looking at it."[134]

At the same time, a minority of number of informants were in favour of prosecution for senior leaders, believing that they personally were not of interest to the authorities, and so did not fear prosecution.[135] Notably, community members in the Acholi region were strongly pro-amnesty and were of the view that prosecutions would be counter-productive to long-term prospects for

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[129] *See* section 6.3.3 – "Prosecutions – A Just Approach?"

[130] *The New Humanitarian*, Forgive and forget? Amnesty dilemma haunts Uganda, 12 June 2015: "In addition to Acellam, who was finally granted amnesty earlier this year, a number of other more senior LRA commanders, such as Kenneth Banya and Sam Kolo Otto, have also benefitted from the law."

[131] *See* section 6.2.3 – "Prosecutions – An Unequal Approach?"

[132] *Id*.

[133] Interview with Sheikh Musa Khalil, 5 December 2018, Gulu.

[134] Interview with Archbishop John Baptist Odama, 3 December 2018, Gulu.

[135] *See* section 6.2.3 – "Prosecutions – An Unequal Approach?"

peace.[136] Somewhat conversely, community members in Lango were divided as to the importance of prosecution, but overall relayed pro-accountability sentiments for senior commanders.[137] Thus, it is clear that the prosecutorial "turn" has undoubtedly impacted upon how amnesty is perceived and understood by both amnesty recipients and the communities in which they live.

6.5 Conclusion

Overall, the use of amnesty has had a *positive impact* in northern Uganda, facilitating the return of thousands of victimised abductees and encouraging the end of hostilities. The amnesty project has nevertheless been undermined by practical weaknesses in terms of resettlement, a lack of gender-sensitivity in the programming and planning of reintegration, and the failure to promote reconciliation initiatives which factored in and enabled traditional and cultural norms. Additionally, the prosecutorial "turn" has had a limited but discernibly *negative impact* on the amnesty project itself, as it has eroded the concept of amnesty as conceived and understood by the relevant stakeholders. Despite the conceptual erosion of amnesty which has been caused by this turn, I consider that the negative impact to be nonetheless a marginal one. The erosion is not of a severity that fatally undermines the amnesty project, nor has it prompted widespread social discord, given the recognition that prosecutions will be extremely small in number, and that only the most senior commanders are being targeted. Indeed, some informants indeed were supportive of senior prosecutions, as were a number of the (Langi) community discussants in Abia. However, had prosecutions occurred much earlier in the life of amnesty, it is questionable whether the amnesty project would have been as productive as it has been.

What is to be the long-term legacy of amnesty in Uganda? I asked this question directly of Nathan Twinomugisha, Legal Officer to the Amnesty Commission. He considered that the Ugandan experience of amnesty needs to be carefully studied as to why, in a situation where mass atrocities occurred, there was no widespread revenge and that amnesty facilitated a measure of peace. It is worth quoting his answer in full:

> "The legacy has set an example of how to end rebellion. We have learned the bad and the good about amnesty. Because our amnesty I think was different. I've not seen any amnesty like ours. And most of the countries should come and study what we did here. […] Our legacy should be that I wish the international community also instead of sometimes lambasting without coming to the ground and studying the situation, should come and find out. Could we have, was it good,

[136] *See* section 6.3.3 – "Prosecutions – A Just Approach?"

[137] *Id*.

could we have done it better, what was good about it? My quarrel with most Western thinking, they come and say, no you can't, you can't give amnesty, no it should be. I would hear those voices. Have they come to the ground and studied the African communities, how we live?

For example, I've been intrigued by the way these people were welcomed. The people who got amnesty. I don't think it would happen in the West. People, someone who committed, and you welcome him, someone should go and study that. It's strange to me, as a lawyer, but the people, we expected terrible revenge. But it never happened. Why? Someone should study. Why wasn't there large-scale revenge on the people we took back? Even when we are taking these people back, we don't expect backfire. They were accepted, welcomed as children and people understood them.

So, our legacy should be that people should come and study how do you treat people who have wronged society. Is there a third way, is there another way, apart from insisting on trials. Is there some good, instead of standing there, somewhere, lambasting the whole amnesty, come to the ground and find out. Because I do believe we saved lives."[138]

[138] Interview with Nathan Twinomugisha, 14 December 2018, Kampala.

7 Conclusion

Today, northern Uganda is at relative peace. A hard-won peace. A peace won not by negotiating or inflicting military defeat, but through the granting of unconditional forgiveness through amnesty. The conflict between the LRA and the Ugandan armed forces was effectively ended through the staggered implementation of an unconditional amnesty for all those willing to defect and "renounce rebellion." At the time the *Amnesty Act* was passed in the year 2000, there was a clear consensus among all stakeholders – the public, politicians, cultural and religious leaders – that the amnesty on offer, and which was subsequently granted, amounted to *complete* forgiveness for all acts committed in the course of rebellion, including joining the LRA, helping the LRA, fighting for the LRA, and for committing crimes against civilians.[1]

Thousands received this amnesty – over 13,000 from the LRA. A total of 27,000 recipients.[2] Willing recruits, senior commanders, junior commanders, conscripted children forced to fight and kill, abducted women and girls forcibly married and sexually enslaved – no category of person was exempt. Messages of forgiveness and absolution were broadcast over the radio into the bush, proving to be a crucial medium for the deliverance of amnesty. The Amnesty Commission implemented its mandate as best it could, with extremely limited financial and human resources, particularly in the context of an ongoing armed conflict. Massive demobilisation and the resettlement of former combatants was made possible only with the assistance of local and international NGOs.[3]

The resettlement process was lacking in many respects, both in terms of initial resettlement and the monitoring of reintegration. In particular, the gender under-enforcement undermined the efficacy of the amnesty process. The inattention to the gender-specific needs of women returning with children born of rape in particular was a significant gap in the resettlement process, reducing the quality of reintegration for many. As well as gender under-enforcement, there was also insufficient attention given to the needs of children and adolescents, whose priorities were arguably not forgiveness from the state in the form of an amnesty certificate, but rather focused care and diversion to culturally appropriate methods of reconciliation, and if necessary, traditional mechanisms of accountability. Had the amnesty

[1] *See* section 3.5 – "Debating Amnesty".

[2] *See* section 3.9 – "Amnesty Figures".

[3] *See* section 3.8 – "Resettlement".

process incorporated a more holistic and concrete link to traditional and cultural mechanisms, it arguably would have been a more "foundational transitional justice tool",[4] reinforcing the rule of law after such a lawless conflict, rather leaving itself open to accusations of facilitating impunity and rewarding perpetrators.

Crystallising International Law versus Local Realities

The *Amnesty Act* was passed a time when the international legal trend was moving in a direction that amnesties for serious crimes are unlawful, because they irreconcilably conflict with treaty-based obligations to investigate and prosecute serious crimes, and foreclose legal remedies to victims. As the amnesty project was continuing apace in Uganda, international and regional courts around the world were gradually coalescing around a "crystallising norm" that prohibits amnesties for serious crimes, namely war crimes, crimes against humanity and genocide.[5] In the same decade, the United Nations likewise hardened its position on amnesty, and today will only endorse amnesties where they expressly exclude such crimes. Despite this, there was an apparent cognitive dissonance in respect of the Ugandan amnesty law. At the time of its enactment, international observers and commentators perhaps took comfort in the ambiguous legislative wording that granted amnesty for acts "in furtherance of rebellion", which made no reference to serious crimes. Initial assessments in the early period of amnesty's operation did not set off any loud alarm bells in respect of its compatibility with international law. Yet, the brutality of the LRA war was clear for all to see. This was no ordinary rebellion. The LRA became notorious around the world for senseless and horrific crimes committed against civilians. Casualties were widespread and systematic, and the range of the criminal acts clearly of serious gravity. This resulted in a state referral to the International Criminal Court in 2004, and a year later, five arrest warrants were issued.[6] Yet, before and after this intervention, Uganda amnestied LRA fighters for serious crimes, and as the parliamentary debates demonstrate, it intended to do so.[7] Moreover, as the fieldwork establishes, key stakeholder figures, returning LRA abductees and their communities were of the same understanding as to the scope of the amnesty being granted.[8]

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[4] Pádraig McAuliffe, *Transitional Justice and Rule of Law Reconstruction, A Contentious Relationship* (Routledge, 2013), p.289: "[f]oundational concerns for the rule of law in transition should be given greater weight when designing transitional justice responses, be they trials domestically, in The Hague, a truth commission or a traditional hearing in a village."

[5] *See* section 2.5.3 – "Jurisprudence on Amnesty".

[6] *See* section 4.2 – "The Intervention of the International Criminal Court".

[7] *See* section 3.5 – "Debating Amnesty".

[8] *See* section 6.2.1 – "Amnesty As Forgiveness".

This was no accident. Amnesty in Uganda was seen as the morally right thing to do. The LRA was, in essence, an army of abductees. Young boys and men were abducted, trained and forced to participate in hostilities. In addition, they routinely committed serious crimes against civilians. Women and girls were abducted and enslaved into a life of domestic servitude, and often distributed as forced wives, whereupon sexual violence and slavery was commonplace. Women also regularly participated in criminal acts, such as pillaging during combat, while some held military ranks. These were complex victim-perpetrators.[9] Many committed crimes in the coercive environment of the LRA, some under duress, others with a degree of agency.[10] Nevertheless, local leaders lobbied for complete forgiveness for thousands of these complex victim-perpetrators. The Ugandan state agreed by passing the *Amnesty Act*.

Belated Justice, Redefined Amnesty

With the ICC warrants remaining unexecuted, and the LRA removed to the DRC following failed peace talks in Juba, the "justice cascade" was delayed in arriving to Uganda. In 2009, Thomas Kwoyelo was arrested and charged with war crimes.[11] As recounted, his quest for amnesty was ultimately denied by the Supreme Court in 2015, who narrowed the scope of amnesty to exclude serious crimes. I argue that this judgement redefined the prevailing meaning of amnesty as heretofore understood by the people of northern Uganda, thereby increasing insecurity and anxiety among returnees.[12] In 2015, Dominic Ongwen was arrested in the Central African Republic and transferred to the ICC where he awaits judgement.[13] Although Ongwen did not make a case for amnesty, like Kwoyelo, they are both complex victim-perpetrators. Under the letter of the *Amnesty Act* as enacted, they would have been entitled to amnesty, which made no reservation in respect of acts to be excluded, nor did it exclude those who were deemed to be the "most responsible." It simply gave the Director of Public Prosecutions discretion to veto the granting of amnesty, a discretion not invoked for over a decade of the Act's operation. The Supreme Court's clarification of the law came after 15 years of sustained, blanket amnesty. In doing so, the transitional justice terrain has shifted significantly, with the recently approved National Transitional Justice Policy also signalling an end to unconditional amnesty in the future.[14]

[9] *See* section 5.2 – "The Discourse of Complex Victimhood".

[10] *See* section 5.6 – "Complex Perpetrators in the LRA".

[11] *See* section 4.5 – "The Case of Thomas Kwoyelo".

[12] *See* section 4.6.6 – "Re-Defining Amnesty".

[13] *See* section 4.4 – "The Case of Dominic Ongwen".

[14] Ministry of Internal Affairs, *National Transitional Justice Policy* (June 2019), p.19.

Looking Over the Amnesty Canyon into the Future

What does this mean for the broader debate concerning the compatibility of amnesty with international law? Does the positive impact of amnesty in Uganda in response to internal armed conflict evidence support for a *pro*-amnesty norm, *contra* the anti-amnesty norm for serious crimes, as expounded by international jurisprudence? The beginning of this thesis framed the debate with metaphorical reference to an "Amnesty Canyon", a valley divided on one side by the "law" which prohibits amnesty for serious crimes, and state practice tacitly endorsing it on the other.[15] This very canyon is visible within Uganda. Despite international treaty obligations, including those under the Rome Statute, Uganda's state practice from 2000-2015 was to effectively grant blanket amnesty for serious crimes. Uganda's Supreme Court narrowed the scope of amnesty in 2015, ruling that the *Amnesty Act* did not, in fact, permit amnesty for serious crimes – only rebellion. In this sense, the experience of Uganda both contributes to, and undermines support for, an anti-amnesty norm for serious crimes. Arguably, the Supreme Court's belated adherence to the crystallising anti-amnesty norm does not detract from the sustained state practice that endorsed amnesty as a response to mass atrocity, particularly in an internal armed conflict where prosecutorial obligations have been argued by some to be more permissive.[16] As such, Uganda cannot credibly be presented as a clear example in support of a "crystallising" anti-amnesty norm.

Instead, it can be presented as an example of a state that, faced with a brutal and intractable rebellion, initially prioritised peace over justice to end conflict through amnesty. In doing so, it chose to ignore, or at least postpone, its treaty obligations by granting amnesty for serious crimes. Criminal accountability arrived first with the intervention of the ICC and then with the creation of the ICD. By adopting this approach – amnesty first, and prosecutions later – Uganda took a risky path that risked social cohesion, but in the long-term it is a path that has arguably reinforced the rule of law, as it transitions further away from conflict to long-term, sustainable peace.

Lawyers, judges, policy-makers and law-makers in transitional settings around the world should pause and reflect on Uganda's experience with amnesty. Its positive experience challenges the absolutist prohibition to amnesty that law and jurisprudence has often demanded. It should also be perhaps recognised that the crystallising anti-amnesty norm has not materialised, and there is no prospect of crystallisation any time soon. Rather than

[15] *See* section 1.1 – "The "Amnesty Canyon".

[16] *See* section 2.6 – "Challenging the "Anti-Amnesty Norm".

hardening, we have instead seen a softening in some international jurisprudence in particular, as shown by the *Marguš* and *Gadaffi* cases at the ECHR and ICC respectively. States refusal to insert an express prohibition on amnesty into the Draft Convention on Crimes Against Humanity should also give us pause for thought. In the so-called age of accountability, states found themselves unable to rule out recourse to non-accountability measures in the form of amnesty. This is quite remarkable, because if international law truly prohibits amnesty, then states should have had no problem agreeing to its prohibition.

In this regard, the continued position of the United Nations to remain steadfast in its opposition to amnesties for serious crimes belies the reality that post-conflict states often find themselves. It leaves a somewhat incongruous situation where UN bodies will decry all forms of amnesties for serious violations of human rights, but remain largely silent when states use such amnesties to effectively end conflict. Uganda's amnesty may well have breached its international obligations according to the UN, but it still ended a war and reintegrated thousands through the use of amnesty. International lawyers, scholars and policymakers need to confront this reality and perhaps ask can a new path be forged – one that is lawful, realistic and humane. I recognise that blanket style amnesties – even if initially effective in the DDR sense, as Uganda's amnesty arguably was – disregard victims' rights to truth and reparation. Therefore, amnesties that incorporate measures of non-judicial accountability, including truth-telling, apologies and reparations need not automatically attract labels of illegality, illegitimacy or "incompatibility" with international legal obligations to investigate and/or prosecute. Such amnesties can lawfully stand alongside prosecutorial strategies to target those "most responsible" for committing serious crimes. Where states are simply unable to adopt parallel strategies, the international legal community should not stand in the way of sequencing amnesty and prosecutorial accountability, if it means ending conflict and saving lives.

Annex A: Information Sheet and Consent Form – Amnesty Recipient

Information sheet for qualitative interviews of amnesty recipients

Purpose of the Study. As part of the requirements for my PhD degree at NUI Galway, Ireland, I have to carry out a research study. The purpose of the survey is to research attitudes of people in northern Uganda towards the Amnesty process, and recent prosecutions of former LRA fighters in Uganda and at the International Criminal Court.

What will the study involve? The study will involve a short interview that will explore a number of issues relating to the amnesty process. It shall last no more than 1.5 hours, and will be audio recorded.

Why have you been asked to take part? You have been asked because you have received an amnesty certificate.

Do you have to take part? Participation in the interview is completely voluntary, and there is no compensation for taking part. If you agree to take part, you will sign a consent form before commencing the interview, indicating your consent by signing your name. If you wish to remain anonymous, you may sign with an "X". You will also retain a copy of the consent form and this information sheet. You have the option of withdrawing your participation from the interview before it begins, or discontinuing during the interview itself. After the interview, you may subsequently withdraw permission to use the data within two weeks of the interview, in which case the material will be deleted.

Will your participation in the study be kept confidential? Your participation will be confidential, and I will ensure that no clues to your identity appear in the thesis. Any extracts from what you say that are quoted in the thesis will be entirely anonymous.

What will happen to the information that you give? The data will be kept confidential for the duration of the study, available only to my research supervisor and me. It will be securely stored on an encrypted laptop. On completion of the project, the data will be retained for minimum of a further ten years and then destroyed.

What will happen to the results? The study results will be presented in the thesis. They will be seen by my supervisor, a second marker and the external examiner. The thesis may be read by future students on the course. The study may be published in a research journal.

What are the possible disadvantages of taking part? I don't envisage any negative consequences for you in taking part. However, it is possible that talking about your past experiences may cause some distress.

What if there is a problem? Should you feel distressed during the interview, you are free to cease the interview and withdraw. At the end of the interview, I will discuss with you how you found the experience and how you are feeling. If you subsequently feel distressed, and would like to be referred for counselling support you should contact African Youth Initiative Network (AYINET), who offer psychosocial support to victims of conflict. They can be contacted at 0772539879.

Who has reviewed this study? Approval must be given by NUI Galway before studies like this can take place.

Any further queries? If you need any further information, you can contact me at paulbradfield85@gmail.com or on the following local number _____.

If you agree to take part in the study, please sign the consent form overleaf.

CONSENT FORM

I agree to participate in Paul Bradfield's research study.

The purpose and nature of the study has been explained to me in writing.

I am participating voluntarily.

I give permission for my interview with Paul Bradfield to be audio-recorded.

I understand that I can withdraw from the study, without repercussions, at any time, whether before it starts or while I am participating.

I understand that I can withdraw permission to use the data within two weeks of the interview, in which case the material will be deleted.

I understand that my anonymity will be ensured in the write-up by disguising my identity.

I understand that disguised extracts from my interview may be quoted in the thesis and any subsequent publications if I give permission below:

I agree to quotation/publication of extracts from my interview ☐

I do not agree to quotation/publication of extracts from my interview ☐

Signed: _____ Date: _____

(Name, or with "X")

PRINT NAME: _____

Annex B: Information Sheet and Consent Form – Focus Group Participant

Information sheet for qualitative interviews of community members

Purpose of the Study. As part of the requirements for my PhD degree at NUI Galway, Ireland, I have to carry out a research study. The purpose of the survey is to research attitudes of people in northern Uganda towards the Amnesty process, and recent prosecutions of former LRA fighters in Uganda and at the International Criminal Court.

What will the study involve? The study will involve a short interview that will explore a number of issues relating to the amnesty process. It shall last no more than 1.5 hours, and will be audio recorded.

Why have you been asked to take part? You have been asked because you have been randomly chosen as a community member living in a district affected by the LRA conflict.

Do you have to take part? Participation in the interview is completely voluntary, and there is no compensation for taking part. If you agree to take part, you will sign a consent form before commencing the interview, indicating your consent by signing your name. If you wish to remain anonymous, you may sign with an "X". You will also retain a copy of the consent form and this information sheet. You have the option of withdrawing your participation from the interview before it begins, or discontinuing during the interview itself. After the interview, you may subsequently withdraw permission to use the data within two weeks of the interview, in which case the material will be deleted.

Will your participation in the study be kept confidential? Your participation will be confidential, and I will ensure that no clues to your identity appear in the thesis. Any extracts from what you say that are quoted in the thesis will be entirely anonymous.

What will happen to the information that you give? The data will be kept confidential for the duration of the study, available only to my research supervisor and me. It will be securely stored on an encrypted laptop. On completion of the project, the data will be retained for minimum of a further ten years and then destroyed.

What will happen to the results? The study results will be presented in the thesis. They will be seen by my supervisor, a second marker and the external examiner. The thesis may be read by future students on the course. The study may be published in a research journal.

What are the possible disadvantages of taking part? I don't envisage any negative consequences for you in taking part. However, it is possible that talking about your past experiences may cause some distress.

What if there is a problem? Should you feel distressed during the interview, you are free to cease the interview and withdraw. At the end of the interview, I will discuss with you how you found the experience and how you are feeling. If you subsequently feel distressed, and would like to be referred for counselling support you should contact African Youth Initiative Network (AYINET), who offer psychosocial support to victims of conflict. They can be contacted at 0772539879.

Who has reviewed this study? Approval must be given by NUI Galway before studies like this can take place.

Any further queries? If you need any further information, you can contact me at paulbradfield85@gmail.com or on the following local number _____.

If you agree to take part in the study, please sign the consent form overleaf.

CONSENT FORM

I agree to participate in Paul Bradfield's research study.

The purpose and nature of the study has been explained to me in writing.

I am participating voluntarily.

I give permission for my interview with Paul Bradfield to be audio-recorded.

I understand that I can withdraw from the study, without repercussions, at any time, whether before it starts or while I am participating.

I understand that I can withdraw permission to use the data within two weeks of the interview, in which case the material will be deleted.

I understand that my anonymity will be ensured in the write-up by disguising my identity.

I understand that disguised extracts from my interview may be quoted in the thesis and any subsequent publications if I give permission below:

I agree to quotation/publication of extracts from my interview ☐

I do not agree to quotation/publication of extracts from my interview ☐

Signed: _____ Date: _____

(Name, or with "X")

PRINT NAME: _____

Annex C: Information Sheet and Consent Form – Stakeholder

Information sheet for qualitative interviews of key stakeholder figures

Purpose of the Study. As part of the requirements for my PhD degree at NUI Galway, Ireland, I have to carry out a research study. The purpose of the survey is to research attitudes of people in northern Uganda towards the Amnesty process, and recent prosecutions of former LRA fighters in Uganda and at the International Criminal Court.

What will the study involve? The study will involve a short interview that will explore a number of issues relating to the amnesty process. It shall last no more than 1.5 hours, and will be audio recorded.

Why have you been asked to take part? You have been asked because of the central role you played in the amnesty process, either as part of your official duties, or because of your direct experience as a stakeholder in the community.

Do you have to take part? Participation in the interview is completely voluntary, and there is no compensation for taking part. If you agree to take part, you will sign a consent form before commencing the interview, indicating your consent by signing your name. If you wish to remain anonymous, you may sign with an "X". You will also retain a copy of the consent form and this information sheet. You have the option of withdrawing your participation from the interview before it begins, or discontinuing during the interview itself. After the interview, you may subsequently withdraw permission to use the data within two weeks of the interview, in which case the material will be deleted.

Will your participation in the study be kept confidential? If you wish to remain anonymous, your participation will be confidential, and I will ensure that no clues to your identity appear in the thesis. Any extracts from what you say that are quoted in the thesis will be entirely anonymous.

What will happen to the information that you give? The data will be kept confidential for the duration of the study, available only to my research supervisor and me. It will be securely stored on an encrypted laptop. On completion of the project, the data will be retained for minimum of a further ten years and then destroyed.

What will happen to the results? The study results will be presented in the thesis. They will be seen by my supervisor, a second marker and the external examiner. The thesis may be read by future students on the course. The study may be published in a research journal.

What are the possible disadvantages of taking part? I don't envisage any negative consequences for you in taking part. However, it is possible that talking about your past experiences may cause some distress.

What if there is a problem? Should you feel distressed during the interview, you are free to cease the interview and withdraw. At the end of the interview, I will discuss with you how you found the experience and how you are feeling. If you subsequently feel distressed, and would like to be referred for counselling support you should contact African Youth Initiative Network (AYINET), who offer psychosocial support to victims of conflict. They can be contacted at 0772539879.

Who has reviewed this study? Approval must be given by NUI Galway before studies like this can take place.

Any further queries? If you need any further information, you can contact me at paulbradfield85@gmail.com or on the following local number _____.

If you agree to take part in the study, please sign the consent form overleaf.

CONSENT FORM

I agree to participate in Paul Bradfield's research study.

The purpose and nature of the study has been explained to me in writing.

I am participating voluntarily.

I give permission for my interview with Paul Bradfield to be audio-recorded.

I understand that I can withdraw from the study, without repercussions, at any time, whether before it starts or while I am participating.

I understand that I can withdraw permission to use the data within two weeks of the interview, in which case the material will be deleted.

I understand that, unless I give permission for my identity to be used, my anonymity will be ensured in the write-up by disguising my identity.

I understand that, unless I give permission for my identity to be used, disguised extracts from my interview may be quoted in the thesis and any subsequent publications if I give permission below:

I agree that my identity can be published in the study ☐

I do not agree that my identity can be published in the study ☐

I agree to quotation/publication of extracts from my interview ☐

I do not agree to quotation/publication of extracts from my interview ☐

Signed: _____ Date: _____

(Name, or with "X")

PRINT NAME: _____

Annex D: Questionnaire for Recipients of Amnesty

I. Biographic details

1.	Age	
2.	Gender	
3.	Ethnicity	
4.	District	

II. <u>Views on individual amnesty experience</u>

5.	Ice-breaker: Tell me about yourself and your background.	
6.	Tell me about how you came to receive amnesty.	
7.	Did you go through a rehabilitation/reception centre?	
8.	Did you receive a re-settlement package from the amnesty commission?	
9.	If yes, what was given to you?	▪ Money ☐ If yes, how much? _____ ▪ Blanket ☐ ▪ Cups ☐ ▪ Plates ☐ ▪ Basin ☐ ▪ Seeds ☐ ▪ Mattress ▪ Jerry can ☐ ▪ Agricultural equipment ☐ ▪ Other
10.	Did the amnesty commission ever include you in any re-integration activities with your local community?	
11.	After receiving amnesty, were you ever contacted by the amnesty commission again?	

12.	What do you understand the amnesty to mean?	
13.	Did anyone ever explain to you what actions in the past the amnesty covers?	

III. Views on reintegration

14.	Are you involved in local community affairs?	
15.	Do you work/farm alone, or with others?	
16.	Do you feel accepted by your community? How do they act towards you?	
17.	Are you married?	
18.	If yes, did you marry a former rebel or another person?	
19.	Do you think the community view you in a positive or negative light?	
20.	Have you ever been discriminated when seeking employment because of your rebel history?	
21.	Have you ever been discriminated when interacting with local officials because of your rebel history?	
22.	Have you ever received verbal abuse because of being a former rebel?	
23.	Have you ever received physical abuse because of being a former rebel?	

IV. Reconciliation

24.	Have you participated in any traditional ceremony since your return?	
25.	If yes, what kind of ceremony?	▪ Mato oput ☐ ▪ Stepping on the egg ☐ ▪ Slaughtering of the goat ☐ ▪ Bending of the spear ☐ ▪ Cleansing of the spirit ☐ ▪ Other ☐
26.	Were there any barriers to doing the ceremony?	
27.	Was a traditional ceremony necessary for you after having received amnesty?	
28.	Did the community treat you any differently after the ceremony?	
29.	Did your clan support you in the process?	
30.	Did the amnesty commission in any way facilitate or support the traditional ceremony?	
31.	Was there anything you would have liked to do when coming home to your community?	

Additional questions for female recipients of amnesty:

32.	Did you return with children born in the bush?	
33.	How does the community act towards the child?	

34.	Was your child given any additional financial support from the amnesty commission?	
35.	Was there any additional support that you would like to have had from the amnesty commission?	

V. General views on amnesty

36	Has amnesty contributed to reconciliation between you and your community?	
37	Has amnesty contributed to reconciliation in northern Uganda generally?	
38	Should all rebels be entitled to amnesty?	
39	Do you think a person who received amnesty should do anything in return for getting amnesty?	Yes: ▪ Apologise to community ☐ ▪ Acknowledge/confess what they did ☐ ▪ Make reparations to victims ☐ ▪ Undergo traditional ceremonies ☐ ▪ Go through a rehabilitation centre ☐ ▪ Other ☐ No ☐
40	Was there anything missing in the amnesty process that you would have wanted to be included?	

VI. General views on Trials

Have you heard of Thomas Kwoyelo? Should Thomas Kwoyelo be prosecuted or given amnesty?	Prosecuted ☐ Amnesty ☐

Have you heard of Dominic Ongwen? Should Dominic Ongwen be prosecuted or given amnesty?	Prosecuted ☐ Amnesty ☐
Should Joseph Kony be prosecuted or given amnesty?	Prosecuted ☐ Amnesty ☐
Do you know if your amnesty certificate guarantees you protection from prosecution?	Yes ☐ No ☐
Do you fear being prosecuted as a result of other LRA prosecutions?	Yes ☐ No ☐

Annex E: Questionnaire for Community Focus Groups

I. Biographic details

1	Age	
2	Gender	
3	Ethnicity	
4	District	

II. Views toward amnesty recipients (assessing reintegration/reconciliation)

5	What do you understand amnesty to mean?	
6	What do you understand reconciliation to mean?	
7	What is required in order to reconcile a former rebel and his community?	
8	Are there people with amnesty living in your village?	
9	Do you know if they have done any traditional ceremony upon returning? Which one? Was this supported by the community?	
10	Which is more important – amnesty or a traditional ceremony?	
11	Have any of your family members received amnesty?	
12	Would you be comfortable if a recipient of amnesty was living in the same compound as you?	
13	Would you be comfortable to see a former rebel live in the same house as you?	

14	Would you feel comfortable to have a former rebel and/or recipient of amnesty in your house for dinner?	
15	Would you buy produce from a former rebel and/or recipient of amnesty in the local market?	
16	Would you feel comfortable working with a former rebel and/or recipient of amnesty in the fields?	
17	Would you approve of your son or daughter marrying a former rebel and/or recipient of amnesty?	
18	Are recipients of amnesty and/or former rebels included or excluded from local community affairs?	
19	Do you think the community view recipients of amnesty and/or former rebels in a positive or negative light?	
20	How does the community view children born in the bush?	

III. General views on amnesty and trials

21	Has amnesty contributed to reconciliation between returnees and this community?	
22	Has amnesty contributed to reconciliation in northern Uganda generally?	

23	Should persons abducted into a rebel group be granted amnesty or prosecuted?	
24	Should rebel leaders be granted amnesty or prosecuted?	
25	Do you think a person who receives amnesty should be required to do something in return? If so, what?	Yes: ☐ ▪ Apologise to community ☐ ▪ Acknowledge/confess what they did ☐ ▪ Make reparations to victims ☐ ▪ Undergo traditional ceremonies ☐ ▪ Go through a rehabilitation centre ☐ ▪ Other ☐ No ☐
26	Have you heard of Thomas Kwoyelo? Should Thomas Kwoyelo be prosecuted or given amnesty? Why?	Prosecuted ☐ Amnesty ☐
27	Have you heard of Dominic Ongwen? Should Dominic Ongwen be prosecuted or given amnesty? Why?	Prosecuted ☐ Amnesty ☐
28	Should Joseph Kony be prosecuted or given amnesty? Why?	Prosecuted ☐ Amnesty ☐
29	In terms of justice and accountability after the conflict, what would you like to see done?	

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