Thesis

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A COMPARATIVE STUDY OF TRANSITIONAL JUSTICE IN THE REPUBLIC OF SOUTH AFRICA AND THE DEMOCRATIC REPUBLIC OF THE CONGO

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DECLARATION

Student number: 5100-064-4

I declare that this thesis, **A Comparative Study of Transitional Justice in the Republic of South Africa and the Democratic Republic of the Congo**, is my own work and that all the sources that I have used or quoted have been indicated and acknowledged by means of complete references.

Mr Tunamsifu SP **June 2016**

ABSTRACT

This study compares the transitional justice mechanisms adopted in the RSA with similar mechanisms adopted in the DRC. The main goal is to make a scholarly contribution to the existing body of knowledge by analysing the role played by criminal prosecutions and the TRC in both countries. The study relied on legislation, literature and empirical fieldwork as its sources of information. To collect data, 50 key informants were interviewed and three focus group discussions were held.

Findings reveal that during the political transition in the RSA, the legal order was not reformed, and the judiciary used the threat of prosecution to compel perpetrators to make full disclosure of their activities in exchange for amnesty. Although the TRC recommended the prosecution of those who refused to testify, it is remarkable that none of the high profile cases was prosecuted. However, the political leadership supported the TRC to ensure that reconciliation efforts were prioritised. In the DRC on the other hand, little reform was made in the judicial sector, and though few cases were prosecuted, alleged perpetrators who had been integrated into public institutions were not prosecuted. Under the complementarity principle, the ICC helped to prosecute a handful of the thousands of perpetrators. Due to fragile peace, insufficient funds, and lack of political will, the TRC in the DRC failed to investigate a single case.

The study recommends that in order to restore victims' dignity in the RSA, the State needs to fulfil its obligation to implement the TRC's recommendations especially the obligation to grant reparations and to prosecute anyone who failed to apply for amnesty or who was denied amnesty. If the State continues to neglect this obligation, the SACTJ should consider holding the government accountable or submitting cases to a neutral country which subscribes to the principle of universal jurisdiction. In the cases about the remains of missing persons, it is suggested that the SACTJ should continue its dialogues but involve elders from different South African communities in order to encourage those with information about such cases to disclose it.

In the case of the DRC, the importance of restoring peace and the State's authority is stressed. Considering the regional dimension of the conflicts, the study also calls for a regional rather than a national approach to handling the cases that would see to the creation of a Great Lakes Regional Court and a Great Lakes Regional TRC. If this call is not taken seriously, the civil society organisations from the ICGLR Member States could consider organising a roundtable talk from which an unofficial regional Commission of Inquiry that would investigate the crimes committed in the DRC would emanate. The final report of the Commission should then be submitted to the different parliaments of affected countries, to the ICGLR's Executive Secretary, to the AU's Chairperson and to the UN Secretary General.

Key words:

Amnesty; apartheid; complementarity; the DRC; gross violations of human rights, International Humanitarian Law; International Criminal Court; internationalised armed conflicts; prosecution; the RSA; transitional justice; Truth and Reconciliation Commission.

DEDICATION

To

My beloved wife Namuninga Barame Alice;

My Children Eulalie Bajoje, Euclide Bajoje Tunamsifu, Eldad Bajoje Adili, Euloge Bajoje Hodari, Elliette Bajoje Amini and Elliot Bajoje Amani;

My Father Alphose Shirambere Bajoje;

The memory of my Mother Jacqueline M'Muzuka

All the victims of internationalised armed conflicts in the Democratic Republic of the Congo (DRC) and of the apartheid in South Africa, and

All African people who fought, fight, and continue to fight for peace, justice and reconciliation of yesterday, today and tomorrow

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Tunamsifu SP.

Pretoria, South Africa, June 2016

KEY ACRONYMS

ABA	: American Bar Association
ADF/NALU	: Allied Democratic Forces–National Army for the Liberation of Uganda
AFDL	: Alliance des Forces Démocratiques pour la Liberation du Congo-Kinshasa/ Alliance of Democratic Forces for the Liberation of Congo-Zaire
AJCR	: African Journal on Conflict Resolution
AJDG	: African Journal of Democracy and Governance
AJIL	: Asian Journal of International Law
ANC	: African National Congress
APC	: Armée Patriotique Congolaise
Art	: Article
ASIL	: American Society of International Law
AULR	: American University Law Review
AZAPO	: Azanian Peoples' Organisation
CFS	: Congo Free State
CLR	: Children's Legal Rights
CNS	: Conférence Nationale Souveraine/ National Sovereign Conference
CVR	: Commission Vérité et Réconciliation
DIC	: Dialogue Inter-Congolais
DRC	: Democratic Republic of the Congo/ République Démocratique du Congo
ECCC	: Extraordinary Chambers in the Courts of Cambodia
Ed(s)	: Editor(s)
EJIL	: European Journal of International Law
EMOI	: Etat Major Opérationnel Intégré/ Integrated Operational General Staff
FAR	: Forces Armées Rwandaises/ Armed Forces of Rwanda

FARDC	: Forces Armées de la République Démocratique du Congo/ Armed Forces of the DRC
FDLR	: Forces Démocratiques de Libération du Rwanda
FFP	: Freedom Front Plus
FILJ	: Fordham International Law Journal
FNI	: Front des Nationalistes et Intégrationnistes/ Nationalist and Integrationist Front
FPLC	: Forces Patriotiques pour la Libération du Congo/ Patriotic Forces for the Liberation of Congo
FPR	: Front Patriotique Rwandais
FRPI	: Force de Résistance Patriotique en Ituri
HHHJ	: Harvard Human Rights Journal
HICLR	: Hastings International and Comparative Law Review
HRQ	: Human Rights Quarterly
HRW	: Human Rights Watch
IACHR	: Inter-American Court of Human Rights
ICC	: International Criminal Court
ICCPR	: International Covenant on Civil and Political Rights
ICD	: Inter-Congolese Dialogue
ICGLR	: International Conference on the Great Lakes Region
ICJ	: International Court of Justice
ICRtoP	: International Coalition for the Responsibility to Protect
ICTJ	: International Center for Transitional Justice
ICTR	: International Criminal Tribunal for Rwanda
ICTY	: International Criminal Tribunal for the Former Yugoslavia
IHL	: International Humanitarian Law
IJTJ	: International Journal of Transitional Justice
IL	: International Law
ILP	: International Law Politics
IRRC	: International Review of the Red Cross

JAH	: Journal of African History
JICJ	: Journal of International Criminal Justice
JMAS	: Journal of Modern African Studies
JPR	: Journal of Peace Research
LHB	: Law and Human Rights Behaviour
LJIL	: Leiden Journal of International Law
MLC	: Mouvement pour la Libération du Congo/ Movement for the Liberation of Congo
MNC	: Mouvement National Congolais/ Congolese National Movement
MONUC	: Mission des Nations Unies en République Démocratique du Congo/ United Nations Mission in the Democratic Republic of the Congo
MONUSCO	: Mission de l'Organisation des Nations Unies pour la stabilisation en RD Congo/ United Nations Organization Stabilization Mission in the DR Congo
NCA	: Norwegian Church Aid
NDPP	: National Director of Public Prosecutions
NJIHR	: Northwestern Journal of International Human Rights
NPA	: National Prosecuting Authority
NURC	: National Unity and Reconciliation Commission
OHCHR	: Office of the High Commissioner for Human Rights
OSS	: On S'en Sortira
OTP	: Office of the Prosecutor
PCIJ	: Permanent Court of International Justice
PCLU	: Priority Crimes Litigation Unit
PNUD	: Programme des Nations Unies pour le Développement
PPA	: Philosophy & Public Affairs
PSC Framework	: Peace, Security and Cooperation Framework
PSPR	: Personality and Social Psychology Review
PUC	: Presses Universitaires du Congo
RCD	: Rassemblement Congolais pour la Démocratie/ Congolese Rally for

Democracy

RCD/ML : Rassemblement Congolais pour la Démocratie-Mouvement de Libération

RCD/N : Rassemblement Congolais pour la Démocratie-National

RDF : Rwandan Defense Forces

RDIDC : Revue de Droit International et de Droit Comparé

RES : Resolution

RMP : Registre du Ministère Public

RP : Rôle Pénal

RPF : Rwandan Patriotic Front

RQDI : Revue Québécoise de Droit International

RSA : Republic of South Africa

RUF : Revolutionary United Front

SA : South Africa

SACP : South African Communist Party

SACTJ : South African Coalition for Transitional Justice

SADF : South African Defence Force

SAJIA : South African Journal of International Affairs

SAP : South African Police

SCA : Supreme Court of Appeal

SCSL : Special Court for Sierra Leone

STL : Special Tribunal for Lebanon

TC : Transitional Constitution

(Td) JTRSA : (Td) The Journal for Transdisciplinary Research in Southern Africa

TFV : Trust Fund for Victims

TJ : Transitional Justice

TLJ : Tribal Law Journal

TLR : Tennessee Law Review

TMJ : Tribunal Militaire de Garnison

TRC : Truth and Reconciliation Commission

UCLR : University of Chicago Law Review

UNGA	: United Nations General Assembly
UNHROHC	: United Nations Human Rights Office of the High Commissioner
UNISA	: University of South Africa
UNJHRO	: United Nations Joint Human Rights Office
UNMIK	: United Nations Interim Administration Mission in Kosovo
UNODC	: United Nations Office on Drugs and Crime
UNSC	: United Nations Security Council
UNSG	: United Nations Secretary-General
UNTAC	: United Nations Transitional Authority in Cambodia
UNTAET	: United Nations Transitional Administration in East Timor
UPC	: Union des Patriotes Congolais / Union of Congolese Patriots
UPDF	: Uganda People's Defence Forces
USA	: United States of America
USIP	: United States Institute of Peace
Vol	: Volume
WULR	: Washington University Law Review

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CHAPTER 1

INTRODUCTION

1.1 Background

In dealing with the violation of law, the primary responsibility of the State is to investigate and prosecute crimes. No State however would have adequate resources to deal with the prosecution of hundreds of thousands, possibly millions, of perpetrators who have committed widespread crimes during a period of conflict because prosecutions are often expensive, time consuming, and divisive.[1] Darryl Robinson affirms that, "prosecution of thousands of perpetrators may be financially and logistically completely impossible".[2] Thus, States in transition may choose procedures that accommodate a middle ground approach favouring policies aimed at balancing numerous goals, including punishment and reconciliation, to guarantee a peaceful future. As a response to large-scale crimes, transitional justice not only provides redress to victims, it also creates or enhances opportunities for the transformation of the political systems, conflicts, and other conditions that may have been at the root of abuses. Dealing with the legacies of past abuses, transitional justice focuses on two goals – the first is to gain some level of justice for victims, and the second is to reinforce the possibilities for peace, democracy and reconciliation. To achieve these two ends, transitional justice measures often combine elements of retributive, restorative, and social justice. It is not a special form of justice, but justice adapted to transforming societies.[3]

This research examines transitional justice mechanisms employed to achieve justice and reconciliation in the aftermath of the apartheid in the Republic of South Africa (RSA) and serious violations of human rights and of international humanitarian law (IHL) committed in

[1] USIP http://www.usip.org/files/TRANSITIONAL%20JUSTICE%20formatted.pdf (Date of use: 5 June 2013).
[2] Robinson 2003 *EJIL* 494.
[3] The United Nations Document https://www.un.org/en/peacebuilding/pdf/doc_wgll/justice_times_transition/26_02_2008_background_note.pdf (Date of use: 2 May 2013). Read also ICTJ "What is Transitional Justice"?

various internal political crises and armed conflicts (beginning with the 1996 armed conflict) in the Democratic Republic of the Congo (DRC).

1.2 Subject Matter and Problem Statement

In this section, the subject matter and the problem statement of the study are discussed.

1.2.1 Subject matter

Certain events may appear suddenly in the history of a State that plunge it into a dark period and these may be characterised by systemic human rights violations and serious violations of IHL. In such situations, States are often confronted by the dilemmas of transitional justice, that is, choosing whether to impose criminal sanctions against abusers or employ non-criminal sanctions to facilitate reconciliation and rebuild the nation. In a deeply divided society, states Alex Boraine, punishment cannot be the final word if healing and reconciliation are to be achieved.[4] Darryl Robinson concurs that, "criminal proceedings and incarceration may not be the best approach to rebuilding a traumatized society".[5] However, Song Sang-Hyun[6] affirms that deterrence is one of the main aims of punishment in traditional criminal theory. He believes that, as the most direct preventive effect of international justice, punishment is not necessarily the most significant one; "Holding trials before the ICC is the last available tool, not a goal in itself."[7] Georgi Verbeeck warns that in cases of fragile transformation and domestic instability or fragile peace, "procedures of legal prosecution may easily lead to new violence and can endanger the survival of a young post-conflict society". Thus, in the last decade, according to

[4] Boraine *A Country Unmasked* 282.
[5] Robinson 2003 *EJIL* 494.
[6] Sang-Hyun was appointed a judge on 11 March 2003 for a term of three years, and he was re-elected in 2006 for a further full term of nine years. He was elected the President of the Court on 11 March 2009 for a term of three years, and re-elected on 11 March 2012 for another three-year period. He was assigned to the Appeals Division, and elected from the Asian Group of States, list A. See The President https://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/presidency/the%20president/Pages/judge%20sang_hyun%20song%20_republic%20of%20korea__%20president.aspx (Date of use: 10 February 2016)
[7] Sang-Hyun 2013 *AJIL* 207.

Teitel, transitional justice has focused primarily on maintaining peace and stability.[8] Tomuschat agrees that:

> In fact, after a national cataclysm it does not suffice to think in terms of criminal prosecutions. After having been divided, a nation must be rebuilt; its internal cohesion must be consolidated by processes which are far more complex than criminal proceedings and their effects on social psychology.[9]

Priscilla B. Hayner notes that, "Many attempts to prosecute and punish those responsible for severe abuses under a prior regime have seen little success".[10] Laura M Olson concurs that, "Trying suspected war criminals that are political and military leaders however does not always appear the appropriate or easiest policy choice".[11] Often the following regime may introduce a system of justice – a victorious justice system – in which only the officials of the previous regime are seen as perpetrators of crimes. Andrea Lollini therefore acknowledges that it is in such context that transitional justice, which refers to the mechanisms (whether judicial, quasi-judicial, alternative or complementary to criminal trials) for dealing with crimes committed under a preceding political system, intervenes.[12] Borello notes that:

> The term "transitional justice" refers to the combination of policies that countries transitioning from authoritarian rule or conflict to democracy decide to implement in order to address past human rights violations. Transitional justice seeks to restore the dignity of victims and to establish trust among citizens and between citizens and the state.[13]

From a historical perspective, the evolution of transitional justice can be found in three phases according to the genealogical description by Ruti G. Teitel.[14] Phase I began in 1945 with the Nuremberg Trials which reflected the triumph of transitional justice within the scope of international law. As the post-World War I national trials did not serve to deter future carnage, the post-World War II transitional justice began by eschewing national prosecutions and seeking

[8] Verbeeck "Revenge or Reconciliation" 207; Teitel 2002 *FILJ* 898.
[9] Tomuschat "National Prosecutions" 159.
[10] Hayner *Challenge of Truth Commissions* 8.
[11] Olson 2006 *IRRC* 294.
[12] Lollini *Constitutionalism* 61.
[13] Borello *Road to a Just Peace* 13.
[14] Teitel 2003 *HHHJ* 69-94.

international criminal accountability instead. In this period, justice policy simply assumed the legitimacy of punishing human rights abuses.

The second phase, or the post-Cold War period, deals with the transition that began in 1989 from communist regimes to democracy and modernisation. Towards the end of the twentieth century, global politics was characterised by an acceleration of conflict resolution and a persistent discourse of justice and law throughout society. During this period, the tension between punishment and amnesty was complicated by the recognition of dilemmas inherent in periods of political flux. The goal was not to attain merely justice, but peace for both individuals and society as a whole. Thus, the Phase II model is associated with the jurisprudence of forgiveness and reconciliation under the Truth and Reconciliation Commission (TRC).

The third phase is a new generation of transitional justice moving from the exception to the norm to become a paradigm of the rule of law. This phase is characteried by the *fin de siècle* or the end of the century acceleration of transitional justice phenomena associated with globalisation and typified by conditions of heightened political instability and violence. Phase III can be characterised as steady-state transitional justice that is evident in the deployment of the humanitarian regime. It has expanded and merged with the law of human rights.[15]

The term "transitional justice", as we understand and use it today, emerged with reference to the transitions from authoritarian rule in Eastern Europe and Central America in the late 1980s and early 1990s, according to Christine Bell.[16] Dani Wadada Nabudere and Andreas Velthuizen also note that:

> In the second half of the twentieth century the collapse of a democratic order in many countries of post-colonial Africa, Asia, Latin America and former Yugoslavia, gave rise to dictatorships, internal wars and conflicts. Consequently, this led to a series of practices aimed at addressing the consequences of the failure of the state to protect the people from a violation of their basic human rights. These practices have come to be referred to as 'transitional justice'.[17]

[15] See Teiltel *Contemporary Essays* 63-64.
[16] Bell 2009 *IJTJ* 7.
[17] Nabudere and Velthuizen *Restorative Justice* 9.

According to Martina Fischer, the concept of transitional justice covers not only the establishment of tribunals, truth commissions, lustration of state administrations, settlement on reparations, but also political and societal initiatives devoted to fact-finding, reconciliation, and cultures of remembrance.[18] Indeed, transitional justice, according to Ruti G. Teitel, can be defined as the conception of justice associated with periods of political change, characterised by legal responses that confront the wrongdoings of former repressive regimes.[19] Like the broader subject of human rights of which it forms a part, transitional justice, for Mark Freeman, is a multidisciplinary field of study and practice that encompasses aspects of law, policy, ethics, and social science.[20] In this study therefore, various aspects of IHL, of international law of human rights, of criminal law, and of reconciliation will be analysed.

1.2.2 Problem statement

Transitional justice, which is *sui generis* justice, aims at looking back and looking forward in dealing with the magnitude of past abuses in countries transitioning from dictatorial and authoritarian regimes or armed conflicts to democracy. In the RSA context, for instance, transitional justice refers to the Truth and Reconciliation Commission (TRC) in the post-apartheid period and the domestic role of criminal trials of numerous atrocities of the apartheid period. The atrocities directed against black people were committed by the security forces, but human rights violations and atrocities were also committed in the struggle and resistance against the apartheid state by the liberation movement including the armed wing of the African National Congress (ANC). To overcome the gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge, the Epilogue of the Interim Constitution of the RSA, 1993 (as amended by Act No. 24 of 1994) states that "these can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for *ubuntu* but not for victimization".[21] In addition, the Preamble of the Constitution of the Republic of South Africa,

[18] Fischer "Transitional Justice and Reconciliation" 407.
[19] Teitel 2003 *HHHJ* 69.
[20] Freeman *Procedural Fairness* 4.
[21] Interim Constitution of South Africa, 1993 cited by Doxtader and Salazar *Fundamental Documents* 5.

1996, as amended by Act No. 3 of 2003 (hereafter Constitution of 1996) recognises the injustices of the past and the necessity to heal the divisions.[22] According to Andrea Lollini, transitional justice was extremely important to the post-apartheid political and constitutional order, and it appears to be an essential part of the constitution-making process in all countries that were formerly criminal states.[23] Elizabeth Stanley confirms that following a negotiated transition to democracy, the TRC was established in South Africa to deal with crimes of past regime, and as "a central tenet to the reconstruction of South Africa society, from a 'deeply divided past' to a more peaceful future".[24]

In the DRC context however, transitional justice refers to the TRC and the jurisdiction of the ICC which complements existing domestic judicial systems dealing with gross violations of human rights and of IHL committed against civilian populations by the military regime[25] as well as by various armed forces and armed groups,[26] both local and foreign.[27] The ICC acts only when States are unwilling or unable to conduct investigation and prosecution. It serves the same purpose as other transitional justice mechanisms, that is, to ensure accountability, and to seek redress for victims and deterrence of future atrocities. Moreover, the Court which cannot deal

[22] Constitution of the Republic of South Africa, 1996.
[23] Lollini *Constitutionalism* 61.
[24] Stanley 2011 *JMAS* 525, 537.
[25] A military regime is a form of government in which the military holds the power as was the case in the DRC under the leadership of President Mobutu who carried out a *coup d'état* when he was the Chief of the Congolese Army between 1965 and 1997.
[26] In the DRC, an armed force refers to the national army or the military forces of the country while an armed group is a non-State army or an armed wing owned by rebels.
[27] There is ample evidence to confirm the commission of mass crimes by the armies of Uganda, Rwanda and Burundi in the territory of the DRC. The FARDC soldiers have also been accused of committing crimes just as both the Congolese and foreign armed groups such as AFDL, RCD-Goma, MLC, UPC, CNDP, Mayi-Mayi, FDLR, LRA, and ADF/NALU, etc. Parts of the evidence include: ICJ *DRC v. Uganda* (2005) §§23, 237-238 & 243); UNJHRO *Report on Human Rights Violations* §17-34; UNSC S/RES/2098 (2013) http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_res_2098.pdf (Date of use: 05 June 2013); PSC Framework §2; OHCHR *Report Mapping Exercise* §§17, 39, 46, 153-154, 157, 161-162, 197-289, 350, 352-356, 441, 444, 447, 590, 609, 616, 618, 692, 778, 862, 871, 879 & 884; Tunamsifu 2013 *A38JIL* 244-252; HRW *Renewed Crisis* 27-37 37-41, 42-44; HRW http://www.hrw.org/news/2012/09/11/dr-congo-m23-rebels-committing-war-crimes (Date of use: 11 September 2012); HRW http://www.hrw.org/news/2013/02/05/dr-congo-war-crimes-m23-congolese-army (Date of use: 5 May 2013); and UNSC *Wealth of the DRC* §5, 32, 44, 214, 221, etc.

retroactively with crimes committed before 1st July 2002 and does not recognise amnesties, may therefore try an individual amnesty granted by a government or a truth commission.[28]

Thus, in order to address the past, the Transitional Constitution of the DRC (2003) instituted the TRC (art 154) with the aim of consolidating national unity through sincere reconciliation amongst Congolese (art 155).[29] The Preamble of the February 2006 Constitution also recognises the need to consolidate a national unity and fight impunity[30] because, since independence the country has witnessed various political crises and armed conflicts which tend to "divide" the country. Thus, Zalaquett argues that, "forgiveness and reconciliation require that past injustices be uncovered and acknowledged, that perpetrators be held accountable, and that reparations be provided to those who were harmed. Thus, justice as truth and accountability are essential elements of restorative justice".[31]

Whereas the RSA's TRC had power to grant amnesty and it is understood that the criminal trials achieved a certain degree of success in getting testimonies from victims and witnesses, in the DRC, the TRC failed to investigate a single case and did not cooperate with the ICC which prosecuted only five people. Thus, the RSA's TRC has been accused by victims of being unjust because rather than being prosecuted perpetrators applied for and received amnesty. The majority of the Congolese population are suffering and do not know the truth about what happened to them or their loved ones, where and how crimes were committed, and who gave the order for the acts that were committed. In many cases, perpetrators are moving about freely while, and at the time of writing (from April 2013 to February 2016), there is ongoing fighting by the FARDC against Congolese and foreign armed groups which are committing crimes against civil population.[32] In such a context, there is still a very strong desire for truth seeking, reconciliation, and prosecuting perpetrators in the DRC as well as abroad.

[28] See Rojo: http://www.amicc.org/docs/Transitional_Justice.pdf (Date of use: 10 February 2016).
[29] Translated from the original in French: *de consolider l'unité nationale grâce à une véritable réconciliation entre les Congolais. See articles 154-155 of Constitution de la Transition de la RDC (2003)*.
[30] Translated from the original in French: *Depuis son indépendance, le 30 juin 1960, la RDC est confrontée à des crises politiques… avec les guerres qui ont déchiré le pays de 1996… Dans le but de consolider l'unité nationale … et lutter contre l'impunité. Constitution de la RDC* (2006).
[31] Kiss "Restorative Justice" 81.
[32] PSC Framework §2.

Although transitional justice is considered the ultimate model all over the world,[33] in the RSA, it has been criticised by victims who continued to demand strict justice or retributive justice. In the DRC, the TRC failed to carry out thorough investigation of cases and few cases were prosecuted by the ICC. Such issues have motivated the researcher to investigate how transitional justice mechanisms in the RSA were substantially achieved while they failed in the DRC, and how the design of new transitional justice mechanisms in the DRC can achieve their objectives by learning from the RSA experiences.

As set out above, the main question of this research is as follows:

What transitional justice mechanisms were employed to secure justice and reconciliation in the RSA and in the DRC?

Other related questions include:

- What was the role of criminal prosecutions under Transitional Justice policy in the RSA and in the DRC?
- What role did the RSA's TRC and the DRC's TRC play in dealing with past abuses?
- What should be done to restore the victim's dignity in the RSA and in the DRC?

1.3 Study Objectives

The main goal of this research is to make a scholarly contribution to the existing body of knowledge by analysing the role played by the transitional justice mechanisms in the two case studies and offering practical solutions.

The specific objectives are:

- To analyse the role of criminal prosecutions under transitional policy in the RSA and in the DRC;

[33] Verbeeck points out that the "combination of confession and exoneration made the TRC such a unique international experiment". See Verbeeck "Revenge or Reconciliation?" 211.

- To assess the role played by the RSA's TRC and the DRC's TRC in dealing with past abuses;
- To identify ways and means of restoring the dignity of victims in the RSA and in the DRC.

1.4 Rationale behind the Study

During the apartheid era in the RSA and the period of various armed conflicts in the DRC, gross violations of human rights and of IHL were committed. Despite their formal, domestic judicial mechanisms, the RSA and the DRC, as part of efforts to build a sustainable peaceful future, forged their own suitable ways of bringing about reconciliation with regard to past abuses by offering victims a central role.

Although the RSA's TRC is considered to be the ultimate model all over the world,[34] it seems that the process did not lead to reconciliation. Indeed, the TRC itself cannot achieve national reconciliation; it can only serve as a point of departure for the promotion of reconciliation from which other structures can be launched in order to continue efforts towards community healing and sustainable peace. In this regard, Alex Boraine notes that "the Commission can claim some credit for helping many to face up to the truth of the past, with all its horror and shame, not in order to dwell there but to deal with that past and move into a freer existence".[35]

It has been alleged that the role played by the prosecution was exclusively to threaten perpetrators in order to obtain information for the TRC. Victims who remain dissatisfied with the proceedings have criticised the transitional justice mechanisms in the RSA. In the DRC, the TRC has been discredited for its inability to carry out a single enquiry. However, the Congolese military courts, on rare occasions, have prosecuted and convicted soldiers who committed war crimes and crimes against humanity after the transition. The ICC, complementing existing

[34] See Bussmann "Remarks" 41; Carver (n.d) *TLJ* 51. However, Lyn S. Graybill rightly points out that, "Only time will determine the TRC's ultimate effectiveness in reconciling the South African nation". See Graybill *Miracle or Model* 177.

[35] Boraine *A Country Unmasked* 343.

domestic courts which have jurisdiction over international crimes, has so far limited its activities to Ituri District where it has prosecuted a handful of perpetrators out of thousands or possibly millions of cases.

The primary motivation for the present research is to make a scholarly contribution to the existing body of knowledge as part of the ongoing efforts to restore the dignity of victims in both the RSA and the DRC and to demonstrate the necessity for justice and reconciliation for Congolese victims/survivors of the horrors of various armed conflicts. Thus, this study draws from the South African experiences in defining the priorities needed for designing future transitional justice mechanisms in the DRC. However, some degree of differences exists in the two contexts due to the involvement of foreign State and non-State actors in the various armed conflicts in the DRC. The study also calls for the extension of the activities of the ICC to the whole of the DRC, and for collaboration between the DRC and third States which are enjoined to prosecute perpetrators in their territories or extradite them.

Although examples abound of how other countries have dealt with human rights abuses committed by former regimes,[36] owing to the different contexts, there is no prototype that can be used automatically elsewhere. The comparison of transitional justice in the RSA and in the DRC is prompted however by the following:

- The adoption of the DRC's TRC was influenced by the RSA's TRC experience during the Inter-Congolese dialogue on energy facilitation in Sun City (RSA);
- The similarities in both States are seen in the ways they chose to deal with past abuses by offering victims a central role;[37]

[36] Graybill *Miracle or Model* 1.

[37] Following a series of events in Africa, the UNSC decided by its resolution 955 (1994) to establish an international tribunal for prosecuting persons responsible for genocide and other serious violations of IHL in Rwanda. Accordingly, in 1995, the Government of National Unity of the RSA agreed to create a TRC. In the same vein, while the Statute of the ICC entered into force on 1 July 2002 with the jurisdiction to prosecute themost serious crimes of concern to the international community as a whole (article 5), in the DRC, the participants in the Inter-Congolese dialogue signed a peace agreement on 16 December 2002 in which they opted for the creation of a TRC.

- On the other hand, the contexts differ because the RSA's TRC had the power to grant individualised amnesty and to *subpoena* witnesses while in the DRC the application of amnesty for international crimes was clearly prohibited; and
- In the RSA, the role of the judiciary was only to issue threats against perpetrators, while in the DRC, the ICC has jurisdiction over international crimes.

1.5 Delimitation of the Study

This research was conducted in the RSA and in the DRC. The researcher reviewed what had happened in the past in order to explain the period covered by the study (1995-2012). The research considers the period in which the South African government passed apartheid laws to the time of the reconciliation process (1948-1994), while in the DRC it covers the period of the first political crises after the ndependence, the dictatorship regime, and various armed conflicts (1960-1996). The analysis takes into account the community's opinion from the accounts of the key informants during the fieldwork.

In 1995, the Promotion of National Unity and Reconciliation Act was signed into law in the RSA and, through it, the TRC which began its hearings in 1996 was inaugurated. In the DRC, 1996 also was the year various armed conflicts erupted which resulted in mass violations of human rights and various violations of IHL. In 2002, while the final report of the RSA's TRC was being amended, delegates to the Inter-Congolese dialogue in Sun City, which was facilitated by South Africa, agreed to the establishment of a TRC for the DRC. The law establishing the TRC in the DRC was enacted in 2004, and the Commission ended its mission in 2006 but presented its final report in February 2007 in an unfavourable period characterised by a weak justice system and the emergence of a new rebel group, the CNDP. However, in 2012, the ICC's decision to deal with some cases of past abuses committed in Ituri starting with the conviction of Thomas Lubanga on 14 March 2012, coincided with the re-escalation of armed conflicts in the DRC by the M23 armed group as well as the de-escalation of armed conflicts by the DRC government. The study is delimited to 2012 in respect of both countries because in the RSA, victims blamed the mechanisms and continued to demand strict justice while, in the DRC,

after the end of the TRC, victims continue to wait for the opportunity to relate their experiences and to hold perpetrators accountable for their crimes.

1.6 Research Design and Research Methodology

The research design, as stated by Burns and Grove, guides the researcher in planning and implementing the study in a way that would most likely achieve the intended goal.[38] A methodology is viewed as a body of practices, procedures and rules used by researchers to offer insight into the workings of the world.[39] However, Johann Mouton differentiates between the research design and the research methodology arguing that the first focuses on the end product – what kind of study is being planned and what kind of result is aimed at (for example historical, comparative study, interpretive approach or exploratory study). The research methodology on the other hand focuses on the research process and the kind of tools and procedures to be used (such as document analysis, survey methods, analysis of existing data).[40]

1.6.1 Type of study

This research is a comparative study and uses a qualitative approach which takes into account the points of view of key informants and of victims' organisations in order to explore the problem and understand the context in which the transitional justice mechanisms were adopted and implemented. According to Dahlia K. Remler *et al*, qualitative research can be defined in terms of the kind of data it produces and the analysis it conducts. In terms of data, qualitative research involves various kinds of non-numerical data such as interviews (oral communication) written texts or documents, visual images, observations of behaviour, case studies, and so forth.[41] However, this research is also based on a literature study or content analysis, legal analysis and empirical field on transitional justice mechanisms with specific reference to the

[38] Burns and Grove *Research* 211.
[39] Lange http://www.sagepub.com/upm-data/50317_Lange_Chapter_1.pdf (Date of use: 11 March 2013).
[40] Mouton *Resource Book* 56.
[41] Remler and Van Ryzin *Research Methods* 57.

RSA and the DRC. The methods used to investigate the mechanisms of transitional justice in its dealing with past abuses are the historical method and the comparative method.

- ***Historical method***

According to Lange, the historical method explores either what happened at a particular time and place or what the characteristics of a phenomenon were like at a particular time and place. It analyses particular phenomena in particular places at particular times.[42] Thus, in the case of the RSA, the historical method is helpful in examining what happened under apartheid period from 1948 to 1994, while in the case of the DRC the method helps to understand what happened during the internal political crisis which erupted after independence, and during the military regime, which was marked by periods of various armed conflicts. Accordingly, the historical method offers one some insight into the past events in the RSA as well as in the DRC. It also enables one to appreciate the choice by these two countries to embrace transitional justice mechanisms in spite of the calls for prosecution and punishment, especially in the light of the operations of the TRCs and the role of prosecution during the transitional period.

As Mark Freeman has pointed out, "It is common today for countries emerging from periods of conflict or repression to consider the possibility of establishing a truth commission".[43] Thus, as a comparative study of two different contexts, this research also makes use of the comparative method.

- ***Comparative method***

The comparative method compares the characteristics of different cases and highlights similarities and differences between them. It is used to explore causes that are common to a set

[42] Lange http://www.sagepub.com/upm-data/50317_Lange_Chapter_1.pdf (Date of use: 11 March 2013).
[43] Freeman *Procedural Fairness* 3.

of cases[44] such as the TRCs in the RSA and in the DRC and the role played by the prosecution. As shown by J. Paul Lomio, Henrik S and George D, the comparative method is founded upon the actual observation of the elements at work in a given system. It examines how jurists work with specific rules and general categories in various legal systems.[45] In this regard, legislation has been effective in a significant number of countries dealing with past abuses even though such legislation is often peculiar to the context of each State. This seems to be the case with the DRC's TRC which was influenced by the RSA's TRC. From a legal point of view, both TRCs are comparable because they have the similar goals. Thus, this study appreciates the similarities and differences between the legal frameworks that created the RSA's TRC and the DRC's TRC. The research goal is to assess the role played by both commissions in order to help design a new TRC for the DRC, taking the RSA's TRC model as a point of departure. Furthermore, the method helps to analyse the challenges of implementing criminal laws during transitional periods in which the promotion of peace and reconciliation was preferred to retribution in both the RSA and the DRC.

1.6.2 Sample

The research employed a non-probability sample, mainly the purposive sample. Comparing probability and non-probability samples, Samy Tayie explains that a probability sample is selected according to mathematical guidelines whereby the probability of selecting each unit is known, but a non-probability sample does not follow the guidelines of mathematical probability. Whereas non-probability sampling does not select participants randomly, probability sampling uses some form of random selection. However, the significant difference is that probability sampling allows researchers to calculate the amount of sampling error present in a study unlike non-probability sampling.[46] In qualitative research, according to Natasha Mack *et al*, only the

[44] Lange http://www.sagepub.com/upm-data/50317_Lange_Chapter_1.pdf (Date of use: 11 March 2013).
[45] Lomio *et al Legal Research* 60.
[46] Tayie *Research Methods* 32.

sample of a population is selected for any given study. Thus, purposive sampling groups participants according to preselected criteria relevant to a particular research question.[47]

The following criteria were followed to select respondents in the DRC. The first criterion was based on the participant's experiences as a former member of the TRC, while the second was based on the participant's role as a representative of the Military High Court, and the third criterion was based on participant's role as the representative of the *Procureur Général de la République* or the Prosecutor General of the Republic. The fourth criterion was that the participant should be a representative of an association of victims of armed conflicts or of an association taking care of victims or advocating victims' cases in the courts of law in the DRC.

However, the researcher did not interview only key informants identified in the DRC, but included additional informants suggested through the use of the snowball sampling method. As pointed out by Natasha Mack *et al*, snowballing is considered a type of purposive sampling in which participants or informants with whom contact has already been made use their social networks to refer the researcher to other organisations which could potentially participate in or contribute to the study. The authors add that snowball sampling is often used to find and recruit "hidden populations", that is groups not easily accessible to researchers through other sampling strategies.[48]

In the RSA, selection of respondents was based on the following criteria. The first was the personal experiences of the commissioners who had worked with the former TRC. The second was that the respondent could be a representative of the National Prosecuting Authority (NPA) in the RSA, and the third was that the respondent could be a representative of an association of victims of apartheid, of an association that cares for victims of apartheid in the RSA or of the South African Coalition for Transitional Justice (SACTJ). The fourth criterion was that the respondent could be a representative of the Department of Defence's archives which handle the public archives and documents or files of the former regime.

[47] Mack *et al Qualitative Research* 5.
[48] Mack *et al Qualitative Research* 5-6.

In this study, fifty key informants were selected based on their personal experiences or on their respective institutions and positions. In addition, 31 participants in a focus group were selected based on their status as victims or their membership of a victims' organisation which cares for victims of apartheid abuses.

1.6.3 Data collection technique

After the approval of the proposal from the College of Law Research Ethics Review Committee, data was collected through interviews and a focus group guide. Those who could not be reached in person were contacted by telephone and a few respondents agreed to be interviewed via Skype.

1.6.4 Research instruments

The research methodology aimed to access not only the legal framework and literature from libraries and the internet, but also from third sources (literature by key informants), that is, from the respondents via the interview guide and the focus group guide (see Appendix D). The ultimate aim is to present a body of sources that could be accessed by all who could benefit from it.

According to Kvale, as cited by Dapzury Valenzuela and Pallavi Shrivastava, "the qualitative research interview seeks to describe and the meanings of central themes in the life world of the subjects. The main task in interviewing is to understand the meaning of what the interviewees say".[49] The aim of a semi-structured interview is to encourage the respondents to speak "in their own words", to obtain a first-person account.[50] This method is helpful in understanding the experiences being related by the interviewees. Semi-structured and open-ended questionnaires were used to collect data, as these are easy to administer directly.

[49] Valenzuela and Shrivastava http://www.public.asu.edu/~kroel/www500/Interview%20Fri.pdf (Date of use: 18 March 2013).
[50] Packer *Research* 43.

The focus group was used in order to obtain the opinions of victims and representatives of victim's organisations on transitional justice mechanisms. Thus, data was collected from victims' organisations in the RSA and in the DRC by using tape recordings (digital voice recorder), and notes were taken based on the focus group question guide. Focus groups, according to Natasha Mack *et al*, are especially effective for capturing information on social norms and the variety of opinions or views within a population. The richness of focus group data emerges from the group dynamic and from the diversity of the group. Participants influence one another through their presence and their reactions to what other people say, and because not everyone will have the same views and experiences, many different viewpoints are likely to be expressed by participants.[51]

1.6.5 Field data analysis method

After collecting data, interview and focus group data was transcribed to facilitate analysis. During the stage of analysis, transcripts were grouped according to participants' responses to each question and to the different themes. Thus, the idea of *abductive logic* was helpful as it is associated with the interpretive tradition. It involves hearing different views and creating insightful accounts of how the meanings of different actors can help to explain or understand their social interactions, according to Norma Romm.[52] Furthermore, Mclntyre-Mills, as cited by Romm, explains that "the logic involves some 'creativity' or 'leaping' – because it does not just reproduce meanings as expressed by participants, but tries to generate a fresh account of the way in which reality is being patterned as result of the different actors' processes of meaning-making".[53]

[51] Mack *et al Qualitative Research* 52.
[52] Romm *Manual for UNISA Post-Graduate Students* 8.
[53] Romm *Manual for UNISA Post-Graduate Students* 8.

1.6.6 Ethical considerations

For Norma Romm, ethics refers to what is considered adequate or justified behaviour in the practice of research. It is concerned with what is regarded as a fair way for researchers to proceed with their investigation.[54] Therefore, regarding the ethical concerns, the protection of participants' right to confidentiality was guaranteed. As participation was voluntary, the right to withdraw at any stage of the research without giving any reason and without any penalty was guaranteed, and the researcher respectfully acknowledged and supported their right to do so. In the focus group, participants were discouraged from revealing the identities or comments of others during the discussion, while the researcher also undertook not to reveal any personal information about them. Thus, confidentiality and anonymity of participants were safeguarded during the interviews and the focus group discussions. This meant that participants had the right to respond anonymously, and the researcher implemented a system of assigning substitution numbers to participants.

1.7 Brief Literature Review

Dena Taylor defines a literature review as an account of what has been published on a topic by accredited scholars and researchers.[55] For instance, the literature review may reveal that the topic under consideration has already been adequately researched.[56] Thus, Carol M Roberts states that, "A researcher cannot perform significant research without first understand[ing] the literature in the field. Not understanding the prior research clearly puts a researcher at a disadvantage".[57] Lisa Emerson and Mike Brennan however argue that a literature review is not required as part of the proposal itself.[58]

Indeed, there has been considerable growth in the body of literature pertaining to transitional justice in recent times. This section examines literature on transitional justice

[54] Romm *Manual for UNISA Post-Graduate Students* 28.
[55] Taylor http://www.writing.utoronto.ca/images/stories/Documents/literature-review.pdf (Date of use: 1 July 2013).
[56] Emerson and Brennan "Proposals" 52.
[57] Roberts *Dissertation Journey* 87.
[58] Emerson and Brennan "Proposals" 52.

mechanisms with a specific focus on the TRC and the prosecution of past abuses in the RSA and the DRC. Analysing the role played by the prosecution and the TRC in both countries, the research offers certain recommendations about how to restore the victim's dignity in the final chapter.

1.7.1 Literature on the TRC

Although there is ample literature on the RSA's TRC, fewer publications exist on the DRC's TRC. Literature shows that the RSA's TRC was regarded an innovation in the sense that it could grant individual amnesty and exercised power to subpoena perpetrators. Therefore, it is considered the ultimate model all over the world because of its incomparable achievements.[59] A number of authors note that the achievements were more apparent abroad than in the RSA where victims were waiting for appropriate remedies, but the amnesties granted precluded any future criminal or civil proceedings against perpetrators,[60] and there was dissatisfaction regarding the symbolic reparations.[61] Instead of vertical enforcement of reparations which is administrative in character, the horizontal presents a viable option against perpetrators, that is, a judicial action.[62] Accordingly, the RSA's TRC was criticised for holding the mission of reconciliation above that of finding the truth and for not using its power to subpoena perpetrators;[63] it had difficulty bringing all relevant actors to the table.[64] The Commission was an invaluable gift of a trial-and-error learning curve for the RSA,[65] a praiseworthy undertaking, necessary for the future of South Africa.[66]

[59] Hayner *Challenge of Truth Commissions* 29; Bisset *Criminal Courts* 30,75-76; Bussmann "Remarks" 41; Cassin 2006 *IRRC* 238; Lollini *Constitutionalism* 61-62; Nabudere and Velthuizen *Restorative Justice* 30; Boraine *A Country Unmasked* 258; Ngoma-Binda *Justice Transitionnelle* 40-41; Chapman and Van der Merwe "Assessing" 8,12-13; Verdoolaege *Reconciliation Discourse* 16-19; Verdoolaege "The Debate on Truth and Reconciliation" 31; Giannini *et al Prosecuting Apartheid-Era* 17; Carver (n.d) *TLJ* 51.
[60] Bisset *Criminal Courts* 80; Cole *Stages of Transition* 125; Lollini *Constitutionalism* 61-62, 102-103, 106 and 111; Koppe "Reparations" 217.
[61] Koppe "Reparations" 218-219; Cole *Stages of Transition* 123; Boraine *A Country Unmasked* 41, 66, 81, 119.
[62] Nibogora *The Right to Reparations* 27-30.
[63] Hayner *Challenge of Truth Commissions* 28; Cole *Stages of Transition* 124.
[64] Bouris *Political Victims* 182; Verdoolaege *Reconciliation Discourse* 19-20.
[65] Daye *Political Forgiveness* 122.
[66] Verdoolaege *Reconciliation Discourse* 21.

In the DRC on the other hand, existing literature attests that victims had high expectations from the Commission. They sought to know the truth concerning the crimes committed and reparation to the victims for their losses, but the Commission was not able to carry out its mandate, as it faced many problems.[67] A number of authors have examined factors that prevented the Commission from achieving any of its objectives. The factors include the nature of the TRC's composition, lack of consultation process, dual mandate (truth-seeking and mediation), unrealistic mandate, lack of human and material resources, budget deficiencies, lack of financial support from the international community, absolute lack of political will to have independent and fair accountability mechanisms, and security issues (sporadic violence and continuing insecurity).[68] Many of these authors also agree that the Commission achieved little in pacifying traumatised communities but focused its *ad hoc* efforts on conflict mediation and resolution;[69] such tasks do not form part of the core mandate of a TRC.[70] As the Commission ended its task in 2006 without success, these authors conclude that the Commission must be reactivated in order to establish the truth of what happened in the country.[71]

As perpetrators (high-ranked military and political officials) who planned or ordered abuses (and continue to do so) were appointed to official positions, this study affirms the Congolese demand for justice and reconciliation or the victims' right to remedies. Thus, the study also considers the feasibility of reconstituting a new TRC which would prioritise people's consultation and take into account the "regional" character or dimension of the various conflicts in which foreigners have had a hand in past abuses, that is, the regional dimension of reconciliation.

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[67] Ngoma-Binda *Justice Transitionnelle* 18, 37; OHCHR *Report Mapping Exercise* §983, 1064; Savage *Sustainable Justice* 9; Schotsmans 2006-2007 *Annuaire* 201; Vinck and Pham 2008 *IJTJ* 401; Borello *Road to a Just Peace* 46; Davis and Hayner *Peacemaking* 22; Vanspauwen and Savage "Truth-seeking in the DR Congo" 394; Savage and Kambala wa Kambala "The Challenge of Finding Justice" 346.

[68] Bisset *Criminal Courts* 60; OHCHR *Report Mapping Exercise* §1064; Ngoma-Binda *Justice Transitionnelle* 45-74; Savage *Sustainable Justice* 10; Schotsmans 2006-2007 *Annuaire* 201; Vinck and Pham 2008 *IJTJ* 401; Borello *Road to a Just Peace* 14; Davis and Hayner *Peacemaking* 22; Vanspauwen and Savage "Truth-seeking in the DR Congo" 400-1; Savage and Kambala wa Kambala "The Challenge of Finding Justice" 347.

[69] Savage *Sustainable Justice* 9; Borello *Road to a Just Peace* 45; Davis and Hayner *Peacemaking* 22; Vanspauwen and Savage "Truth-seeking in the DR Congo" 402; Savage and Kambala wa Kambala "The Challenge of Finding Justice" 346.

[70] Borello *Road to a Just Peace* 45; Davis and Hayner *Peacemaking* 22; OHCHR *Report Mapping Exercise* §1066.

[71] Davis and Hayner *Peacemaking* 22; OHCHR *Report Mapping Exercise* §1065-69; Borello *Road to a Just Peace* 45.

1.7.2 Literature on prosecution

In the case of the RSA, there is scanty literature on the prosecution of apartheid crimes based on the transitional justice policy. The number of prosecutions was not significant[72] due to different reasons. The prosecution of apartheid criminals was not the route that the RSA chose to take.[73] However, the activities of the TRC and the criminal trials were interconnected and complementary.[74] Alison Bisset states that the threat of prosecution was used as the impetus for perpetrators to offer testimony, and this tied the success of the Commission to the credibility of that threat.[75] Some authors consider that many white prosecutors and judges who remained in the South African justice system after apartheid were unwilling or unable to prosecute former figures from the apartheid era due to the acquittal of all defendants.[76] Flanagan argues that few ANC members or supporters were prosecuted for apartheid-related offences.[77] From the above, the prosecution of those who failed to come forward or who were denied amnesty remains crucial and many victims also continue to wait to be rehabilitated. Therefore, this study serves as a scholarly contribution to existing literature and calls for further efforts to restore the victim's dignity.

In the DRC, the ICC which complements existing domestic courts has jurisdiction over international crimes. Available literature shows that there were tens of thousands of serious crimes and perpetrators, and hundreds of thousands of victims,[78] but the ICC has prosecuted only a handful of perpetrators for crimes committed in Ituri and very few domestic trials against perpetrators have been followed for different reasons.[79] A number of authors have identified the most serious obstacles to prosecutions in the DRC which include lack of security, the "destabilization argument", legal obstacles and jurisdictional issues. Others include the lack of

[72] Fernandez "Post-TRC Prosecutions" 65; Giannini *et al Prosecuting Apartheid-Era* 77.
[73] Republic of South Africa, *Truth Commission* Volume 6 594.
[74] Bisset *Criminal Courts* 75-6,83; Giannini *et al Prosecuting Apartheid-Era* 13; Lollini *Constitutionalism* 109.
[75] Bisset *Criminal Courts* 77.
[76] Bisset *Criminal Courts* 78; Fernandez "Post-TRC Prosecutions" 65; "Dirty War's Skeletons Still Rattle" cited by Giannini *et al Prosecuting Apartheid-Era* 79*;* Giannini *et al Prosecuting Apartheid-Era* 77, 82-83.
[77] Flanagan "Prosecution Frenzy" cited by Giannini *et al Prosecuting Apartheid-Era* 83;
[78] OHCHR *Report Mapping Exercise* §54,996-7; Schotsmans 2006-2007 *Annuaire* 201.
[79] Savage *Sustainable Justice* 6; Schotsmans 2006-2007 *Annuaire* 214-215.

capacity to deal with widespread violations, lack of independence due to political interference, lack of political will to enable the judiciary to try such cases, weak budget, probable lack of cooperation by foreign governments, and corruption.[80]

Most of these authors suggest that the ICC should consider opening investigations in areas other than Ituri, and that the creation of a hybrid court or a "Special Court" is expedient. Each State still has an immediate role to play in fighting impunity by implementing extraterritorial and universal jurisdiction and prosecuting the "people bearing the greatest responsibility". There is also a stress on the need to reform the justice and security service sectors, carry out an intensive training program to build the capacity of the Congolese judicial system in the field of international crimes, ensure the independence of the judicial system, and increase the level of security for victims, witnesses and judicial staff.[81] Considering the involvement of foreign State and non-State actors in different armed conflicts and their culpability directly and indirectly in millions deaths, this study recommends a type of regional justice that involves all affected countries.

Furthermore, the research has drawn from the legal framework, as primary sources, which create the mechanisms of transitional justice in the RSA and in the DRC (such as Constitutions, relevant pieces of national legislations, peace agreements, and case law in the areas of investigation) as well as instruments of international law. Moreover, literatures by key informants were helpful in complementing the content analysis and comparing the mechanisms of transitional justice in both countries.

The works of Ruti G. Teitel, ICTJ, USIP, UNSC, Neil J. Kritz, among others, were examined[82] to understand the scope of transitional justice. Ruti G. Teitel is credited with a study of the genealogy of transitional justice, while the works of the ICTJ and USIP are valuable in

[80] Borello *Road to a Just Peace* 17-26; OHCHR *Report Mapping Exercise* §901, 1014-18; Davis and Hayner *Peacemaking* 25-7; Vinck and Pham 2008 *IJTJ* 409-10; Schotsmans 2006-2007 *Annuaire* 225-27; Savage *Sustainable Justice* 6-7; Savage and Kambala wa Kambala "The Challenge of Finding Justice" 338-41.

[81] Borello *Road to a Just Peace* 49-52; OHCHR *Report Mapping Exercise* §1126-43; Davis and Hayner *Peacemaking* 39-41.

[82] Teiltel *Contemporary Essays;* Teitel *Transitional Justice*; Teitel 2003 *HHHJ*; Teitel 2002 *FILJ*; ICTJ http://ictj.org/sites/default/files/ICTJ-Global-TJ-In-HRC-2011-English.pdf (Date of use: 24 April 2012); USIP http://www.usip.org/files/TRANSITIONAL%20JUSTICE%20formatted.pdf (Date of use: 5 June 2013); UNSC *Rule of Law.*

terms of different goals and mechanisms of transitional justice. With regard to the definition of transitional justice, reference was made to the UNSG. Indeed, much of the literature tends to focus on specific analysis of different mechanisms of transitional justice (such as criminal prosecutions, truth commissions, amnesty, lustration or vetting process, institutional reform, reparations and compensation programmes, and memorialisation), but this research focuses on prosecution and the TRC. Thus, the work of Priscila B. Hayner, who is considered a leading authority on matters relating to the TRC, as well as the work of Mark Freeman on views that question Priscilla B. Hayner, Alex Boraine,[83] and others. On the issue of prosecution, reference is made among others to Cherif Bassiouni, Van Beth Shaack and Ronald C Slye, and Alison Bisset.[84]

1.8 Framework of the Research

This research is structured into six chapters. Chapter One is the introductory chapter to the research. It presents a background to transitional justice, the subject matter and problem statement, the study objectives, the rationale for the study, delimitation of the study, description of the research methodology, and a brief literature review.

Chapter Two focuses on transitional justice – the theoretical assumptions and mechanisms of transitional justice. It presents the point of departure and assumptions, tries to elucidate justice in post-conflict situations and offer an understanding of the goals and mechanisms of transitional justice. The chapter also considers the victims' right to remedies.

Chapter Three deals with transitional justice in the RSA in the context of apartheid and the legal framework of transitional justice mechanisms in the RSA; the role of prosecution of apartheid-era crimes; the role of the TRC in dealing with apartheid-era crimes; and the post-TRC prosecution.

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[83] Hayner *Challenge of Truth Commissions;* Hayner *Facing the Challenge of Truth Commissions;* Hayner 1994 *HRQ;* Freeman *Procedural Fairness;* Boraine "Potential"; Boraine *A Country Unmasked.*

[84] Bassiouni "Mixed Models"; Shaack and Slye *Enforcement;* Bisset *Criminal Courts.*

In Chapter Four, the notion of transitional justice in the DRC is investigated in the light of various armed conflicts and legal framework of transitional justice mechanisms in the DRC. The prosecution of past abuses as well as the role of the TRC in dealing with past abuses is examined.

In Chapter Five, a comparative appraisal of the field research in both the RSA and the DRC is presented. It outlines the findings from the fieldwork and analyses the results.

Chapter Six serves as the conclusion and summary of the study but it also offers some recommendations based on the findings of the study.

CHAPTER 2

TRANSITIONAL JUSTICE: THEORETICAL ASSUMPTIONS AND MECHANISMS

2.1 Introduction

In any human society, conflicts are inevitable; they are an inescapable fact of human existence. Conflicts can be inter-personal, inter-group, intra-state and inter-state, and because they are inevitable, they often have many consequences not only for human beings but also for the environment. Thus, the escalation of violent conflicts is often characterised by grave human rights violations and breaches of IHL, which therefore deteriorate into situations that require humanitarian interventions. In some cases, warring parties may choose to stop fighting and negotiate a settlement, or a third party could step in enable parties to transform their relationship and reach an agreement. Thus, beyond stalemate and de-escalation, warring parties agree to refrain from re-engaging in armed conflict, prevent future conflict and engage in the process of peace building. The world witnessed a similar situation in the second half of the twentieth century and the beginning of the twenty-first century. Citing Balint, Stephan Parmentier affirms that, "it is estimated that in the period 1945-1996 only, 220 conflicts have resulted in 87 millions deaths and many more millions of people stripped of their fundamental rights, property and dignity".[85] Similarly, Cherif Bassiouni asserts that in the preiod 1945-2008 about 310 conflicts have resulted in an estimated 92 million casualties.[86] As mentioned above in chapter one, between six and ten million people have been killed as a result of various armed conflicts in the DRC since 1996.[87]

[85] Parmentier 2003 *IAC* 203-204.
[86] Bassiouni "Mixed Models" 470.
[87] There is no official statistics on persons who have been (and still are) killed in the different internationalised armed conflicts in the DRC. However, the estimate by scholars is between six and ten million. See MBUTA *L'Onu et la Diplomatie des Conflits* 25; Nkashama *Guerres Africaines* 362; Phillips *Righteous Orientation* xxi; Pérouse De Montclos "Politics of Armed Conflicts" 59; Kahongya "SOS du Gouverneur" 2.

Regrettably, Stephan Parmentier and Cherif Bassiouni did not provide a detailed table of the number of people who died in wars and conflicts according to the region or country. Hence, Milton Leitenberg agrees that an estimated 41 million fatalities of wars and conflicts have occurred in the period between 1945 and 2000.[88] Compared to the estimated number of deaths in situations of conflict provided by Stephan Parmentier and Cherif Bassiouni, the estimate by Milton Leitenberg seems to be much less. However, the advantage of Leitenberg's study is that it provides a detailed table of the number of deaths in wars and conflicts in the 20th century on which this research will focus, as it shows the estimate in terms of the various regions and that the number of deaths in the case of the DRC is alarming. The countries with the highest number of deaths in the regions are outlined below:

- Latin America: Colombia (from 1948-1989): 309.000
- Middle East: Iraq (from 1959-2000): 1.644.000
- South Asia: Afghanistan (from 1978-2000): 2.000.000
- Far East: China (from 1946-1989): 6.407.000
- Sub-Sahara Africa: Sudan (from 1955-2000): 2.760.000
- Northern Africa: Algeria (from 1954-2000): 1.132.000
- Russia, Balkan and CIS States: Former Yugoslavia (from 1991-1996): 300.000.[89]

The study shows that conflicts had occurred in almost every region of the world. Unfortunately, few of those responsible for such atrocities have been prosecuted. Most of the perpetrators have enjoyed impunity, in part, due to the absence of post-conflict justice mechanisms in the countries where the atrocities took place, according to Cherif Bassiouni.[90] However,

> Accountability, it is contended, deters future violations, while impunity constitutes an invitation to repetition. Accountability processes in general, and criminal trials in particular, are said to provide a 'higher' degree of truth, focusing not only on events, but also incontestably identifying who bears personal responsibility for abuses. It is argued that the absence of accountability runs against the rule of law and therefore undermines one of the fundamental pillars of a more democratic regime, whereas accountability enhances the legitimacy of the new regime. Accountability prevents perpetrators from reclaiming power

[88] Leitenberg *Deaths in Wars* 79.
[89] Leitenberg *Deaths in Wars* 75-79.
[90] Bassiouni "Mixed Models" 470.

> again through violence. It may help a new regime rid the armed and security forces of their worst elements and to create a better climate to foster respect for human rights. Holding perpetrators accountable prevents acts of vengeance, vigilante justice and cyclical patterns of reciprocal violations.[91]

From the number of deaths per region shown above, it can be deduced that the DRC, where between six and ten million people were killed, has recorded a large number of fatalities during the various armed conflicts which have spilled over to the twenty-first century. The number of deaths, according to Prof Mbata Mangu, is much higher than the national population of many African countries and several times more superior to the number of victims of the Rwandan, Yugoslavian and Sierra Leonean conflicts which attracted so much attention that the UNSC resolved to create three international tribunals to address the issues.[92]

Indeed, the period of moving from past abuses to peace building is understood as one in which transitional societies are confronted with the issue of post-conflict justice and reconciliation which are essential elements for their future development. The societies could also be confronted with how to address horrendous human rights abuses and reconcile the nation in the aftermath of conflicts or authoritarian regimes. The term "transition period" would be employed in this study in line with Chrisje Brants' definition which sees it as a period in which a society divided by the chaos, illegality and injustices of the past moves to one in which democracy and the rule of law become the leading and binding principles of stability. It implies a 'before' and an 'after' which one could argue does not exist or, in any event, may not necessarily be left or lived as such.[93] Thus, from the perspective of a civil society recovering from mass violence, Wendy Lambourne argues that, "justice may be sought as redress for crimes, but also as a way of coming to terms with the past and building a new future".[94] It is in this context that transitional justice is implemented.

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[91] Gahima *Transitional Justice in Rwanda* 7.
[92] Mangu 2003 *AHRLJ 3(2)* 237. For more details, read also Aguilar *Torture* 27; UNESCO *Hidden Crisis* 139; Nzongola-Ntalaja. http://projectcongo.org/images/The_20International_20Dimensions_20of_20the_20Congo_20Crisis.pdf (Date of use: 29 April 2011).
[93] Brants "Introduction" 3.
[94] Lambourne 2009 *IJTJ* 29.

In this chapter, the research presents the point of departure and theoretical assumptions about retributive and restorative justice followed by an analysis of justice in transition. It then explains the goals of transitional justice and its key terms and mechanisms some of which were implemented in the RSA and in the DRC and which will be discussed respectively in chapters 3 and 4 of this study.

2.2 Point of Departure and Assumptions

In this section, the point of departure of the study is presented as well as the theoretical assumptions about retributive and restorative justice, and justice in transition. The goals and mechanisms of transitional justice are also outlined.

2.2.1 Point of departure

The point of departure for this research is the judicial mechanism which corresponds to the *retributive justice theory* as well as the non-judicial mechanism which corresponds to the *restorative or distributive justice theory*. The judicial mechanism comprises of criminal prosecutions (international, hybrid, and domestic) while the non-judicial mechanism includes truth commissions (often with amnesty as a tool), lustration or vetting process, institutional reform, and building memorials. Both mechanisms provide reparations to victims. Depending on the context and in line with international legal standards, a State may choose to combine these two mechanisms in order to respond to past abuses. Christian Nadeau points out that transitional justice is usually equated with TRCs.[95] Similarly, Eric Wiebelhaus-Brahm notes that, "the truth commission has become a staple of post-conflict justice".[96] Of the different components of transitional justice therefore, TRCs have been the preferred mechanism. It is in this light that Priscilla Hayner reviews the activities of forty truth commissions in some transitional societies,

[95] Translated from the original in French: "*La justice transitionnelle est ainsi le plus souvent identifiée aux commissions de vérité et réconciliation. See Nadeau "Quelle Justice après la Guerre?"*

[96] Wiebelhaus-Brahm "Truth Commissions" 477.

highlighting the five strongest commissions.[97] Alison Bisset also shows that in most of the States in which various crimes of human rights and/or IHL have been committed in recent times, truth commissions have been established, or the States have at least considered establishing them. Often, transitioning societies find that they are unable, or unwilling, to investigate and prosecute perpetrators owing to weakened legal and administrative systems.[98]

In Mali, the 2013 transitional government announced the creation of a "reconciliation and dialogue commission" to try to restore peace among the different groups and investigate cases of human rights violations that were committed.[99] However, Neil J. Kritz observes that, "Truth commissions have become almost a routine, it has become a standard practice, you have a transition and everybody immediately says we have to have a truth commission without any clear understanding as to why or what they are about".[100] Uruguay and Spain are examples of nations that have faced their past without the establishment of truth commissions,[101] while Rwanda chose to punish offenders through a traditional mechanism of justice named *Gacaca* as well as through the International Criminal Tribunal for Rwanda (ICTR)[102] created by the UNSC. According to Nagy as cited by Buckley-Zistel and Zolkos, the question today is not whether something should be done to redress atrocities but how it should be done.[103]

[97] The TRC in South Africa; the Commission for historical clarification in Guatemala (its full name was actually the Commission to clarify past human rights violations and acts of violence that have caused the Guatemalan people to suffer); the TRC in Peru; the Commission for Reception, Truth, and Reconciliation (CAVR, for its acronym in Portuguese: the *Comissão de Acolhimento, Verdade e Reconciliação*) in Timor-Leste; the Equity and Reconciliation Commission (in French: *Instance Équité et Réconciliation*) in Morocco. See Hayner *Challenge of Truth Commissions* 27-44.

[98] Bisset *Criminal Courts* 60 and 63.

[99] Focus http://www.focus-fen.net/?id=n301102 (Date of use: 8 March 2013).

[100] Kritz *Key Note Address* cited by Kisiangani *Transitional Justice* 1.

[101] De León "A Twisted Path to Reconciliation" 12.

[102] On 1st July 1994, the UNSC, through Resolution 935, established an Independent Commission of Experts to investigate grave violations of IHL committed during the civil war in Rwanda. The Commission's interim report concluded that both sides had committed serious breaches of IHL and crimes against humanity. See the Secretary-General's Letter dated 1 October 1994 from the Secretary-General addressed to the President of the Security Council, §§146-47, delivered to the Security Council, U.N. Doc. S/1994/1125 (Oct. 1, 1994) cited by Bernaz and Prouvèze "Prosecutions" 290. However, according to the National Unity and Reconciliation Commission, Rwandashould consider the prosecution of those who committed genocide a priority. See NURC *Barometer* 14.

[103] Nagy "Global Project" 276 cited by Buckley-Zistel and Zolkos "Gender" 14.

2.2.2 Theoretical assumptions

The theoretical assumptions in the discussion that follows are about retributive justice, restorative justice and transitional justice.

2.2.2.1 Retributive justice

With retributive justice, whoever commits crimes must be brought to justice, be judged, and eventually, if he/she is found guilty, must be punished. Immanuel Kant affirms that, "Criminals must pay for their crimes; otherwise an injustice has occurred".[104] Hegel states that punishment is the right of the criminal. It is an act of own will.[105] Bouhe Wartna *et al* explain that, "sanctions are imposed for two reasons: as means of retribution and to prevent crime from happening again".[106] Thus, for Van Beth Shaack and Ronald C Slye state, punishing the perpetrators can provide the truth and punishment necessary to satisfy the victims, prevent individual retaliation for past injustices, and prevent history from repeating itself.[107]

Indeed, scholars agree that retributive justice refers essentially to the punishment of an offender without exceptions for his/her unlawful wrongdoing. The idea is reiterated by many authors.[108] Retributive justice theory however raises additional sub-theories such as subjectivism,[109] retributivism or objectivism,[110] and utilitarianism.[111]

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[104] Kant http://faculty.msmary.edu/Conway/PHIL%20400x/Kant%20Retributive%20Theory.pdf (Date of use: 27 May 2013).

[105] Cited in Murphy 1973 *PPA* 3.

[106] Warta, Alberda and Verweij "Effectiveness of Penal Interventions" 305.

[107] Shaack and Slye *Enforcement* 5-10.

[108] Markel, Flanders and Gray 2011 *CLR* 607; Markel "What Might Retributive Justice Be?" 50; Markel and Flanders 2010 *CLR* 930; Shaack and Slye *Enforcement* 5-10; Gray 2010 *CLR* 1620; Bronsteen, Buccafusco and Masur 2009 *UCLR* 1038; Wenzel *et al* 2008 *LHB* 375; Cahill 2007 *WULR* 818; Perry 2006 *TLR* 7; Darley and Pittman 2003 *PSPR* 326.

[109] Subjectivism theory is endorsed by Wenzel *et al* 2008 *LHB* 375-81, 817-8; Quinn 1985 *PPA* 56,88; Nino "Theory of Punishment" 105; Hampton "Moral Education" 116; Simmons "Right to Punish" 252.

[110] The theory of retributivism or objectivism is endorsed by Markel, Flanders and Gray 2011 *CLR* 607; White "Pro Tanto Retributivism" 130, 141; Tunick "Retributive Theory" 173, 185; Brooks "Retribution" 232, 242; Duff "Retributivism" 4; Murphy "Thoughts on Retributivism" 101-102; Simons 2009 *CLRS* 2, 9; Cahill 2007 *WULR* 817-819; Goldman "Paradox of Punishment" 34, 39.

[111] Utilitarian theory is endorsed by Murphy "Retribution" 5; Bronsteen, Buccafusco and Masur 2009 *UCLR* 1039; Davis "Harm" 190.

Subjectivists maintain that punishment is justified by the subjective experiences of those who are punished although retributivists and utilitarians do not approve of this subjectivist explanation of punishment as suffering. Thus, objectivism holds that punishment should be justified on objective grounds without reference to the subjective experiences of particular offenders. In the case of retributivism however, punishment can be justified only if, and to the extent that, it is deserved. It follows that retributivists are committed to the proportionality between cases. Utilitarian theories hold that punishment is justified if, and only to the extent that, it can achieve more good than harm.[112] In other words, while subjectivists claim that punishment is the suffering inflicted on the offender for the right reasons, retributivists and utilitarians maintain that if punishment is not deserved then it cannot be imposed.

Indeed, prosecution is an instrument for meting out retributive justice to punish perpetrators of massive violations of human rights and of IHL, and it is one of the various approaches of transitional justice towards past abuses. As noted by the United States Institute of Peace (USIP), "Prosecutions help to reaffirm legal order and encourage trust in public institutions".[113] Accordingly, the theory of retributive justice is appropriate for this study because the prosecution initiative is the primary responsibility of States and it ensures that those who have committed crimes are held accountable for their deeds. Thus, national courts have jurisdiction over cases, but when the so-called "big fish" who are often most culpable are considered untouchable, the international court may act in a complementary way to exercise its jurisdiction.

Nevertheless, dissatisfaction and frustration with the formal justice system in preserving and strengthening customary law and traditional justice practices have led to calls for alternative responses which bring together warring or conflicting parties to resolve the conflict and address its consequences. The alternative responses to crime and social disorder, which encourage peaceful expression of conflict, constitute restorative justice.[114]

[112] Gray 2010 *CLR* 1621-42.
[113] USIP http://www.usip.org/files/TRANSITIONAL%20JUSTICE%20formatted.pdf (Date of use: 5 June 2013).
[114] UNODC *Handbook on Restorative Justice* 5.

2.2.2.2 Restorative justice

Restorative justice is not a new approach because throughout history, it has been employed to rebuild broken human relationships between victims and offenders. As noted by Ruth Ann Strickland, it dates back much further in history as community justice,[115] and it continues to be expanded, developed, attractive, and adapted to the current ever-changing world. There are various definitions of restorative justice, all of which are relatively similar but which represent diverse aspects, principles, and values. In her book on restorative justice, Marian Liebmann asserts that the practice aims to restore the well-being of victims, offenders, and communities damaged by crime, and prevent further offences. She further argues that a dialogue between the victim and the offender can transform the crime into something different, an experience that can bring healing to all concerned.[116] Restorative justice also focuses on repairing the damage or harm that the offender has inflicted on the victim and on the community rather than on preserving an abstract legal order by harnessing positive individual empowerment and social resources to support healing, as well as by reconciling the wronged and the perpetrator, while simultaneously working to rehabilitate the victim. These goals have been considered by many authors.[117]

Thus, Antonio Buti argues that restorative justice is both victim-centric and conflict-centric, a process of healing rather than of punishment,[118] and a powerful tool for peace building.[119] As societies continue to pursue restorative justice relentlessly, its definition has also become considerably varied. This research endorses the following definition of restorative justice:

> Restorative justice works to resolve conflict and repair harm. It encourages those who have caused harm to acknowledge the impact of what they have done and gives them an

[115] Strickland *Restorative Justice* 2.
[116] Liebmann *Restorative Justice* 25-26.
[117] Authors who have endorsed the goals of restorative justice theory include: Nabudere and Velthuizen *Restorative Justice* 3; Strickland *Restorative Justice* 1; Blume "Restorative Justice" 34; Beck "Introduction" 3; Buti "Restorative Justice" 699-701; Aertsen *et al* 2011 *TEMIDA* 9; Walgrave *Restorative Justice* 3; UNODC *Handbook on Restorative Justice* 7; Strang *Repair or Revenge* 44; Van Ness and Strong *Restoring Justice* 49; Daly "Restorative Justice" 88, etc.
[118] Buti "Restorative Justice" 700-701.
[119] Blume "Restorative Justice" 55.

> opportunity to make reparation. It offers those who have suffered harm the opportunity to have their harm or loss acknowledged and amends made.[120]

From the above, this study affirms that restorative justice is a process which brings together the offender, the victim, and their social networks within a *baraza* or *barza* (council) of wisdom to discuss what happened, resolve the dispute peacefully, and heal injuries in order to move towards a peaceful future. It offers the offender who has caused harm to the victim and the community an opportunity to acknowledge the impact of what he/she has done, request sincere forgiveness and make reparation. It also offers victims the opportunity to heal, have their injury or loss acknowledged and redressed in order to prevent further offences.

In an article, Sharon Levrant, Francis T. Cullen, Betsy Fulton and John F. Wozniak, have provided six points that suggest that the restorative justice movement may not achieve its progressive goals because of, amongst other things, corruption and, in fact, restorative justice may increase the extent and harshness of criminal sanctions.[121]

From the definition above, numerous authors have identified various principles of restorative justice.[122] Those principles, also called the signposts of restorative justice, which offer general guidelines proposed by Howard Zehr who is considered the "grandfather or pioneer" of restorative justice:[123]

- Focus on the harms of wrongdoing more than the rules that have been broken;
- Show equal concern and commitment to the victims and offenders, involving both in the process of justice;
- Work toward the restoration of victims, empowering them and responding to their needs as they see them;
- Support offenders while encouraging them to understand, accept, and carry out their obligations;

[120] Restorative Justice Consortium *Restorative Process* cited by Liebmann *Restorative Justice* 25.
[121] Levrant *et al* "Reconsidering Restorative Justice" 115.
[122] Examples include Blume "Restorative Justice" 42-43; Liebmann *Restorative Justice* 26-27; Zehr and Mika "Restorative Justice" 80-81; UNODC *Handbook on Restorative Justice* 33-35; Van Ness and Strong *Restoring Justice* 29.
[123] Zehr and Mika "Restorative Justice" 80-81.

- Recognise that while obligations may be difficult for offenders, they should not be intended as harms and they must be achieved;[124]
- Provide opportunities for dialogue, direct or indirect, between victims and offenders as appropriate;
- Involve and empower the affected community in the justice process, and increase its capacity to recognise and respond to community bases of crime;[125]
- Encourage collaboration and reintegration rather than coercion and isolation;[126]
- Give attention to the unintended consequences of our actions and programmes; and
- Show respect to all parties, including victims, offenders and justice colleagues.

Fundamental restorative justice values have been analysed by several scholars.[127] Pamela Blume however acknowledges that since there are multiple definitions of restorative justice, there is no uniform set of restorative justice values.[128] Substratum values include non-domination, empowerment, healing, participatory democracy, respect for all stakeholders, accountability of the offender and concern about the harm done and the needs of stakeholders – primarily, the victim, the offender and the community. High on the list of values, according to Brooks and cited by Antonio Buti, is reconciliation along with redemption and moral restoration.[129] Antonio Buti however reiterates that Roy Brooks associates restorative justice with the "atonement model",[130] which focuses on the rehabilitative aspects of reparations.[131] In the latest publication, *Restorative Justice Today,* Lorenn Walker states that, "it is important to remember that restorative justice is concerned with people's needs and offers people opportunities for healing

[124] Dorme suggests an addition to the principle: "[r]ecognize that while obligations may be difficult for offenders, those obligations should not be intended as harms, and they must be achievable". See Blume "Restorative Justice" 43.
[125] Dorme suggests the following addition to the principle: "[f]ind meaningful ways to involve the community and to respond to the community bases of crime". See Blume "Restorative Justice" 43.
[126] Dorme suggest the following addition to the principle: "[e]ncourage collaboration and reintegration of both victims and offenders, rather than coercion and isolation". See Blume "Restorative Justice" 43.
[127] Some of the values are cited in this research from: Blume "Restorative Justice" 40-41; Buti "Restorative Justice" 703-704; Van Ness and Strong *Restoring Justice* 53-150; Zehr and Mika "Restorative Justice" 80, etc.
[128] Blume "Restorative Justice" 40.
[129] Buti "Restorative Justice" 703.
[130] The atonement model offers an apology to the victims of past injustice, which will be made more significant by monetary or other additional reparations.
[131] Buti "Restorative Justice" 703.

while the mainstream criminal justice system primarily focuses on identifying and punishing people".[132]

The restorative justice theory is appropriate for this study because in the aftermath of gross violations of human rights and serious violations of IHL, "even a properly functioning justice system working at full capacity would not be able to handle such a large number of cases".[133] Restorative justice therefore may receive and resolve an important number of cases for a limited time. It is crucial to bear in mind that restorative justice is "victim-centric" and "conflict-centric", focused on restoring or rebuilding broken human relationships among the victim, the offender and their communities, and the acknowledgment of the harm by the offender who repairs the damage and receives forgiveness in view of a peaceful future. Lorenn Walker sees restorative justice as an opportunity to heal and to improve the criminal system and justice outcomes for a community.[134]

In dealing with past abuses, post-conflict justice in transitional societies tends to be retributive. The international judicial models, with their many expectations, could contribute to the enhancement of local judicial systems, but unfortunately, they have been removed from the social environment where the crimes took place and have not produced the best results that could enhance justice, capacity building of national systems and educate future generations. For example, Cherif Bassiouni points out that the total costs of the ICTY and ICTR have hardly benefited the judicial systems of the former Yugoslavia and Rwanda even though they have so far exceeded $1.7 billion.[135] The dissatisfaction with modern retributive justice and the need to allow active participation of both victims and offenders, addressing the causes of conflicts, redressing the harm done to the victims, and institutional transformation, etc., all imply that "criminal justice should become restorative rather than retributive".[136] Thus, both the RSA and

[132] Walker "Restorative Justice" 10.
[133] OHCHR *Report Mapping Exercise* §996.
[134] Walker "Restorative Justice" 4.
[135] Bassiouni "Mixed Models" 473.
[136] Wright *Justice for Victims and Offenders* cited by Van Ness and Strong *Restoring Justice* 29.

the DRC have resolved to combine retributive and restorative justice in order to deal with past abuses, reconcile the nation, and build a sustainable peaceful future.[137]

Indeed, the mechanism of retributive justice adopted in the RSA was domestic jurisdiction while in the DRC the ICC has jurisdiction over international crimes and complements existing domestic judicial systems. The mechanisms of restorative justice in the RSA however were the TRC which had the power to grant individualised amnesty and lustration by revealing the truth about the activities of the previous regime without removing perpetrators from the public position. In the DRC, the TRC did not have the power to grant amnesty for international crimes, but the vetting process as an element of institutional reform did not work because abusers were promoted and granted important positions within the government as well as in the army and police.

2.2.2.3 Transitional justice

There is an assumption that transitional justice mechanisms can help nations to move from apartheid to democracy, from military regime or armed conflicts to democracy, ensure accountability of offenders, restore the victims' dignity, promote reconciliation and prevent further violence. Thus, transitional justice is based on the assumption that the transition to peace after violent conflicts or authoritarian rule requires a clean break from past injustices in order to prevent their recurrence.[138] Besides, the official truth about state atrocities must be revealed; therefore, the victims' testimony becomes a shareable truth, a national story, and the basis of transitional consensus.[139] In Martien Schotsmans' view:[140]

> It seems that transitional justice can contribute more to sustainable peace after a political transition under the following conditions: that state institutions perform at least minimal

[137] In the RSA context, both the previous regime and the liberation movement were involved in human rights abuses. In the DRC, the situation seems to be similar as the LD Kabila regime (a former rebel movement that overthrew Mobutu's regime in a military coup) was succeeded by the current government of Joseph Kabila which opposed the different rebel groups. To end the conflict, the conflicting parties signed the Sun City peace agreement even though both had engaged in IHL violations. Consequently, if prosecutions were to be initiated in the RSA and in the DRC, the question that must be raised is who would prosecute whom?

[138] Buckley-Zistel and Zolkos "Gender" 3.

[139] Teitel *Transitional Justice* 83, 82.

[140] Schotsmans 2006-2007 *Annuaire* 201.

> functions or that an effective reform of these institutions can take place after a reasonable delay, that the need for national ownership is respected, that a minimal level of security and protection is established and that reflection on and commitment to possible reparation mechanisms exist.

Subsequently, States which have experienced past abuses have to decide in their own independent and sovereign manner to address the past in their own ways. This point of view has been conveyed by the UNHROHC's Report Mapping which claims that States are seldom in a position to meet their human rights obligations, particularly when that implies answering for serious crimes committed in the past. The scale and severity of the crimes dictate that *ad hoc* and exceptional measures be adopted to compensate for these failings and to provide adequate responses both to the victims and to society at large.[141] In addition, Priscilla Hayner shows that, "While the decision to dig into the details of a difficult past must always be left to a country and its people, there is much that can be learned from those who have taken this step before".[142] This is crucial because modern States are sovereign and independent; they have to make a decision without external interference. However, this does not mean that a sovereign State cannot be advised by and learn from past experiences of other States which had undergone similar situations.

During various armed conflicts in the eastern DRC, massive crimes were committed and, at the time of writing, these crimes are still being perpetuated.[143] Therefore, this research argues that there is a need for perpetrators to be made accountable for their crimes and for the establishment of a truth and reconciliation commission which can help to restore the victims' dignity, recommend prompt reparation, promote national reconciliation, and prevent further abuses. As armed conflicts in the DRC remain unresolved and and the rate of crimes continue to soar, this study calls for the designing of new transitional justice mechanisms in the DRC that would focus on establishing a new TRC by prioritising consultation with people in response to

[141] OHCHR *Report Mapping Exercise* §993.
[142] Hayner *Challenge of Truth Commissions* 6.
[143] See HRW http://www.hrw.org/news/2012/09/11/dr-congo-m23-rebels-committing (Date of use: 11 September 2012) and HRW http://www.hrw.org/news/2013/02/05/dr-congo-war-crimes-m23-congolese-army (Date of use: 5 May 2013).

the Congolese demand for justice and reconciliation.[144] Such mechanisms will help to uncover the whole truth about the massacre of approximately ten million people during different armed conflicts, the reasons behind the killings, sexual violence as a weapon of war, the looting of natural resources by foreign countries, the disappearance of Congolese *contingents* (*Zaireans)* who were keeping the Rwandan refugee camps under the UN mandate, and the killing of Rwandan refugees and the destruction of their camps in the DRC, and so forth.

However, The TRC will not act alone but it will complement the national judicial system. The ICC's jurisdiction will be extended to the whole of the Congolese territory in order to hold those who planned, ordered, and committed the crimes accountable for their deeds. Blanket amnesties are unhelpful not only because the DRC is a State Party to the Rome Statute of the ICC, but also because the country has to act in accordance with the UNSC S/RES/1315 (2000).[145] Considering also the fact that foreigners were involved in gross violations of IHL during the different armed conflicts in the DRC,[146] this research looks at the possibility of applying the principles of *Aut Dedere Aut judicare* and of universal jurisdiction in order to eradicate the idea of impunity of crimes under international law and contribute to preventing future atrocities,. By applying the principle *Aut Dedere Aut judicare,* foreign countries will be called upon to prosecute or extradite their nationals who have committed crimes in the DRC, while the principle of universal jurisdiction will request a third State to decide to prosecute warlords who have committed such crimes in the territory of the DRC despite their nationality.

[144] Different peace agreements in the DRC served as the basis for the creation or the reactivation of a national TRC. The agreements include the global and inclusive agreement on transition in the DRC on 16th December 2002; the Engagement Act of 23 January 2008; the Peace Agreement of 23 March 2009, and the Peace, Security and Cooperation Framework for the DRC and the region established on 24 February 2013. Therefore, it is important to officially recognise and publicly expose past atrocities.

[145] Referring to the Lomé Agreement, the UNSC adopted at its 4186th meeting on 14 August 2000, Resolution 1315(2000) recalling that "… amnesty provisions of the Agreement shall not apply to international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law".

[146] See OHCHR *Report Mapping Exercise* §37-41. Violations of IHL committed by the combatants of the FDLR; Committed by the combatants of the ADF–NALU (§350); and committed by soldiers of the Rwandan, Ugandan and Burundian armies (§179-289).

2.3 Justice in Post-conflict Situations

In post-conflict and post-authoritarian societies, justice is one of the values or means that can be employed to deal effectively with widespread human rights abuse and gross IHL violations. However, justice in post-conflict situations is invariably a key issue which is often neglected in the interest of peace and stability,[147] but which can lead to a climate of impunity. Edward Newman states that:

> If impunity remains, the social divisions remain open and volatile; if the state has not granted a public acknowledgement of the wrongs of the past, these wrongs constitute a continuing affront to society… In the absence of justice and accountability repressive institutions are unreformed, and while there may be democratic regime change, human rights abuse can continue, albeit under a different ideological guise.[148]

Furthermore, Newman argues that, "[j]ustice is a variable among a balance of values that a particular society must come to terms with".[149] Accordingly, transforming societies, in order to fight impunity, consolidate democracy, peace and stability, must implement justice adapted to their context that is to be "justice in transition".

The term "justice in transition" could refer to a post-conflict justice, a post-apartheid justice or a post-authoritarian justice implemented within a limited time in order to investigate grave human rights violations and breaches of IHL that occurred in the past with the purpose to restore the State authority, peace and the dignity of victims, and to promote national reconciliation. Catherine M. Cole understands "justice in transition" as justice during periods of regime change and political transition, or justice during times of political transition.[150] This view of justice in transition remains unclear; hence, it is the focus of the present section.

The concept of justice is not quite simple to define. Most renowned thinkers, according to Hans Kelsen, have failed to answer the question of what is justice. Hans Kelsen also admits that he cannot define justice, noting that even though Jesus Christ of Nazareth taught a new

[147] Newman "Transitional Norms" 31.
[148] Newman "Transitional Norms" 35.
[149] Newman "Transitional Norms" 47.
[150] Cole *Stages of Transition* 62.

justice of love "… Love your enemies and pray for those who persecute you",[151] he did not define what is justice. For Kelsen justice is that social order under whose protection the search for truth can prosper. Hence, his justice is the one of freedom, of peace, of democracy – of tolerance.[152] However, a Roman definition of *iustitia* states that justice "is a constant and perpetual desire to render everyone his due".[153] Shivesh C. Thakur maintains that giving "to each his due" is the conventional wisdom of the meaning of justice but the question to ask is what constitutes one's "due"? Thakur explains that, "What is 'due' to a person can almost equally plausibly be argued to be either whatever he has a right to, or whatever he deserves, or what he needs".[154] His view affirms Thomas Aquinas' definition of justice as the perpetual and constant will to render to each one his (or her) right.[155] The above definition of justice stresses what is "due" to and "right" for everyone in a constant and perpetual will. However, it is possible for two people to claim the same rights over one thing and at the same time.

Furthermore, Hans Kelsen remarks that, "Where there is no conflict of interests, there is no need for justice".[156] Therefore, because conflicts are inevitable, the need for justice will remain, and during armed conflicts, warring parties are regulated by the conduct of the *jus in bello*, commonly known as IHL. The Manual on the Implementation of IHL explains that IHL, "is a set of rules which seek for humanitarian reasons to limit the effects of armed conflict. IHL protects persons who are not or who are no longer participating in hostilities and it restricts means and methods of warfare".[157] However, the *jus in bello* provides legal protection even to people who are not or no longer participating directly in hostilities; it is common to observe one or both warring parties committing numerous violations to promote their own interests. In the aftermath of a conflict, it is the responsibility for the state to address those violations, and it is the duty of the judges to redress unjust situation by rendering justice to the affected parties.

[151] Matthew Chapter 5:44.
[152] Kelsen "What is Justice?" 206.
[153] Berger (ed) *Encyclopedic* 535a.
[154] Thakur *Justice* 10.
[155] Aquinas "Of Justice" 95.
[156] Kelsen "What is Justice?" 186.
[157] ICRC *Implementation of IHL* 13.

For this reason, Jan Klabbers distinguishes between the *jus ad bellum*, the *jus in bello*, and the *jus post bellum.* The *jus ad bellum* regulates the transition from peace to war and the *jus in bello* regulates conduct during war or during armed conflicts while the *jus post bellum* regulates and deals with the events in the period immediately after the end of armed conflict.[158] The *jus post bellum* is focused on the post-conflict peace therefore it is of interest in this section and because apartheid and the struggle against it, are regarded as international armed conflict. In this regard, Articles 1(2) and 55 of the UN Charter recognise and protect the right of a people to resist racist regimes and exercise their right to self-determination and independence. Based on the UN Charter, Article 1 of both the ICCPR and the ICESCR provide that States Parties to this Covenant shall respect and promote the realisation of the right of self-determination by all peoples. Therefore, such a legitimate struggle was acknowledged as international armed conflicts[159] by the UNGA through Resolution 3101(XXVIII) adopted on 12 December 1973.[160] On 8 June 1977, the Diplomatic Conference on the Reaffirmation and Development of IHL applicable in Armed Conflicts adopted the Protocol Additional to the Geneva Conventions of 12 August 1949, which relates to the Protection of Victims of International Armed Conflicts (Protocol 1 of 1977). Furthermore, Article 1(4) of Protocol 1 of 1977 recognises, an "armed conflict in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination".

From this provision, three groups can be identified. The first relates to peoples who are fighting against a colonial power, the second has to do with alien occupation and the third to peoples who are fighting against a racist regime. It is within the last group that the African National Congress can be situated, as it was a national liberation movement which fought the apartheid regime in South Africa. However, even if South Africa under the racist regime was not part to the Protocol 1, the ANC made a unilateral declaration on 28 November 1980 to

[158] Klabbers *International Law* 215.

[159] With regard to the UNGA Resolution 3103 (XXVIII), the notion of International armed conflicts that involve two or more States includes the struggle of peoples against colonial and alien domination and racist regimes.

[160] The resolution provides that "the armed conflicts involving the struggle of peoples against colonial and alien domination and racist régimes are to be regarded as international armed conflicts in the sense of the 1949 Geneva Conventions, and the legal status envisaged to apply to the combatants in the 1949 Geneva Conventions and other international instruments is to apply to the persons engaged in armed struggle against colonial and alien domination and racist regimes". UNGA Resolution 3103 (XXVIII) (1973) http://www.palis-d.de/archive/text/UNResolution3103.pdf (Date of use: 19 June 2015).

adhere to the Geneva Conventions of 1949 and Protocol 1 of 1977.[161] Thus, with regard to Article 96(3, c), the Geneva Conventions and Protocol 1 were equally binding on the ANC and the racist regime. Again, Article 85(4, c) of Protocol 1 of 1977 provides that, "Practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination" shall constitute grave breaches of this Protocol which may be prosecuted by any state on the basis of universal jurisdiction. Thus, from the above, it is clear that past abuses in South Africa were characterised by the international community as crimes against humanity committed during an international armed conflict in which the black majority fought against a racist regime.

This study refers to the definition of justice given by the UN Secretary General in the report on "the rule of law and transitional justice in conflict and post-conflict societies":

> Justice is an ideal of accountability and fairness in the protection and vindication of rights and the prevention and punishment of wrongs. Justice implies regard for the rights of the accused, for the interests of victims and for the well-being of society at large. It is a concept rooted in all national cultures and traditions and, while its administration usually implies formal judicial mechanisms, traditional dispute resolution mechanisms are equally relevant.[162]

In ordinary or peaceful times, justice is understood as the full enforcement of laws through formal judicial institutions. However, the role of justice in transition is to respond to the heinous crimes committed in the past during a limited period through formal and/or informal judicial institutions that guarantee the supremacy of the law above all individuals. Such institutions also offer victims a central role in the process (for example through healing) while seeking reconciliation that would produce a new and healthy democratic society. Justice in transition therefore does not presuppose the violation of the Constitution of the Republic, but it is what Professor Philippe Xavier calls a "*constitutional pact*"[163] that is concluded among parties to seal the constitutional normalisation process. For this reason, the choice of derogative "justice" or justice in transition remains temporal for the purpose of transitional moment in order to re-

[161] ANC and Umkhonto we Sizwe http://theirwords.org/media/transfer/doc/za_anc_mk_1980_02-fdcf14f6a39d5c73ebee6318a8568ad5.pdf (Date of use: 22 June 2015).
[162] UNSC *Rule of Law* §7.
[163] "Pacte Constitutionnel" see Philippe http://www.juridicas.unam.mx/wccl/ponencias/16/297.pdf (Date of use: 18 November 2011).

establish the rule of law.[164] Furthermore, transition from violent conflicts or authoritarian regimes to democracy means that the Constitution was frequently violated rather than respected by the previous regime, and it may seemingly contain provisions that allowed the authoritarian regime to rule the country in its own way.

Indeed, several modes of justice in transition that deal with past abuses are available. These could be through national, hybrid and international courts or through non-judicial systems. The following section will consider the goals of transitional justice and the mechanisms through which they are achieved.

2.3.1 The goals of transitional justice

In addressing international crimes of the past, transitional justice was restricted to situations of political transitions or "periods of political change",[165] but now, as Stephan Parmentier has observed, transitional justice is extended to all situations with a legacy of large-scale past abuses committed whether in violent conflicts or in the course of establishing a democracy. Therefore, transitional justice deals with a large numbers of victims and a large numbers of offenders.[166]

> The perpetrators include officials of the old regime – such as dictators, party leaders, judges, bureaucrats, and soldiers- and collaborators among the civilian population, including business and religious leaders, union officials, and ordinary folk who inform on their friends and neighbours. The victims argue that they were unjustly deprived of jobs, positions, educations, and property. Officials in the new regime, who were often victims of the old regime, must decide how to answer these calls for transitional justice.[167]

According to Chrisje Brants, the procedures of transitional justice mark a specific point in time and institute a particular socially, culturally and legally determined version of events, in a

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[164] "Experience has since taught us regime change does not necessarily set a society on an inevitable path to democracy and the rule of law. Yet, even regimes in states whose political transitions are unsuccessful often attempt to undertake some processes of reckoning with past abuses". Read Gahima *Transitional Justice in Rwanda* 1.

[165] Teitel 2003 *HHHJ* 69.

[166] Parmentier "The Missing Link" 382-383

[167] Posner and Vermeule http://www.law.uchicago.edu/files/files/40.eap-av.transitional.both_.pdf (Date of use: 28 March 2013).

particular and prescribed manner.[168] In the last three decades (since the late 1980s), the study of transitional justice has grown rapidly and, as a research area, it has become attractive to several disciplines such as international law, criminal law, political sciences, sociology, and so forth. Nevertheless, its definition is still in dispute and remains vague.

In this study therefore, the notion of transitional justice provided by the former UN Secretary General, Kofi Annan, in the report on "the rule of law and transitional justice in conflict and post-conflict societies" is endorsed. The report defines transitional justice 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. These may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof.[169]

This research agrees with the above notion of transitional justice because it covers the variety of contexts in which the legacy of large-scale past abuses are found. It explains the purpose and suggests a diversity of mechanisms that may be undertaken to transform the society. If well implemented, societies in transition can achieve national cohesion and sustainable peace.

Indeed, the goals of transitional justice depend on how societies in transition understand the concept. As contexts in which past abuses have been committed may differ, transitions may have different goals. However, Posner and Vermeule argue that many transitions seek political as well as economic reform; their achievement can be judged by the quality of political reforms and the success in creating a vibrant market economy.[170] According to the United States Institute of Peace (USIP), the goals of transitional justice are to respond effectively to past abuses by establishing the truth about what happened and why, acknowledging victims' suffering, holding perpetrators accountable, compensating for past wrongs, preventing future

[168] Brants "Introduction" 3.
[169] UNSC *Rule of Law* §8.
[170] Posner and Vermeule http://www.law.uchicago.edu/files/files/40.eap-av.transitional.both_.pdf (Date of use: 28 March 2013).

abuses, and promoting social healing.[171] In the same vain, Pablo de Greiff classifies two immediate goals of transitional justice, that is, providing recognition to victims and fostering civic trust, as well as two final goals – contributing to reconciliation and democratisation.[172]

From the above, goals of transitional justice can be identified as: gathering information, providing reparation, restoring the dignity of victims, establishing trust among citizens and in public state institutions, promoting national reconciliation, restoring national cohesion, preventing future abuses, and holding accountable those who planned and ordered the crimes whether through hybrid tribunal or international courts that complement existing domestic judicial systems.

Clara Ramírez-Barat asserts that public engagement is fundamental to the goals of transitional justice especially with regard to the following aims:

- Properly informing the public so that they can participate in the justice process;
- Giving affected populations a voice in the process to ensure transitional justice measures address their needs;
- Publicising goals and results so that justice is seen to be done;
- Promoting inclusiveness and transparency in the justice processes to advance democratisation;
- Building a sense of local ownership over the justice process.[173]

Indeed, the aforementioned goals of transitional justice can be attainted with a real political will through judicial mechanisms and non-judicial mechanisms known as measures, components or mechanisms of transitional justice dealing with past abuses.

[171] USIP http://www.usip.org/files/TRANSITIONAL%20JUSTICE%20formatted.pdf (Date of use: 5 June 2013).
[172] De Greiff 2010 *Politorbis* 21 see also Hovil *Gender* 4.
[173] Ramírez-Barat *Making an Impact* 3.

2.3.2 Mechanisms of transitional justice

As mentioned above, a holistic approach entails judicial and non-judicial mechanisms which are measures that societies in transition may adopt or combine in order to respond to past abuses. A number of scholars and practitioners have referred to those mechanisms in the framework that the former UN Secretary General, Kofi Annan, proposed in the report on *the rule of law and transitional justice in conflict and post-conflict societies.* An investigation of publications of the last five years, (2008-2013), shows that many of them outline measures such as criminal prosecutions, truth commissions, reparations, institutional reform, and vetting or lustration process.[174] Acknowledging that the list is not exhaustive, most authors have added memorialisation to it.[175] Furthermore, Priscilla B. Hayner talks about the promotion of national reconciliation,[176] whereas Van Beth Shaack and Ronald C Slye add amnesty and traditional dispute settlement system.[177] Thus,

> These mechanisms complement each other and are not exclusive. Most of the many countries that have looked to a past marked by dictatorship, armed conflict and large-scale serious crime have used several types of transitional justice measures, implemented simultaneously or gradually in order to restore rights and dignity to victims, to ensure that human rights violations are not repeated, to consolidate democracy and sustainable peace and to lay the foundations for national reconciliation.[178]

Subsequently, mechanisms of transitional justice that states can employ in dealing with the violent past endorsed in this study include prosecution or accountability, truth and reconciliation

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[174] Celermajer "The Role of Ritual" 124, Quinn "Transitional Justice" 338, Nabudere and Velthuizen *Restorative Justice* 10-11, Hayner *Challenge of Truth Commissions* 8, De Greiff 2010 *Politorbis* 21, Olsen, Payne and Reiter 2010 *JPR* 803, Fischer "Transitional Justice and Reconciliation" 407, Shaack and Slye *Enforcement* 6, OHCHR *Report Mapping Exercise* §57, Fombad http://www.nyulawglobal.org/Globalex/Africa_Truth_Commissions1.htm (Date of use: 15 April 2013); USIP http://www.usip.org/files/TRANSITIONAL%20JUSTICE%20formatted.pdf (Date of use: 5 June 2013), ICTJ http://untreaty.un.org/cod/avl/pdf/ls/Van-Zyl_RecReading1_.pdf (Date of use: 02 May 2013).

[175] Celermajer "The Role of Ritual" 124, Hayner *Challenge of Truth Commissions* 8, De Greiff 2010 *Politorbis* 21, Shaack http://iis-db.stanford.edu/docs/578/Transitional_Justice_CDDRL_Talk_2011.pdf (Date of use: 28 March 2013), ICTJ http://untreaty.un.org/cod/avl/pdf/ls/Van-Zyl_RecReading1_.pdf (Date of use: 02 May 2013).

[176] Hayner *Challenge of Truth Commissions* 8.

[177] Shaack http://iis-db.stanford.edu/docs/578/Transitional_Justice_CDDRL_Talk_2011.pdf (Date of use: 28 March 2013).

[178] OHCHR *Report Mapping Exercise* §57.

commission, amnesty process, lustration or vetting process, reparation, institutional reform, and building memorials.

2.3.2.1 Judicial mechanisms of transitional justice

Lindsey Raub concurs with Andrew Clapham that, "The Nuremburg trials confirmed that individuals had duties under international, as well as national, law and that international law could reach beyond states and attach responsibility to individuals for violations of these obligations".[179] Hence, for more than two decades, several *ad hoc* and hybrid tribunals have been created to prosecute those who are most culpable. National courts and tribunals can also respond to past abuses during the transitional period if they have the capacity to do so, are independent, and if they have not been party to the conflict. However, it is rare to find a fair and impartial judicial system in post-conflict societies as crimes could have been committed against the political will of the perpetrator.

2.3.2.1.1 National courts or tribunals

Van Beth Shaack and Ronald C Slye[180] argue that under national or domestic jurisdiction, a State has the power to regulate activities undertaken within or directed toward its territory as well as acts committed anywhere else by its nationals. Thus, international law today provides four justifications for a State to assert jurisdiction – territoriality,[181] nationality,[182] protection[183] and universality.[184]

[179] Raub 2009 *ILP* 1014.
[180] Shaack and Slye *Enforcement* 99-112.
[181] The territorial principle allows a State to criminalise and seek to prosecute certain undesirable conducts when they are committed within its territory.
[182] The nationality principle permits a State to apply its criminal laws to its nationals who may be either perpetrators or victims of criminal acts.
[183] Conducts that threaten interests that are vital to the state may also be criminalised pursuant to the protective principle.
[184] The universality principle allows all States to define and prosecute perpetrators of certain violations of international law (*delicta juris* gentium) regardless of the nationality of the perpetrator, the nationality of the victim, or the place of commission.

According to the territorial principle, under normal circumstances, formal national court systems have jurisdiction to prosecute unlawful acts or prosecute individuals accused of committing any single crime inside their territory in order to enforce national criminal laws and promote the rule of law. In this regard, Article 2 of the Congolese Criminal Code provides that transgressions committed on the territory of the DRC be punished in accordance with the law.[185] Therefore, offenders should be punished for the crimes they have committed. Joanna R. Quinn reasons that "if others see that someone is being punished for committing particular crimes, they will be deterred from committing the same crimes".[186] Alex Boraine also affirms that, "prosecutions are guard against impunity and the risk of future violations".[187] For Jonathan Burchell and John Milton, detection and apprehension of persons who contravene the criminal law that forbids the infliction of pain or suffering may be brought to punishment.[188]

In case of widespread crimes committed during dictatorships, authoritarian rule, military regimes, apartheid, or armed conflicts, national courts and tribunals may be unable to investigate serious large-scale crimes and prosecute a large number of perpetrators due to the lack of capacity or political will. As the activities are regarded as crimes against humanity, the international community cannot refrain from doing something. Thus, after the mass atrocities, a number of *ad hoc* international criminal tribunals were established in the 1990s. Such tribunals engaged the services of qualified international judges and prosecutors who used their expertise to investigate crimes and conduct impartial proceedings.[189]

2.3.2.1.2 Ad hoc tribunals established by the UNSC

Acting under chapter VII of the Charter of the UN, the UNSC established the ICTY, the ICTR and the Special Tribunal for Lebanon (STL). The ICTY and the ICTR were to prosecute crimes

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[185] Translated from the original in French: « *L'infraction commise sur le territoire de la République est punie conformément à la loi* ». Code Pénal Congolais *Journal Officiel de la RDC* No.0 Spécial du 30 Novembre 2004.
[186] Quinn "Transitional Justice" 331.
[187] Boraine *A Country Unmasked* 281.
[188] Burchell and Milton *Principles* 2.
[189] Raub 2009 *ILP* 1017-18.

of concern to all humankind and both had primacy over national courts to avoid *litispendance*[190] in the Former Yugoslavia and in Rwanda. The STL was created in the context of the fight against acts terrorism.

In the former Yugoslavia, widespread violations of IHL and the continued practice of "ethnic cleansing" became a threat to international peace and security. Subsequently, the UNSC decided through Resolution 808(1993) to establish an international tribunal, known as the ICTY, to prosecute persons responsible for serious violations of IHL from 1991.[191] Similarly, after the genocide and other systematic, widespread and flagrant violations of IHL in Rwanda, courts and the judiciary in Rwanda were unable to deal with the large number of suspects. At the request of the government of Rwanda (S/1994/1115), the UNSC, acting under chapter VII of the Charter of the UN, decided through Resolution 955(1994) to establish an international tribunal known as the ICTR. The sole purpose was to prosecute persons responsible for genocide and other serious violations of IHL committed in the territory of Rwanda and in the territory of neighbouring States between 1 January 1994 and 31 December 1994.[192]

The case of Lebanon remains significant. After a car bomb explosion on 14 February 2005 in which the former Prime Minister of Lebanon, Rafik Hariri, the Minister of the Economy and 19 other people were killed and hundreds more were wounded,[193] the terrorist act and its implications were considered a threat to international peace and security by the UNSC. Following the Agreement between the UN and the Lebanese Republic on 23 January and 6 February 2007, and acting under Chapter VII of the Charter of the UN, the UNSC decided through Resolution 1757(2007) to establish the STL.[194] Cherif Bassiouni notes that the STL is the first international tribunal to apply solely domestic law (Lebanese Criminal Code) to acts of

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[190] *Litispendance* may occur when two courts or tribunals have jurisdiction on one matter and create a conflict of jurisdiction. In other words, it is a case of concurrent jurisdiction often between national systems.

[191] UNSC Res 808 (1993) http://www.icty.org/x/file/Legal%20Library/Statute/statute_808_1993_en.pdf (Date of use: 16 August 2013).

[192] UNSC Res 955 (1994) http://politikwissenschaft.univie.ac.at/fileadmin/user_upload/inst_politikwiss/Kraler/WS0708/SC_Res_955__1994___ICTR.pdf (Date of use: 5 May 2011). However, it remains unclear why Resolution 955(1994) excluded several other crimes committed since 1990, as Rwanda was in a non-international armed conflict.

[193] Bassiouni "Mixed Models" 465.

[194] UNSC Res 1757 (2007) http://www.licus.org/liclib/USNC1559/UNSC%20Resolution%201757-May%2030,2007-Tribunal%20Ch%20VII.pdff (Date of use: 17 August 2013).

terrorism.[195] Therefore, the Hariri case was a highly selective and politicized affair, as it excluded several other crimes committed in the same period.[196]

In respect of this study, the above cases show that the ICTY and the ICTR were established by the UNSC to prosecute persons responsible for serious violations of IHL and genocide. The establishment of the ICTR also coincided with the end of the apartheid in the RSA. However, the UNSC did not consider the situation in the RSA a threat to international peace and security. Not only did the UNSC not see the necessity to establish an *ad hoc* tribunal as in the case of the former Yugoslavia or Rwanda, the RSA's government also did not request for such a tribunal. The same observation could be highlighted in the case of the DRC where, in 2006, the TRC ended its mission without any enquiry, but the UNSC did not intervene in the situation even at the request of the president and in accordance with the Sun City Accord that an *ad hoc* tribunal could be requested. However, the Hariri case became a threat to international peace and security which resulted in the establishment of the STL in 2007 while in the DRC conflict continued to escalate (even up to November 2013) without similar attention or action from the UNSC.

2.3.2.1.3 Hybrid tribunals

Two hybrid tribunals were created by the UN transitional administration – in East Timor and in Kosovo. Between 1975 and 1999, more than 120,000 out of a population of 650,000 East Timorese were killed during Indonesia's invasion and occupation of the country. The country's infrastructure was burned and looted, and the judicial system became virtually non-existent.[197] Consequently, on 30 August 1999, a referendum through which the East Timorese people expressed their clear wish to begin a process of transition towards independence under the authority of the UN was approved. Acting under chapter VII of the UN Charter, the UNSC decided through Resolution 1272(1999) to establish the UN Transitional Administration in East

[195] Bassiouni "Mixed Models" 468.
[196] Nashabe *Justice Dissected* 7-8.
[197] Bassiouni "Mixed Models" 451-452.

Timor (UNTAET).[198] The UNTAET established a Special Panel of three judges two of which were foreigners and the third an East Timorese. The panel was authorised to apply the law of East Timor as well as international law where appropriate to handle serious criminal offences.[199]

Similarly, serious crimes were committed during the Bosnian civil war in Kosovo, but the local judicial system also lacked both the capacity and the autonomy to conduct trials independently. Since prosecuting crimes was beyond the jurisdiction of the ICTY, to address these mounting crises of accountability and justice, the United Nations Interim Administration Mission in Kosovo (UNMIK) appointed a panel of three judges which included two international judges to adjudicate in existing Kosovar courts through Regulations 6 and 64.[200] Lindsey Raub notes that both international criminal law and international human rights law could be applied and the participation of international judges created an air of impartiality.[201]

Additionally, the Special Court for Sierra Leone and the Extraordinary Chambers in the Courts of Cambodia (ECCC) were created by a treaty-based agreement between the UN and the governments of these two countries. The devastating ten-year civil war in Sierra Leone was ended by the Lomé Peace Accords between the government and the Revolutionary United Front (RUF) which spelled out a power-sharing formula and granted general amnesty. Thus, the UNSC established the UN Mission in Sierra Leone (Res 1270(1999)) which concluded an agreement with the government to establish a Special Court for Sierra Leone. Cherif Bassiouni notes that the Special Court is a "treaty-based *sui generis* court of mixed jurisdiction and composition". The trial chamber consisted of two international judges and one local judge, while the appeals chamber had three international judges and two local judges.[202]

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[198] UNSC Resolution 1272(1999) http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N99/312/77/PDF/N9931277.pdf?OpenElement (Date of use: 19 August 2013).

[199] UNTAET Regulation 2000/11 §11 http://www.un.org/peace/etimor/untaetR/Reg11.pdf (Date of use: 19 August 2013); UNTAET Regulation 2000/15 §22.2 http://www.un.org/peace/etimor/untaetR/Reg0015E.pdf (Date of use: 19 August 2013).

[200] See UNMIK/REG/2000/6 §1.1 http://www.unmikonline.org/regulations/2000/re2000_06.htm (Date of use: 21 August 2013); and UNMIK/REG/2000/64 §2.1 http://www.unmikonline.org/regulations/2000/re2000_64.htm (Date of use: 21 August 2013).

[201] Raub 2009 *ILP* 1028.

[202] Bassiouni "Mixed Models" 442.

In Cambodia on the other hand, following the atrocities by the Khmer Rouge, the 1991 Paris Accords ended Cambodia's civil war by calling for the creation of the UN Transitional Authority in Cambodia (UNTAC). Nonetheless, the new government was unwilling to prosecute any Khmer Rouge leader and it rejected the establishment of an international tribunal.[203] To end impunity, a draft agreement between the UN and Cambodia was concluded and approved by the General Assembly regarding the ECCC which was constituted by five judges (three Cambodians and two foreigners appointed by the UN) who were authorised to prosecute Khmer Rouge leaders.[204]

2.3.2.1.4 International Criminal Court (ICC)

At the Diplomatic Conference of Plenipotentiaries on the establishment of the International Criminal Court held in Rome from 15 June to 17 July 1998, an international treaty was adopted known as the Rome Statute. The treaty later established the ICC and came into force on 1 July 2002 with the resolve to put an end to impunity. It therefore became the first universal and permanent criminal court. Its Preamble recalls "the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes" by emphasizing its "complementary to national criminal jurisdictions". The ICC exercises its jurisdiction over persons for war crimes, crimes against humanity and genocide (Article 5) committed only after 1 July 2002, as well as aggression (jurisdiction in 2017) in accordance with the principle of non-retroactivity *ratione personae* (Article 24) irrespective of the official position (Article 27). The Statute recognises the referral of situations by State Party (Article 14), by State which is not a Party to the Statute if it accepts the jurisdiction of the ICC (Article 12(3)) and by the Security Council acting under Chapter VII of the Charter of the UN (Article 13b). However, the Prosecutor may also initiate investigations *proprio motu* based on information on crimes within the jurisdiction of the Court (Article 15). However, Article 17(1a) provides that the ICC shall exercise only its

[203] Bassiouni "Mixed Models" 458-62.
[204] UNSC Res 745 (1992). http://www.lcil.cam.ac.uk/sites/default/files/LCIL/documents/transitions/Cambodia_7_UNSC_Resolution_745.pdf. (Date of use: 21 August 2013) and UNGA/RES/10135 (2003) http://www.un.org/News/Press/docs/2003/ga10135.doc.htm (Date of use: 26 August 2013).

jurisdiction if the State is unwilling or genuinely unable to carry out the investigation or prosecution.

From the above descriptions, the *ad hoc* tribunals do not involve local judges and they are located far from where crimes were committed. Therefore, trials do not have impact on the local population who witnessed the atrocities and who would like to attend trials to testify against those responsible for the atrocities. Besides, getting testimonies from victims and witnesses during an enquiry and obtaining access to potential evidence remain a challenge in such situations. Since international tribunals do not necessarily involve the local population, Lindsey Raub notes that they risk a lack of national ownership in the process. On the contrary, hybrid tribunals seem to have improved the limitation of *ad hoc* tribunals by combining international and local judges and by working in the same settings where the crimes were committed, where also affected populations can attend the trials. Hybrid tribunals not only encourage trust among victims who would like a fair and impartial trial, but also enhance justice capacity building. Lindsey Raub notes that the local population is aware that the progress of trials and the tribunal contributes to the rebuilding of the national infrastructure, in particular the judiciary.[205]

Among challenges are the prolonged time of dealing with cases, budgets, security of eyewitnesses, and the issue of cooperation with local authorities. Each tribunal (at least theoretically) has the opportunity to learn from its predecessors and incorporate their successes while avoiding their failures.[206] Indeed, a number of authors have criticised the slowness of the ICC proceedings as well as the delay of the Appeals Chamber in issuing judgements. The fact that proceedings are often too slow and the trials prolonged have disappointed victims waiting for the conviction of their persecutors and for reparations. Thus, the ICC must make effort to prevent further delays in proceedings and avoid long trials in order to restore the credibility of the court and avoid frustration on the part of victims.[207]

[205] Raub 2009 *ILP* 1020-21.
[206] Raub 2009 *ILP* 1043.
[207] Luzolo and Bayona *Procédure Pénale* 759; Rowe (2010) and Steger (2014) "For Conservatives" 8; Mihajlov 2011 *MJIL* 33; IAB (International Bar Association) "Enhancing Efficiency" 19; Laborde-Barbanègre and

Others criticise the ICC for prosecuting only African cases for example, those of the DRC, Uganda, Central African Republic, Mali (four cases referred by the affected States), Darfur/Sudan and Libya (two cases referred by the UNSC), and Kenya and Côte d'Ivoire (two cases which the ICC commandeered based on Prosecutor's *proprio motu powers*). From the above, it can be deduced that since the creation of the ICC, African States, the UNSC and the ICC's Prosecutor brought African cases to the ICC. Besides cases referred by States, others come from the UNSC but it is alleged that the Prosecutor focuses only on Africa as there were no cases from other parts of the world. Du Plessis, Maluwa and O'Reilly tend to support the allegation that there is an anti-African bias or that the ICC is selectively biased against Africa.[208] Similarly, John Mukum Mbaku points out that the African critics of the activities of the ICC note that the Court is reluctant to prosecute powerful western countries including the United States, the United Kingdom, Russia and China, which can threaten its existence.[209] However, Alana Tiemessen concurs that referrals by States Parties and by the UNSC have undermined the independence and impartiality of the ICC as prosecutions were politicised by targeting only one side of the conflict which reflects the strategic political interests of referring actors.[210] Based on those allegations, Tim Murithi argues that, "the ICC system and the Office of the Prosecutor have failed to make a strong case, which ultimately can only be reinforced by actions to demonstrate that this Court is for all and not for the select and marginalised few".[211]

No investigation for instance has taken palce in respect of the crimes committed in Iraq by the coalition of America and Britain (2003-2008) or in Syria (since 2011), which are prosecutable under international law. The ICC has jurisdiction over crimes committed in Iraq because the United Kingdom is a State Party since 4 October 2001 even though the crimes were committed on the territory of Iraq which is not a Party to the Rome Statute. Thus, on 13 May 2014, the Prosecutor decided to re-open the preliminary examination of the situation in Iraq in order to determine whether there is a reasonable basis for proceeding with an investigation. The decision was made following further information submitted to the Office of the Prosecutor on 10

Cassehgari "Reflections on ICC" 1; WCRO (War Crimes Research Office (WCRO), "Expediting Proceedings" 48, 50-51; IBA "Procedural Crossroads" 10; *Avocats sans Frontières* "Legal Representation" 14.

[208] Du Plessis, Maluwa and O'Reilly 2013 *IL* 2.

[209] Mbaku "International Justice" 10.

[210] Tiemessen 2014 *IJHR* 7.

[211] Murithi "Embattled Relationship" 3.

January 2014 in accordance with the requirements of Article 15(2) of the Rome Statute.[212] This research argues that investigation against nationals of the United States, the United Kingdom, and Syria, among others will alleviate criticism against the ICC.

Indeed, the difference between the ICC and the *ad hoc* tribunals is that the ICC is a permanent court. It does not act, even temporally, as a substitute for the national judicial systems but complements them "unless the State is unwilling or genuinely unable to carry out the investigation or prosecution".

Nonetheless, Cherif Bassiouni argues, there are no internationally agreed upon guidelines for determining which modalities of accountability should be applied to different cases by societies in transition.[213] The need raised by the population to create a hybrid or *ad hoc* tribunal against perpetrators does not suffice if the UNSC does not share the same view.

2.3.2.2 Non-judicial mechanisms

The components of non-judicial mechanisms of transitional justice include truth and reconciliation commission, lustration or substitute criminal proceedings and vetting process, institutional reform, amnesty process, reparation, and building memorial.

2.3.2.2.1 Truth and Reconciliation Commission (TRC)

Of the various elements of non-judicial mechanisms mentioned above, a number of authors have focused on truth and reconciliation commissions.[214] According to Alison Bisset, truth

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[212] Office of the Prosecutor http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/reports%20and%20statements/statement/Pages/otp-statement-iraq-13-05-2014.aspx (Date of use: 16 February 2015).

[213] Bassiouni "Mixed Models" 472.

[214] Bisset *Criminal Courts* (2012), Fombad http://www.nyulawglobal.org/Globalex/Africa_Truth_Commissions1.htm (Date of use: 15 April 2013), Hayner *Challenge of Truth Commissions* (2011), Hayner *Facing the Challenge of Truth Commissions* (2002), Fischer "Transitional Justice and Reconciliation" (2011), Wiebelhaus-Brahm "Truth Commissions" (2010), Hazan *Behind Truth and Reconciliation* (2010), Nadeau "Quelle justice après la guerre? "(2009), Totten *Nw.J. Int'lHum.Rts*, Ngoma-Binda *Justice Transitionnelle* (2008), De León" A Twisted Path to Reconciliation?"

commissions emerged in the early 1980s, as a number of states undertook the transition from authoritarian regime to democratic rule or from war to peace often in the aftermath of violent internal conflicts.[215] Rachel Kerr and Eirin Mobekk point out that truth commissions may have different names, such as truth and justice commission, truth and reconciliation commission, historical clarification commission,[216] commission of inquiry, and so forth, but this study retains the appellation, truth and reconciliation commission (TRC).

Acknowledging that truth commissions are not easily defined, authors have referred to the leading authority on the subject namely Priscilla B. Hayner. Mark Freeman finds Hayner's definition helpful but he argues that the dfinition overlooks other essential attributes of truth commissions. In her book *Unspeakable Truths: Facing the Challenge of Truth Commissions*, Priscilla B Hayner uses the term "truth commissions" to refer to those bodies that share the following characteristics:

> (1) truth commissions focus on the *past*; (2) they investigate a pattern of abuses over a period of time, rather than a specific event; (3) a truth commission is a temporary body, typically in operation for six months to two years, and completing its work with the submission of a report; and (4) these commissions are officially sanctioned, authorized, or empowered by the state (and sometimes also by the armed opposition, as in a peace accord).[217]

At the time of Priscilla B Hayner's study, twenty-one truth commissions had already been in operation. Thus, she identifies other essential elements that all Commissions have in common namely that they are established at a period of transition from one government to another, and to investigate recent events, usually at the point of a political transition. They are tasked with the mission to investigate widespread crimes which are politically motivated and perpetrated in order to weaken political opponents.[218]

(2007), Freeman *Procedural Fairness* (2006), Tomuschat "National Prosecutions" (2006), Teiltel *Transitional Justice* (2000), Boraine *A Country Unmasked* (2000)

[215] Bisset *Criminal Courts* 26.

[216] Kerr and Mobekk *Peace and Justice* 130.

[217] Hayner *Facing the Challenge of Truth Commissions* 14.

[218] Hayner *Facing the Challenge of Truth Commissions* 17.

As mentioned above, Mark Freeman claims that the Hayner's definition has omitted other essential attributes of truth commissions. Thus, Mark Freeman redefines a truth commission as follows:

> A truth commission is an *ad hoc*, autonomous, and victim-centered commission of inquiry set up in and authorized by a state for the primary purposes of (1) investigating and reporting on the principal causes and consequences of broad and relatively recent patterns of severe violence or repression that occurred in the state during determinate periods of abusive rule or conflict, and (2) making recommendations for their redress and future prevention.[219]

In her latest updated publication, Priscilla B. Hayner argues that Freeman's definition is more descriptive than definitional. She therefore revises her definition in the following terms:

> A truth commission (1) is focused on past, rather than ongoing, events; (2) investigates a pattern of events that took place over a period of time; (3) engages directly and broadly with the affected population, gathering information on their experiences; (4) is a temporary body, with the aim of concluding with final report; and (5) is officially authorized or empowered by the state under review.[220]

Priscilla B. Hayner further notes that the truth commissions are typically tasked with some or all of the following goals: "to discover, clarify, and formally acknowledge past abuses; to address the needs of victims; to "counter impunity" and advance individual accountability; to outline institutional responsibility and recommend reforms; and to promote reconciliation and reduce conflict over the past".[221] Ruti G. Teitel adds that, if the mandate of the truth commissions is to establish what happened during past rule, fulfilling this mandate goes beyond amassing the facts. Like successor trials, truth commissions are forums for public historical accountability regarding contested traumatic events because transitions imply a displacement or substitution of truth regimes.[222] Furthermore, Alison Bisset notes that truth commissions aim to contribute to the transitional justice objective of preventing human rights abuse in the future by publishing

[219] Freeman *Procedural Fairness* 18.
[220] Hayner *Challenge of Truth Commissions* 11-12.
[221] Hayner *Challenge of Truth Commissions* 20.
[222] Teitel *Transitional Justice* 84.

their final report, which documents their findings, outlines patterns of abuses and makes recommendations for reform.[223]

In the researcher's view, even if Hayner's definition appears sufficiently flexible, it seems to overlook one key element in providing reparation which is as essential as the right to remedy. Without reparation, there can be no healing and reconciliation.

2.3.2.2.2 Lustration or substitute criminal proceedings and vetting process

Lustration or vetting process is known also as screening, disqualification or purging. A number of scholars and legal practitioners[224] view lustration as a process of removing or limiting access to public office of politicians, members of judicial institutions who are corrupt or guilty of misconduct, and members of the armed or security forces of the State who have committed crimes under the past authoritarian regime or have collaborated with a criminal organisation. It is also a process of declassification which opens the public archives and documents files of the former secret police or secret intelligence in order to inform the public. Similarly, Maja Kova shows that the vetting process calls for individual responsibility of those involved in past human rights abuses.[225] The UN Secretary General notes it has proven to be a vital element of transitional justice and it facilitates a stable rule of law in post-conflict countries.[226]

According to Gábor Halmai, the idea behind the process of lustration is the prevention of human rights abuses through personnel reforms which excludes those who lack integrity from public institutions, or at least informs the general public, especially the voters, of the history of those who run for public positions and which builds fair and efficient public institutions. The author argues that the advantage of vetting is that persons who had worked in those institutions could not be elected because it was conceptualised simply as a response to past misconduct.[227]

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[223] Bisset *Criminal Courts* 28 and 31.
[224] Nalepa "Trust-Building" 2; Nalepa "Lustration" 735; Smith *War Crimes* 148-149; Shaack and Slye *Enforcement* 6-9; Uzelac "Barriers to Lustration" 57; 47-52, Markešić "To Lustration Crisis" 113; Johnson http://www.jurlandia.org/lustration.htm (Date of use: 2 April 2013); Teitel *Transitional Justice* 164; Méndez "Transitional Justice" 12.
[225] Kova 2007 *ICSR* 54.
[226] UNSC *Rule of Law* §52.
[227] Halmai "Lustration and Access to the Files" 24-26.

Alan Uzelac states that lustration practices are related primarily to those who hold high offices. A purely political and informal removal of all those who are supposed to have links with the past regime does not differ at all from the totalitarian practices of the past. In a civilised environment, lustration must be undertaken through legal practices. If belonging to or collaborating with a criminal organisation was not deemed to be a crime, then, applying lustration is in fact running against one of the fundamental principles of the rule of law, that is, the prohibition of the retrospective application of the law. The principle *nullum crimen, nulla poena sine lege* is today understood as one of the fundamental human rights. To violate that fundamental human right in the name of protecting fundamental human rights sounds contradictory, if not absurd.[228] However, it appears that Alan Uzelac excludes criminal activities carried out by the secret service which were not considered crimes under the domestic law during the previous regime. Such crimes could breach the rule of customary law considered a norm in respect of *jus cogens* which creates obligations *erga omnes* – binding to all States without exception.

Nonetheless, lustration can be politically misused, argues Monika Nalepa. Politicians can use and abuse lustration policies to their own advantage therefore lustration cannot lead to reconciliation with the past but may fail to improve trust in political élites and State institutions.[229] Ivan Markešić shows that such policies can result in many conflicts and clashes and passing such a law cannot be in the interest of the State.[230] Additionally, Van Beth Shaack and Ronald C Slye note that the difficulty lies in the fact that war crimes or abuses may reoccur because they were never properly confronted and condemned in the first place.[231]

If lustration is implemented, says Anđelko Milardović, it has to be observed only in the context of transitional justice, it must not be a contest with political and ideological opponents, but it must have a legal form.[232] However, Dragoş Petrescu notes that it is difficult to apply lustration laws even if they introduce a temporary limitation of 10 years for access to public

[228] Uzelac "Barriers to Lustration" 57 and 47-52.
[229] Nalepa "Trust-Building Mechanism? 2.
[230] Markešić "To Lustration Crisis" 113.
[231] Shaack and Slye *Enforcement* 9.
[232] Milardović "Waves of Democratization" 107.

office.[233] Vesna Rakić-Vodinelić notes that some of the reasons for this include the lack of social consensus on the necessity to confront the past; the idea of invoking "legalism" as an excuse for inaction when it comes to facing the past; mocking the TRC; hindering the work of the lustration commission, and so on.[234]

Consequently, Ivan Markešić finds lustration unnecessary because it is not indispensable to the task of rebuilding the future. It is helpful to know what happened in the past in order to avoid similar mistakes. However, by "digging" into the past and administering justice based on the past make it difficult to build a happy future. Indeed, one should not forget what happened in the past but forgiveness is the only way to reconciliation and personal catharsis.[235]

2.3.2.2.3 Institutional reforms

Under dictatorships, military regimes, armed conflicts or apartheid, public institutions are the key tool for maintaining authoritarian rules. Consequently, opponents of the regime or rebels are often intimidated, oppressed, murdered or assassinated. In the aftermath of a repressive rule, in order to move on, transitional societies may exclude dangerous people or persons lacking integrity that had planned, ordered or executed atrocities from participating in reformed institutions that support a peaceful transition to democracy, sustain peace and safeguard the rule of law. The process is referred to as vetting in the context of institutional reform which is often based on the recommendation of a truth commission or one of the measures of transitional justice.

According to the International Centre for Transitional Justice (ICTJ), institutional reform is the process of reviewing and restructuring public State institutions so that they respect human rights and preserve the rule of law, and are accountable to their constituents. Federico Borello adds that it is an essential condition for preventing abuses from recurring.[236] Institutional reform aims to acknowledge victims as citizens and rights holders and to build trust between all citizens

[233] Petrescu "Dilemmas" 146-148.
[234] Rakić-Vodinelić "Attempt of Lustration" 171-178.
[235] Markešić "To Lustration Crisis" 126.
[236] Borello *Road to a Just Peace* 46.

and their public institutions. Institutional reform may also include many justice-related measures such as vetting, structural reform, oversight, transforming legal frameworks, disarmament, demobilisation, and reintegration as well as education.[237]

2.3.2.2.4 Amnesty process

In the case of a non-international armed conflict, escalation often results when the warring parties fail to stop fighting and negotiate a settlement. However, Article 13 of the Additional Protocol II to the Geneva Conventions states that the civilian population and individual civilians shall enjoy the protection and shall not be the object of attack arising from military operations. Parties are presumed to be aware that any attack against the civilian population as well as individual civilians constitutes a war crime as provided by Article 8 (2,b,i) of the Rome Statute. Even a third party may help parties to reach agreement; a warring party responsible for crimes under international law may be unwilling to cease hostilities without clear guarantee that an act barring any prosecution against them will be signed. That act is referred to as the law of amnesty. The law of amnesty is crucial in overcoming the issues that require conflict resolution. Mahnoush H. Arsanjani asserts that, "Amnesties sometimes may be the only feasible option for stopping bloodshed and even for enhancing aggregate human rights, in the absence of the ability or the willingness of the international community to get involved".[238] In such situations, citing Mahnoush H. Arsanjani,[239] Darryl Robinson adds that "amnesties might be regarded as 'the price for getting rid of tyrants and their associates', and they have therefore been considered 'one of the techniques for ending civil wars or enabling transitions from authoritarian to democratic governments'".[240]

Van Beth Shaack and Ronald C Slye agree that the granting of amnesty is one of the most common responses of governments to abuses by their own officials or by their opponents in order to put things behind them. The authors affirm that amnesties provide an individual immunity from legal accountability. They usually protect an individual from both criminal and

[237] ICTJ http://ictj.org/our-work/transitional-justice-issues/institutional-reform (Date of use: 31 May 2013).
[238] Arsanjani 1999 *ASIL* 66.
[239] Arsanjani 1999 *ASIL* 65.
[240] Robinson 2003 *EJIL* 495.

civil liability.[241] Thus, Alex Boraine explains that the act of amnesty involves pardoning offences, bringing the perpetrator back into society, and helping to restore to the victim and the perpetrator the dignity which both lost.[242] Furthermore, Andrea Lollini notes that a decision granting amnesty precludes any future criminal or civil proceeding against the person receiving amnesty[243] for what he or she had done. Again, Antonio Cassese contends that legislation granting amnesty cancels the crimes because "After the enactment of such laws, conduct that was previously criminal is no longer such, with the consequence that: (i) prosecutors forfeit the right or power to initiate investigations or criminal proceedings; and (ii) any sentence passed for the crime is obliterated".[244] Thus, human rights organisations generally oppose the use of amnesties in any circumstance, arguing that they further impunity and undercut domestic and international efforts to deter future gross violations of human rights:[245]

> We code amnesties when a state officially declares that those accused or convicted of human rights violations, whether individuals or groups, will not be prosecuted or further prosecuted, and/or will be pardoned for their crimes and released from prison.[246]

Accordingly, blanket amnesty, partial amnesty and self-amnesty granted for crimes against humanity, war crimes or genocide are illegal and promote impunity. In this regard, Laura M Oslon states that, "The state must be aware that those granted amnesty would not be immune from prosecution outside that state".[247] On the issue of blanket amnesty, Priscilla B. Hayner notes that the ICC would simply not accept the idea of a national amnesty for the most serious crimes under international law.[248] The reason is that the Preamble of the Rome Statute affirms 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". However, as the ICC plays a complementary role to national judicial systems, cases that could be tried at the national level

[241] Shaack and Slye *Enforcement* 978.
[242] Boraine *A Country Unmasked* 296.
[243] Lollini *Constitutionalism* 61-62, 102-103, 106 and 111.
[244] Cassese *International Criminal Law* 312.
[245] Shaack and Slye *Enforcement* 978.
[246] Olsen, Payne and Reiter 2010 *JPR* 805.
[247] Olson 2006 *IRRC* 289.
[248] Hayner *Challenge of Truth Commissions* 116.

are tried by the ICC regardless of the principle of *Ne bis in idem.* This is to prevent shielding the accused, as provided by Article 20 (3) of the Rome Statute. For instance, in the Barrios Altos case, the Inter-American Court of Human Rights (IACHR) considers that all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible because they are intended to hinder the investigation and punishment of those responsible for serious human rights violations. They are prohibited because they violate non-derogable rights recognised by international human rights law.[249]

As these crimes shocked people's conscience, other States are permitted to exercise universal jurisdiction over them.[250] In Sierra Leone, Article IX of the *Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front* of July 1999 that granted amnesty for international crimes Foday Sankoh, all combatants and collaborators does not stop the Special Court of Sierra Leone from having jurisdiction over persons within its competence in respect of those crimes.[251] Although IHL[252] encourages granting amnesty to those who took part in non-international armed conflicts which are subject to prosecution for the violation of domestic criminal law, the amnesty excludes those who may have committed crimes under international law as in the case of the DRC where amnesty laws (2003, 2009 and 2013)[253] excluded such crimes committed during armed conflicts.

Jonathan Sisson and Mô Bleeker explain that for humanitarian reasons, blanket amnesties allow demobilised combatants, prisoners of war and civilian detainees who should be released from detention, and conscientious objectors and deserters who may have sought asylum abroad to be reintegrated into their communities. However, the authors argue that any decision to grant limited amnesty to offenders should respect the following conditions:

[249] *Case of Barrios Altos v. Peru* (2001) IACHR 14.
[250] Shaack and Slye *Enforcement* 984.
[251] In this regard, the UN holds that the amnesty and pardon in Article IX of the agreement shall not apply to international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law. See UNSC S/1999/836.
[252] Article 6(5) of Additional Protocol II to the Geneva Conventions calls for the "broadest possible amnesty".
[253] Since 2003, three amnesties laws have been signed as part of the peace settlement in the RDC with the aim of encouraging warlords to disarm, to transform their rebel group or movement into political party, and to become integrated into public institutions.

- Amnesty should only be considered in circumstances which such measures do not violate obligations arising under international law;
- Amnesty policies should be linked to non-judicial mechanisms of accountability, for example, truth commissions or vetting, to discourage impunity and strengthen the rule of law;
- Amnesty for less serious offenders and those lower down in the chain of command is more appropriate as a measure when criminal proceedings are foreseen for the most serious perpetrators and when combined with other non-judicial measures;
- Amnesty policies should include provisions for the individual adjudication of claims, where appropriate.[254]

Granting amnesty for crimes under international law is irrelevant because those crimes are not subject to any statute of limitations that could prohibit their investigation or prosecution. However, the commitment to grant amnesty during the de-escalation process is a mechanism that allows warring parties or opponents to reach an agreement as a framework of transition from armed conflict to peace or from authoritarian regime to democracy. Unfortunately, granting amnesty is a violation of the domestic criminal law, and it therefore, promotes impunity and violates the victims' right to remedies.

2.3.2.2.5 Reparation

Often in the aftermath of mass atrocities, it is found that many families experience the loss of their loved ones due to death or disappearance which means an increase in the number of widows/widowers and orphans. Some families experience loss of property due to vandalism or looting, while many lose their jobs as they become refugees or displaced people or because the companies they worked for had been vandalised or shut down. Some people are unable to work, function or perform any task because they were injured and then disabled due to the amputation of some parts of their bodies. However, the wrongful acts may have been committed by the

[254] Sisson and Bleeker 2010 *Politorbis* 74.

State against its own citizens or against the citizens of another State or they may have been committed by rebel groups.

Thus, a third State that provides support to rebel groups against a neighbouring country, as noted by the ICTY in the Appeals Chamber, can be held internationally accountable for any misconduct of the group if it is proved that it wields overall control over the group.[255] All those wrongful acts need reparation which could be in the form of restitution, compensation, and rehabilitation, etc., whether in material or moral form. In this regard, the leading opinion of the Permanent Court of International Justice (PCIJ) in the *Chorzów Factory* case states that, "It is a principle of international law that the breach of an engagement involves an obligation to make a reparation in an adequate form".[256] In the case of serious human rights violations and breaches of IHL, reparations can be made through national judicial systems if they are not part of the conflict, through *ad hoc* tribunals, through hybrid tribunals, through the ICC,[257] or following the recommendation of the TRC. Indeed,

> Since the Second World War, with the establishment of the United Nations and the acceptance of the Charter of the United Nations as the principal instrument of international law, the international legal framework has gradually been transformed from a law of coexistence to one of cooperation. The internationalization of human rights was part of this process. With the adoption of the Universal Declaration of Human Rights and the International Covenants on Human Rights, it was recognized that human rights were no longer a matter of exclusively domestic jurisdiction and that consistent patterns of gross violations of human rights warranted international involvement. Furthermore, international human rights law progressively recognized the right of victims of human rights violations to pursue their claims for redress and reparation before national justice mechanisms and, if need be, before international forums.[258]

In the words of Naomi Roth-Arriaza, "Reparations are generally framed as repair for past damage, putting the victim back where he or she would have been, had the wrong not occurred".[259] Additionally, the USIP states that, "Reparations are intended to recognise and repair harm, restore victims' dignity and rebuild trust and solidarity among communities that

[255] See the judgment *Prosecutor v. DU[KO TADI]* (1999) (94:1A) ICTY 131.
[256] *Case Concerning the Factory Chorzów* (1927) 9 PCIJ 21.
[257] See the Rome Statute respectively on Article 75 (relative to reparations to victims) and 79 (relative to a trust fund).
[258] OUNHCHR *Reparations Programmes* 5.
[259] Roth-Arriaza 2004 *HICLR* 160.

have been torn apart by violence".[260] It is in this regard that transitional justice seeks to restore victims' dignity through the establishment of forums for justice, truth and reparation for the wrongs they have suffered.[261] Lisa Magarell confirms that efforts to restore victims' dignity are reinforced through reparations to truth seeking, accountability, and reform.[262] However, it is often difficult to restore the victims to their previous situations or to repair harm following the criterion of *restitutio in integrum*. For example, even if it were possible to rebuild destroyed houses/buildings or return properties looted, could loved ones who were killed be restored? Hence, Naomi Roth-Arriaza raises the question, "What could replace lost health and serenity; the loss of a loved one or of a whole extended family; a whole generation of friends; the destruction of home and culture and community and peace?"[263] As repairing the irreparable is very complex, even impossible, symbolic and moral reparations may come with some inconvenience, and many of the victims may not easily accept them. However, "dramatic gestures of atonement" are often welcomed, as in the incident in the RSA in 2006 in which "the apartheid-era minister of police spontaneously walked into the office of a man he had tried to kill and literally washed his victim's feet".[264]

Reparation is an important ingredient in reconciliation and post-conflict reconstruction, and consequently an important measure of transitional justice that allocates direct benefits to the victims. In other words, reparations are essential to any transitional justice initiative, as noted by Lisa Magarrell. They focus directly and explicitly on the victims' situation, and seek to provide some repair for rights that have been trampled, for harms suffered, for indignities endured.[265] No doubt, "Reparations are a powerful tool for helping victims to recover from conflict, but can also sow division when one group is favoured for reparations over others who may deserve them".[266] What this means then is that reparation programmes must be designed to facilitate equal access to all victims and not to traumatise them again. Therefore, for reparations to work effectively, victims must be identified, their injuries must be quantified, and resources must be

[260] USIP http://www.usip.org/files/TRANSITIONAL%20JUSTICE%20formatted.pdf (Date of use: 5 June 2013).
[261] OHCHR *Report Mapping Exercise* §991.
[262] Magarrell *Reparations* 2.
[263] Roth-Arriaza 2004 *HICLR* 158.
[264] Cole *Stages of Transition* 123.
[265] Magarrell *Reparations* 2.
[266] USIP http://www.usip.org/files/TRANSITIONAL%20JUSTICE%20formatted.pdf (Date of use: 5 June 2013).

available to make some form of payment or in-kind service to the aggrieved party.[267] At the same time, argues Lisa Magarrell, "transitional justice approaches in which reparations do not feature are less effective because they do not *directly* change the situation in which victims find themselves".[268]

2.3.2.2.6 Building memorials

Memorialisation initiatives include public memorials such as museums and monuments. They include activities that aim to commemorate or enhance the understanding of a conflictive past such as carrying out documentation various activities as well as giving recognition to survivors.[269] Building memorials or museums and monuments is part of the symbolic reparations which focus on citizens and victims. According to Gavin Stamp, the idea behind it is that every single missing man or woman should receive a permanent memorial,[270] but the initiative is also a potential tool of communication from one generation to another. Thus, memorialisation initiatives, as recognised by *Impunity Watch*, are important as they offer insight into the root causes of violence, which can offer lessons that would guarantee non-recurrence.[271] In the foreword to his study, Ralph Sprenkels explains that memorialisation initiatives contribute to enhancing societal trust, respect and cohesion, and provide a widely applicable tool that helps to create societal foundations for transformative change in favour of human rights which is essential for the democratisation process at large.[272]

Paul Williams uses the term memorial as an umbrella term for anything that serves in remembrance of a person or event.[273] In the design of the memorial, according to Maya Lin, a fundamental goal was to be honest about death, since we must accept the loss in order to begin to overcome it. It is true that people cannot forget their loved ones, and the pain of the loss will

[267] USIP http://www.usip.org/files/TRANSITIONAL%20JUSTICE%20formatted.pdf (Date of use: 5 June 2013).
[268] Magarrell *Reparations* 2.
[269] Impunity Watch "Memory for Change" 17.
[270] Stamp *The Memorial* 101.
[271] Impunity Watch "Memory for Change" 17.
[272] Impunity Watch "Memory for Change" iv.
[273] Williams *Memorial Museums* 7.

always be there, it will always hurt, but we must acknowledge the death in order to move on.[274] In this regard, Nabudere clearly argues that:

> [M]emory and mutual supportive action belong together; one is a condition for the other. Memory creates the space in which social action can unfold, while forgetting is synonymous with inability to act, or in the Egyptian language, with 'sloth/inertia'. Without the past there is no action. Without memory there can be no conscience, no responsibility, and no past.[275]

On his part, Paul Williams distinguishes between the terms memorial museum and memorial site. The memorial museum is a specific kind of museum dedicated to a historic event commemorating mass suffering of some kind, while the memorial site is used to describe physical locations that serve a commemorative function, but are not necessarily dominated by a built structure.[276] Memorial museums can help to educate future generations about past abuse, and help them to avoid its recurrence by saying, "Never again". Memorial museums can also draw foreigner's attention to historical sites. Paul Williams agrees that they form key sites that can capitalise on the growth of "cultural tourism". However, the author notes that, "They are advantageous for visitors not only in the way they conveniently condense historical narratives within a single authentic site, but also in the way they impart moral rectitude to those who visit".[277]

2.4 Victims' Right to Remedies

The components or mechanisms of transitional justice are well expressed and supported through victims' right to remedies as outlined in the *United Nations 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 IHL*. Their *raison d'être* appears to be the *pillars of transitional justice* because no process of transitional justice can be implemented without focusing on those rights that make room for the rehabilitation of victims. Nonetheless, in the

[274] Lin http://dcrit.sva.edu/wp-content/uploads/2011/06/Making-the-Memorial.pdf (Date of use: 29 August 2013).
[275] Nabudere and Velthuizen *Restorative Justice* 6.
[276] Williams *Memorial Museums* 8.
[277] Williams *Memorial Museums* 190.

aftermath of violent conflicts, of repressive rule or of mass atrocities, it is not easy to determine who is really a victim and who is not. It has been noted that:

> Victims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term "victim" also includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.
>
> A person shall be considered a victim regardless of whether the perpetrator of the violation is identified, apprehended, prosecuted, or convicted and regardless of the familial relationship between the perpetrator and the victim.[278]

From the above, it can be deduced that victims with different degrees of injuries can be found on both sides, as the consequences of mass atrocities affect all. Therefore, it is important for leaders in the period of transition to avoid imbalance in the treatment of victims or to appear as promoting victor's justice by pursuing perpetrators on one side. In such situations, affected population or victims must be treated equally and with respect in order to avoid reopening the wounds of psychological trauma.

Indeed, remedies for gross violations of international human rights law and serious violations of IHL, as presented in the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation, include the victim's right as stated by international law. It is the case of equal and effective access to justice, adequate, effective and prompt reparation for harm suffered, access to relevant information concerning violations and reparation mechanisms.[279] The victim's right can be understood in terms of the right to justice, the right to truth, the right to reparation, and the guarantees of non-recurrence of violations (duty of preventions).[280]

[278] UN Doc 2006 *Basic Principles and Guidelines* 5-6.
[279] UN Doc 2006 *Basic Principles and Guidelines* 6.
[280] UN *Guidance Note* 3-4.

2.4.1 The right to justice

The right to justice is guaranteed and protected by a number of international instruments that each State Party is required to act appropriately to implement. Article 2 of the International Covenant on Civil and Political Rights (ICCPR, 1966) guarantees the right to justice that each State Party undertakes to ensure through competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State. Any individual must enjoy this right regardless of his/her sex, race, colour, language, religion, political or other opinion, national or social origin, property or other status. Articles 4, 5, 7, and 12 of the Convention against Torture and Other Cruel, Inhuman, Degrading Treatment or Punishment (1984) also guarantee the right to justice. They stipulate that each State Party shall take necessary measures to establish its jurisdiction over acts of torture punishable by appropriate penalties (Articles 5 and 4), and ensure that its competent authorities proceed to a prompt and impartial investigation (Article 12). Thus, any person against whom proceedings are brought shall be guaranteed fair treatment at all stages of the proceedings (Article 7). The International Convention for the Protection of All Persons from Enforced Disappearance (2007) also guarantees the right to justice. Each State Party is to act appropriately to investigate (Article 3) and submit the case to its competent authorities, extradite the fugitive, or surrender him/her to an international criminal tribunal for the purpose of prosecution (Article 11) in order to hold criminally responsible any person who commits acts of enforced disappearance (Article 6) which are punishable by appropriate penalties (Article 11).

Based on the above international instruments, it can be deduced that the right to justice also requires proper administration of justice; in other words, the right to a fair trial. Theo van Banning *et al* assert that the right to a fair trial is not a simple distinct issue, but rather consists of a complex set of rules and practices. It is the right to a "fair and public hearing within reasonable time by an independent and impartial tribunal established by law". It includes access to an independent court or tribunal, impartiality in the objective sense as well as the subjective

sense, fair and public hearing taking place "within reasonable time", and the presumption of innocence.[281]

The right to a fair trial is also guaranteed by Article 10 of the Universal Declaration of Human Rights (1948) and by Article 14 of the ICCPR (1966) including the right to be presumed innocent (Article 11), as well as by regional Conventions. This right is also stipulated by Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), Article 8 of the American Convention on Human Rights (Pact of San José, Costa Rica, 1969), and Article 7 of the African Charter on Human and Peoples' Rights (1981).

As contained in international and regional instruments of human rights, the victim of a gross violation of international human rights law or of a serious violation of IHL shall have equal access to an effective judicial remedy. Therefore, obligations arising under international law to secure the right to access justice and fair and impartial proceedings shall be reflected in domestic laws.[282] This case study shows that the right to justice is guaranteed and protected in the DRC and the RSA in line with the abovementioned provisions. Whereas Section 34 of the Constitution of 1996 guarantees the access to courts and the right to a fair trial (Article 35, 3), these are guaranteed by Article 19 of the Constitution of the DRC (2006, revised in 2011).

However, the fact that the right to justice is guaranteed and protected does not mean every citizen is aware of this, which means Member States should "disseminate" information about all international and regional instruments as well as domestic provisions of human rights through public and private media, schools, churches and mosques to ensure their citizens are aware of their rights. In cases of gross violations of international human rights law and serious violations of IHL, Basic Principles and Guidelines on the Right to a Remedy and Reparation provides that States should:

> b) Take measures to minimize the inconvenience to victims and their representatives, protect against unlawful interference with their privacy as appropriate and ensure their safety from intimidation and retaliation, as well as that of their families and witnesses, before, during and after judicial, administrative, or other proceedings that affect the interests of victims;

[281] Banning *et al Human Rights Reference Handbook* 31-32.
[282] UN Doc 2006 *Basic Principles and Guidelines* 6.

c) Provide proper assistance to victims seeking access to justice;
d) Make available all appropriate legal, diplomatic and consular means to ensure that victims can exercise their rights to remedy for gross violations of international human rights law or serious violations of international humanitarian law.[283]

Depending on the context in which gross violations of international human rights law and serious violations of IHL are committed, they can constitute crime against humanity or war crimes as defined by the Rome Statute. Article 7 of the Rome Statute defines "crime against humanity" as any acts committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack, which include murder, extermination, enslavement, deportation or forcible transfer of population, torture, rape, sexual slavery, crime of apartheid, and so forth. Article 8 defines war crimes as part of a plan or policy or as part of a large-scale commission of such crimes. It refers to grave breaches of the Geneva Conventions of 12 August 1949 namely any of the following acts against persons or property protected under the provisions of the relevant Geneva Conventions: wilful killing, torture, extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

Since those crimes are not subject to any statute of limitations (Article 29 of Rome Statute), during the peace talks, no amnesty shall be given to perpetrators for any reason in order to render effective the right to justice and fight impunity.[284] In this way, the right to justice is guaranteed through prosecution in domestic courts and tribunals that have jurisdiction over international crimes, in *ad hoc* or hybrid international tribunal or in the ICC. Consequently, there is no justification for States to do nothing about the crimes.

2.4.2 The right to truth

As mentioned above, the right to justice allows States to investigate and prosecute perpetrators in order to hold them accountable if found guilty of heinous crimes. Thus, the right to truth helps victims or their family members affected by past abuses to find out exactly what happened

[283] UN Doc 2006 *Basic Principles and Guidelines* 6.
[284] The only exception is the amnesty for acts of war and insurgency or rebellion.

to them or their loved ones, the reasons behind these heinous crimes, and the truth about the whereabouts of their missing family members. They have a right to know whether they are somewhere in prison or have been killed so that they could mourn them properly. This is in accordance with Article 32 of Additional Protocol I to the Geneva Conventions of 12 August 1949 and the Protection of Victims of International Armed Conflicts, which recognises the right of families to know the fate of their relatives. Furthermore, Article 33 (1) of Additional Protocol I states that:

> As soon as circumstances permit, and at the latest from the end of active hostilities, each Party to the conflict shall search for the persons who have been reported missing by an adverse Party. Such adverse Party shall transmit all relevant information concerning such persons in order to facilitate such searches.

Article 24 (2) of the International Convention for the Protection of All Persons from Enforced Disappearance also guarantees the right to truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person. Consequently, States Parties have the obligations to respond appropriately to these issues, and the Preamble reaffirms the right to freedom to seek, receive and impart information to that end.[285] The right of access to information includes the availability of archives, and Article 32 (1) of the Constitution of the RSA as well as Article 24 of the Constitution of the DRC guarantees the right to information.

In the report by the independent expert mandated to update the set of principles to combat impunity, Diane Orentlicher analyses the right to know based on four general principles namely the inalienable right to the truth, the duty to preserve memory, the victims' right to know, and the guarantees to give effect to the right to know:[286]

> PRINCIPLE 2 – THE INALIENABLE RIGHT TO THE TRUTH
>
> Every people has the inalienable right to know the truth about past events concerning the perpetration of heinous crimes and about the circumstances and reasons that led, through massive or systematic violations, to the perpetration of those crimes. Full and effective exercise of the right to the truth provides a vital safeguard against the recurrence of violations.

[285] See also UN Doc Resolution 9/11 http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_9_11.pdf (Date of use: 4th March 2013).
[286] UN Doc *E/CN.4/2005/102/Add.1* 7-8.

PRINCIPLE 3 – THE DUTY TO PRESERVE MEMORY

A people's knowledge of the history of its oppression is part of its heritage and, as such, must be ensured by appropriate measures in fulfilment of the State's duty to preserve archives and other evidence concerning violations of human rights and humanitarian law and to facilitate knowledge of those violations. Such measures shall be aimed at preserving the collective memory from extinction and, in particular, at guarding against the development of revisionist and negationist arguments.

PRINCIPLE 4 – THE VICTIMS' RIGHT TO KNOW

Irrespective of any legal proceedings, victims and their families have the imprescriptible right to know the truth about the circumstances in which violations took place and, in the event of death or disappearance, the victims' fate.

PRINCIPLE 5 – GUARANTEES TO GIVE EFFECT TO THE RIGHT TO KNOW

States must take appropriate action, including measures necessary to ensure the independent and effective operation of the judiciary, to give effect to the right to know.

Appropriate measures to ensure this right may include non-judicial processes that complement the role of the judiciary. Societies that have experienced heinous crimes perpetrated on a massive or systematic basis may benefit in particular from the creation of a truth commission or other commission of inquiry to establish the facts surrounding those violations so that the truth may be ascertained and to prevent the disappearance of evidence. Regardless of whether a State establishes such a body, it must ensure the preservation of, and access to, archives concerning violations of human rights and humanitarian law.

In order to seek the truth of gross violations of international human rights law and serious violations of IHL, trials are employed as legal mechanisms to investigate and find information that may allow the tribunal or the court to find the suspect guilty or to release him or her. However, court proceedings, as pointed out by Tyler Giannini *et al*, may not be the best vehicle to uncover the truth, since it is generally in the defendant's interest to deny guilt in order to evade culpability.[287] Thus, since truth commissions are not mandated to punish or sanction perpetrators, it seems that they are better suited to investigate mass abuses perpetrated in the past than engaging in court proceedings. The truth commissions will not only enable victims to know the truth and to be heard, as they are victim-centric, but also make room for perpetrators to tell their version of the events.

[287] Giannini *et al Prosecuting Apartheid-Era Crimes* 6.

On the issue of truth, the TRC of South Africa has admitted four notions to acknowledge their limitations namely "factual or forensic truth; personal or narrative truth; social or 'dialogue' truth and healing and restorative truth".[288] *Factual or forensic truth* takes into account "the familiar legal or scientific notion of bringing to light factual, corroborated evidence, of obtaining accurate information through reliable (impartial, objective) procedures, featured prominently in the Commission's findings process".[289] However, *personal and narrative truth* encourages victims as well as perpetrators to tell their personal truths freely in order to uncover existing facts about past abuses. Therefore, it "contribute[s] to the process of reconciliation by ensuring that the truth about the past included the validation of the individual subjective experiences of people who had previously been silenced or voiceless".[290]

Social or dialogue truth, transcending the division of the past, "made a conscious effort to provide an environment in which all possible views of life were invited to participate in the process …"[291] Lastly, *healing and restorative truth* is "the kind of truth that places facts and what they mean within the context of human relationships – both amongst citizens and between the state and its citizens". This truth can help to "contribute to the reparation of the damage inflicted in the past and to the prevention of the recurrence of serious abuses in the future".[292] In addition, citing Crocker and Vandegiste, Gerald Gahima recognises *general truth*, "such as the plausible causes of the abuses", among other kinds of truth that transitional justice processes aspire to establish.[293]

2.4.3 The right to reparations

The right to reparations is a fundamental right accorded to victims or their family members as guaranteed by international and regional instruments of human rights. Article 8 of the Universal Declaration of Human Rights (1948) stipulates that, "Everyone has the right to an effective

[288] Republic of South Africa, *Truth Commission* (vol. 1) 110.
[289] Republic of South Africa, *Truth Commission* (vol. 1) 111.
[290] Republic of South Africa, *Truth Commission* (vol. 1) 112.
[291] Republic of South Africa, *Truth Commission* (vol. 1) 113-14.
[292] Republic of South Africa, *Truth Commission* (vol. 1) 114.
[293] Gahima *Transitional Justice in Rwanda* 5.

remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law". Besides, Article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination (1965) guarantees the right to seek just and adequate reparation or satisfaction for any damage suffered. In the ICCPR (1966), Article 2 (3, a) guarantees that any person whose rights or freedom are violated shall have an effective remedy. Whereas Article 14 of the Convention against Torture and Other Cruel, Inhuman, Degrading Treatment or Punishment (1984) guarantees the right of redress and/or to fair and adequate compensation, including the means for as full rehabilitation as possible.

However, violent conflicts or activities of authoritarian regimes may also affect children. Thus, Article 39 of the Convention on the Rights of the Child (1989) provides that a child victim shall be recovered and reintegrated in an environment which fosters the health, self-respect and dignity of that child. Lastly, Article 24 (4-5) of International Convention for the Protection of All Persons from Enforced Disappearance (2007) permits that victims of enforced disappearance have the right to obtain reparation and prompt, fair and adequate compensation. The Convention states that the right to obtain reparation covers material and moral damages and, where appropriate, other forms or reparation such as restitution, rehabilitation, satisfaction, including restoration of dignity and reputation, among others.

Indeed, the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation highlights under Principle 15 that reparation should be proportional to the gravity of the violations and the harm suffered. Antonio Buti reports that this principle also prescribes that the State must provide reparations if it perpetrated the wrong, but if the State is not the perpetrator, the offending party should offer reparations to the victim or repay the State if it has already awarded compensation to the victim. Thus, "It can be inferred that the state must pay the reparation if the actual offending party cannot. This places the state in a key position, whether only as the allocator of resources for reparations or as the perpetrator of the wrong".[294] Principles 19-22 explain the forms of reparation that can provide a guarantee against repetition

[294] Buti "Restorative Justice" 706.

which are *restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition*:[295]

> 19. *Restitution* should, whenever possible, restore the victim to the original situation before the gross violations of international human rights law or serious violations of international humanitarian law occurred. Restitution includes, as appropriate: restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one's place of residence, restoration of employment and return of property.
>
> 20. *Compensation* should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case, resulting from gross violations of international human rights law and serious violations of international humanitarian law, such as:
>
> a) Physical or mental harm;
> b) Lost opportunities, including employment, education and social benefits;
> c) Material damages and loss of earnings, including loss of earning potential;
> d) Moral damage;
> e) Costs required for legal or expert assistance, medicine and medical services, and psychological and social services.
>
> 21. *Rehabilitation* should include medical and psychological care as well as legal and social services.
>
> 22. *Satisfaction* should include, where applicable, any or all of the following:
>
> a) Effective measures aimed at the cessation of continuing violations;
> b) Verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further harm or threaten the safety and interests of the victim, the victim's relatives, witnesses, or persons who have intervened to assist the victim or prevent the occurrence of further violations;
> c) The search for the whereabouts of the disappeared, for the identities of the children abducted, and for the bodies of those killed, and assistance in the recovery, identification and reburial of the bodies in accordance with the expressed or presumed wish of the victims, or the cultural practices of the families and communities;
> d) An official declaration or a judicial decision restoring the dignity, the reputation and the rights of the victim and of persons closely connected with the victim;
> e) Public apology, including acknowledgement of the facts and acceptance of responsibility;
> f) Judicial and administrative sanctions against persons liable for the violations;
> g) Commemorations and tributes to the victims;
> h) Inclusion of an accurate account of the violations that occurred in international human rights law and international humanitarian law training and in educational material at all levels.

[295] UN Doc 2006 *Basic Principles and Guidelines* 7-8.

Reparation may be provided through judicial and non-judicial mechanisms of transitional justice such as judicial bodies, TRC or reparations programmes. Thus, the right to reparation is very important for the rehabilitation of victims. However, as victims are affected in different ways, it is important to consult them about any programme designed for reparation.

2.4.4 The guarantee of non-recurrence of violations (duty of prevention)

Post-conflict societies may often be uncertain, and transitional authorities have the duty to restore the State's authority so that victims would not have to endure a repeat of of human rights violations. To strengthen this obligation, Article 2 of the ICCPR (1966) provides that each State Party shall ensure that all individuals within its territory whose rights or freedoms are violated have an effective remedy determined by competent authority. Besides, acts of torture under whatever circumstances must be prevented (Article 2 Convention against Torture). Article 23 (2) of the International Convention for the Protection of All Persons from Enforced Disappearance equally guarantees that each State Party ensures that orders or instructions prescribing, authorising or encouraging enforced disappearance are prohibited, and that all persons who refuse to obey such orders will not be punished.

Therefore, as stated by Principle 35,[296] States must undertake institutional reforms and other measures necessary to ensure respect for the rule of law, foster and sustain a culture of respect for human rights, and restore or establish public trust in government institutions. Adequate representation of women and minority groups in public institutions is essential to the achievement of these aims. Additionally, institutional reforms aimed at preventing a recurrence of violations should be developed through a process of broad public consultations that include the participation of victims and other sectors of civil society.

Guarantees of non-repetition should include, where applicable, any or all of the following measures, which will also contribute to prevention: [297]

a) Ensuring effective civilian control of military and security forces;

[296] E/CN.4/2005/102/Add.1.
[297] UN Doc 2006 *Basic Principles and Guidelines* 23.

b) Ensuring that all civilian and military proceedings abide by international standards of due process, fairness and impartiality;
c) Strengthening the independence of the judiciary;
d) Protecting persons in the legal, medical and health-care professions, the media and other related professions, and human rights defenders;
e) Providing, on a priority and continued basis, human rights and IHL education and training for law enforcement officials as well as military and security forces;
f) Promoting the observance of codes of conduct and ethical norms, in particular international standards, by public servants including law enforcement, correctional, media, medical, psychological, social service and military personnel, as well as by economic enterprises;
g) Promoting mechanisms for preventing and monitoring social conflicts and their resolution;
h) Reviewing and reforming laws contributing to or allowing gross violations of international human rights law and serious violations of IHL.

2.5 Findings

In the second half of the twentieth century and the beginning of the twenty-first century, the world witnessed the death of millions of people in violent conflicts – internal, international and internationalised – to repressive rule, mass atrocities, genocide, apartheid, and such others. To deal with such situations, transitional justice mechanisms offer possibilities that transforming societies may adopt in addressing the root causes of violence, and fight impunity by holding accountable "people bearing the greatest responsibility" with the hope of promoting reconciliation between perpetrators and victims. Antonio Buti confirms that, "the reconciliation must be done according to justice in which the right of the victims are paramount".[298] For this purpose, transitional societies have the duty to restore victims' dignity which is included in the pillars of transitional justice.

[298] Buti "Restorative Justice" 706.

In terms of the main research question which is to know the role played by the transitional justice mechanisms in the two case studies, this chapter is designed to offer a comprehensive understanding of retributive and restorative justice, as well as of fundamental mechanisms of transitional justice. Thus, Chapters Three and Four of this study will focus on specific mechanisms that were adopted in dealing with the past in both the RSA and the DRC.

In this chapter, theoretical assumptions on retributive and restorative justice are explored as well as their relationships to transitional justice mechanisms. Analysis of justice in transition and goals of transitional justice are presented. Subsequently, fundamental mechanisms of transitional justice are defined and analysed. The mechanisms considered in this chapter include firstly prosecutions or judicial mechanisms of transitional justice (that is, national judicial prosecution, *ad hoc* tribunals established by the UNSC, hybrid tribunals established by the UN transitional administration and by treaty-based, and the ICC). The secondly type are non-judicial mechanisms of transitional justice (that is, the TRC, lustration or substitute criminal proceedings and vetting process, institutional reforms, amnesty process, reparation, and building memorials). The third are pillars of transitional justice or victims' right to remedies (that is, the right to justice, the right to truth, the right to reparations, and guarantees of non-recurrence of violations or duty or preventing). Chapter 6 offers recommendations based on the research objective.

The next chapter focuses on mechanisms of transitional justice that have been adopted and implemented in dealing with gross human rights violations committed under apartheid regime in the RSA.

CHAPTER 3

TRANSITIONAL JUSTICE IN THE REPUBLIC OF SOUTH AFRICA

3.1 Introduction

The Republic of South Africa is known globally not only for its former apartheid policy and the struggle against apartheid, but also for its peculiar political transition – the so-called *road to reconciliation.*[299] South Africa's historical heritage, admits Andrea Lolline, was based on the institutionalisation of fragmentation, injustice, separation, and exclusion.[300] Volker Nerlich confiirms that the apartheid legal order was based on the systematic violation of fundamental human rights principles. Racial categorisation of the population substituted equality before the law, and rights were attributed according to skin colour.[301] Gross violation of human rights emanating from past conflicts in South Africa (SA), according to Act 34 of 1995, include "the killing, abduction, torture or severe ill-treatment of any person; or any attempt, conspiracy, incitement, instigation, command or procurement to commit an act referred". This chapter tries to apprehend the dilemma that South Africa faced in dealing with the legacies of past abuses at the end of the apartheid regime.

For over two decades (1994 to 2016), the post-segregationist South Africa had incorporated international human rights that are well protected within the Constitution of 1996 (Chapter 2: Bill of Rights). This new attitude allows South Africa to play its role within the international community which was not the case four decades earlier during the period of the apartheid regime (from 1948 to 1990) when the norms of human rights were not implemented

[299] The road to reconciliation must lead to both material reconstruction and the restoration of dignity. It involves the redress of gross inequalities and the nurturing of respect for our common humanity. It entails sustainable growth and development of the spirit of *ubuntu* as well as wide-ranging structural and institutional transformation and the healing of broken human relationships. It demands guarantees that the past will not be repeated as well as restitution and restoration of humanity – as individuals, as communities and as a nation. See Republic of South Africa, *Truth Commission* (vol 1) 110.

[300] Lollini *Constitutionalism* 2.

[301] Nerlich "Criminal Justice" 91.

equally. John Dugard affirms that, "Whereas international law was previously seen as a threat to the state, it is now viewed as one of the pillars of the new democracy."[302] However, in the aftermath of conflict, there has been little success in the implementation of human rights principles especially by successive governments. Regarding the prosecution of persons who allegedly committed serious crimes, the Preamble of the Rome Statute affirms that those who commit crimes must not go unpunished. Thus, in accordance with Article 86, States Parties have the obligation to cooperate fully with the Court in its investigation and prosecution. If the person is found on the territory of States Parties, Article 89(1) provides that the State has the obligation to arrest and surrender him or her to the Court as requested. Nevertheless, for political reasons, States often refuse to cooperate with the ICC, as in the case of Bosco Ntaganda in the DRC or of President Bashir in South Africa.

In this chapter, a brief overview of the historical context of apartheid and the legal framework of transitional justice mechanisms in the RSA are presented. A discussion of the role played by the courts and the TRC in dealing with the perpetrators of crimes then follows.

3.2 Context of Apartheid and Legal Framework of Transitional Justice Mechanisms in the RSA

This section presents the context of apartheid and the legal framework of transitional justice mechanisms in South Africa. It is motivated by the need to describe the context of past abuses in order to have a better understanding of the issues at hand as well as to present and discuss the legal framework that resulted from the compromise made during the political negotiations for the transition.

[302] Dugard 1997 *EJIL* 77.

3.2.1 Context of apartheid in South Africa

The RSA or South Africa (as it is commonly called) is located in the southern part of the African continent where it takes its name.

South Africa is flanked on the west by the Atlantic Ocean and on the east by the Indian Ocean, and situated at the southernmost extremity of the continent. South Africa is strategically located on the important sea route between West and East. In the North, it is bordered by Namibia, Botswana, Zimbabwe, and the Northeast by Mozambique and Swaziland while in the East, Lesotho is enclaved by

Figure 1: Map of the RSA and neighbouring countries[303]

The English and the Dutch colonised South Africa in the seventeenth century and the country received self-governance from Britain in 1910. The 1910 Act of the Union created a single nation in which only white South Africans were truly citizens. The South African Party[304] won the 1910 general elections and on May 31, Louis Botha became the first prime Minister appointed by the Governor-General of the Union of South Africa. The Governor-General was the head of state representing the British up to the time of the referendum for the Republic in March 1961. During the next four decades, successive governments passed laws creating a

[303] Map of South Africa http://www.yourchildlearns.com/online-atlas/south-africa-map.htm (Date of use: 03 March 2016). On the description of RSA's location, read South Africa Touris Board *South Africa* 3.

[304] Roger B. Beck affirms that, "The South African Party was a coalition of the Het Volk and Nationalist parties of the Transvaal, the Orangia Unie Party of the Orange Free State, and the South African Party in the Cape. It represented a wide range of English and Afrikaner interests. The Unionists Party, dominated by wealthy mining magnates and capitalists, generally supported South African Party policies. A small Labour Party represented white workers". See Beck *South Africa* 112.

segregated society, which prepared the way for the harsher apartheid system that followed.[305] The move is incomprehensible because a government has the obligation to serve its entire people equally and not implement policies based on the oppression and exploitation of the majority by the minority of the population on racial grounds,[306] as was the case, unfortunately, in South Africa.

According to Robin Cohen, cited by Kathy Bieke, the South African apartheid policy was based on four basic premises, "White monopoly of political power, the manipulation of space to achieve racial segregation, the control of black labor, and urban social control".[307] Parker and Mokhesi-Parker agree that:

> White minority rule was not just by a government that happened to be composed of white people. It was ruled by and in the interests of whites. Those interests required the control of black labour and land; they resulted in dispossession and forced labour; they were enforced by white courts as much as by private terror. Such enforcement required the courts to fetter their powers, to deny their jurisdiction, to pretend statutes had ousted their authority to hear cases, and to refuse plaintiffs the standing to have their complaints heard.[308]

In its early history, states Elaine Bing, the ideological concerns were of less importance than later in the twentieth century when apartheid played a role in protecting entrenched white interests.[309] Indeed,

> In South Africa, racial tension exists since the beginning of colonialism. The tension manifested in apartheid, a formal system of depriving the majority of the population from basic human development and access to resources. By the twentieth century apartheid elevated physical and cultural differences to an ideology that resulted in a long drawn-out battle between the oppressed and the ruling elite.[310]

Historical reports show that between 1897 and 1905 Alfred Milner, the High Commissioner to South Africa who became the Governor of the Transvaal Colony and the Orange River Colony,

[305] Beck *South Africa* 111-112.
[306] Bubenzer *Post-TRC Prosecutions* 1.
[307] Bieke 2 http://www.nwc.cc.wy.us/waw/essays/Essay63.pdf (Date of use: 18 February 2013).
[308] Parker and Mokhesi-Parker *Apartheid and Criminal Justice* 3.
[309] Bing *Unmaking the Torturer* 7.
[310] Nabudere and Velthuizen *Restorative Justice* 29.

embraced the idea of British racial superiority and passed legislation compelling blacks to live in segregated locations.[311] In 1913, the Natives Land Act limited African land ownership to the reserves (or homelands) and divided the country into black and whites areas.[312] Giliomee reports that in 1933, the Afrikaner Broederbond tried to build Afrikaner nationalist unity that contributed to the apartheid plan. In 1934, a "comprehensive mass segregation" for blacks was recommended as "the national policy",[313] and in 1948, when the National Party won the elections, the situation was further aggravated as the rule of racial segregation and economic exploitation was institutionalised into law.[314] In 1949, the Prohibition of Mixed Marriages Act No. 55 (as amended by Act No. 21 of 1968) that prohibited marriages between whites and members of others racial groups was adopted.[315] In 1950, the Population Registration Act (as amended and repealed by Act No. 114 of 1991) provided for the classification of South Africans into four racial categories and made it mandatory for people of colour to carry an identification pass under the Group Areas Act.[316]

Officially, apartheid was institutionalised in 1948[317] by the National Party (NP) – a predominantly Afrikaner[318] nationalist party – and it was ended in 1993 with the advent of the Interim Constitution. Furthermore, the segregationist ideology was established and implemented during the same period that the Universal Declaration of Human Rights of 1948 was adopted. Later in 1965, the Preamble of the International Convention on the Elimination of All Forms of Racial Discrimination decried the "racial discrimination still in evidence in some areas of the world and by governmental policies based on racial superiority or hatred, such as policies of

[311] Bing *Unmaking the torturer* 12-13.
[312] Graybill *Miracle or Model* 181.
[313] Giliomee *The Afrikaners* 445.
[314] Bubenzer *Post-TRC Prosecutions* 5.
[315] Republic of South Africa, *Truth Commission* (vol 1) 452.
[316] Bubenzer *Post-TRC Prosecutions* 5.
[317] According to John N Mubangizi, "The coming to power of the National Party in 1948 was to have a profound effect on the protection of human rights in South Africa for a long time to come. Soon after the Nationalist government took control, it enacted laws to define and enforce segregation. The systemic way in which apartheid was formalized was what made it different from the segregation and racial hatred that occurred in other countries". See Mubangizi *Protection of Human Rights* 40-41.
[318] Ole Bubenzer notes that the *Afrikaner* population descended from an amalgamation of the earliest European settlers, who originated mainly from the Netherlands, Germany and France. See Bubenzer *Post-TRC Prosecutions* 5.

apartheid, segregation or separation". The Convention sought "to build an international community free from all forms of racial segregation and racial discrimination".[319]

Consequently, the prohibition of apartheid was regarded as a rule of customary law and as a norm of *jus cogens* which creates obligations *erga omnes* owed by all States to the community of States as a whole.[320] As a peremptory norm, the Convention is binding to all States without exception including South Africa even though it was not State Party. Thus, deeply concerned about the inhuman and aggressive policies of apartheid, the UNSC and the UNGA both adopted a number of resolutions. On the one hand, the UNSC through Resolution 392(1976) reaffirmed that, "the policy of apartheid is a crime against the conscience and dignity of mankind and seriously disturbs international peace and security".[321] Through its Resolution 473(1980), the UNSC reaffirmed that "the policy of apartheid is a crime against the conscience and dignity of mankind and is incompatible with the rights and dignity of man, the Charter of the United Nations and the Universal Declaration of Human Rights, and seriously disturbs international peace and security".[322]

However, the late action of the UNSC against the policy of apartheid in South Africa, the language used by the UNSC to express crimes committed by the apartheid regime as well as its avoidance of adopting sanctions were not innocent and demonstrated that the regime benefitted from the support of some permanent members of the UNSC that went through similar practices. From the analysis by Kader Asmal, it can be deduced that the racial regime benefitted from the support of some great powers. Due to their political interests during the Cold War, "the United States, the United Kingdom and the Federal Republic of Germany, which in most of the resolutions directed against the apartheid regime abstained from voting or, as far as they are able, prevented sanctions from being imposed against South Africa in the Security Council".[323] On the other hand, the UNGA, in its different resolutions stated clearly that, "the policies of apartheid of the Government of South Africa are a negation of the Charter of the UN and

[319] The International Convention on the Elimination of All Forms of Racial Discrimination (1965) entered into force 4 January 1969.
[320] Tilley *Beyond Occupation* 22.
[321] UNSC Res 392 adopted on 19 June 1976 §3.
[322] UNSC Res 473 adopted on 13 June 1980 §3.
[323] Asmal "Against Apartheid" (n. d).

constitute a crime against humanity".[324] For example, Resolution UNGA A/RES/2671 (1970) requested all States to terminate and suspend all cooperation with the racist minority government of South Africa.[325] Thus, "When the Cold War ended and major powers could not be played off against each other anymore, international pressure forced the South African regime to relinquish".[326] Subsequently,

> After forty-five years of apartheid in South Africa, and thirty-odd years of some level of armed resistance against the apartheid state by the armed wing of the African National Congress (ANC) and others, the country had suffered massacres, killings, torture, lengthy imprisonment of activist, and severe economic and social discrimination against its majority non-white population. The greatest number of deaths took place in the conflict between the ANC and the government-backed Inkatha Freedom Party, particularly in the eastern region of the country that is now KwaZulu-Natal.[327]

Piers Pigou points out that during the apartheid era, "acts of torture, assault and extra-judicial execution were officially outlawed, and this provided an adequate legal veneer for a culture of denial to permeate". Strangely, such abuses were in fact widespread and systematic. The author adds that, "the political leadership was, at best, aware of the various methodologies employed by the security forces". In the early 1990s, during the negotiation, widespread violence and killing occurred and it was reported that the agents of such crimes were from the IFP and the South African Police.[328]

From the late 1980s, the apartheid regime exploited and escalated the conflict between the ANC and the IFP through Colonel Eugene de Kock who was one of the many violent actors and the commander of the hit squad near Pretoria at that time. De Kock (among others) was

[324] UNGA Res 2189 (XXI) adopted on 13 December 1966 §6; UNGA Res 2262 (XXII) adopted on 3 November 1967 §2; UNGA Res 2326 (XXII) adopted on 16 December 1967 §5; UNGA A/RES/2671 (1970) http://www.refworld.org/docid/3b00f1a68.html (Date of use: 12 June 2014); UNGA Res 33/183B adopted on 24 January 1979.
[325] Doxtader and Salazar *Fundamental Documents* 3-4.
[326] Nabudere and Velthuizen *Restorative Justice* 29.
[327] Hayner *Challenge of Truth Commissions* 27.
[328] Pigou http://www.csvr.org.za/docs/policing/monitoringpolice.pdf (Date of use: 7 July 2015).

supplying weapons to Inkatha in a struggle with the ANC for political power and influence in the rapidly shifting political landscape of transitional South Africa.[329] It is reported that,

> The black-on-black violence –Inkatha versus the ANC – that we encouraged was a handy propaganda tool because the outside world could be told with great conviction that the barbaric natives, as might have been expected, started murdering each other at every opportunity. We contributed to this violence for a number of years both passively (by failing to take steps) and actively (by sponsoring training and protecting violent gangs).[330]

Even though the majority of whites in the country accepted and supported apartheid during most of the period of white domination, not all white South Africans did.[331] Some white people opposed it (not always loudly enough)[332] and even gave their lives for the struggle.[333] To end the apartheid, it was important to find a political solution to the problem and to guide the transition. Therefore, from the 1980s, unofficial, private and confidential talks began outside of South Africa (in London, Switzerland, Dakar, Lusaka, etc.) between senior ANC leaders and British businesspeople on the one hand and with politically influential Afrikaners, on the other. Following an international consensus and the Comprehensive Anti-Apartheid Act of 1986 (CAAA),[334] on 11 February 1990, President Frederic Willem de Klerk decided to release from prison, Nelson Mandela, the famous ANC leader who was the most prominent political foe of the NP and to start negotiations with opposition groups about South Africa's constitutional future.[335]

[329] See Nerlich "Criminal Justice" 98 and Cobban "Conflict Termination" 42.
[330] De Kock and Gordin *Damage* 100.
[331] However, most of the white people who decried apartheid did not have the courage to let go of their privileged positions as beneficiaries of its policies.
[332] During his term as the President of the Methodist Church of Southern Africa, Alex Boraine, like a number of other white South Africans, "wanted to look particularly at the top leadership of the National Party and tell them what their policies were doing… what was really happening as a result of their policies and the implementation of those policies by the security forces". He was then criticised and threatened by the Cabinet and accused of being disloyal and unpatriotic. See Boraine *A Country Unmasked* 21, 27.
[333] Löwstedt *Apartheid* 6.
[334] Esterhuyse *Endgame* 33-42.
[335] Du Bois and Du Bois-Pedain « *Introduction* » 1.

Jacqueline A. Kalley notes that these actions were taken to normalise South Africa's political situation and were hailed by the whole world.[336] The political decision[337] was rather significant because, on the one hand, it marks a point of departure from the old order which was controlled by the apartheid regime, and on the other hand, it paved the way for a series of events that would move South Africa forward. The negotiations resulted in the adoption of the Interim Constitution of 1993 and the democratic election of April 1994 that inaugurated the Constitutional Assembly and the interim government of national unity with the installation of Nelson Mandela as the first democratically elected President of the RSA. For the first time the Constitution of 1996 provided the legal framework for a political system that is based on democratic values, social justice, fundamental human rights, and equality of all citizens.[338] It was an expression of justice and the reconciliation to come. Andrea Lollini states that the unity of the people through a new and equal South African citizenship symbolised a radical break from the segregationist State.[339] Even though the process could not leave the past alone, "Everyone agrees that South Africans must deal with that history and its legacy".[340] The Commission agrees that,

> We could not make the journey from a past marked by conflict, injustice, oppression, and exploitation to a new and democratic dispensation characterised by a culture of respect for human rights without coming face to face with our recent history. No one has disputed that. The differences of opinion have been about how we should deal with that past; how we should go about coming to terms with it.[341]

Thus, facing insurmountable challenges, the Government of National Unity was tasked with the responsibility of dealing with past abuses under the apartheid regime in South Africa using

[336] Kalley *South Africa's Treaties* 73.
[337] The political decision was in accordance with the views expressed by F.W. De Klerk in his inaugural presidential address in 1989 when he was elected the leader of the National Party. De Klerk had declared: "Our goal is a new South Africa, a totally changed South Africa; a South Africa which has rid itself of the antagonisms of the past; a South Africa free of domination or oppression in whatever form; a South Africa within which the democratic forces – all reasonable people – align themselves behind mutually acceptable goals and against radicalism, irrespective of where it comes from". See Doxtader and Salazar *Fundamental Documents* 65.
[338] Constitution of the Republic of South Africa, 1996.
[339] Lollini *Constitutionalism* 20.
[340] Republic of South Africa, *Truth Commission* (vol 1) 1.
[341] Republic of South Africa, *Truth Commission* (vol 1) 5.

transitional justice mechanisms. The mechanisms of transitional justice that were preferred in handling the past include criminal justice (with a different approach to restorative justice) and the truth and reconciliation commission. With the adoption of these mechanisms, the post-apartheid South Africa took the decision *not to punish the perpetrators, but to know the truth*. The constituent decision made here, "was to opt for a form of justice that was complementary to criminal justice and that incorporated restorative justice methods limiting the new state's ability to take penal action".[342]

3.2.2 Legal framework of transitional justice mechanisms in the RSA

> The acceptance by a society in transition of the pre-existing legal order has particularly perverse effects when that legal order was intrinsically unjust and defines the past which that society seeks to leave behind.[343]

After the release of all political prisoners and the unbanning of the liberation movements, the negotiations in the transition period that culminated in the RSA's first democratic elections held on 27 April 1994 did not change the South Africa's judicial structure under apartheid. In other words, the apartheid criminal system remained unreformed in the post-apartheid South Africa. However, a special tribunal to prosecute apartheid-era crimes and crimes committed by anti-apartheid organisations was not set up. The special tribunal such as that of Nuremberg was not a viable option not only because South Africa simply could not afford the resources that it would have had to invest in such an operation, that is, in terms of time, money and personnel but also for political reasons.[344] Thus, the option was made based on dialogue and eventually, the negotiated settlement and was not imposed. Fred Hendricks points out that "while there have been some crucial institutional changes in South Africa in relation to human rights —the

[342] Lollini *Constitutionalism* 61.
[343] Nerlich "Criminal Justice" 93.
[344] Republic of South Africa, *Truth Commission* (Vol 1) 5.

establishment of the constitutional court and the bill of rights—the judiciary itself has not changed in any fundamental way since 1994".[345]

However, because gross human rights violations were perpetrated by both parties (non-state entities and state entities) and perpetrators held important positions in public life, the past was still present. Conscious of that fact, the National Executive Committee of the ANC, in 1993, considered models from other parts of the world and agreed to set up a Truth Commission to look into all violations of human rights since 1948.[346] By December 1993, substantial progress was made in efforts to adopt an Interim Constitution (Act No. 200 of 1993).[347]

After the victory of the ANC, the dominant liberation movement against apartheid, and the election of Nelson Mandela as the President of the RSA, the democratic Government of National Unity was committed to building the future based on respect for human rights. Hence, the first statement by the government to Parliament was made by the Minister of Justice on 27 May 1994 and it was a proposal to set up a Truth and Reconciliation Commission to enable South Africa to come to terms with its past. In the statement, he invited individuals as well as civil society organisations to submit their comments and proposals before the legislation was finalised.[348] Based on the commitment to build a human rights culture that transcends divisions in the RSA, in 1995, the Minister of Justice presented a brochure to the Parliament on the creation of the TRC arguing that it must involve citizens in the debate in order to advance the cause of reconciliation. The Minister was unwilling to present an amnesty law to the Parliament because it could ignore the victims of violence entirely instead of restoring their dignity and carrying out to reparation.[349] Then, in mid-1995, in order to prevent a repetition of the past in the future, the South African Parliament passed the Promotion of National Unity and Reconciliation Act (No. 34 of 1995 as amended by Act No. 23 of 2003) with the main objective of promoting national unity and reconciliation in a spirit of understanding. In December 1995, the Commission was inaugurated while the first hearings and investigations started in April

[345] Hendricks *Crises of Inequality* 17.
[346] Boraine *A Country Unmasked* 12-37.
[347] Kalley *South Africa's Treaties* 73.
[348] Boraine *A Country Unmasked* 40-41.
[349] Doxtader and Salazar *Fundamental Documents* 6.

1996.[350] Besides, the Preamble of the Constitution of 1996 recognises the injustices of the past, the need to honour those who suffered for justice and freedom and the necessity to heal the divisions of the past and establish a society based on forgiveness, reconciliation, democratic values, social justice and fundamental human rights:

> The Commission would not be a court of law and would not conduct trials. The role of the criminal justice system was to remain unaffected by the Bill. In other words, the Commission was not to take the place of the normal process of criminal justice, nor was criminal justice to be suspended during the life of the Commission. The two would operate side by side. The aim of the Bill was to re-establish the rule of law and the principle of accountability…[351]

From the above, this research deduces that the legal frameworks of transitional justice mechanisms adopted in South Africa comprise of the Epilogue of the Interim Constitution of 1993, the Promotion of National Unity and Reconciliation Act (1995) as a TRC Act, and subsequently, the Constitution of 1996. Thus, the following section considers the role of the prosecution during the TRC period in the RSA.

3.3 Role of Prosecution during the TRC Period in the RSA

In the aftermath of apartheid, it is clear that entities exercising governmental functions as well as non-state entities committed serious violations of human rights and breaches of the Geneva Conventions that constitute war crimes and crimes against humanity under customary international law. Even though the apartheid regime failed to curb those violations, against all expectations, the post-apartheid government was unwilling to prioritise prosecution while the Epilogue offered the possibility to set up tribunals. As mentioned in the previous section, there was "a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu but not for victimisation".[352] Therefore, the TRC was given the power to grant amnesty to individual perpetrators who committed crimes that were politically motivated between 1960 and April 1994. According to Priscilla B. Hayner, any crime committed for private gain, or out of personal malice, ill will, or spite was not eligible for

[350] Hayner *Challenge of Truth Commissions* 27.
[351] Boraine *A Country Unmasked* 69.
[352] Doxtader and Salazar *Fundamental Documents* 5.

amnesty. It was clear, then, that this truth-for-amnesty offer would only be taken up by those who reasonably feared prosecution.[353] In what follows, two prominent cases will be examined in order to understand how the constitutional court sustained the policy.

3.3.1 AZAPO and Others v. Truth and Reconciliation Commission and Others [1996] 3 All SA 15 (C)

A. Facts and decision

In the *AZAPO and Others v. Truth and Reconciliation Commission and Others* case,[354] there were four applicants – one political organisation and three individuals – who had lost their relatives in unexplained circumstances. The first applicant was the Azanian Peoples Organisation (AZAPO) acting in the interest of its members as well as in the public interest. Nontsikelelo Margaret Biko was the second applicant acting in her own interest, in the interest of her minor children and in the public interest. Churchill Mhleli Mxenge and Chris Ribeiro were respectively third and fourth applicants acting in their own and in the public interest. The four applicants instituted proceedings in the Constitutional Court alleging that the Promotion of National Unity and Reconciliation Act No. 34 (1995) was unconstitutional. Therefore, granting any amnesty to any person in terms of the Act could be a violation of human rights, as the victims of such a violation or their dependants would lose their civil remedies against the perpetrators. Moreover, the Attorney-General would also lose his right to prosecute the perpetrator and, in the event of declining to prosecute, the victims or their dependants would lose their right to institute private prosecution against the perpetrator. They sought an order from the Court directing that the respondents be interdicted and restrained from granting any amnesty to any person in terms of the Act.

In order to achieve "reconciliation between the people of South Africa and the reconstruction of society" which was required in the Post-amble of the Interim Constitution,

[353] Hayner *Challenge of Truth Commissions* 29.
[354] *AZAPO and Others v. Truth and Reconciliation Commission and Others* [1996] 3 All SA 15 (C).

amnesty that included immunity against civil actions was required. Thus, the Court held that it would be impossible to achieve this if amnesty were limited to criminal liability. Perpetrators would never seek immunity if they knew that they would be exposed to civil proceedings, and this would defeat the purpose of the amnesty provisions in the Post-amble. For these reasons, the Court held that the applicants had not established a clear or *prima facie* right that would entitle them to an interdict, and the application was dismissed accordingly.

B. Comments

In reaching the decision, the Court assured the plaintiffs that the purpose of the Post-amble would be achieved, and it is clear that the Constitutional Court had demonstrated the constitutionality of the RSA's TRC. However, individualised amnesty in exchange for full disclosure did not proscribe the victim's right to justice that would see to the prosecution of those who failed to apply for amnesty or who were denied amnesty. Thus, offenders did not have to fear, but they were encouraged to apply for amnesty and confess the whole truth in order to enable victims or survivors understand what happened to their loved ones. In the next case, AZAPO did not withdraw because it had challenged the validity of Section 20(7) of the TRC Act on constitutional grounds.

3.3.2 AZAPO and Others v. the President of the Republic of South Africa and Others [1996] (8) BCLR 1015 (CC)

A. Facts and decision

During the apartheid era in the RSA, fundamental human rights suffered a big blow as the result of apartheid laws and the resistance against it. Following the negotiation that resulted in the Interim Constitution of 1993, it was widely agreed that there was a need to build a new democratic order based on the commitment of reconciliation and national unity that was well expressed in the Epilogue to the Interim Constitution.[355] In accordance with the Epilogue, the

[355] *AZAPO and Others v. President of the Republic of South Africa and Others* 1996 (8) BCLR 1015 (CC) § [1, 2-3]

Parliament enacted the Promotion of National Unity and Reconciliation Act 34 of 1995 that established the RSA's TRC. In order to achieve the very difficult task of making a transition from apartheid to a democratic political order, it was expedient to grant amnesty to those who made full disclosure of the politically motivated crimes that they committed. The TRC Act was designed to encourage perpetrators to reveal the truth first, if all relevant acts were committed in secrecy. The authoritarian regime had concealed the truth about its activities and records were not easily accessible.[356] Again, witnesses were often unknown, dead, unavailable or unwilling. Therefore, without the incentive of an amnesty, perpetrators were not obliged to make full disclosure of their activities which could help victims or dependants to understand what had happened and enable the government of the new nation to acknowledge the acts of wrongdoing. Besides, it would be difficult to adopt and enforce the Interim Constitution.[357] However, the claimants argued that such indemnification was not necessary to encourage perpetrators to reveal the truth.[358]

Actually, Section 20(7a) of the TRC Act states that, once granted such amnesty, no person could be held criminally or civilly liable in respect of an act, omission or offence committed.[359] On the other hand, Section 22 of the Interim Constitution states that justifiable disputes could be settled by a court of law or any other independent and impartial forum. Thus, Applicants contended that if amnesty provided immunity from criminal prosecutions, it was not extended to civil liability.[360] The Applicants also faulted the constitutionality of Section 20(7) of the TRC Act, arguing that it constituted a violation of Section 22 of the Constitution. In terms of Section 232(4)[361] of the Interim Constitution, the Court observed that that the provisions of the

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[356] Regarding the destruction of records, Jeremy Sarkin-Hughes points out that, "The apartheid State, destroyed tons of documents to hide their misdeeds". See Sarkin-Hughes *Carrots and Sticks* 372. Verne Harris concurs that approximately 44 tons of paper-based and microfilm records covering the period 1989-1994 were destroyed between a six to eight-month period in 1993 to "clean up" offices. Systematic destruction of records continued until late 1994. See Harris "Destruction of Public Records" 7.

[357] *AZAPO and Others v. President of the Republic of South Africa and Others* 1996 (8) BCLR 1015 (CC) § [17, 19].

[358] *AZAPO and Others v. President of the Republic of South Africa and Others* 1996 (8) BCLR 1015 (CC) Editor's Summary.

[359] *AZAPO and Others v. President of the Republic of South Africa and Others* 1996 (8) BCLR 1015 (CC) § [7]

[360] *AZAPO and Others v. President of the Republic of South Africa and Others* 1996 (8) BCLR 1015 (CC) Editor's Summary.

[361] Section 232(4) of the Interim Constitution states that: "In interpreting this Constitution a provision in any Schedule, including the provision under the heading 'National Unity and Reconciliation', to this Constitution

TRC Act form part of the Constitution and therefore had the same effect within the the scope of the meaning of Section 33(2)[362] of the Constitution.[363] Hence, the Court held that the criticism of the constitutionality of Section 20(7) of the TRC Act was baseless and the application was refused.[364]

B. Comments

Undoubtedly, with the aftershock of gross violations of human rights and serious violations of IHL, victims agitated for the prosecution of those who perpetrated, ordered or instructed others to commit the atrocities, and called for reparations of the injury against them. In other words, the right to have justifiable disputes settled by a court of law was very crucial for the victims. However, as desired objectives may differ from State to State, the right to justice may as well be limited by such objectives.

The Epilogue in the Interim Constitution on National Unity and Reconciliation in the RSA, "which under Section 232(4) formed part of the Constitution and ranks equally with the rest of it"[365] had limited the right to justice, and amnesty for criminal and civil liability was therefore permitted in order to achieve reconciliation and reconstruction. Considering the obscurity of the past, the process allowed perpetrators "to make the necessary disclosures to reveal the truth",[366] and this study assumes that the process can also enable victims or their dependants to discover the truth. Besides the "top-down truth zone" where partial truth and reconciliation are mutually supportive, "testimonial truth claims give important recognition to

shall not by reason only of the fact that it is contained in a Schedule, have a lesser status than any other provision of this Constitution which is not contained in a Schedule, and such provision shall for all purposes be deemed to form part of the substance of this Constitution".

[362] Section 33(2) of the Interim Constitution states that: "Save as provided for in subsection (1) or any other provision of this Constitution, no law, whether a rule of the common law, customary law or legislation, shall limit any right entrenched in this Chapter".

[363] *AZAPO and Others v. President of the Republic of South Africa and Others* 1996 (8) BCLR 1015 (CC) § [11].

[364] *AZAPO and Others v. President of the Republic of South Africa and Others* 1996 (8) BCLR 1015 (CC) § [51].

[365] *AZAPO and Others v. President of the Republic of South Africa and Others* 1996 (8) BCLR 1015 (CC) § [54].

[366] *AZAPO and Others v. President of the Republic of South Africa and Others* 1996 (8) BCLR 1015 (CC) Editor's Summary.

marginalised historical experiences in sites of conflict, where there are few other evidential traces than the words of a witness", as Andreas G. Velthuizen has noted.[367]

In this case, AZAPO and Others had questioned the constitutionality of Section 20(7) of the TRC Act, relative to the amnesty provision. After arguing that the provision must be read holistically and explaining the objective that the Epilogue to the Interim Constitution sought to achieve, the Court held that the Section was constitutional. The constitutionality of Section 20(7) was justified during the period of the operation of the TRC, but it could not be extended beyond the TRC's operation or used to deprive the victims' the right to justice where amnesty was denied or not applied. However, other countries where granting of amnesty is limited to persons who have taken part in non-international armed conflicts cannot refer to this judgment. In such a situation, granting amnesty for crimes under international law is irrelevant. Therefore, the amnesties granted in South Africa for criminal and civil liability have effect only on the local level and remain open to universal jurisdiction. When victims or survivors presented their cases in countries that apply universal jurisdiction, the South African government would be requested to investigate and prosecute or extradite its nationals (under the principle *Aut dedere Aut judicare*) who are deemed to be perpetrators. For instance, two cases that occurred in Sierra Leone and Argentina are helpful in understanding this situation.[368]

In Sierra Leone, a peace agreement was signed in July 1999 between the government and the Revolutionary United Front (RUF). Based on Article IX, the government resolved to grant Corporal Foday Sankoh and all combatants and collaborators absolute and unconditional pardon. The provision was the price to pay to end the armed conflict. However, when the Special Court for Sierra Leone was set up it did not take into account the Lomé Peace Agreement because Fonday Sankoh was arrested in May 2000 and indicted in March 2003 as the one who bore the greatest responsibility for the serious crimes committed from 1997 to

[367] Velthuizen 2014 *TdJTRSA* 25.
[368] For more cases especially in Chile, El Salvador and Peru, read the full paper available at https://www.ictj.org/sites/default/files/ICTJ-Argentina-Pardons-Brief-2008-English.pdf (Date of use: 4 November 2015).

1999. On 29 March 2003, Sankoh was transferred to the hospital where he died four months later.[369]

In Argentina, widespread crimes against humanity were committed during the Dirty War, and to end the military dictatorship, two amnesty laws known as Full Stop (or *Ley de Punto Final)* and Due Obedience (or *Ley de Obediencia Debida)* were adopted by the National Congress of Argentina respectively in 1986 and 1987. As those laws violated Argentina's international obligations, they were declared unconstitutional in March 2001 by the Argentine federal judge Gabriel Cavallo because they granted amnesty for crimes against humanity. Subsequently, about 1 000 cases were reopened and approximately 300 members of the security forces who had formerly benefited from those laws were indicted.[370]

From the Lomé Peace Agreement and Argentina's "Full Stop" and "Due Obedience Laws", it can be understood that amnesty granted in violation of international customary law cannot prevail in international courts or national courts to prosecute alleged perpetrators for international crimes that they committed (when the situation becomes normalised). The abovementioned cases encouraged perpetrators to take advantage of the post-apartheid policy. However, in the next section the discussion will focus on some cases that challenged perpetrators to apply for or refuse amnesty.

3.3.3 Impacts of the AZAPO cases on alleged perpetrators

Volker Nerlich has affirmed that "the criminal justice system played a crucial role in making perpetrators come forward and apply for amnesty".[371] This point of view, nevertheless, raises the question of whether the prosecution was a threat to perpetrators. The cases involving Dr Basson and Ronnie Blani demonstrate how prosecution discouraged perpetrators from applying for amnesty.

[369] See *The Prosecutor against Fonday Saybana Sankoh* 2003 Case No SCSL-03-03-I-001.
[370] Unger "The Use of Pardons" 1-3.
[371] Nerlich "Criminal Justice" 90.

Generally, many people regard criminal prosecution as being expensive and time consuming and dread the possibility of being condemned and punished with imprisonment. Thus, South Africa's decision to uncover the truth about past abuses rather than prosecute abusers was well emphasised in the Epilogue of the Interim Constitution. This position was sustained by the Constitutional Court in the case of *AZAPO and Others v. TRC and Others (1996)* in which the Court highlighted the importance of amnesty by rejecting the claim of the unconstitutionality of the Act No. 34 (1995) that provided amnesty for truth telling. The judgment was significant because it encouraged perpetrators to apply for amnesty.

Perpetrators had to confess politically motivated crimes and the truth in exchange for amnesty. However, after a successful application and even though the society (families and friends) recognised the applicant as a kidnapper, torturer or murderer, he/she would walk away free. Most offenders knew that the prosecutor was fully aware of their deeds, as their collaborators had already testified about the crimes which were ordered by their former superiors. Applying for amnesty assured them that they would not be prosecuted, and that they would obtain protection against civil liability because there was nothing in the language of the TRC Act "which indicated that amnesty should be restricted to criminal liability".[372]Thus, perpetrators who had been indicted or already put on trial for their deeds were strongly encouraged to apply for amnesty.[373] Indeed,

> The threat of prosecution was the decisive incentive for the vast majority of perpetrators from the security police to apply for amnesty. Many only applied for amnesty when they became aware of an imminent threat of being charged or when they were implicated in a criminal trial concerning former colleagues.[374]

The process was facilitated by complementing criminal justice with amnesty. On the one hand, trials were postponed pending the outcome of the amnesty applications, and on the other hand, the public stigmatisation of the perpetrator was similar to that of a convicted offender in a

[372] *AZAPO and Others v. President of the Republic of South Africa* [1996] 8 BCLR 1015 (CC) Editor's Summary.
[373] Nerlich "Criminal Justice" 105-106.
[374] Bubenzer *Post-TRC Prosecutions* 22.

criminal trial.[375] It is important to understand the mechanisms of transitional justice adopted by the TRC in South Africa in dealing with apartheid-era crimes, and the following section attempts to consider these.

3.4 Role of the TRC in Dealing with Apartheid-era Crimes in the RSA

The basis of the RSA's TRC was the Epilogue of the Interim Constitution of 1993 and the Act No. 34 of 1995 of the Promotion of National Unity and Reconciliation (TRC Act) which came into force after a long negotiation process. The need for a TRC had been on the agenda even before the process of political negotiation to address past conflicts, untold suffering and injustice and work toward a peaceful future founded on the equality of all South Africans.

The Epilogue provides that "amnesty shall be granted in acts of omissions and offences associated with political objectives and committed in the course of the conflicts of the past". However, Mr Dullah Omar, who was then Minister of Justice, recognised that an amnesty law could ignore the victims of violence. Regarding the need to heal the nation, the Minister of Justice also admitted that the new South Africa could not forgive perpetrators unless they attempted to restore the honour and dignity of victims and make provisions for reparation. In order to build a culture of human rights and heal the wounds of the past to attain a new future, the Minister of Justice acknowledged that the truth concerning human rights violations could not be suppressed or simply forgotten. Rather, they had to be investigated, recorded and made known. Therefore, establishing the TRC was necessary to advance the cause of reconciliation,[376] and it also had the potential to serve a pro-active purpose in consolidating democracy.[377] To understand the past was a way for South Africa to renew its commitment that gross violations of human rights would never again take place. The government affirmed that, "It is only by accounting for the past that we can become accountable for the future".[378]

[375] Nerlich "Criminal Justice" 102,105.
[376] Omar http://www.justice.gov.za/Trc/legal/justice.htm (Date of use: 20 May 2014).
[377] Simpson http://www.csvr.org.za/wits/papers/paptrce2.htm (Date of use: 3 April 2013) .
[378] Republic of South Africa, *Truth Commission* (Vol 1) 7.

However, the RSA's TRC was not without criticism. It had been criticised as a means of witch-hunting certain people, especially Afrikaners. It was also alleged that commissioners were biased in favour of the ANC, or were made up mainly of the so-called "struggle"-types who were supporters of the ANC, SACP or PAC, among others.[379] However, the process of their nomination was open to the public, the interviews were conducted in public sessions by a panel that consisted of representatives of all the political parties, and many of commissioners were chosen based on their anti-apartheid activities. Moreover, the commissioners did not appoint themselves even though some were chosen by the major political party. The President in consultation with his Cabinet of National Unity ratified the final selection of the commissioners. A highlight of the proceedings occurred when the Amnesty Committee decided to grant amnesty to thirty-seven ANC members. Unanimously, the Commission then applied to the High Court for a judicial review of the Committee's decision.[380] It can be deduced that the Commission demonstrated that commissioners were politically independent and not biased against any particular political party or group.[381] The consultation processes was rather complex, but it was important as it enabled the population to own and trust their own institutions.

Thus, the appreciation of the RSA's TRC must be in accordance with its objectives and the achievements of its structures as provided by the Act No. 34 of 1995 on National Unity and Reconciliation (hereafter the TRC Act).

3.4.1 Objectives, period covered and structures of the RSA's TRC

The following paragraphs will consider the objectives, the period covered by and the structure of the RSA's TRC beginning with the objectives.

[379] Republic of South Africa, *Truth Commission* (Vol 1) 8-9.
[380] See Republic of South Africa, *Truth Commission* (Vol 1) 9-10.
[381] Republic of South Africa, *Truth Commission* (Vol 1) 11.

3.4.1.1 Objectives

The RSA's TRC Act mandated the TRC with the task to promote national unity and reconciliation in a spirit of understanding. Through investigations and hearings, the Commission was to establish the causes, nature and extent of the gross violations of human rights during the apartheid era. The Commission had the power to grant amnesty to persons who make full disclosure of criminal activities that had political objective, and to recommend reparation measures in respect of victims in order to restore the human and civil dignity of such victims. Section 3 of the TRC Act thus provided that the TRC recommend certain measures for preventing future violations of human rights.

However, the task of the TRC was restricted to only a fraction of human rights violations that emanated from the apartheid policy which sponsored what were perhaps some of the worst acts committed against the people of South Africa and the surrounding region in the post-1960 period. Therefore, it provided a picture that was by no means complete.[382]

3.4.1.2 Period covered by the TRC

Initially, the TRC covered the period between 1 March 1960 (the month in which the Sharpeville massacre took place) and 5 December 1993 (the date that the final agreement on the political negotiations was reached). In order to coincide with the date of the inauguration of the first democratically elected President of the RSA, the period of coverage was extended to 10 May 1994.[383] It is important to consider that the period also covered any act or omission associated with a political objective and which was advised, planned, directed, commanded, ordered or committed by any person within or outside the Republic.[384] Furthermore, two significant explanations are offered regarding the limited period imposed on the TRC. The first explanation relates to the African context and the struggle for the decolonisation of Africa, whereas the second explanation relates to the specific context of South Africa and the climactic

[382] Republic of South Africa, *Truth Commission* (Vol 1) 29.
[383] Republic of South Africa, *Truth Commission* (Vol 6) 8.
[384] Section 20 (2) of the Promotion of National Unity and Reconciliation Act.

phase of a conflict that dated back to the mid-seventeenth century, to the time when European settlers first sought to establish a permanent presence on the sub-continent.[385]

The apartheid state was constructed in 1948 when segregation into a systematic pattern of legalised racial discrimination was set up, but the mandate of the TRC ignored this period even though discrimination existed before that time.[386] Ignoring the period between 1948 and 1960 is justifiable if there were no sufficient evidence to prove the consequences of the institutionalisation of the apartheid policy. Regulating racial discrimination by law under the apartheid regime had led to strong prejudice, and between 1960 and 1982, an estimated 3.5 million people were forcibly removed from their homes and dispossessed of their lands, while their sources of livelihood were also destroyed. Unfortunately, the TRC did not accord them the status of victims.[387] Regarding the Population Registration Act of 1950 that reflected the classification of each individual, especially of the coloured people, John Dugard remarks that, "Statistics, however, cannot capture the misery and human suffering caused by this legislative scheme which sometimes even results in division of families owing to the different racial classifications of members of the same family".[388] Moreover, there were no objections to segregation laws so that the affected population could contest such laws in court. The parliament's decision was supreme and could not be subjected to judicial review. This stance was reiterated by the Republican Constitution of 1961 (Act 32) modelled on the Constitution of 1910, and Section 59(2) of it declares that, "No court of law shall be competent to enquire into or to pronounce upon the validity of any Act passed by Parliament…"[389] On the one hand, there was no reason to ignore the misery, human suffering and racial prejudice of that time (1948-1960) which were brought about by the apartheid legal system. On the other hand, the apartheid regime and the struggle against it had caused unspeakable and untold suffering that created all sorts of victims that the RSA's TRC could not handle due to their diversity. In fact,

> No post-conflict state can involve every single victim in healing activities, truth-telling, trials and reparation measures. Material resources and manpower are too scarce. Of necessity,

[385] Republic of South Africa, *Truth Commission* (Vol 1) 25.
[386] Republic of South Africa, *Truth Commission* (Vol 1) 29.
[387] Mamdani "Justice" 36-37.
[388] Dugard "Legal Framework" 83.
[389] Dugard "Legal Framework" 82.

> usually only a fraction of those whose fundamental rights have been violated will be accepted as "real" victims, but even so, they may fulfil a positive role of representing symbolically the wider constituency of victims in the formal reconciliation process.[390]

3.4.1.3 Structures and powers

In order to achieve the objectives of the TRC, three committees and additional structures such as the investigation unit and subcommittees were created. The Committee on Human Rights Violations was responsible for collecting statements from victims and witnesses and recording the extent of gross violations of human rights. It then granted victims the opportunity to relate their sufferings. The Committee on Amnesty processed and decided individual applications for amnesty in respect of acts committed during the period 1960-1994. The Committee on Reparation and Rehabilitation was tasked with designing and putting forward recommendations for a reparations program. In its effort to restore the dignity of victims, the committee tried to rehabilitate the victims and restore their human and civil dignity.[391]

The population was consulted in a process that was an open countrywide nomination. An independent selection panel comprising representatives of all the political parties, the civil society, and South Africa's religious bodies publicly interviewed commissioners.[392] The President then appointed Archbishop Desmond Tutu as the Chairperson of the Commission and Dr Alex Boraine as the Vice Chairperson. The commissioners of the TRC consisted of seventeen South Africans and it held its first meeting on 16 December 1996. Members of the Commission were Ms Mary Burton, Adv Chris de Jager, the Revd Bongani Finca, Ms Sisi Khampepe, Mr Richard Lyster, Mr Wynand Malan, the Revd Dr Khoza Mgojo, Ms Hlengiwe Mkhize, Mr Dumisa Ntsebeza, Dr Wendy Orr, Adv Denzil Potgieter, Dr Mapule F Ramashala, Dr Fazel Randera, Ms Yasmin Sooka and Ms Glenda Wildschut.[393] The TRC had a staff of 300

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[390] Huyse "Victims" 54.

[391] Section 3(3) of the Promotion of National Unity and Reconciliation Act; Hayner *Challenge of Truth Commissions* 28; Republic of South Africa, *Truth Commission* (Vol 6) 733.

[392] Tutu http://global.britannica.com/topic/Truth-and-Reconciliation-Commission-South-Africa (Date of use: 29 October 2015).

[393] Republic of South Africa, *Truth Commission* (Vol 1) 44.

in four centres namely Cape Town, Johannesburg, Durban and East London, and its annual budget was approximately US$18 million for each of its first two and half years.[394]

3.4.2 Powers, achievements and recommendations

The powers, achievements and recommendations of the RSA's TRC are discussed briefly in the next paragraphs.

3.4.2.1 Powers

The TRC Act gave the TRC quasi-judicial powers to grant individualised amnesty for politically motivated crimes committed between March 1960 and April 1994, to search premises and seize evidence, to subpoena witnesses, and to run a sophisticated witness-protection program.[395] The TRC also had the mandate to conduct questioning under oath[396] and to hold public and private hearings along with the increasing power to grant confidentiality to those who offered testimony.[397] However, the Commission was not granted full powers of investigation because it was limited in time and could not investigate all types of violation.

The powers given to the TRC enabled it to obtain information from some sectors of the society which would not otherwise have offered testimony.[398] Those powers distinguished the RSA's TRC from and made it a model for other similar Commissions all over the world.

3.4.2.2 Achievements

In terms of its achievements, it is important to note that the RSA's TRC found fault with different parties involved in the atrocities of the apartheid era, that is, the apartheid government,

[394] Hayner *Challenge of Truth Commissions* 27-28.
[395] Hayner *Challenge of Truth Commissions* 29; Republic of South Africa, *Truth Commission* (Vol 1) 54; Sections 29, 31-32 and 35 of the Promotion of National Unity and Reconciliation Act.
[396] Section 29(1,c) of the Promotion of National Unity and Reconciliation Act .
[397] Bisset *Criminal Courts* 32.
[398] Bisset *Criminal Courts* 32.

the liberation forces including the ANC, as well as other forces.[399] The Commission received over 21 000 statements from individuals who alleged that they were victims of human rights abuses and 7 124 from people requesting amnesty for acts they committed, authorised or failed to prevent.[400] However, Jeremy Sarkin-Hughes confirms that the real number of credible applications that were based on political objectives were about 2 500.[401] The TRC helped to lay the foundations for a culture of human rights in the RSA[402] and to ensure that the past would not be repeated.

The Committee on Human Rights Violations had the duty to identify people who were victims of killings, abduction, torture, grievous harm and related violations, and to understand the context in which those gross violations of human rights were committed.[403] The committee was guided by the principles of compassion, respect and equality in defining who a victim was.[404] Thus, Section 1 of the TRC Act offers a definition of what it means to be a victim. Victims are persons who, individually or together with one or more persons, suffered harm in the form of physical or mental injury, emotional suffering, pecuniary loss or a substantial impairment of human rights – as a result of a gross violation of human rights or of an act associated with a political objective for which amnesty had been granted. The suffering could also be a result of intervening to assist persons who were in distress or to prevent victimisation of such persons and relatives or dependants of victims. In addition, where victims were not found, their known relatives and dependants were granted individual reparation. Relatives include parents (or those who acted/act in place of a parent), spouse (according to customary, common, religious or indigenous law), children (either in or out of wedlock or adopted), and someone the victim has/had a customary or legal duty to support.[405]

After the committee completed the substantive part of its work and conducted an extensive audit, approximately 7 000 deponents could not be declared victims. The majority of

[399] South African History online http://www.sahistory.org.za/topic/truth-and-reconciliation-commission-trc (Date of use: 26 May 2014).
[400] Republic of South Africa, *Truth Commission* (Vol 2) 1.
[401] Sarkin-Hughes *Carrots and Sticks* 115.
[402] Republic of South Africa, *Truth Commission* (Vol 6) 774.
[403] Republic of South Africa, *Truth Commission* (Vol 5) 15.
[404] Republic of South Africa, *Truth Commission* (Vol 5) 1.
[405] Republic of South Africa, *Truth Commission* (Vol 5) 176.

deponents were willing to testify in public and therefore the hearings became the public face of the Commission.[406] The Commission gathered information, and made sources available and accessible. The reports were processed and coded in order to assist the Committee on Reparation and Rehabilitation in order to establish harm suffered, determine the needs and expectations of victims, establish criteria for identifying victims in urgent need, and develop proposals regarding long-term reparation and rehabilitation measures.[407]

The Committee on Amnesty finalised 6 377 cases, except for approximately 736 cases involving people in senior positions from both the liberation movement and the former security forces.[408] For that reason, the Committee "continued to hold amnesty hearings for another two and a half years after the release of the commission's 1998 report, finally concluding in 2001".[409] The Committee considered a number of factors in determining whether an applicant satisfied the criteria for making full disclosure of all the relevant facts relating to acts associated with a political objective committed in the course of the past conflicts. The Committee was also directed to consider the relationship between the act, omission or offence and the political objective pursued, and in particular, the directness and proximity of the relationship and the proportionality of the act, omission or offence to the objective pursued.[410] Any crime committed for personal gain or out of personal malice, ill will, or spite was not eligible for amnesty.[411] The Committee had denied 5 392 applications for amnesty[412] for lack of political objective, and only 1 167 individuals were granted amnesty while 145 got partial amnesty.[413]

The Committee on Reparation and Rehabilitation was tasked with taking appropriate "measures aimed at the granting of reparation to, and the rehabilitation and the restoration of the human and civil dignity of, victims of violations of human rights".[414] The Committee focused on

[406] Republic of South Africa, *Truth Commission* (Vol 5) 774, 6-7.
[407] Republic of South Africa, *Truth Commission* (Vol 5) 1-2, 177.
[408] Republic of South Africa, *Truth Commission* (Vol 6) 774.
[409] Hayner *Challenge of Truth Commissions* 31.
[410] Section 20(3,f) of the Promotion of National Unity and Reconciliation Act.
[411] Section 20(3,f) of the Promotion of National Unity and Reconciliation Act; Hayner *Challenge of Truth Commissions* 29.
[412] South African History online http://www.sahistory.org.za/topic/truth-and-reconciliation-commission-trc (Date of use: 26 May 2014).
[413] Sarkin-Hughes *Carrots and Sticks* 107.
[414] Preamble of the Promotion of National Unity and Reconciliation Act.

the immediate, visible need of sustenance by many victims. Two reasons justified the *raison d'être* of the right to reparation in the RSA. The first shows that there could be no healing or reconciliation without adequate reparation and rehabilitation measures. The second states that reparation was essential to counterbalance amnesty.[415] Aware that "no amount of reparations could ever make up for the losses suffered by individuals, families, and communities because of gross human rights violations, the nation had an obligation at least to try to transform abject poverty into modest security".[416] Thus, under international obligation, South Africa had the responsibility to offer victims of human rights abuses fair, adequate and significant compensation.[417]

Again, the South African government had accepted its moral obligation to carry over the debts of its predecessors which means it was equally responsible for reparation. Implementation of reparation afforded all South Africans an opportunity to contribute to healing and reconciliation. The proposed reparation and rehabilitation policy has five components that include legal, administrative and institutional measures designed to prevent the recurrence of human rights abuses – urgent interim reparation, individual reparation grants, symbolic reparation/legal and administrative measures, community rehabilitation programmes and institutional reform.[418]

The Committee was guided by certain internationally accepted approaches to reparation and rehabilitation which are redress, restitution, rehabilitation, restoration of dignity and reassurance of non-repetition.[419] The Committee processed and submitted to the President's Fund 17 088 of the 19 890 claims by the victims. However, the Committee was unable to trace 1770 victims, for whom no identifiable addresses or identity numbers were provided even

[415] Republic of South Africa, *Truth Commission* (Vol 5) 170.
[416] Republic of South Africa, *Truth Commission* (Vol 1) 125.
[417] Article 14 of the Convention Against Torture of 1984 and Article 24 (4) of the International Convention for the Protection against Enforced Disappearances (CPED) of 2007.
[418] Republic of South Africa, *Truth Commission* (Vol 5) 174, 175-176.
[419] These are respectively the right to fair and adequate compensation the right to fair and adequate compensation the right to the re-establishment, as far as possible, of the situation that existed prior to the violation; the right to the provision of medical and psychological care and fulfilment of significant personal and community needs; the right to the provision of medical and psychological care and fulfilment of significant personal and community needs; the right of the individual/community to a sense of worth; and the strategies for the creation of legislative and administrative measures that contribute to the maintenance of a stable society and the prevention of the re-occurrence of human rights violations.

though their names were submitted to the Presidents' Fund.[420] Section 42 of the TRC Act provides that the President's Fund served to make payment to victims as reparation. Funds contained all monies appropriated by the Parliament and donated or contributed for that purpose:

> The main work of the Committee on Reparation and Rehabilitation, besides determining who qualified as a victim for the purposes of the TRC, was to make recommendations on an urgent interim and final reparations policy. The urgent interim recommendations were to be made as soon as possible during the life of the CRR and the final reparations policy was to be included in the TRC's Final Report to the President.[421]

3.4.2.3 The TRC's recommendations

The findings of the Committees on Amnesty and on Human Rights Violations include gathering information about the victims' profile, the context in which violations took place, the motivation behind such violations and full confessions of abusers. From these findings, Section 3(1,c) of the TRC Act recommends reparation measures in respect of victims in order also to prevent the future violation of human rights. Furthermore, Section 4(h) of the TRC Act allows the Commission to make such recommendations to the President with regard to the creation of institutions that are conducive to a stable and fair society and institutional, administrative and legislative measures. After considering the recommendations, the President could then make his own recommendations to the Parliament which would formulate its own resolution and grant reparations based on the recommendations of the President.[422] Thus, payment was calculated according to the number of dependants and needs of the victim. An applicant with no dependant was eligible for up to R2 000 compensation. One dependant raised the maximum possible payment to R2 900. The maximum for a victim with two dependants was R3 750, for three dependants, R4 530, for four dependants, R5 205, and for five or more dependants, it was R5 705.[423] However, the processing of payments took longer than expected. The recommendation to the President was made in September 1996, but the Regulations were promulgated in April 1998 while the payment began in July 1998. The process was completed three years after the

[420] Republic of South Africa, *Truth Commission* (Vol 6) 165, 180.
[421] Colvin "Overview of the Reparations" 9.
[422] Abduroaf *Truth Commissions* 31-32.
[423] Republic of South Africa, *Truth Commission* (Vol 5) 181; Colvin "Overview of the Reparations" 15.

first payment (1998-2001). The President's Fund paid a total of R44 000 000 to 14 000 victims each receiving payment ranging from R2 000 to R5 600.[424] Victims who were entitled to urgent interim payment were those in urgent need of medical, emotional, educational, symbolic, social, legal or administrative assistance or intervention.[425]

However, reciepients reacted differently to the payments. Some victims perceived the funds as a symbolic gesture of acknowledgment while others felt they were inadequate and, for that reason, felt even more alienated from the TRC's mission of forgiveness and reconciliation. None of the victims however saw the reparation as blood money used to buy their silence in the face of amnesties that dishonoured the dead. The funds also became a source of conflict in some communities because those who did not receive any payment became jealous and sometimes threatened recipients with violence.[426] In this regard, John de Gruchy remarks that:

> If the TRC's recommendations on reparation are not taken seriously, we shall be guilty of something similar and the victims will remain victims. This will inevitably undermine the building of a moral culture. If we are to build a moral culture, we need to demonstrate that we care, and care adequately, for those who are the victims of injustice and violence, or natural disaster. A moral society is a caring society.[427]

Regarding past conflicts in the RSA, the TRC concluded that most South Africans participated in either oppression or resistance to apartheid. Thus, to achieve reconciliation and unity, reconciliation and healing were needed by all.[428] Mamphela Ramphele argues that "until there is an intense focus on reparation – not only on material reparation to those who were deprived, but also on addressing the psychological and spiritual needs of those who were dehumanized, we will not achieve the kind of society that we yearn for".[429]

However, even the critics of the TRC admitted that the Commission had made a small contribution to the building of the new RSA, and while truth may not always lead to

[424] Colvin "Overview of the Reparations" 15; Abduroaf *Truth Commissions* 33-34.
[425] Koppe "Reparations" 219.
[426] Colvin "Overview of the Reparations" 16.
[427] De Gruchy "Moral Culture" 170.
[428] Republic of South Africa, *Truth Commission* (Vol 5) 307.
[429] Ramphele "Morality"174.

reconciliation, there can be no genuine, lasting reconciliation without truth. Therefore, in order for reconciliation and unity to become a reality in South Africa, input from all South African peoples is still required because the task cannot be left to the TRC alone.[430] Njabulo Ndebele affirms that reconciliation is a process that should continue because it would not be achieved solely through the TRC and its hearings and Report.[431] Alex Boraine also agrees that reconciliation needs to continue through debate and dialogue with a view to building a nation and reconciling peoples who have been divided for a long time and who remain divided in many ways.[432]

To ensure that there would be no repetition of the past in the future, the TRC recommended the urgent development of a strong human rights culture. To give this a chance to succeed, findings of the Commission should be accessible, museums should be established and maintained, socioeconomic rights should be recognised and protected,[433] and human rights curricula should be introduced in formal and specialised education while the training of law enforcement personnel should be prioritised.[434] Francis Wilson argues that redressing the bias in human capital investment should be one of the most urgent priorities of the democratic government in South Africa, and the initiative for improving primary school education should be one of the major priorities.[435] In the same vein, Grace Naledi Pandor claims that, "focus on education is necessary and important, particularly given our aim of ensuring that every young person enjoys the right to education".[436]

On the call for the removal of perpetrators from public office, the TRC found that lustration was inappropriate in the South African context. Therefore, it recommended that

[430] Republic of South Africa, *Truth Commission* (Vol 5) 306.
[431] Ndebele "Reconciliation" 150.
[432] Boraine "Potential" 77.
[433] Republic of South Africa, *Truth Commission* (Vol 5) 306.
[434] Republic of South Africa, *Truth Commission* (Vol 5) 311.
[435] Wilson "Inequality" 180-183. See also Dumisa Ntsebeza who argues that, "There will be no reconciliation as long as the division between the 'haves' and the 'have-nots' exists. As long as the historical imbalance persist between the beneficiaries of South Africa's racial capitalism, who are mainly white, and the victims thereof, the black working class and the rural poor, so that the whole nation can be reconciled. See Ntsebeza "Live for" 105.
[436] Pandor "Nation" 185.

perpetrators be reintegrated into society by encouraging them to engage (through donation, skills and time) in community-based projects in communities which were wronged.[437]

On the issue of accountability after the TRC, where amnesty had not been applied or where it has been denied, the TRC recommended that prosecution should be considered if evidence exists that an individual committed gross human rights violation. In order to contest the idea of impunity, the granting of general amnesty should be resisted. Therefore, Attorneys-General must pay rigorous attention to the prosecution of members of the South African Police Service (SAPS) who are found to have assaulted, tortured and/or killed persons in their care, and in cases of serious allegations against individuals, the TRC had to disclose information at its disposal.[438] Georgi Verbeeck notes that, "If the victim sees no former perpetrators being held accountable, he may seek revenge on his own terms, and continue the cycle of violence".[439] Similarly, John de Gruchy argues that, "if the perpetrators of crimes get away with what they did, then the rule of law is undermined. Yet if their punishment has no redemptive possibility, it deepens the divisions in society, increases enmity and resentment, prevents reconciliation and encourages vengeance".[440] However, as stated in Section 31(3) of the TRC Act, testimony given during the hearings "shall not be admissible as evidence against the person concerned in criminal proceedings in a court of law or before anybody or institution established by or under any law".

Indeed, given that the Committee on Amnesty denied 5392 applications for amnesty besides those who did not apply for amnesty, it can be deduced that numerous perpetrators were eligible for prosecution of crimes committed during the apartheid period.

The TRC raised many expectations and despite the criticisms raised, it is uncontested that the Commission had helped a number of South African survivors to understand what happened to their loved ones. In this regard, Jeremy Sarkin-Hughes notes that, "the TRC has helped to uncover at least some truth about what occurred in South Africa. It has helped to piece

[437] Republic of South Africa, *Truth Commission* (Vol 5) 310.
[438] Republic of South Africa, *Truth Commission* (Vol 5) 309.
[439] Verbeeck "Revenge or Reconciliation?" 206.
[440] De Gruchy "Moral Culture" 171.

together some of the many human rights abuses that occurred. It has also imbued the new government with a degree of human rights respectability".[441] However, Jose Zalaquett argues that, "it is not sufficient that well-informed citizens have a reasonably good idea of what really happened".[442] Again, Desmond Tutu acknowledged that while many former police officers came seeking amnesty, members of the old South African Defence Force (SADF) hardly cooperated with the TRC. Thus, some truths still need to be known in order to heal and reconcile the people of South Africa.[443] It was reported that for human rights violations committed within the borders of the RSA, only thirty-one members of the SADF applied for amnesty and only five SADF members applied for amnesty for human rights violations committed outside the borders of the RSA.[444]

The idea of amnesty, states Jeremy Sarkin-Hughes, "was unpalatable for many, but it was accepted as necessary: 1) for a peaceful transition, 2) because amnesty was only considered in specific circumstances, and 3) because prosecutions would follow for those offenders who did not apply or who did not qualify".[445] Indeed,

> The threat of prosecution was so basic to the entire exercise for without it, some of the perpetrators who did apply for amnesty would have had no motive to testify at all.… Many survivors and their families were identified as victims of gross human rights abuses, many refused to have anything to do with the hearings for the simple reason that they wanted those responsible prosecuted.[446]

In the following section, a consideration of what the post-TRC prosecution of apartheid-era crimes in South Africa entails is offered.

[441] Sarkin-Hughes *Carrots and Sticks* 371.
[442] Zalaquett "Political Constraints" 31 cited by Sarkin-Hughes *Carrots and Sticks* 372.
[443] Tutu *Forgiveness* 188-189.
[444] Republic of South Africa, *Truth Commission* (Vol 6) 183.
[445] Sarkin-Hughes *Carrots and Sticks* 365.
[446] Fernandez "Post-TRC Prosecutions" 71.

3.5 Post-TRC Prosecution - An Unfinished Task

As mentioned above, the constitutionality of the TRC Act was not a limitation to the victims' right to justice against perpetrators who had failed to apply for amnesty or who were denied amnesty. The final recommendation of the RSA's TRC was clear regarding criminal prosecutions where evidence exists.

On 21 March 2003, President Thabo Mbeki received the TRC's Final Report, and the final draft of the TRC Report was tabled before the Parliament on 15 April 2003. On that occasion, the President declared before the Parliament on behalf of the government that the issue of amnesty would be reserved for the National Director of Public Prosecutions (NDPP), which would pursue any case that, according to the normal practice in criminal justice, is deemed to deserve prosecution and can be prosecuted.[447] Prior to this statement, on 24 March 2003, after being appointed by the President, the NDPP established the Priority Crimes Litigation Unit (PCLU) which was charged to prosecute persons who were denied amnesty by the TRC. As the PCLU was not an investigative agency, it depended on the South African Police Services and the Directorate of Special Operations (DSO, better known as the Scorpions) for its investigative work:[448]

> The PCLU was responsible for managing and directing the investigation and prosecution of crimes dealt with in the Implementation of the Rome Statute of the International Criminal Court Act No. 27 of 2002, serious national and international crimes, including acts of terrorism and sabotage, high treason, sedition, mercenary activities and other priority crimes to be determined by the NDPP.[449]

Essentially, "these were that only serious human rights abuses should be prosecuted where there was reliable evidence, but that humanitarian considerations as well as the interests of reconciliation should also play a role in the decision-making".[450] In the interest of South Africans, those who did not apply for amnesty or who were denied amnesty were requested to

[447] Doxtader and Salazar *Fundamental Documents* 468.
[448] Fernandez "Post-TRC Prosecutions" 66.
[449] Bubenzer *Post-TRC Prosecutions* 28.
[450] Fernandez "Post-TRC Prosecutions" 66.

come forward and divulge information at their disposal in order for the NDPP to decide in the public interest whether or not to prosecute them.[451] With this discretionary authority of the NDPP, the Prosecution Policy provided some criteria that governed the decision to prosecute. Thus, "Once a prosecutor is satisfied that there is sufficient evidence to provide a reasonable prospect of a conviction, a prosecution should normally follow, unless public interest demands otherwise".[452] After obtaining the testimonies of victims or institutions concerned, the NDPP could then decide to prosecute or exonerate the perpetrators and it was obliged to inform the Minister of Justice of all decisions taken which also must be made available to the public. However, the NPA and all other related agencies were not allowed to use any information obtained from an accused person in the proceedings or in any subsequent criminal trial of such a person.[453]

The process of granting amnesty employed by the RSA's TRC and the arrangement to prosecute or not to prosecute perpetrators after the TRC showed that the post-apartheid government was unwilling to prosecute perpetrators.[454] In May 2002, President Thabo Mbeki pardoned thirty-three ANC members who were denied amnesty in accordance with Section 84(2,j) of the Constitution of 1996.[455] It is clearly an unfinished task. In other words, while the South African government was against the idea of blanket amnesty, it was considering, at the same time, different strategies that could limit prosecutions and therefore jeopardise the culture of human rights in the RSA. This can also be understood in the light of the political compromise under which the TRC was created. Apparently, "the guidelines were generally designed to allow

[451] Procedural Arrangements §1.
[452] §4(c) of the Prosecution Policy was issued by the National Directorate of Public Prosecutions. However, the policy amendments to the National Prosecution Policy dated 1 December 2005 generated much debate. Therefore, in December 2008, the High Court of Pretoria declared that the policy was inconsistent with the Constitution of 1996, and it was unlawful and invalid. See the matter between Thembesile Phumelele Nkadimeng and Others v. the National Director of Public Prosecutions and Others 32709/07.
[453] Prosecution Policy Appendix A §B9-11, 15.
[454] In the same vein, Lovell Fernandez argues that, "To be sure, the government is not oblivious to the need for prosecutions to take place", see Fernandez "Post-TRC Prosecutions" 73. Louise Mallinder also views the situation as "the false promise of prosecution in South Africa" arguing that prosecutions are very difficult where there is little political will. See Mallinder "Amnesties".
[455] Lollini *Constitutionalism* 123.

the NDPP to stop a prosecution wherever it is deemed detrimental for the overall progress of reconciliation and nation-building", according to Ole Bubenzer.[456]

Bubenzer further acknowledges that, "From early 2006 all post-TRC prosecutions were concentrated at the PCLU and the regional prosecutors were obliged to refer such cases to the National Prosecution Authority (NPA) in Pretoria".[457] Thus, "Until the end of 2006, TRC matters took up on average only about 30 to 50 per cent of the unit's work".[458] In total, "167 investigations have been registered. The majority of these cases have been closed as not warranting prosecutions, while a small number of prosecutions have been identified".[459] However, some cases involving those who were denied amnesty were brought to trial for example the Gideon Nieuwouldt cases.

3.5.1 The Gideon Nieuwoudt Cases

Gideon Nieuwoudt was brought to trial on two cases – the Motherwell Four and the Pebco-Three cases.

3.5.1.1 The Motherwell Four Case

In the Motherwell Four case, Gideon Nieuwoudt, a former security police colonel, together with his colleagues, Marthinus Ras and Wahl du Toit, was sentenced by the Port Elizabeth Court to 20 years' imprisonment for a murder committed in 1989. He and his colleagues then appealed against the conviction to the Supreme Court of Appeal. The Court postponed the appeal in order for them to apply for amnesty that was denied in 1998 by the TRC because the evidence was not credible. However, the High Court called for a review of the amnesty refusal. Unfortunately, Gideon Nieuwoudt died in August 2005, a few days before he could again be denied amnesty, while his colleagues were subsequently granted amnesty.[460]

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[456] Bubenzer *Post-TRC Prosecutions* 136.
[457] Bubenzer *Post-TRC Prosecutions* 33.
[458] Bubenzer *Post-TRC Prosecutions* 31.
[459] Fernandez "Post-TRC Prosecutions" 66.
[460] Fernandez "Post-TRC Prosecutions" 66-67.

3.5.1.2 The Pebco-Three case

Champion Galela, Qaqawuli Dodolozi and Sipho Hashe who were members of the Port Elizabeth Black Civic Organisation (anti-apartheid activists known as PEBCO-Three) were killed in 1985.[461] In 1996, Gideon Nieuwoudt and others (including Harold Syman, Hermanus Barend Du Plessis, Johannes Martin van Zyl, Gerhardus Johannes Lotz, Johannes Koole, etc.) applied for amnesty for their involvement in the killing of these three activities. Due to the contradictory testimony among applicants during the hearings, their application for amnesty was rejected for lack of full disclosure. However, Snyman and Mogoai were granted amnesty.[462]

In February 2004 after the establishment of the PCLU, Anton Ackerman, who was appointed as Special Director of Public Prosecution, decided to charge Gideon Nieuwoudt for the murder of the Pebco-Three.[463] Following his arrest, Nieuwoudt was released on R5000 bail.[464] However, in November 2004, the NDPP imposed a moratorium on all TRC-related cases. The proceedings in the Pebco case were affected because all TRC-related investigations and prosecutions were put on hold. Thus, after the bail hearings between 2004 and 2007, the court proceedings did not make progress and the case was still pending.

On 16 July 2007, the remains of the Pebco-Three were found after an NPA investigation team combed the farm in Post Chalmers in the Eastern Cape.[465]

3.5.1.3 Protest against Gideon Nieuwoudt's prosecution

There were some objections to the arrest of Gideon Nieuwoudt as well as the indictment of Ronnie Blani (a case that will be analysed in the next section).

For instance, Pieter Mulder, the leader of the Freedom Front Plus (FFP) averred that "it was 'extremely unjust that the "small fry" who only executed orders' were being prosecuted

[461] Fernandez "Post-TRC Prosecutions" 66.
[462] Bubenzer *Post-TRC Prosecutions* 65-66.
[463] Bubenzer *Post-TRC Prosecutions* 66.
[464] Fernandez "Post-TRC Prosecutions" 66.
[465] Bubenzer *Post-TRC Prosecutions* 67-68.

'while those who gave the orders have in the meantime retired peacefully and are now being ignored'. If the NPA was to be consistent, it should also prosecute Thabo Mbeki and other senior African National Congress leaders".[466] Given that apartheid officials were rarely forced to account for their crimes, those in the high echelons of the government and in the ANC circles as well as in the local ANC structures also thought it was unjust to prosecute a former liberation force cadre. Accordingly, the NPA was advised to suspend the arrests. Explaining its action, the NPA stated that there was no strategic plan on how to deal with TRC-related cases, and it was necessary to approach them on a holistic and uniform basis.[467] Therefore, for appropriate political and policy approaches to post-TRC prosecutions meetings were held by the Minister of Justice and Minister of Safety and Security with high-ranking NPA and police officials. In November 2004, they resolved to impose a moratorium on all TRC-related prosecutions and investigations pending the composition and approval of the guidelines,[468] which shows the complexity involved in prosecuting past abuses.

3.5.2 Dr Basson and Blani Cases

Two other cases worthy of note are those of Wouter Basson and Ronnie Blani.

3.5.2.1 S v. Basson 2005 (12) BCLR 1192 (CC)

A. Facts and decision

The case of Wouter Basson who was indicted on 67 counts including murder and conspiracy to commit various crimes was submitted in the Pretoria High Court on 4 October 1999. Most of the crimes Basson was accused of were committed before 1994 in foreign countries such as Namibia, Swaziland, Mozambique and the United Kingdom when he worked in a division of the South African Defence Force (SADF) and as the head of the biological and chemical warfare programme of the Apartheid State.[469] The conspiracy was about plots to murder persons

[466] Fernandez "Post-TRC Prosecutions" 68.
[467] Bubenzer *Post-TRC Prosecutions* 130-131.
[468] Bubenzer *Post-TRC Prosecutions* 131.
[469] *S v. Basson* 2005 (12) BCLR 1192 (CC) § [1].

perceived to be enemies of South Africa by the SADF. The conspiracy was continuously organised and directed by members of the SADF within South Africa, where plans were approved, poisons and other weapons prepared, and instructions were issued to the operatives. Regarding the mass murders that took place in Namibia, at the time of alleged conspiracy, Namibia was not a sovereign country as it was administered by the South African government and was therefore an integral part of the RSA.[470]

On 11 April 2002, Wouter Basson was acquitted on all counts based on section 18(2) of the Riotous Assemblies Act[471] which states that South African courts do not exercise jurisdiction over crimes committed beyond the borders of the RSA. Accordingly, the State appealed to the Supreme Court of Appeal (SCA) against the judgment. The application addressed three issues namely the bias of the trial judge, admissibility of the bail records, and the quashing of six charges. However, the leave to appeal was not granted,[472] and the State then applied condonation of its non-compliance with the rules. In May 2003, the SCA refused the application for condonation including the issue of the quashing of the charges. Thereupon, the State sought leave to appeal to the Constitutional Court against the decision. On 9 September 2005, the Constitutional Court upheld the State's appeal against the decision of the SCA on the issue. As the appeal was being upheld, the Constitutional Court overturned the quashing of the conspiracy charges. Therefore, the State was permitted to determine what steps it wished to take in respect of the charges.[473]

Unfortunately, a few months after the trial, the NPA decided to reopen the case and to prosecute Wouter Basson on those charges based on the decision of the Constitutional Court.[474] The reason for this decision was that a new trial would violate the double jeopardy rule, which

[470] *S v. Basson* 2005 (12) BCLR 1192 (CC) § [227].
[471] Section 18 (2) provides that, "Any person who – conspires with any other person to aid or procure the commission of or to commit; or incites, instigates, commands, or procures any other person to commit, any offence, whether at common law or against a state or statutory regulation, shall be guilty of an offence and liable on conviction to the punishment to which a person convicted of actually committing that offence would be liable." Therefore, the section did not criminalise crimes committed beyond the borders of South Africa.
[472] *S v. Basson* 2005 (12) BCLR 1192 (CC) § [1-2].
[473] *S v. Basson* 2005 (12) BCLR 1192 (CC) § [15, 14, 263].
[474] Swart 2008 *ZaöRV* 212.

in this case would be an inevitable procedural obstacle for a new prosecution.[475] The principle of double jeopardy, which the case refers to,[476] prevents anyone from being tried twice for the same crime as it is well protected by Article 14(7) of the ICCPR.[477] Ole Bubenzer argues that it is incomprehensible that the Court did not elaborate on the principle of universality which would clearly have provided for the jurisdiction of South African courts and would have rendered invalid the decision not to prosecute for unknown reasons.[478] Van Beth Shaack and Ronald C Slye explain that the principle of universal jurisdiction grants any state the authority to assert jurisdiction over an unlawful act, regardless of the nationality of the perpetrator or the victim, and regardless of where the act took place. Accepted under international customary law, the principle of universal jurisdiction is justified based on the severity of the crime and the undesirable consequences of impunity.[479]

B. Comments

In the aftermath of an unjust legal system in which gross violations of human rights and of IHL were committed, the victims' need for justice becomes rather complex if the legal system is not yet reformed or normalised. In the case of South Africa where the criminal law excluded (did not cover) the system of apartheid itself,[480] South African courts declined to exercise jurisdiction over persons who committed crimes in other countries.[481] Volker Nerlich claims that when a society in transition accepts the pre-existing legal order, there would be dire consequences especially when that legal order was intrinsically unjust and defines the past which that society seeks to leave behind. Nerlich further agrees with Gustave Radbruch that, from a judicial viewpoint, laws which build on the negation of equality could not be considered laws at all.[482] The NDPP Bulelani Ncquka following the acquittal of Michael Luff also denounced the lack of transformation of the judiciary. Luff, whose application for amnesty was denied because he did

[475] Bubenzer *Post-TRC Prosecutions* 45; Read also Nerlich "Criminal Justice" 104.
[476] *S v. Basson* 2005 (12) BCLR 1192 (CC) § [252].
[477] Article 14(7) of the ICCPR provides that, "No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country."
[478] Bubenzer *Post-TRC Prosecutions* 45.
[479] Shaack and Slye *Enforcement* 113.
[480] Nerlich "Criminal Justice" 93.
[481] *S v. Basson* 2005 (12) BCLR 1192 (CC) § [223].
[482] Nerlich "Criminal Justice" 93-94.

not make full disclosure regarding the killing of an ANC member in 1985, was acquitted during the criminal proceedings because there was insufficient evidence to prove him guilt beyond reasonable doubt.[483] On the contrary, Georgi Verbeeck argues that the rule of law was still intact after apartheid and that the judiciary had maintained a high standard of impartiality. However, the new South Africa wanted to follow a different path.[484]

Indeed, there is an assumption that laws that operated under the apartheid regime could not grant the victims of that regime their rights. Laws that were enacted during the apartheid regime were meant to sustain the policies of the regime. In other words, during that time there could not have been laws against repressive practices that would justify those who opposed racist laws or the policy of exterminating opponents, etc. Thus, the Center for the Study of Violence and Reconciliation states that, "the judiciary's failure to invalidate unjust laws or interpret them so as to minimise their harsh effects coupled with official claims of judicial independence helped the government legitimise and perpetuate the apartheid legal order".[485] Before one can attempt to confirm whether the apartheid regime protected perpetrators, it is prudent not to presume that any person who committed crimes at that time remained free of its movement:

> While formal structural guarantees of independence existed and while the judiciary had a history of independence and at times rendered decisions contrary to the wishes of the ruling party, a closer examination of the judiciary's position, powers and composition reveals that the judicial branch was not truly independent and did not effectively curb abuses of power by the other branches of government. Instead, by upholding blatantly discriminatory and unjust legislation, the judiciary functioned as part of the apartheid legal order and contributed to legitimising and sustaining it.[486]

In the case of Namibia for example, at the time of the alleged conspiracy, the South African government controlled Namibia as an integral part of South Africa and in terms of the Defence Act, the SADF was deployed in Namibia as part of the RSA. Therefore, the Riotous Assemblies

[483] Sarkin-Hughes *Carrots and Sticks* 377-378; Lollini *Constitutionalism* 124.
[484] Verbeeck "Revenge or Reconciliation?" 209.
[485] Center for the Study of Violence and Reconciliation *After the Transition* 19.
[486] Center for the Study of Violence and Reconciliation *After the Transition* 11.

Act was applicable in Namibia.[487] However, interpreting this Act, judges have considered Namibia as being outside South Africa and consequently, they held that section 18(2) of the Riotous Assemblies Act, 17 of 1956 contemplates conspiracies to commit offences which are justiciable in South Africa, and that murders committed beyond the borders are not within the jurisdiction of South African courts.

Paradoxically, the Military Discipline Code criminalised certain conduct of Defence Force members even when committed beyond the borders of South Africa. The provisions of section 19A of the Riotous Assemblies Act were applicable also in the territory of South West Africa, and South African courts had jurisdiction to try such crimes committed beyond the borders of the RSA.[488] Nevertheless, the Constitutional Court accepted the prosecution's declination to exercise jurisdiction in such cases based on John Dugard's view that the decision is an aspect of sovereignty which has given rise to presumption against the extraterritorial operation of criminal law.[489] In this regard, Mia Swart points out that, "it was ironic that the Riotous Assemblies Act, a legislation designed to prosecute 'terrorists' and enemies of the apartheid state, was used to prosecute Basson".[490] The author also concludes that the South African criminal justice system was ill equipped to handle cases of such complex nature.[491]

Taking into account the subjective territorial principle,[492] Van Beth Shaack and Ronald C Slye concur that a State may assert jurisdiction over acts commenced within the State, but consummated abroad.[493] In the case in question, there was tangible and substantial link between events in South Africa and the conspiracy to commit murders in Namibia.[494] Besides, "[t]he conspiracy was a continuing conspiracy organised and directed by members of the SADF from within SA, where plans were approved, poisons and other weapons prepared, and instructions

[487] *S v. Basson* 2005 (12) BCLR 1192 (CC) § [227].
[488] *S v. Basson* 2005 (12) BCLR 1192 (CC) § [206, 210].
[489] Dugard *International Law* 133 See *S v. Basson* 2005 (12) BCLR 1192 (CC) § [223].
[490] Swart 2008 *ZaöRV* 216.
[491] Swart 2008 *ZaöRV* 224.
[492] The territorial principle entails two situations - subjective and objective territorial principles. As the analysis takes into account the subjective territorial principle, it is important to underline that "under the objective territorial principle, a State may assert jurisdiction over acts committed abroad that are consummated within the territory of the prosecuting State." Shaack and Slye *Enforcement* 98.
[493] Shaack and Slye *Enforcement* 98.
[494] *S v. Basson* 2005 (12) BCLR 1192 (CC) § [228].

were issued to the operatives".[495] It is assumed that preparing, ordering and instructing such acts from South Africa, which may be understood as the point of departure with Namibia as the landing place, constitute conspiracy. If the South African courts therefore observed the territorial principle as a whole, especially the subjective territorial principle, Wouter Basson would have not been acquitted as the conspiracy was ordered in South Africa and consummated in Namibia. However, the complexity of the case when applying the subjective territorial principle lies in the fact that Namibia was considered a non-sovereign entity while it was under the control of the South Africa government. Thus, since South African courts have agreed that Namibia was an integral part of South Africa, then South African courts should exercise jurisdiction over persons who committed crimes in Namibia during the apartheid era.

In the aftermath of mass violence, to prioritise prosecution, it is important that parties agree on the reform of the previous unjust legal order and the operations of the judiciary during the political negotiations. This would allow the adoption of legislations to the present context or to post-conflict justice. In this case, it is important for the RSA, during the negotiation settlement process, to agree on the amendment that allows South African courts to apply South African criminal laws to its nationals who were either perpetrators or victims of criminal acts when considering nationality principle[496] for four reasons. Firstly, the targeted victims were South African opponents of the apartheid regime living in neighbouring countries or in entity administered by the South African government. Secondly, conspiracies to commit offence or crimes were committed by the members of the RSA's defence and security forces. Thirdly, murder was criminalised in South Africa where all members of the SADF were liable to prosecution, and fourthly, as the TRC's mandate included gross human rights violations committed outside South Africa it was judicious that South African courts had jurisdiction. Thus, under the *active nationality principle*, South African courts could exercise jurisdiction because the offenders were South African members of the SADF or South African members of particular liberation movements. In addition, under the *passive personality principle*, South

[495] *S v. Basson* 2005 (12) BCLR 1192 (CC) § [227].

[496] The nationality principle, according to Van Beth Shaack and Ronald C Slye, comes in two forms - the 'active nationality principle' which permits jurisdiction when the *offender* is a national or resident of the state prescribing or prosecuting undesirable conduct. The 'passive personality principle' permits jurisdiction where the *victim* is a national of the prosecuting state". Shaack and Slye *Enforcement* 98.

African courts could exercise jurisdiction because victims were South Africans. However, as South African courts at the time of apartheid already declined to exercise jurisdiction over persons who committed crimes abroad, one may argue that applying the nationality principle, could be seen as the violation of the principle of non-retroactivity or the principle *nullum crimen, nulla poena sine lege.*

In the second chapter, this argument was excluded, that is, assuming that if the domestic law does not criminalise unlawful acts prohibited by the rule of customary law, when the situation is normalised, such conduct may be prosecuted. Tyler Giannini *et al* concur that the State's obligation to protect human rights by preventing wholesale impunity abuses does not necessarily demand the prosecution of every human rights violation.[497] Unfortunately, Section 25(3,f) of the Interim Constitution of 1993 recommends that one should "not to be convicted of an offence in respect of any act or omission which was not an offence at the time it was committed, and not to be sentenced to a more severe punishment than that was applicable when the offence was committed". In this regard, a peremptory norm of international law provides rights to individual victims of war crimes regardless of the attitude of the State.[498] During the process of negotiation in South Africa, as delegates agreed that rules of customary international law form part of the law of the RSA (Section 231(4) of the Interim Constitution), conspiracy to commit various crimes would be justifiable in the country. For this reason, the final volume of the TRC's report notes that, "It could be argued that the new government has an obligation, in terms of international law, to deal with those who were responsible for crimes committed under apartheid, even though their acts were considered legitimate by the South African government at the time".[499] In the second case, the spirit of the Epilogue appeared to have prevailed because even if the accused had admitted all elements of the offences, it seems that the court had decided the case *ex aequo et bono*.

[497] Giannini *et al Prosecuting Apartheid-Era* 17.
[498] *AZAPO and Others v. Truth and Reconciliation Commission and others* [1996] 3 All SA 15 (C) 26.
[499] Republic of South Africa, *Truth Commission* (Vol 6) 594.

3.5.2.2 State v. Ronnie Blani CC81/2004[500]

A. Facts and decision

The accused Buyile Ronnie Blani, at that time a 40-year-old male of the Military Base Grahamstown, was prosecuted in the High Court of the Eastern Cape for two murders[501] and housebreaking with intent to commit robbery and robbery with aggravating circumstances. Buyile and certain companions were members of the Addo Youth Congress that was affiliated to the ANC. They intentionally participated in acts to destabilise the country which occurred on 17 June 1985. After the commission of these crimes, Buyile went into exile.[502] Subsequently,

> Most members of the group were tried and either sentenced to death or long jail terms. Two death penalties were executed and two were later commuted to live imprisonment. During the negotiation period in the early 1990s, all remaining convicts in the case received either presidential pardons in 1993 or indemnity under the laws of 1990 and 1992.[503]

One of the co-perpetrators of these crimes who had also fled into exile, Malgas, applied for and he was granted amnesty by the TRC. However, when Buyile returned to the country, he was under the impression that he had been granted leave to return, but he had misunderstood the legislation and failed to apply for amnesty. Buyile was therefore arrested in June 2004.[504] In the Court, Buyile claimed that did not kill the two deceased, but admitted that he participated in the incident and agreed with the facts. He was then charged on the basis that he participated with a common purpose in all three of the counts.[505]

Taking all three counts together, Buyile was sentenced to five years imprisonment four of which were suspended for 5 years. However, the judge had taken into consideration the fact that Buyile misunderstood the legislation because he lacked legal advice. The law was

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[500] *S v. Buyile Ronnie Blani* Case no. CC81/2004 unreported.
[501] Koos de Jager, a 72-year old male and Myrtle Louisa de Jager, a 65-year old female were an elderly married couple who resided on the farm Enhoek.
[502] *S v. Buyile Ronnie Blani* Case no. CC81/2004 unreported.
[503] Bubenzer *Post-TRC Prosecutions* 74.
[504] Bubenzer *Post-TRC Prosecutions* 74.
[505] *S v. Buyile Ronnie Blani* Case no. CC81/2004 unreported.

successfully applied in the case of Malgas and presidential pardon was granted to other members of the group. Clearly, it is an element of justice that people who committed the same crimes are treated more or less the same way, and considering what had happened to the co-perpetrators, the Court considered it inappropriate to sentence Buyile to a long jail term, and consequently the accused was not found guilty.[506]

B. Comments

In general, the Court imposes whatever sentence it feels appropriate in any case.[507] The case in question was brought to the High Court of South Africa because Buyile Ronnie Blani failed to apply for amnesty. Thus, two important facts may be considered. The first is that the Court was satisfied that the accused had admitted that he committed all elements of the offences. Second, the Court had considered that the accused was guilty of those offences. Thus, the Court could have sent a strong message to all perpetrators of past crimes who did not or who failed to apply for amnesty by sentencing Buyile to a long period in jail. The conviction could be a motivation for those who did not apply for amnesty to cooperate with the NDPP in order to benefit from arrangement provided by the Prosecution Policy.

3.5.2.3 Impact of Dr Basson and Ronni Blani cases

Although the role of the criminal prosecution was seen as a threat to perpetrators, one of its criticisms had to do with the acquittals of the well-known figures of the apartheid regime and the decision to prosecute former superiors and politicians who were incriminated by the accused. Volker Nerlich points out that, "Whereas the investigation and prosecution of illegal Security Branch activities were reasonably successful… it seems to have been much more difficult for the criminal justice to address the secret operations of the SADF".[508] Apparently, the higher officials or the *big fish* in the conflict who were from from both sides (members of the liberation movement and former members of the defence and security forces and police) were not incriminated. In this regard, Pieter Mulder, as cited by Lovell Fernandez, argues that it

[506] *S v. Buyile Ronnie Blani* Case no. CC81/2004 unreported.
[507] *S v. Buyile Ronnie Blani* Case no. CC81/2004 unreported.
[508] Nerlich "Criminal Justice" 95.

was "extremely unjust that the 'small fry' who only executed orders were being prosecuted 'while those who gave the orders' have in the meantime retired peacefully and are now being ignored'".[509] Helena Cobban explains that one of the consequences of the country's socio-political infrastructure, which remained largely in place until 1994, could have been a "threat" to the new South African government if it were to prosecute perpetrators of earlier atrocities.[510]

Furthermore, the criminal justice in the post-apartheid South Africa investigated only crimes committed under the apartheid regime but not apartheid itself as a crime against humanity. This demonstrates the challenges inherent in a system whose legal order was not yet reformed. However, the apartheid policy was criminalised into South African law with the adoption and the implementation of the Rome Statute of the ICC through Act 27 of 2002. Otherwise, inhumane acts committed under the apartheid regime did not constitute a crime against humanity under South African law before their incorporation in 2002 even if it was qualified by the UN Resolution 1970 as such.

It seems that the acquittal of Wouter Basson was meant to send a strong message to those who committed crimes outside the borders of South Africa who argued that there was no reason for them to apply for amnesty or fear prosecution because the South African criminal justice system could not exercise jurisdiction over them. Volker Nerlich notes that Magnus Malan, the last apartheid Minister of Defence, had publicly advised potential applicants not to apply for amnesty,[511] saying that being put on trial was preferable to having to testify before the TRC.[512] However, Johannes Velde van der Merwe, a former head of the Security Police, encouraged former members of the South African Police as well as former chiefs and generals of the SADF to participate in the process.[513] Serious consequences of acquittals of people such as Basson and Malan meant that the truth about the past particularly in relation to the involvement of the members of the defence and security forces would probably remain unknown.[514] Priscilla B. Hayner concurs with the acquittal of Magnus Malan, noting that it was

[509] Fernandez "Post-TRC Prosecutions" 67-68.
[510] Cobban "Conflict Termination" 46.
[511] Nerlich "Criminal Justice" 108.
[512] Sarkin-Hughes *Carrots and Sticks* 372.
[513] *The State v. van der Merwe, Vlok, Smith, Otto, van Staden (Chikane Case)* § [78].
[514] Swart 2008 *ZaöRV* 224.

clear that the threat of prosecution would not be strong enough to persuade many senior-level perpetrators to take advantage of the amnesty process.[515] For his part, Fred Hendricks concludes that, "since we are incapable of administering justice, of prosecuting the criminals, we should rather attempt to lure them into revealing their crimes and exposing what their roles were in the violence of the past. These very same perpetrators may then walk free without even showing remorse for their actions".[516]

The issue of exercising exclusively domestic jurisdiction over serious past crimes, most of which remain often unpunished, arises when perpetrators are found on both sides. Thus, Darryl Robinson points out that a truth commission offers many important benefits that are not provided by prosecution alone. It can supplement prosecutions as a valuable means of giving a voice to victims, promoting reconciliation, and facilitating the compensation of victims, among others.[517] A criminal trial is a formalised process that necessitates the emergence of a winner and a loser, and therefore it does not lead to reconciliation. Besides, the presumed offender may deny guilt in order to evade culpability, and without sufficient evidence to prove guilt it might be difficult to obtain a conviction.

3.5.3 The State v. van der Merwe, Vlok, Smith, Otto, van Staden

A. Facts and decision

In the abovementioned case, the complainant was Reverend Frank Chikane and the accused were Johannes Velde van der Merwe, Adriaan Johannes Vlok, Christoffel Lodewikus Smith, Gert Jacobus Louis Hosea Otto, and Hermanus Johannes van Staden. The accused did not apply for amnesty.[518] The case is relative to the plea and sentencing agreement in terms of Section 105A of Act 51 of 1977 as amended.

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[515] Hayner *Challenge of Truth Commissions* 29.
[516] Hendricks *Crises of Inequality* 21.
[517] Robinson 2003 *EJIL* 484.
[518] *The State v. van der Merwe, Vlok, Smith, Otto, van Staden §* [57].

The complainant Reverend Chikane who was targeted for being an outspoken opponent of apartheid was the Secretary-General of the South African Council of Churches and the Vice President of the United Democratic Front. On his way to various countries to campaign for the imposition of economic sanctions against the apartheid regime in South Africa,[519] there was an attempt to murder him by administering a poisonous substance, Paraoxon,[520] to his clothing at the Jan Smuts Airport on 23 April 1989. The action was carried out by some officials of the former SADF under the secret project called Project Coast headed by Dr Wouter Basson, the project officer. After wearing clothing from his suitcase in which the poison was administered, Reverend Chikane took ill and was hospitalised several times.[521]

During the prosecution of Dr Basson, the accused were urged several times to cooperate in order to obtain indemnity from the prosecution under Section 204 of Act 52 of 1977, but they refused. Reverend Chikane also wrote to them numerous times to seek reconciliation, but they ignored all his requests. The accused assisted the State by pleading guilty as it was difficult for the State to prove its case, but as the result of cooperation, accused Johannes Velde van der Merwe and Adriaan Johannes Vlok were able to establish their role, while Christoffel Lodewikus Smith and Gert Jacobus Louis Hosea Otto also confessed their roles. Thus, in August 2006, Adriaan Johannes Vlok, who was a former Minister of Law and Order under the apartheid regime, publicly washed Reverend Chikane's feet at the Union Buildings in Pretoria as a gesture of reconciliation[522] and as a symbolic act of repentance.[523]

In June 2007, following the sentencing agreement, the accused Johannes Velde van der Merwe and Adriaan Johannes Vlok were sentenced to 10 years' imprisonment. However, the accused Christoffel Lodewikus Smith, Gert Jacobus Louis Hosea Otto, and Hermanus Johannes van Staden were each sentenced to five years' imprisonment. For all the accused, the sentence

[519] *The State v. van der Merwe, Vlok, Smith, Otto, van Staden §* [28, 29, 35].
[520] Paraoxon is a lethal toxic substance. See *the State v. van der Merwe, Vlok, Smith, Otto, van Staden* § [44].
[521] *The State v. van der Merwe, Vlok, Smith, Otto, van Staden §* [13.1, 14-15, 31-34, 36-37, 43, 47].
[522] *The State v. van der Merwe, Vlok, Smith, Otto, van Staden* § [61, 62, 67, 52, 69].
[523] Bubenzer *Post-TRC Prosecutions* 138.

was wholly suspended for 5 years on the condition that they were not convicted of a crime that relates to the administration of poison during the period of suspension.[524]

B. Comments

This case is about alleged perpetrators of past abuses who failed to apply for amnesty. Acts committed against Reverend Chikane, an anti-apartheid activist campaigning for the imposition of economic sanctions against the apartheid regime, including administering poison in his suitcase, were politically motivated. However, the alleged perpetrators received individualised amnesty to protect them from both criminal and civil liability. The case serves as a good example because the accused failed to apply for amnesty and consequently, they were prosecuted as recommended by the TRC. Nevertheless, in the more than 400 post-TRC cases which have been investigated, the prosecutor still has the obligation to follow the TRC's recommendation.

3.5.4 Eugene Alexander De Kock case – from TRC to conviction and parole process

A. Facts and decision

Eugene Alexander de Kock is a former Colonel of the South African Police with a military background but without any training in IHL. His actions while serving in different units of the police in African neighbouring countries and in Europe during the apartheid era as well as his appearance in trial and during hearings in the TRC are well documented. Activities in which De Kock participated included shootings, assassinations, ambushes, murders, abductions, burning, poisoning and blowing up bodies of anti-apartheid activists.

On 5 May 1994, De Kock was arrested and on 26 August 1995, he was found guilty of 89 out of 121 charges. On 30 October 1996, he was sentenced to two life terms plus 212 years' imprisonment. The charges against him included:

- Six charges of murder, that is, of the five men killed at Nelspruit plus Goodwill Sikhakhane;

[524] *The State v. van der Merwe, Vlok, Smith, Otto, van Staden* § [81].

- Two charges of conspiracy to commit murder – Phemelo Nthehelang and Brian Ngqulunga;
- One charge of culpable homicide – Bheki Mlangeni;
- Sixty-six fraud charges;
- One charge of defeating the ends of justice – Johannes Sweet Sambo;
- One charge of assault with intent to do grievous bodily harm – Japie Maponya;
- One attempted murder charge – Dirk Coetzee;
- Nine charges of possession of illegal arms;
- One abduction charge – Japie Maponya;
- One accessory to culpable homicide charge – Phemelo Nthehelang.[525]

De Kock did not deny the horrible crimes for which he was found guilty,[526] but he acknowledged that he did not act alone, as orders were given from generals of the South African Police who received instructions from the highest levels of the government.[527] Therefore, it was unjust to focus solely on him. To corroborate his testimony, De Kock noted that the "state had made torture legitimate" and in handling anti-apartheid activists, police officers were operating above the law without any risk of punishment.[528] Rather, they were awarded medals by the Minister of Law and Order after various incidents (for example, the fatal shooting of the six members of the UmKhonto weSizwe (MK) in Lesotho).[529] De Kock was awarded the Police Star for bombing the ANC's London headquarters in 1982 and for the operation in Swaziland in 1983. The award was bestowed on him by Louis le Grand, the then Minister of Police, for his Outstanding Service in the country's interest. The apartheid government sponsored those activities with huge sums of money.[530] De Kock also admitted that when he was forced to resign, he received a letter stating that, "an undertaking was given that the police would support him in any legal proceedings arising from incidents carried out in the course of his duty… The

[525] De Kock and Gordin *Damage* 273.
[526] De Kock confessed: "I cannot say how dirty one feels. Whatever we attempted in the interests of the country did not work. All we did was to injure people, to leave people with unforgivable pain, to leave behind children who will never know their parents. I sympathise with the victims as if they were my own children". See De Kock and Gordin *Damage* 274-275.
[527] De Kock and Gordin *Damage* 249, 270.
[528] De Kock and Gordin *Damage* 97.
[529] Esterhuyse *Endgame* 38.
[530] De Kock and Gordin *Damage* 85-86, 109, 100.

letter also strictly forbade him from making known the nature of his work, or the contents of the agreement, unless he was given written permission".[531]

In light of the above, it can be deduced that acts committed were known, "lawful" and protected by the apartheid regime. Leon Wessels, the NP's former Deputy Minister of Police, agreed that it was not possible to deny the knowledge of torture. Thus, regarding the role of the State Security Council, Wessels admitted at the Commission's special hearing that, "it was foreseen that under those circumstances people would be detained, people would be tortured, everybody in this country knew people were tortured".[532] Nevertheless, by admitting that torture was administered by a few renegade police officers, the former leader of the NP and former State President FW de Klerk made a submission to the TRC that:

> The National Party is prepared to accept responsibility for the policies that it adopted and for the actions taken by its office-bearers in the implementation of those policies. It is, however not prepared to accept responsibility for the criminal actions of a handful of operatives of the security forces of which the Party was not aware and which it never would have condoned.[533]

De Kock pointed out that President FW de Klerk did not have the courage to acknowledge that during the apartheid era, gross violations of human rights were committed. In De Kock's views, FW de Klerk should have admitted that:

> Yes, we at the top levels condoned what was done on our behalf by the security forces. What's more, we instructed that it should be implemented. Or – if we did not actually give instructions − we turned a blind eye. We didn't move heaven and earth to stop the ghastliness. Therefore, let the foot soldiers be excused. We who were at the top should take the pain. We who were at the top are sorry.[534]

Mike Earl-Taylor notes that Eugene de Kock and Jeremy Gordin believe that "De Kock should be joined in prison by the politicians and generals who planned, ordered and sanctioned his

[531] De Kock and Gordin *Damage* 96.
[532] Republic of South Africa, *Truth Commission* (vol 2) 219.
[533] Republic of South Africa, *Truth Commission* (vol 2) 218-219.
[534] De Kock and Gordin *Damage* 277.

activities".[535] In fact, before the establishment of the TRC, De Kock had applied to the Committee on Amnesty for amnesty.[536] He received amnesty for only some but not all the crimes he committed, and since he was not granted amnesty that he expected for all his crimes based on his confession and cooperation with the TRC, he remained in prison.[537] It is unfortunate that someone had to pay the price for the legacies of past abuses, and in this case, it was De Kock. Dani Wadada Nabudere and Andreas Velthuizen argue that, "What is significant however is that the engineers of apartheid and the violence mongers among the leadership of the liberation movement were not brought to justice".[538]

Reports commended De Kock for the progress he made in improving his skills, for providing continuous assistance to authorities investigating missing persons (Task Team of the National Prosecuting Authority),[539] and for cooperating with organisations for apartheid victims such as the Khulumani Support Group while in prison.[540] In January 2014, De Kock who *was sentenced two life terms plus 212 years' imprisonment* applied to be released on parole arguing that, "Not one of the previous generals, or ministers who were in Cabinet up to 1990, have been prosecuted at all".[541] The word "parole" which means "honour", as described by Joey Moses, is derived from the French "parole d'honneur". Parole is a multi-stage process conferred on a convicted person which allows him or her to be released before the expiry of his or her actual term of imprisonment imposed by the sentencing court.[542] In South Africa, the decision to release a prisoner on parole is governed by the Correctional Services Act No. 111 of 1998 (as amended by Act No. 25 of 2008). According to Section 73 of the 1998 Act, sub-section 6(b)(iv),

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[535] Earl-Taylor *PINS* 79.

[536] The incidents for which he applied for amnesty were associated with "over seventy killings, of which twenty-six were committed outside South Africa, including five of askaris or ex-askaris; nine abductions, three of which were committed outside South Africa; sabotage of five buildings; supply of weapons for attempted coup in the Transkei, and supply of weapons to the IFP". See Republic of South Africa, *Truth Commission* (vol 6) 219.

[537] Payne *Unsettling* 268.

[538] Nabudere and Velthuizen *Restorative Justice* 46.

[539] Ministry of Justice and Correctional Services: Republic of South Africa http://www.dcs.gov.za/docs/landing/MEDIA%20STATEMENT%20EDKFBCDL.pdf (Date of use: 23 February 2015).

[540] Davis http://www.dailymaverick.co.za/article/2014-07-10-freedom-deferred-eugene-de-kock-stays-under-lock-for-now/ (Date of use: 1 August 2014).

[541] Torchia http://www.independent.co.uk/news/world/africa/eugene-de-kock-denied-parole-known-as-prime-evil-killer-of-south-african-apartheidera-black-activists-has-been-in-jail-since-1994-9597660.html (Date of use: 1 August 2014).

[542] Moses *Parole* 4-6.

"A person who has been sentenced to life incarceration, may not be placed on day parole or parole until he or she has served at least 25 years of the sentence".

De Kock requested to be released on parole after twenty years in prison (1994-2014); therefore, under this Act, he was not qualified for parole. However, because De Kock was born in January 1949, he celebrated his 65th birthday in January 2014 which means he qualified for parole under Section 73 of the 1998 Act, sub-section 6(b)(vi). This Section provides that, "A person who has been sentenced to any term of incarceration, excluding persons declared dangerous criminals in terms of section 286A of the Criminal Procedure Act, may be placed on day parole or parole on reaching the age of 65 years provided that he or she has served at least 15 years of such sentence". Unfortunately, appropriating the powers of the Minister of Justice and Correctional Services in respect of offenders serving life sentences, the Minister refused to approve parole on 10 July 2014 arguing that, "none of the victims of the crimes committed by Mr De Kock were consulted".[543] In this regard, Section 78(4) of the 1998 Act stipulates that, "Where the Minister refuses or withdraws parole or delays parole the matter must be reconsidered by the Minister, on advice of the National Council, within two years". However, instead of the two-year period prescribed, the Minister "directed that a further profile be resubmitted not later than 12 months… in order to afford the victims, the offender and other relevant structures time to participate in and finalize all outstanding processes".[544]

Following this decision, De Kock submitted the matter to the High Court of South Africa (Gauteng Division, Pretoria). On 20 November 2014, having considered the "agreement between the parties in the light of the victim/offender dialogue which has taken place between the Applicant and relatives of victims of the crimes committed", the Court made an intangible order. The Court ordered "the National Council for Correctional Services to consider the

[543] In his Media Statement on 10 July 2014, the Minister stated that both provisions of the Correctional Services (Act 8 of 1959 and Act 111 of 1998) and the Correctional Services B Order Chapter 26 which require the Parole Board Clerk to inform victims of the date of the sitting so that they could be represented did not happen. See Department of Correctional Services: Republic of South Africa http://www.dcs.gov.za/UploadedFiles/Parole%20Decision%20on%20Eugene%20Alexander%20De%20Kock.pdf (Date of use: 23 February 2015).

[544] See Department of Correctional Services: Republic of South Africa http://www.dcs.gov.za/UploadedFiles/Parole%20Decision%20on%20Eugene%20Alexander%20De%20Kock.pdf (Date of use: 23 February 2015).

Applicant for purposes of its recommendation on or before 19 December 2014 and the Minister of Justice to make a decision with regard to the placement of the Applicant on parole on or before 31 January 2015".[545] Accordingly, on 30 January 2015, satisfied that comprehensive consultation with affected families has been made and in the interests of nation building and reconciliation, the Minister decided to place Mr De Kock on parole. However, he reminded the public that the action does not reduce the sentence imposed by the court and failure to comply with the set conditions of the parole may result in the revocation of the parole.[546]

B. Comments

De Kock's parole coincided with the decision of the City of Cape Town to immortalise FW de Klerk by renaming Table Bay Boulevard in his honour on 28 January 2015. The spirit of reconciliation motivated both decisions, that is, releasing De Kock on parole[547] and honouring De Klerk. The Mayor of the City of Cape Town paid tribute to the leadership of De Klerk during South Africa's transition process even though the period in question was the only one in which De Klerk admitted authorising a raid on Mpendulo during which five teenagers were killed in October 1993.[548] While some former foot soldiers were sentenced and then released on parole as in the case of De Kock, the prominent figures who were generals and high-ranking politicians in the apartheid regime were not only allowed to retire in luxury but also immortalised by renaming boulevards after them as in the case of De Klerk.

However, what is new about the parole process in South Africa is the release of persons declared dangerous criminals after consultation with victims or victim/offender dialogues. This is different from the *"liberté conditionnellement"* in the DRC, which allows a convicted person

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[545] *Eugene Alexander de Kock v. Minister of Justice and Correctional Services and Chairperson: National Council for Correctional Services* 2014 HCSA (GD) 58500/14 § [1-2].

[546] Ministry of Justice and Correctional Services: Republic of South Africa http://www.dcs.gov.za/docs/landing/MEDIA%20STATEMENT%20EDKFBCDL.pdf (Date of use: 23 February 2015).

[547] De Kock was released on parole in the interest of nation building and reconciliation. Ministry of Justice and Correctional Services: Republic of South Africa http://www.dcs.gov.za/docs/landing/MEDIA%20STATEMENT%20EDKFBCDL.pdf (Date of use: 23 February 2015).

[548] See Gobodo-Madikizela http://apps.ufs.ac.za/media/dl/userfiles/documents/News/2015/2015_02/Pdf1.pdf and http://apps.ufs.ac.za/media/dl/userfiles/documents/News/2015/2015_02/Pdf2.pdf (Date of use: 23 February 2015).

to be released if he/she serves at least a quarter of the sentence imposed as long as the length of incarceration already served is more than three months (Article 35(1) of the Congolese Criminal Code).

3.5.5 Comments on post-apartheid prosecutions

Following due process in order to deter future oppression on the domestic level especially when both sides in the conflict committed atrocities is rather difficult because it is unclear who should be targeted. It is also difficult to meet the expectations of victims waiting for their right to have their disputes settled by a court of law. Jeremy Sarkin-Hughes points out some general guidelines that can help to determine whether to prosecute perpetrators. These are:

1) The nature of the transition and whether the former regime is still capable of an effective uprising;
2) The type and extent of crimes;
3) The applicability of old and new laws;
4) The judiciary's capacity to guarantee fair trials;
5) The public perception of the intention behind the trials and effect the trials could have on reconciliation;
6) The cost and resources in relation to other priorities; and
7) The effect of trials on investor confidence.[549]

In the case of the RSA, it is evident that the post-apartheid security sector was not yet reformed as it was essentially composed of former members, while the elected democratic government was also largely composed of former leaders of the liberation movement. If members of the former regime are made to face prosecution, the new regime could be accused of pursuing victor's justice, and this would be at the risk of an uprising. On the other hand, the prosecution of ANC members who committed atrocities could also be seen as an insult to those heroes of the struggle.

Thus, prosecution of abusers has achieved little success for different reasons. First, perpetrators were acquitted through the application of former legal order that sustained the

[549] Sarkin-Hughes *Carrots and Sticks* 367.

apartheid regime. However, many legitimate acts under the apartheid regime were actually unlawful under international law, and Section 25(3,f) of the Interim Constitution did not encourage prosecution against such acts. Second, during the transition, the policy of reconciliation carried a heavier weight than prosecution as in the case of *State v. Ronnie Blani* (CC81/2004) in which the court decided what it considered fair and equitable in discharging the accused. Third, the TRC covered only a period of 44 years, and it was not easy to find evidence for some crimes committed within that period because documents relating to such situations were destroyed by the Apartheid State.[550] Two of the key informants testified that despite the March 1992 Instruction from the Security Police ordering the destruction of all operational records, the South African Department of Defence did not destroy a single paper.[551] Lovell Fernadez argues that, "Many of the victims, witnesses or perpetrators have long since died or cannot be traced. With the passage of time, memories of witnesses have faded, dockets and exhibits have disappeared or have been deliberately destroyed by the perpetrators and their accomplices, leaving gaps in the chain of evidence".[552] Therefore, even though general amnesty was refused, it was also difficult to pursue prosecution due to lack of resources and evidence.

In order to restore the dignity of victims in the RSA after uncovering the truth, granting amnesty to those who made a full disclosure and providing reparation were the right thing to do but so also is the right to hold accountable those who did not apply for amnesty or who were denied amnesty. Ensuring that everyone who had not been granted amnesty and who had been involved in past abuses follows the due process could restore the dignity of victims in South Africa. However, obtaining successful prosecution was rather difficult because when the ANC came into power, approximately 630 prosecutors resigned between 1994 and 1997, which

[550] See the summary of the TRC's findings on the destruction of documents by the former state. It was reported that, "The former government deliberately and systematically destroyed state documentation over a number of years. This process began in 1978, when classified records were routinely destroyed, supposedly in order to safeguard state security. By the 1990s the process of destruction of records and documents had become a co-ordinated endeavour, sanctioned by the cabinet, with the aim of denying a new government access to incriminating evidence and sanitising the history of the apartheid era." Republic of South Africa, *Truth Commission* (Vol 1) 226.

[551] Key informant #05RSA interviewed in Pretoria on 6 March 2015.

[552] Fernandez "Post-TRC Prosecutions" 77.

represented a total work experience of about 2000 years. At that time, the *PCLU was unable to commit resources to more than three TRC cases.* [553]

In such a situation, it was wise to recommend that the post-TRC prosecution be brought to a hybrid tribunal to deal with cases of those who did not or failed to apply for amnesty irrespective of their former or current official positions. In addition, the tribunal could deal with crimes committed against South African people or committed by South African people in the matters relating to apartheid in neighbouring countries or entities administered by South Africa. This means that the government of South Africa could request the UNSC to create a tribunal that would consist of South African and international judges and that would apply domestic and international laws.

3.6 Findings

In terms of the research problem, this chapter has addressed the first and the second sub-questions about the analysis of the role of criminal prosecutions under transitional policy, and of the role played by the TRC in dealing with past abuses in the RSA.

Indeed, the history of the RSA demonstrates that different South African groups participated in oppression and resistance to apartheid. A *sui generis* justice (criminal justice incorporating a restorative justice approach) and the TRC were adopted as transitional justice mechanisms to deal with past abuses. The interaction between both mechanisms of transitional justice regarding the legacies of past abuses shows that the judiciary did not play an active role as is common in a "normal situation". Thus, survivors were disappointed about the lack of information on how a *sui generis* justice functions during the transition to democracy. The fact that trials were postponed pending the outcome of the amnesty applications shows that the amnesty procedure was complementary to criminal justice. Furthermore, granting individualised amnesty facilitated the reconciliation process. On the one hand, information was readily available because most perpetrators made full disclosure of their activities without fear of being held criminally or civilly liable. On the other hand, victims or survivors were informed about

[553] Fernandez "Post-TRC Prosecutions" 77.

what happened to their loved ones. The TRC received over 21 000 statements, granted more than 1 167 amnesties and submitted 11 088 applications by victims to the President's Fund. Thus, the Commision achieved its aim regardless of the criticisms.

In terms of its findings, this research notes that:

- While implementing transitional justice mechanisms, it is clear that the judiciary did not play an active role in prosecuting perpetrators; it only threatened perpetrators in order to make them disclose the truth about the past. Consequently, some of the most notorious perpetrators who fought against apartheid became senior politicians while many highly placed figures of the apartheid regime retired in luxury. However, the TRC was granted quasi-judicial powers to search premises and seize evidence, subpoena witnesses, conduct questioning under oath, hold public and private hearings, and grant individualised amnesty for politically motivated crimes which protected perpetrators from both criminal and civil liability. In this manner, the process of granting amnesty functioned as an alternative mechanism of accountability.
- The TRC's mandate covered investigation of gross human rights violations committed beyond the borders of South Africa but South African courts lacked such jurisdiction.
- The TRC Act ignored those who were victimised by the human rights violations of the period between 1948 and 1960 during which families were dispossessed and divided due to unjust legislations. During that period, the system was built to deprive the courts of law jurisdiction over lawful (*licéité*) activities or validity of legislations passed by the Parliament. In other words, no competent courts of law had jurisdiction to challenge any legislation passed by the Parliament under apartheid.
- Under the apartheid legal order, the apartheid crimes were not qualified as crimes against humanity but as common law crimes or political crimes.
- Since apartheid was characterised by the international community as a crime against humanity, amnesty granted in such a situation could only have effect at the local level. Besides, individualised amnesty did not deprive the victim's the right to justice that would ensure the prosecution of those who failed to apply for or who were denied amnesty.

- Although it achieved its primary task, the TRC was criticised because its contribution to reconciliation was considered minimal. However, this study admits that reconciliation is a process; it must continue because it cannot be achieved within such a limited timeframe.
- Many survivors who wanted perpetrators to be prosecuted did not attend the hearings because they were disappointed that alleged perpetrators would not be prosecuted.
- The TRC condemned both sides for committing atrocities and unfortunately, because the lustration process was not welcomed in South Africa, alleged perpetrators continued to hold powerful public positions while others who were part of the liberation movement were also appointed to high offices.
- The post-apartheid South African judiciary with its white judges remained under an unjust legal order during the transition to democracy. Even though they were competent, the lustration process would have guaranteed fair trials of crimes committed during the apartheid regime and against the regime.
- There was no judicial action and political will to implement recommendations formulated by the TRC regarding the prosecution of perpetrators who failed to apply for amnesty or who were denied amnesty.
- The fact that the apartheid regime had destroyed public archives, documents and files of the former secret service (except records from the Department of Defence)[554] rendered prosecution as recommended by the TRC difficult for it meant there was lack of evidence.

From the findings, this research agrees with the following propositions.

First, because high profile cases have seen little success and the judiciary did not have jurisdiction over crimes committed abroad the post-TRC prosecution could be brought to a hybrid or mixed international tribunal. Such tribunal would have jurisdiction over serious atrocities committed by South Africans citizens in South Africa as well as in neighbouring countries. In others words, after a policy of innovative restorative justice in South Africa,

[554] Key informants interview guide #05, Pretoria, 6 March 2015.

applying a policy of retributive justice based on the establishment of a hybrid international tribunal was indispensable. The sole purpose of such a tribunal could be the prosecution of those who had not applied for or who did not receive amnesty for gross violations of human rights and other serious violations of IHL committed in South Africa and the entities or territories of neighbouring States. There was no doubt that the timeframe for restorative justice through the TRC was over; therefore, whoever failed to obtain amnesty at that time would be prosecuted, that is, according to the recommendation of the TRC. In addition, it is recommended that societies transitioning from violence to peace or countries transitioning from authoritarian rule to democracy reform their pre-existing unjust legal order and restore the dignity of survivors.

Second, since apartheid was denounced as a crime against humanity, survivors still have the right to present their cases against high-ranking officials as well as challenge the amnesty process itself on the international level. Therefore, prosecution is still possible outside South Africa in countries exercising universal jurisdiction that did not recognise the amnesty in South Africa against whoever planned, ordered or committed apartheid crimes. The removal of perpetrators from public office would be much desired but, unfortunately, the process is rather complex as both sides committed crimes.

Third, the development and implementation of a culture of human rights are crucial as well as the establishment of projects in communities characterised by poverty, lack of good housing, unresolved land issues, unemployment, among others, in order to avoid revenge or acts of xenophobia based on assumption that people from other communities are responsible for their past misfortune (or *malheur).*

Lastly, it is important to consider that during the peace talks in South Africa, the apartheid legal order was not yet reformed and public archives had been destroyed deliberately to erase evidence against the apartheid regime, while no recommendation was made to establish a hybrid international tribunal. Thus, as suggested by the Chairperson of the South African Human Rights Commission, post-TRC cases that have been investigated (more than 400) by the Office of the NDPP could receive forgiveness from the nation due to the high cost of

prosecution both in terms of time and of money.[555] This approach could be considered instead of doing nothing with the TRC's recommendation to prosecute cases that have been investigated regarding those who failed to apply for or who were denied amnesty.

However, the approach could also violate Section 34 of the 1996 Constitution of South Africa which guarantees the right to justice. Thus, key informant #06RSA argued that because not all state documentations were destroyed, the government should be forced to take action and prosecute perpetrators in cases where evidence still exists as recommended by the TRC.[556] In addition, key informant #08RSA agreed that prosecution should start with available files. If the government is unwilling to prosecute offenders, South Africans must hold it accountable and insist on the implementation of the TRC's recommendations.[557] However, key informant #09RSA argues that it is unlikely that the TRC's recommendation regarding prosecution would be implemented because the ANC-led government is reluctant to prosecute highly placed whites who remain strongly connected to the private sector, and who politically are now insulated, at least for the time being, from prosecution.[558] In her study of fifteen truth commissions, Priscilla B Hayner notes that prosecutions of individuals responsible for abuses "are very rare after a truth commission report; in most cases there are no trials of any kind, even when the identity of violators and the extent of the atrocities are widely known".[559] Therefore, one can conclude that the situation in South Africa is not unique.

In the next chapter, the discussion will focus on mechanisms of transitional justice that have been adopted in dealing with gross human rights violations and serious violations of IHL committed during various political crises and armed conflicts in the DRC.

[555] Nerlich "Criminal Justice" 109 citing Barney Pityana, 'Reconciliation after the TRC', address at the 29th Provincial Synod of the Church of the Province of Southern Africa', Durban, 16 July 1999 (available at www.cpsa.org.za/synod/reconciliation.html).
[556] Key informant #06RSA interviewed in Johannesburg on 26 February 2015.
[557] Key informant #08RSA interviewed in Johannesburg on 24 June 2015.
[558] Key informant #09RSA interviewed on Skype from Cape Town 26 June 2015.
[559] Hayner 1994 *HRQ* 604.

CHAPTER 4

TRANSITIONAL JUSTICE IN THE DEMOCRATIC REPUBLIC OF THE CONGO

4.1 Introduction

The Democratic Republic of the Congo (DRC) is well known for what is called its "geological scandal".[560] The country is not only blessed with an immense wealth of natural resources which range from diamond, gold and oil to copper, cobalt, uranium, and coltan, among others, it is also home to the world's second largest rainforest. However, the population does not really benefit from the country's boundless wealth.[561] The DRC unfortunately is also known as a veritable epicentre of perennial internal and internationalised armed conflicts as well as for its political negotiations that resulted in the country's first multi-party elections in 2006. Thomas Turner asserts that the DRC together with its historical precursors has been an arena of conflict since the time of King Leopold II of Belgium who created the Congo Free State in 1885.[562] Indeed, the unprepared decolonisation led the country into the internal political crises characterised by secessions, various mutinies, *coup d'états*, military dictatorship, and a vicious cycle of armed conflicts that have affected the private sector and disorganised the country's political and judicial institutions. In more than five decades after the Independence Day, the country has continued to witness large-scale violations of human rights and serious violations of IHL. Due to widespread widespread impunity for these crimes as well as the state of and challenges faced by the Congolese courts and tribunals in dealing with a large number of cases, the situation was referred to the ICC.

This chapter analyses two mechanisms of transitional justice (criminal prosecution and the TRC or retributive and restorative justice) that were adopted as a result of political

[560] Turner *Congo Wars* 26, 50-52; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda) [1999]* ICJ *White Paper* 184/6.
[561] Tunamsifu *Good Governance* 172; Borello *Road to a Just Peace* vii.
[562] Turner *Congo* 1.

negotiations to deal with crimes in the DRC. The chapter offers a brief overview of the historical context in which those crimes were committed and the legal framework of transitional justice mechanisms in the DRC. Further, reference is made to the jurisdiction of the ICC which acted to complement the national judiciary in dealing with crimes under international law. The chapter also examines the challenges faced by the national judicial system in addressing crimes on the domestic level within a troubled context. This is followed by an analysis of the activities of the TRC during the transition period between 2004 and 2006, and lastly, by a summary of the chapter.

4.2 Context of Serious Crimes and Legal Framework of Transitional Justice Mechanisms in the DRC

This section presents a brief overview of the context in which serious violations of human rights and of IHL were being committed since the colonial period as well as the legal framework of transitional justice mechanisms in the DRC.

4.2.1 Context of serious crimes in the DRC

Since the period of colonisation, the DRC had witnessed difficult periods that resulted in the changing of its name.[563] Emizet François Kisangani observes that, "the DRC has undergone many changes in terms of players and goals, change and continuity have coexisted, and both forces have simultaneously exerted their influence on the political landscape of Congo".[564]

[563] As his personal fiefdom, the King Leopold II named what is now known as the DRC, Congo Free State (CFS) on 1 July 1885. After 75 years of horror, he was forced to hand over to the State of Belgium which renamed the colony Congo Belge on 15 November 1908. After 52 years, on 30 June 1960, the country got Independence and was renamed the Republic of Congo but in August 1964 it became the DRC in accordance with the Luluabourg Constitution. During the reign of President Mobutu, it was renamed Republic of Zaire on 27 October 1971, and when President Laurent Désiré Kabila came to power in May 1997, he changed the name back to the DRC which is the country's current name.

[564] Kisangani *Civil War* 11.

Located in Central Africa precisely at the heart of the African continent, the DRC is the second largest country in Africa by area after Algeria. It is bordered by nine countries - in the west by the Republic of Congo, in the north by the Republic of Central Africa and the South Sudan, in the east by Uganda, Rwanda, Burundi and Tanzania, and in the south by Zambia and Angola.

Figure 2: Map of Africa showing the DRC and its neighbouring countries[565]

The DRC was colonised in two phases – by King Leopold II and by the Belgium State.[566] Despite the role played by the colonial system in social transformation, it is also clear that the reign of Leopold II and of the Belgian colonial administration was characterised by the looting of precious resources and human rights abuses.[567] Obviously, improving the educational system was not the priority of the colonial regime, which Aldwin Roes describes as a weak colonial administration. Crawford Young notes that the 1950s were the main colonial decade with the opening of new opportunities for a growing educated élite class.[568] However, Congolese leaders

[565] Map of Africa showing the DRC and neighbouring countries http://www.goodwinprocter.com/~/media/Images/Publications/Articles/Goodwin%20Alerts/AfricaMap.jpg (Date of use: 3 March 2016). The researcher revised this map.

[566] The first phase of the country's colonisation occurred as a result of the Berlin Conference that ceded the Congo to the King Leopold II from 1885 to 1908. His reign was characterised by widespread murder and unspeakable atrocities against the colonised people. After 75 years of horror, which led to a huge international scandal, Leopold's rule in the Congo had become such an embarrassment that the Belgian parliament was obliged to annex Congo in 1908 (see Turner *Congo* 1; Savage *Sustainable Justice* 3). The second phase of the colonisation began on 15 November 1908. The Belgium State renamed the colony Congo Belge and dominated it for 52 years (from 1908 to 30 June 1960, the country's Independence Day).

[567] Jonas Ewald affirms that repression and arbitrary killings were, at least seemingly, worse in the Belgian Congo, than in other colonies. As a result of the mass killings, the population in Congo was reported to have diminished by around two-thirds between the colonial conquest and 1924 (see Ewald *et al Great Lakes Region* 159).

[568] Young "Contextualizing Congo" 14.

were not prepared for self-rule at that time,[569] which explains the political crisis that arose on the misinterpretation of the constitutional provisions of the *Loi Fondamentale* (Fundamental Law*)*.[570] Regarding the colonial system, Clark finds that:

> It is well appreciated that many things were against Congo in the quest for peaceful development at its independence. Belgian colonial rule had done precious little, of course, to prepare the Congolese to govern a modern state, and it was not unpredictable that they would fail. The nature of the grant of independence itself, and the ensuing scramble for influence among the United States, the Soviet Union, and the former colonizer, both demonstrated the severe weakness of the post-colonial state and further undermined its limited prospects for success.[571]

Anticolonial nationalist movements rapidly emerged to challenge colonial domination in the 1950s. Political organisations were proscribed by the colonial administration whether in the Congo Free State or the Congo Belge. Following international pressures, the only exit plan for Belgium by late 1959 was to respond to the ultimate demand of the divided nationalists – to grant immediate independence.[572] The Belgian government responded by convening a political roundtable conference from 18 to 27 January 1960 that agreed among other resolutions to conduct elections on 22 May 1960, grant Independence on 30 June 1960, and inaugurate the Fundamental Law of a sovereign Congo.[573]

Due to the shoddy preparation, the First Republic (1960-1965) faced various internal crises in which innumerable crimes were committed including the assassination of the first Prime Minister Patrice Lumumba on 17 January 1961. It was during that series of chaos that General Joseph Mobutu, then Chief Commander of the army, took political control of the

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[569] In December 1955, Jef van Bilsen, a Belgian academic, proposed a 30 year-plan for the independence of Congo in order to prepare the Congolese to rule the country. However, Pierre Ryckmans, who served as Governor-General from 1934 to 1946, had declared at the end of his tenure that, "the days of colonialism are over" and urged Brussels to prepare the colony for its independence. See Deibert *Hope and Despair* 18.

[570] The Fundamental Law is the Interim Constitution that was prepared by the Belgian Parliament for the new Republic of Congo at Independence.

[571] Clark "Introduction" 2.

[572] Young "Contextualizing Congo" 14-17.

[573] Following the legislative elections, Patrice Lumumba the leader of the Congolese National Movement (*Mouvement National Congolais, MNC)* became Prime minister and head of the government and Joseph Kasavubu the leader of ABAKO became the Head of State (Kisangani *Civil War* 16; Eisa *Observer Mission* 2). It is therefore in sorrow and pain that the country obtained independence, as it was left unstable by the colonial government.

country and declared himself president in a *coup d'état* on 24 November 1965. In 1971, he renamed the country Republic of Zaïre.[574] During Mobutu's presidency, his military regime was characterised by corruption and poor management:

> Mobutu's rule embodied the worst characteristics of post-colonial African dictatorships: absolute concentration of power, one-party rule, cult of the personality, widespread corruption, cronyism, violent suppression of dissent, accumulation of colossal personal fortunes and, ultimately, total institutional decay.[575]

By the 1990s, the United States of America found that Mobutu had outgrown his "usefulness" and he therefore began to search unsuccessfully for other foreign allies while the US provided the necessary equipment and special training for fighters who would eventually oust Mobutu.[576] It was clear that the country needed a new leader; but instead of helping and equipping their "Rwandan and Ugandan protégés" to invade Zaire, the US together with the international community which could have played a major role during the National Sovereign Conference (*Conférence Nationale Souveraine*, CNS) that would peacefully end Mobutu's regime refused to do so. Thomas Turner argues that the US was focusing disproportionate military assistance on Rwanda as part of the creation of an American "zone of influence" in East Africa.[577] After 32 years of dictatorship of Mobutu's presidency (1965-1997), the country entered into various armed conflicts.

However, among factors or series of events that led to the ousting of President Mobutu was the massacre of students at the University of Lubumbashi in 1990 followed by the looting incidents of the commercial sector by the military in 1991 and 1993 which resulted in the loss of thousands of jobs. Besides these were the failure of the Sovereign National Conference in 1992, the crisis about citizenship, the interethnic conflict in 1993 in the eastern DRC, and the end of the Cold War. The 1994 genocide, massive influx of Rwandan refugees and the interest in using some of the country's natural resources in the eastern DRC to manufacture cell phones and

[574] Mpongola 2010 *Politorbis* 181; Eisa *Observer Mission* 3; Tunamsifu *Conflict Resolution* 168.
[575] Borello *Road to a Just Peace* vii.
[576] Turner *Congo* 38-39.
[577] Turner *Congo* 39.

computers/laptops as well as the sickness of Mobutu in 1996 and his inability to serve his western patrons are some of the factors that led to his demise.[578]

The first armed conflict began in Minembwe (South Kivu Province) on 6 October 1996[579] and, on 17 May 1997, it successfully overthrew the government of Mobutu[580] who fled the country to Morocco while LD Kabila proclaimed himself President.[581] Soon after LD Kabila came to power, some of his allies (Rwanda and Uganda)[582] engaged in the looting of the country's minerals – gold, diamond and coltan. As LD Kabila sought to assert himself as the supreme leader of a sovereign state, he decided to send foreign armies in the DRC back to their respective countries on 28 July 1998. The foreign armies refused to leave, which greatly angered the President.[583] The Rwandan and Ugandan armies were equally enraged and on 2 August 1998, they turned against the President and his regime and chose to support a fresh rebellion.[584] According to François Ngolet, different factors led to the rebellion against LD Kabila:

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[578] Tunamsifu *Conflict Resolution* 169-170; Mangu 2003 *AHRLJ* 236. For more read: Borello *Road to a Just Peace* vii; Binder, De Geoffroy and Sokpoh *Congo* 22; Deibert *Hope and Despair* 52; Eisa *Observer Mission* 5; Turner *Congo Wars* 13; Kisangani *Civil War* 9, 128 ; Mathieu, Mafikiri and Mugangu « escalades conflictuelles » 85 ; Clark 2008 *JEAS 2(1)* 3 ; Nest, Grignon and Kisangani *War and Peace* 13; Nzongola-Ntalaja "Civil War" 93, 95; Nzongola-Ntalaja http://projectcongo.org/images/The_20International_20Dimensions_20of_20the_20Congo_20Crisis.pdf (Date of use: 29 April 2011); Tunamsifu *Conflict Resolution* 6, 131; Mangu 2003 *AHRLJ* 236.

[579] The operation was carried out by Rwandans troops with their Congolese allies within the Alliance of Democratic Forces for the Liberation of Congo-Zaire (AFDL).

[580] Again, the US played an important role in the overthrow. Thomas Turner notes that it had helped neighbouring countries such as Rwanda, Uganda, Burundi, and Angola to put Laurent-Désiré (LD) Kabila in power (Turner *Congo* 40).

[581] See Turner *Congo Wars* 4, 39; Nzongola-Ntalaja *The Congo* 276; Mangu 2003 *AHRLJ* 236.

[582] Thomas Turner reports that, "The Americans had helped the Rwandans, Ugandans and others to put Laurent Kabila in power in Congo in 1997, but they soon came to question the choice". See Turner *Congo* 40. However, Rwanda and Uganda invaded Zaire under the pretext of protecting themselves against rebel incursions, while they were actively involved in looting Congo's natural resources. They destroyed the UNHCR refugee camps in Kivu which were also the base of the remnants of the defeated former Rwandan Army (the *ancien regime*) as well as of the extremist genocidal *Interahamwe* militias. To legitimise the invasion, they needed Congolese allies amongst the Congolese Tutsi who were fighting for recognition of their citizenship. See Nzongola-Ntalaja *The Congo* 215; Nzongola-Ntalaja "Civil War" 95; Nzongola-Ntalaja http://projectcongo.org/images/The_20International_20Dimensions_20of_20the_20Congo_20Crisis.pdf (Date of use: 29 April 2011).

[583] Clark *Gacaca Courts* 24; Nzongola-Ntalaja http://projectcongo.org/images/The_20International_20Dimensions_20of_20the_20Congo_20Crisis.pdf (Date of use: 29 April 2011). See Francois Ngolet's which traces the origins of the rebellion against Kabila.

[584] Rwanda created the *Rassemblement Congolais pour la Démocratie* (RCD, Congolese Rally for Democracy) to oppose the Kinshasa government, but fighting erupted in 1999 as the two fought for control of the RCD in order to ensure control the geostrategic city of Kisangani. Uganda then backed the creation of the *Mouvement pour la*

> The massacre of the Hutu refugees, suppression of democratic reforms, and international pressures created a climate of discontent and opposition toward the Kabila regime. Kabila's problems with the business community, as well as diplomatic tensions with countries such as the United States and Belgium, prevented Kabila from distinguishing himself as a preferable alternative to Mobutu.[585]

The second armed conflict which was unleashed from Goma (North Kivu) was considered aggression[586] because neighbouring countries such as Rwanda and Uganda invaded the DRC through and with their proxies. Jason Stearns reports that, "With support of Rwandan troops who crossed the border, they took control of Goma and Bukavu and began advancing on Kisangani".[587] Felip Reyntjens argues that the rebellion was masterminded in Kigali and endorsed by the Americans,[588] while Robert Gribbin affirms that, "The United States accepted Rwanda's national security rationale as legitimate. We also recognized that the RCD was a proxy, directed in many respects from Kigali, particularly on military/security issues".[589] Prof Mbata Mangu describes this conflict as the most complex and most perplexing that Africa has experienced in its post-colonial history and post-Cold War. It was both an internal rebellion and

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Libération du Congo (MLC, Movement for the Liberation of Congo). The MLC controlled northern areas in the Equateur Province; the RCD, which maintained a close alliance with, and even dependence on Rwanda throughout the conflict controlled the Province of Maniema, most of the Kivus, and parts of Orientale, Kasai Oriental, and Katanga provinces. Other, smaller groups have controlled certain areas at different times. For more details, see Borello *Road to a Just Peace* vii-viii. Moreover, in 2000, Thomas Lubanga, with the support of Uganda and Rwanda, created another rebel group in the District of Ituri called the *Union des Patriotes Congolais* (UPC, Union of Congolese Patriots) on 15 September 2000. For details, read Mangu 2003 *SAJIA* 159-160; Mangu 2003 *AHRLJ* 237.

585 Ngolet *Crisis in the Congo* 11.

586 Ngolet states that when the war erupted in August 1998, Rwanda and Uganda were accused by the government of Kabila of being behind the rebellion in the eastern DRC (see Ngolet *Crisis in the Congo* 21). Therefore, the Rwandan and Ugandan armies decided to support the rebel groups with aggression. The Convention's (1933) definition of aggression states that a State may be qualified as aggressor in an international conflict. Thus, Article 2(5) describes aggression as: "[p]rovision of support to armed bands formed in its territory which have invaded the territory of another State, or refusal, notwithstanding the request of the invaded State, to take, in its own territory, all the measures in its power to deprive those bands of all assistance or protection". See more in the Convention for the definition of aggression, London, 3 July 1993. http://www.iilj.org/courses/documents/ConventionontheDefinitionofAggression.pdf (Date of use: 10 April 2013).

587 Stearns *The Great War of Africa* 188.

588 Reyntjens *The Great African War* 195.

589 Gribbin *The U.S. Role in Rwanda* 283.

a foreign aggression of the DRC by some of its eastern neighbours with the complicity of the most powerful countries.[590]

Concerned by the negative impact of the conflict and "the need to ensure that the principles of good neighbourliness and non-interference in the internal affairs of other countries are respected", a summit was held in Lusaka on 10 July 1999 comprising of the different contenders and the peacemakers,[591] but "both sides to the conflict consistently violated the cease-fire agreement".[592]

On 16 January 2001, President LD Kabila was assassinated allegedly by his bodyguard[593] and on 26 January 2001, he was succeeded by his son, Joseph Kabila, who immediately initiated an inclusive peace process through the Inter-Congolese Dialogue (ICD) held in Pretoria. As a result, on 17 December 2002, a Global and Inclusive Agreement on Transition in the DRC was signed by the various elements/groups and entities.[594] However, the establishment of the government of national unity and transition in June 2003 did not prevent the emergence of new rebel groups (such as the CNDP) because of the failure to restore the State's authority.

Delegates to the ICD held in Pretoria, South Africa (2002)[595] were aware that during the different stages of the armed conflicts, rebel movements –local and foreign- engaged in serious

[590] Mangu 2003 *AHRLJ* 237, 262.

[591] Thus, Parties (leaders of Angola, DRC, Namibia, Rwanda, Uganda, and of two principal rebel groups: RCD and MLC) signed the Lusaka Peace Agreement. They agreed among other things to a cease-fire among all their forces in the DRC (Chapter 1), order the withdrawal of all foreign forces (Chapter 4), organise the inter-Congolese political negotiations (Chapter 5), and the deployment of the UN peacekeeping to ensure implementation of the Agreement (Chapter 8). See Lusaka Ceasefire Agreement of 10 July 1999 http://www.state.gov/t/ac/csbm/rd/22634.htm (Date of use: 23 June 2006).

[592] Dagne "Current Developments" 126.

[593] Hence, the involvement Rwanda and the US in the killing was denounced. It was also reported that a business card from a US military attaché was found in the pocket of Kabila's assassin (see Turner *Congo* 40).

[594] *Global and Inclusive Agreement on Transition in the DRC: Inter-Congolese Dialogue - Political Negotiations on the Peace Process and on Transition in the DRC (2002*) http://www.issafrica.org/AF/profiles/DRCongo/icd/transagmt.pdf (Date of use: 15 May 2011).

[595] Delegates at the inter-Congolese dialogue which was held in Pretoria (Sun City) in 2002 included various elements and entities such as the government of the Democratic Republic of the Congo, the Congolese Rally for Democracy (RCD), the Movement for the Liberation of the Congo (MLC), the political opposition, civil society, the Congolese Rally for Democracy/Liberation Movement (RDC/ML), the Congolese Rally for Democracy/National (RCD/N), and the Mai-Mai. The Global and Inclusive Agreement on Transition in the Democratic Republic of the Congo comprised the following content that parties agreed on: I. Cessation of

human rights violations and committed war crimes and crimes against humanity. The perpetrators included members of the DRC armed forces and foreign armies (of Rwanda, Uganda and Burundi, among others). A number of studies have shown that actors in all the conflicts were directly and indirectly responsible for millions of deaths.[596] Therefore, delegates opted to deal with the past through transitional justice mechanisms. Among mechanisms of transitional justice that were chosen to deal with the past was the Truth and Reconciliation Commission (Resolution DIC/CPR/04) and they requested and recommended that an international criminal tribunal be established for the DRC (Resolution DIC/CPR/05).[597]

President Mobutu had left the judiciary system in a derelict state, and judges were not adequately paid, so that "it was common for judges to give in to corruption… Justice was thus for sale to those who could afford it."[598] In addition, the different armed conflicts had severely affected the Congolese courts and tribunals some of which were destroyed, and at that time, judges were appointed through irregular processes and based on political considerations. Furthermore, "the number of judges was far below the level needed to handle all the cases that could be referred to the courts".[599] For those reasons, the recommendations of restorative justice through the TRC and of retributive justice through an international tribunal were appropriate for dealing with the crimes because of the state of the judiciary and the lack of trust in the Congolese courts and tribunals.

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hostilities that allowed parties to seek a peaceful and equitable solution to the crisis that the country was facing; II. Transition objectives that included the reunification and reconstruction of the country, national reconciliation and the organisation of free and transparent elections; III. Transition principles that guarantee a peaceful transition and ensure the stability of the transitional institutions; IV. The duration of the transition for 24 months that was extended by 6 months which was renewable once; V. Transitional institutions consisting of a transitional executive, a parliament (national assembly and a Senate), a judiciary, and institutions supporting democracy; VI. The army that integrated all armed wings of different rebel groups; VII. Final provisions indicating that the transitional constitution was drafted on the basis of the inclusive agreement on transition; and VIII. Annexes that indicated repartition of responsibilities. For more, read *Global and Inclusive Agreement on Transition in the DRC: Inter-Congolese Dialogue - Political Negotiations on the Peace Process and on Transition in the DRC (2002*).

[596] Nest, Grignon and Kisangani *War and Peace* 12; Binder, De Geoffroy and Sokpoh *Congo* 22; OHCHR *Report Mapping Exercise* §998-999.

[597] Resolution No: DIC/CPR/05 or Resolution No: ICD/CPR/05 of the Final Act of the Inter-Congolese Political Negotiations was relative to the establishment of an International Criminal Court.

[598] UN Doc A/HRC/8/4/Add.2 § 35.

[599] UN Doc A/HRC/8/4/Add.2 § 28.

4.2.2 Legal framework of transitional justice mechanisms in the DRC

Since the colonial era, the DRC has experienced various violations of human rights which have resulted in millions of deaths and unfortunately, most of them, remained unpunished. The post-colonial government did not deal with the issue of the untold inhuman treatment of the colonial-era neither did the 1960s roundtable conference held in Belgium provide any mechanism to resolve it. Under Mobutu's presidency, the CNS, besides the option of revising the constitution of the Third Republic, was supposed to deal with the legacies of the authoritarian regime as a precondition to establishing good governance, rule of law and democracy. However, following various revelations about crimes, mismanagement, and violations of human rights, Mobutu decided to terminate the operations of the CNS.

During the political negotiations, the government of the DRC which was party to the ICD had expected to sign the Rome Statute on 8 September 2000. However, considering the large-scale human rights and IHL violations that were committed in the armed conflicts, Decree Law No. 0013/2002 of 30 March 2002 authorised its ratification,[600] and the instrument of ratification was submitted on 11 April 2002.[601] The government initiative was not innocent because the UNSC, through several resolutions,[602] reminded the various parties in the armed conflicts in the DRC of their obligations to defend human rights and respect IHL. As crimes committed could not remain unpunished, the UNSC also reminded parties to prosecute those responsible for crimes under international law.[603]

Following the global and inclusive agreement on transition in the DRC, the Transitional Constitution was adopted in Sun City, South Africa on 1 April 2003 (Resolution No:

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[600] Décret-loi nº 0013/2002 du 30 mars 2002 autorisant la Ratification du Statut de Rome de la CPI du 17 juillet 1998

[601] Tunamsifu 2012 *A38JIL 1(2)* 2; CPI-ICC http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/2004/Pages/prosecutor%20receives%20referral%20of%20the%20situation%20in%20the%20democratic%20republic%20of%20congo.aspx (Last Date of use: 12 July 2014).

[602] See §14 of the UNSC Resolution 1341 (2001) of 22 February 2001 (S/RES/1341 (2001) http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1342(2001)); §6 of the UNSC Resolution 1234 (1999) of 9 April 1999 (UNSC S/RES/1234 (1999) http://www.worldlii.org/int/other/UNSC/1999/14.pdf (Last Date of use: 29 January 2015), and §15 of the UNSC Resolution 1291 (2000) of 24 February 2000 (UNSC S/RES/1291 (2000) http://www.worldlii.org/int/other/UNSC/2000/7.pdf (Last Date of use: 29 January 2015)).

[603] OHCHR *Report Mapping Exercise* §1012.

DIC/CPJ/02), and an Amnesty Decree Law (No. 03-001 of 15 April 2003)[604] was signed by President Kabila to grant provisional amnesty based on Resolution No: DIC/CHSC/02.[605] Subsequently, the government of national unity and transition was established on 30 June 2003 based on the understanding that there would be sharing of political power. However, warlords who had allegedly committed international crimes and serious human rights violations and individuals with known records of human rights abuses were also integrated into the government. Other perpetrators were promoted or offered important posts in the army, National Police and the diplomatic corps.[606]

The appointment of rebel leaders to higher ranks thus gave the impression that the government "is favouring the perpetrators of crimes in the name of peace and national unity".[607] On 23 September 2003, in his address to the UNGA, President Joseph Kabila asked for the establishment of an *ad hoc* international criminal tribunal for the DRC, that is, an independent instrument of justice that would deal with international crimes including rape as a weapon of war, while the government worked on reforming the judicial sector at the local level.[608] Regrettably, the UN was unwilling to establish another model of the ICTY and of the ICTR due to the high cost.[609] Therefore, as a State Party to the Rome Statute under the transitional government, the DRC formally decided on 3 March 2004 to refer cases of crimes allegedly committed anywhere in the territory of the DRC that fall within the jurisdiction of the Court to the ICC since the Rome Statute entered into force on 1 July 2002.[610]

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[604] The Amnesty Decree Law was signed before the transitional National Assembly took office. The Amnesty Law No. 05/023 of 19 December 2005 adopted by the National Assembly and promulgated by the President replaced the Amnesty Decree Law No. 03-001 0f 15 April 2003. However, both laws excluded international crimes committed during the armed conflicts.

[605] Resolution No: DIC/CHSC/02 or Resolution No: ICD/CHSC/02 of the Final Act of the Inter-Congolese Political Negotiations relates to the Emergency Humanitarian Programme for the DRC.

[606] HRW *Justice Aside* 11.

[607] OHCHR *Report Mapping Exercise* §1013.

[608] Luzolo and Bayona *Procédure Pénale* 760-761; Human Rights First https://www.humanrightsfirst.org/wp-content/uploads/pdf/DCR_Bckgrnd%283%29.pdf (Date of use: 04 July 2014); Mpongola 2010 *Politorbis* 182.

[609] The ICTY and ICTR have played a crucial role in fighting impunity and have made an important contribution to the development of a rich jurisprudence. However, their annual budgets were rather high given the few number of cases processed. Therefore, the UNSG suggested that, "high priority should be given to consideration of the need to provide for an effective system for delivery of justice". See UNSC *Rule of Law* §41-45).

[610] Tunamsifu 2012 *A38JIL 1(2)* 2; ICC-OTP-20040419-50 http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/2004/Pages/prosecutor%20receives%20referral

After "[c]onsidering that lasting national peace and reconciliation could never be built on lies or impunity",[611] under the Transitional Constitution of 5 April 2003 (Article 154 and 155), the National Assembly and the Senate adopted Law No. 04/018 of 30 July 2004 establishing the TRC which was promulgated by the President of the Republic on 30 July 2004.

From the above, one can classify the legal frameworks of transitional justice mechanisms adopted in the DRC into two. The first are the resolutions adopted during the political negotiations in 2002 in Sun City (RSA) and the second are the laws adopted during the transitional period following the peace agreement. Thus, the first mechanisms include the Final Act of the Inter-Congolese Political Negotiations or the Global and Inclusive Agreement on Transition in the DRC of 17 December 2002, and the Transitional Constitution of 5 April 2003. The second mechanisms comprise of the Amnesty Decree Law (No. 03-001 0f 15 April 2003) that was replaced by Amnesty Law No. 05/023 of 19 December 2005, and Law No. 04/018 of 30 July 2004 establishing the TRC.

Moreover, as the DRC is a State Party to the Rome Statute, the jurisdiction of the ICC in dealing with past abuses was very crucial. Among the ICC's objectives is to put an end to impunity for the perpetrators of serious crimes under international law. Thus, by holding those who were most culpable accountable in order to achieve a deterrent effect, the ICC serves the same goal of transitional justice mechanisms. In the aftermath of various internationalised armed conflicts, the Congolese judicial mechanisms were unable to deal with various crimes committed in the country hence the DRC referred cases of crime to the ICC. Thus, the following section focuses on the jurisdiction of the ICC which complemented the national judiciary to deal with crimes committed within the jurisdiction of the Court.

%20of%20the%20situation%20in%20the%20democratic%20republic%20of%20congo.aspx (Last Date of use: 12 July 2014).

[611] Resolution No: ICD/CPR/04 or Resolution No: DIC/COR/04 of the Final Act of the Inter-Congolese Political Negotiations.

4.3 Role of Prosecution in Dealing with Past Abuses

As stated in Chapter 2 (2.1. Introduction), conflicts are an inescapable fact of human existence which will continue to cause many human sufferings including millions of deaths. In the DRC, approximate statistics reveal that since 1996, between six and twelve million people were killed, and millions of women and girls were raped as a result of various internationalised armed conflicts. Thus, this section analyses the role played by the ICC in complementing national criminal jurisdictions and the challenges faced by the DRC's criminal justice system in addressing the abuses of the past. On the limitation of the Rome Statute (jurisdiction *ratione temporis*) and the challenges of the Congolese criminal justice, the last subsection tries to interrogate whether the Protocol on the Statute of the African Court of Justice and Human Rights can serve as an alternative to prosecution.

4.3.1 Jurisdiction of the ICC in complementing national criminal jurisdictions

In the attempt to make individuals accout for serious crimes of human rights and IHL violations, the replication of *ad hoc* international criminal tribunals in every country where conflict occurred cannot be a lasting solution for different reasons – the high cost (budget) of the tribunals, the time it takes to organise the activities, and the prescribed or limited working period. Hence, the ICC, as the first permanent and independent international criminal court which was established to hold accountable those who are most culpable for serious international crimes, seems to be a suitable resolution organ when States Parties are unwilling or unable to conduct investigations and prosecutions. Lindsey Raub concurs that the creation of the ICC diminished the need for these *ad hoc* international institutions.[612] Since the establishment of the ICC, African countries have played a primary role in the enactment of the Rome Statute in order to fight impunity (even though the ICC has been criticised for focusing solely on African cases).

[612] Raub 2009 *ILP* 1015.

As stated in the Preamble and Article 1 of the Rome Statute, the relationship between the ICC and national criminal jurisdictions is based on the principle of complementarity.[613] However, as stated in Article 17, the Court must determine the admissibility of a case if the State which has jurisdiction over it is unwilling or unable to prosecute the person concerned, unless the person has been tried for conduct by another court where proceedings were conducted independently or impartially. Song Sang-Hyun explains that under the principle of complementarity, "the national judiciary of each state retains the right, and the primary duty, to investigate and prosecute grave violations of international humanitarian law".[614] The ICC does not replace national jurisdictions, but enables them to prosecute cases in order to ensure sovereignty and it takes advantage of the benefits of decentralised prosecution by States closest to the crime and most directly affected by it.[615] Kirsten J Fisher further notes that, "This arrangement aims to ensure that the international authority does no supersede the role of national authorities in the administration of criminal justice".[616] Where national jurisdictions can properly investigate and prosecute offenders, the ICC's Prosecutor had considered that they are normally the most effective and efficient means of bringing offenders to justice, since they would normally have the best access to evidence and witnesses.[617] Thus,

> Complementarity is perceived in international criminal law as a principle that defines and organizes the relationship between domestic courts and the permanent International Criminal Court (ICC). The principle of complementarity provides national courts with primacy to exercise jurisdiction over the core crimes defined under the ICC Statute. Only when national courts manifest "unwillingness" or "inability" to adjudicate on an alleged crime may the

[613] The principle of complementarity was not a new idea inserted into the Rome Statute for the first time. Mohamed M. El Zeidy argues that it was developed over a long period of time - between World War I and 1998. The author describes four major models of its evolution. Firstly, it is the outcome of the 1937 Convention for the creation of an International Criminal Jurisdiction based on State consent – the *optional complementarity model*. Secondly, it resulted from the Nuremberg experience based on the division of responsibilities between national and international jurisdictions to avoid conflicts of jurisdiction. Thirdly, the model which was adopted by the 1994 Working Group of the International Law Commission was based on a combination of the consensual system. Fourthly and lastly, as reflected in the 1998 Rome Statute, the model lies between the categories of *optional* and *mandatory* complementarity. Therefore, the principle of complementarity is a flexible idea that is subject to variations depending on the context of its emergence. See El Zeidy *Complementarity* 6-7.

[614] Sang-Hyun 2013 *AJIL* 210.

[615] Werle *Principles* 84.

[616] Fisher *Accountability* 105.

[617] ICC-OTP 2003 http://www.icc-cpi.int/nr/rdonlyres/1fa7c4c6-de5f-42b7-8b25-60aa962ed8b6/143594/030905_policy_paper.pdf (Date of use: 11 July 2014); Raub 2009 *ILP* 1019.

> International Criminal Court step in to remedy the deficiencies resulting from the failure of one or more States to fulfill their duties.[618]

However, the application of the principle of complementarity between the ICC and the national criminal jurisdictions in the aftermath of a violent armed conflict or repressive rule seems to be hypothetical because the latter could have been destroyed or affected by the former regime. In the case of the ICC therefore, the principle of complementarity remains fundamental because, on the domestic level, national criminal jurisdictions are often *unable* to adjudicate widespread international crimes due to, among others, the lack of resources, infrastructure, expertise, and reform in the judiciary as well as unreformed laws and fragile peace. Hence, it is difficult to avoid or resist the culture of impunity. In accordance with Article 12(2a-b), the ICC exercises its jurisdiction over the territorial principle or territorial jurisdiction (*ratione loci)* and the nationality principle or personal jurisdiction *(rationae personae)* for war crimes, crimes against humanity, genocide and crimes of aggression (Article 5).

When the government of national unity and transition took office on 30 June 2003, it faced many challenges including how to rebuild the country, reconcile the nation, fight impunity in respect of large-scale violence and serious crimes which involved a considerable number of perpetrators, and prepare elections after the transitional period. On the issue of fighting impunity, the judicial infrastructures were almost completely run down and there were insufficient funds to process judicial investigations. Luzolo and Bayona assert that though the Congolese criminal justice system prioritised the prosecution of perpetrators of serious crimes, the Congolese judicial system had almost collapsed completely and could not meet the requirements of a fair trial of the crimes committed in the DRC under the jurisdiction of the ICC.[619]

Therefore, under Article 13(a) as well as Article 14 of the Rome Statute, the DRC decided to refer the situation to the ICC formally on 19 April 2004. The government made this referral (starting with the case of Mr Thomas Lubanga) because the UNSC was not keen to

[618] El Zeidy *Complementarity* 4.
[619] Luzolo and Bayona *Procédure Pénale* 763.

create an *ad hoc* international criminal tribunal for the DRC. Such *ad hoc* tribunal would be capable of resisting pressure from the decorated high-ranking rebel leaders integrated into the army, the police, and the government of national unity and transition regarding crimes they have committed during the armed conflicts. Based on the referral, the ICC's Prosecutor was asked to investigate whether one or more persons should be charged with crimes under the ICC's jurisdiction, and whether the Congolese authorities were committed to cooperating with the Court.[620] Thus, on 23 June 2004, the Prosecutor announced his decision to open the first investigation and in October 2004, causing the Office of the Prosecutor (OTP) and the DRC to sign the Judicial Cooperation Agreement while cooperation mechanisms were progressively established on the DRC territory with MONUC/MONUSCO and other relevant organisations.[621] Four cases of crimes perpetrated in Ituri (Thomas Lubanga Dyilo, Germain Katanga, Mathieu Ngudjolo Chui, and Bosco Ntaganda) and two cases of crimes committed in Kivu (Callixte Mbarushimana and Sylvestre Mudacumura) were opened.

4.3.1.1 The Prosecutor v. Thomas Lubanga Dyilo [2012] ICC-01/04-01/06

When the situation in the DRC was referred to the ICC, Thomas Lubanga Dyilo was the first accused rebel leader brought before the Court.

A. Facts and decision

Lubanga was jointly President of a rebel movement named *Union des Patriotes Congolais* or the Union of Congolese Patriots (UPC) formed on 15 September 2000 as well as the Commander-in-chief of the armed wing of the ethnic-based UPC called *Forces Patriotiques pour la Libération du Congo* or Patriotic Forces for the Liberation of Congo (FPLC) formed in September 2002.[622] Schools and villages were targeted in its first wave of the recruitment of

[620] ICC-OTP-20040419-50 http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/2004/Pages/prosecutor%20receives%20referral%20of%20the%20situation%20in%20the%20democratic%20republic%20of%20congo.aspx (Last date of use: 12 July 2014).
[621] Tunamsifu 2012 *A38JIL 1(2)* 3.
[622] *The Prosecutor v. Thomas Lubanga Dyilo [2012] ICC-01/04-01/06-2842* § [22-28, 1115].

predominantly young Hema fighters.[623] Children under the age of 15 years were drafted to participate actively in the conflicts and to serve as Lubanga's bodyguards and as ranked military leaders.[624]

The Ugandan and Rwandan armies were involved in the armed conflict that took place in Ituri between early September 2002 and 13 August 2003.[625] The Ugandan Army occupied Bunia and Rwanda in pursuance of an agreement with the UPC, and provided weapons, uniforms and training to UPC/FPLC soldiers.[626] The Court found insufficient evidence that the Congolese government provided support to the RCD/ML and the Lendu militias. Accordingly, the Court found that there was some international influence in the armed conflict in Ituri between July 2002 and 2 June 2003, the date of the effective withdrawal of the Ugandan army but between 2 June 2003 and 13 August 2003, there was no international influence.[627]

In June 2002, the Ugandan authorities invited Lubanga and others to Kampala where they were arrested and later transferred to Kinshasa.[628] On 10 February 2006, the Pre-Trial Chamber I issued a warrant of arrest for Lubanga. As a result of judicial cooperation, the Congolese authorities facilitated the transfer of the case to The Hague on 16 March 2006.[629] On 29 January 2007, Pre-Trial Chamber I confirmed charges against Lubanga under Articles 8(2)(b)(xxvi) and 25(iii)(a) of the Statute beginning from early September 2002 to 2 June 2003. On 14 March 2012, pursuant to Article 74(2) of the Statute, Mr Thomas Lubanga Dyilo was found guilty as a co-perpetrator of the crimes of conscripting and enlisting children under the age of 15 years into the UPC/FPLC and using them to participate actively in conflicts in Ituri. The crimes which were committed between early September 2002 and 13 August 2003 were within the meanings of Articles 8(2)(e)(vii) and 25(3)(a) of the Statute.[630] Pursuant to Regulation 55 of the Court, the Chamber concluded that the armed conflict relevant to the

[623] *The Prosecutor v. Thomas Lubanga Dyilo [2012] ICC-01/04-01/06-2842* § [23, 26].
[624] *The Prosecutor v. Thomas Lubanga Dyilo [2012] ICC-01/04-01/06-2842* § [29, 54, 65, 56].
[625] *The Prosecutor v. Thomas Lubanga Dyilo [2012] ICC-01/04-01/06-2842* § [67, 72, 76, 85].
[626] *The Prosecutor v. Thomas Lubanga Dyilo [2012] ICC-01/04-01/06-2842* § [517, 554, 557, 1155].
[627] *The Prosecutor v. Thomas Lubanga Dyilo [2012] ICC-01/04-01/06-2842* § [553, 524, 525].
[628] See *The Prosecutor v. Thomas Lubanga Dyilo [2012] ICC-01/04-01/06-2842* § [89, 1060].
[629] ICC-01/04 http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200104/Pages/situation%20index.aspx (Last Date of use: 12 July 2014).
[630] *The Prosecutor v. Thomas Lubanga Dyilo [2012] ICC-01/04-01/06-2842* § [1588, 1358].

charges which occurred between early September 2002 and 13 August 2003 was non-international in character.[631] Therefore, on 10 July 2012, the Majority of the Chamber recommended, by way of a joint sentence, a total period of 14 years' imprisonment.[632] On 7 August 2012, the Trial Chamber I delivered a decision on the principles and procedures to be applied to reparations in this case. Reparations oblige offenders to repair the harm they caused to the victims, hence, conviction and sentence of the Court are examples of reparations. However, because Mr Lubanga was declared indigent, he was required to make only symbolic reparations such as a public or private apology to the victims. Subsequently, the Chamber decided that the Trust Fund for Victims (TFV) would grant reparations within the limitations of its available resources.[633]

On 3 October 2013, Lubanga appealed against the verdict and the sentence[634] but the Appeals Chamber rejected his appeal on 1 December 2014.[635] Following the appeal against the Trial Chamber's "decision establishing the principles and procedures to be applied to reparations", on 3 March 2015, the Appeals Chamber amended the Trial Chamber's order for reparations to victims. It found that "the Trial Chamber erred in not making Lubanga personally liable for the collective reparations due to his current state of indigence". Consequently, the Appeals Chamber ordered that Lubanga be personally liable for the reparations and if the TFV advanced him its resources to enable the implementation of the order, it could claim the advanced resources from Lubanga later.[636]

[631] *The Prosecutor v. Thomas Lubanga Dyilo [2012] ICC-01/04-01/06-2842* § [1359].
[632] *The Prosecutor v. Thomas Lubanga Dyilo [2012] ICC-01/04-01/06-2901* § [107].
[633] *The Prosecutor v. Thomas Lubanga Dyilo [2012] ICC-01/04-01/06-2904* § [179, 237, 269, 273].
[634] *The Prosecutor v. Thomas Lubanga Dyilo [2012] ICC-01/04-01/06-2934-tENG 04-12-2012 2/4 RH A5.*
[635] ICC-CPI-20141201-PR1069 http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1069.aspx (Date of use: 2 December 2014).
[636] ICC-CPI-20150303-PR1092 http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1092.aspx (Date of use: 25 March 2015).

B. Comments

In this case, it is important to note that Lubanga is regarded as one of the leaders of the indigenous tribe, Hema, located in Ituri, and considered a "hero" in his community.[637] The Office of the Prosecutor, based on the assumption that UPC/FPLC committed various crimes, decided to prosecute the accused only on war crimes consisting of enlisting and conscripting children under the age of 15 years to participate actively in armed conflicts. Thus, finding him guilty of those crimes seems to ignore the ethnic aspect of the armed conflict in Ituri in which the Hema fought against Lendu with the help of foreign armies. It is clear that in such a conflict, conscription and enlistment of children under the age of 15 years could not have been the only crimes committed. In this case, it can be deduced that the accused was found guilty of crimes committed against his tribe, as most of the children under the age of 15 were Hema, and "7,000 people had been killed and 100,000 displaced" in the violence.[638] Thus, it was imperative that the accused be held accountable for other crimes such as murder, rape, torture, looting and destruction of property which were committed under his leadership in the attacks carried out by UPC/FPLC against the Lendu.[639] The UN mission reported that without the involvement of Ugandan and Rwandan armies, the local conflict in Ituri would not have turned into the massive slaughter that was witnessed.[640] It is noteworthy that Article 12(2) of the Statute states that the Court may exercise its jurisdiction if the State on the territory of which the conduct in question occurred or if the State of which the person accused of the crime is a national:

> Article 12(2) reads that "[i]n the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:
> (a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;
> (b) The State of which the person accused of the crime is a national."

The above provision includes both the territorial principle and the nationality principle. According to the territorial principle or territorial jurisdiction (*ratione loci*), the ICC has

[637] *The Prosecutor v. Thomas Lubanga Dyilo [2012] ICC-01/04-01/06-2879* § [23].
[638] *The Prosecutor v. Thomas Lubanga Dyilo [2012] ICC-01/04-01/06-2842* § [79].
[639] *The Prosecutor v. Thomas Lubanga Dyilo [2012] ICC-01/04-01/06-2879* § [23].
[640] *The Prosecutor v. Thomas Lubanga Dyilo [2012] ICC-01/04-01/06-2842* § [76].

jurisdiction over crimes committed in the territory of the States Parties, regardless of the nationality of the offenders or perpetrators. In this case, because Uganda is a State Party to the Statute and Ugandan agents were involved in the armed conflict in Ituri, it became urgent for the ICC to prosecute Ugandan nationals who committed serious crimes. However, because Rwanda is not a State Party to the Statute, the DRC is obliged under Article 89 of the Statute to advise the ICC to request Rwanda to arrest and hand over Rwandan agents suspected of committing serious crimes in Ituri:

> Article 89(1) reads that "[t]he Court may transmit a request for the arrest and surrender of a person, together with the material supporting the request outlined in article 91, to any State on the territory of which that person may be found and shall request the cooperation of that State in the arrest and surrender of such a person. States Parties shall, in accordance with the provisions of this Part and the procedure under their national law, comply with requests for arrest and surrender."

Based on an *ad hoc* arrangement, the ICC may negotiate and sign an agreement with Rwanda for assistance to arrest and hand over the fugitives. If Rwanda refuses to cooperate, then the Court may inform the Assembly of States Parties or the Security Council to refer the matter to the ICC (Article 87, 5).

Regarding the nature of armed conflict in Ituri, the Court agreed that the Ugandan army was an occupying power in certain areas of Ituri, but it did not describe the context in which Ituri came to be under foreign occupation. In the *case concerning armed activities on the territory of the Congo (Democratic Republic of the Congo v. Uganda)* brought before the International Court of Justice (ICJ), the DRC asserted that the Ugandan forces attacked the eastern Congo border on 7-8 August 1998 and consequently more areas fell under their control.[641] However, at the time Ituri was occupied, it was not a *res nullius* but a part of the DRC territory. In the Hague Regulations of the 1907, Article 42 stipulates that a "territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised."

[641] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda) [2005]* ICJ Reports General List No. 116 § [167].

Thus, the Pre-Trial Chamber admitted that, "the armed conflict that occurred in Ituri was characterised as an armed conflict of an international character from July 2002 to 2 June 2003, the date of the effective withdrawal of the Ugandan army".[642] However, in its conclusion, the Chamber took into consideration the period from September 2002 to 13 August 2003 to qualify the armed conflict as non-international in character.[643]

Besides the Chamber's qualification of the armed conflict in Ituri, this research assumes that the involvement of the foreign armies of Rwanda and Uganda changed the dynamics of the conflict and increased the number of victims. The non-international armed conflict in Ituri became an internationalised internal armed conflict due to the intervention as well as provision of weapons and uniforms by the Ugandan and Rwandan armies. As result of the conflict, hundreds of thousands of Congolese citizens were killed and tens of thousands fled their homes.

It is important to remark that an internationalised internal armed conflict is marked by both international and non-international elements. According to Dietrich Schindler, internationalised internal armed conflicts occur when in civil wars foreign armed forces intervene in favour of one or the other party.[644] In the same vein, Hans-Peter Gasser shows that, "An internationalized non-international armed conflict is a civil war characterized by the intervention of the armed forces of a foreign power".[645] Thus,

> The term "internationalized armed conflict" describes internal hostilities that are rendered international. The factual circumstances that can achieve that internationalization are numerous and often complex: the term internationalized armed conflict includes war between two internal factions both of which are backed by different States; direct hostilities between two foreign States that militarily intervene in an internal armed conflict in support of opposing sides; and war involving a foreign intervention in support of an insurgent group fighting against an established government.[646]

[642] *The Prosecutor v. Thomas Lubanga Dyilo [2012] ICC-01/04-01/06-2842* § [524].
[643] *The Prosecutor v. Thomas Lubanga Dyilo [2012] ICC-01/04-01/06-2842* § [1359].
[644] Schindler 1982 *IRRC* 255.
[645] Gasser 1983 *AULR* 145.
[646] Steward 2003 *IRRC* 315 quoting Schindler 1982 *IRRC* 255.

Regarding such situations, the ICRC made a significant proposal in 1971 at the *Conference of Government Experts for the Reaffirmation and Development of IHL Applicable in Armed Conflicts*. It stated that:

> When, in case of non-international armed conflict, one or the other Party, or both, benefits from the assistance of operational armed forces afforded by a third State, the Parties to the conflict shall apply the whole of the international humanitarian law applicable in international armed conflicts.[647]

However, Dietrich Schindler notes that the proposal did not gain appropriate support from experts as it was argued that it could encourage insurgents to call for foreign assistance.[648]

Therefore, as stated above, under Article 12(2) and 89 of the Statute, this study strongly recommends that the OTP of the ICC investigate unlawful conducts committed by Rwandan and Ugandan agents who bear the greatest responsibility against the law of occupation that resulted in the death and displacement of protected persons. Furthermore, it is important to consider that Rwanda and Uganda have not yet brought to justice their agents who allegedly committed crimes in the DRC in accordance with the UNSC's Resolution 1341(2001), which stresses "that occupying forces should be held responsible for human rights violations in the territory under their control".[649] Indeed, the same recommendation applies in cases against the military commanders and other superiors of the RCD/ML as well as of the Congolese government where sufficient evidence of perpetration of crimes is found.

4.3.1.2 The Prosecutor v. Germain Katanga and Mathieu Ngudjolo cases

The Germain Katanga and Matthieu Ngudjolo Chui cases were the second and third warrants of arrest investigated and prosecuted by the ICC. Both cases also relate to the situation of the DRC and the application of the principle of complementarity.

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[647] ICRC *Conference of Government Experts* 21.
[648] Schindler 1982 *IRRC* 255.
[649] Resolution 1341(2001) of 22 February 2001 § 14.

Katanga and Ngudjolo belong to the Lendu ethnic group[650] and were former leaders of the *Front des Nationalistes et Intégrationalistes* (FNI) or National Integrationist Front commanding the *Force de Résistance Patriotique en Ituri (FRPI)* or Patriotic Resistance Force in Ituri which was formed as an ethnic interest group.[651] The FNI was an armed group formed in November 2002[652] with the aim of repelling attacks from the Ugandan army and the UPC/FPLC.

On 24 February 2003, the FNI/FRPI indiscriminately attacked the village of Bogoro during which several criminal acts were committed against civilians who were primarily of Hema descent and children under the age of fifteen were drafted to fight in the conflict. In the attack, 200 civilians were killed, while serious bodily harm was inflicted on civilians and several women and girls were abducted as sex slaves.[653] In response to the crimes, the Office of the Prosecutor decided to prosecute the two commanders for only crimes committed during the attack on the village of Bogoro even though the armed conflict lasted from early September 2002 to 13 August 2003.

Therefore, on 17 October 2007, Germain Katanga was brought before the Court and transferred to the detention centre in The Hague. On 22 October 2007, he appeared before Pre-Trial Chamber. Mathieu Ngudjolo was also arrested on 6 February 2008 and was transferred to the detention centre on 7 February 2008, and he appeared before Pre-Trial Chamber I four days later. On 10 March 2008, the Pre-Trial Chamber I decided to join the cases against Katanga and Ngudjolo,[654] but on 21 November 2012, the Pre-Trial Chamber II again separated the joint trial

[650] The "Lendu" comprises several sub-groups with different names depending on their location; those in the region of Djugu are called Bale, while those in the region of Irumu are called Ngiti/Ngity or Walendu, and those in the region of Mahagi are called Walendu Watsi.
[651] Malekian *Jurisprudence* 466.
[652] Germain Katanga and Mathieu Ngudjolo were respectively leaders of the Ngiti and Lendu militias which formed an alliance in November 2002 in order to eliminate and neutralise the threat posed by the Hema and the UPC. See *The Prosecutor v. Mathieu Ngudjolo Chui [2012] ICC-01/04-02/12-3-tENG* § [84].
[653] *The Prosecutor v. Germain Katanga [2007] ICC-01/04-01/07-1-US-tENG* 5; *The Prosecutor v. Mathieu Ngudjolo Chui [2007] ICC-01/04-02/07-1-tENG SL PT* 5.
[654] *The Prosecutor v. Germain Katanga [2008] ICC-01/04-01/07-257* 11.

following its decision to implement Regulation 55 of the Regulations of the Court and the charges against the accused persons were dropped.[655]

4.3.1.2.1 The Prosecutor v. Mathieu Ngudjolo Chui [2012] ICC-01/04-02/12-3-tENG

A. Facts and decision

After signing the peace agreement with the government of the DRC in August 2006, elements of the FNI/FRPI were integrated into the FARDC and Mathieu Ngudjolo was promoted to the rank of colonel in October 2006. While Ngudjolo was undergoing his military training in Kinshasa, he was arrested and transferred to the Court by the Congolese authorities because sufficient evidence on crimes committed during the attack on Bogoro on 24 February 2003 had been found. The Pre-Trial Chamber I was satisfied that the Court had jurisdiction to prosecute Ngudjolo.[656] Ngudjolo's official position as a colonel in the FADRC was considered irrelevant, and the ICC requested his arrest in order to hold him accountable for crimes allegedly committed in Bogoro.

The Prosecution alleged that Ngudjolo was the leader of the Lendu combatants who participated in the attack on Bogoro, but in the Chamber's view, the Prosecution had not proven beyond reasonable doubt that Ngudjolo committed the alleged crimes under article 25(3)(a) of the Statute.[657] Besides, the Chamber was mindful that investigations conducted by the Office of the Prosecutor were conducted in a region still plagued by high levels of insecurity. In such a situation, it was difficult to locate "witnesses with sufficiently accurate recollections of the facts and able to testify without fear, as well as in the collection of reliable documentary evidence necessary for determining the truth in the absence of infrastructure, archives and publicly available information".[658] Thus, in order to gain a better understanding of the context of in which the events happened, the Chamber decided to travel to the DRC. During the judicial site visit on 18 and 19 January 2012, officials of the Chamber travelled to Bunia, Aveba, Zumbe,

[655] *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui [2012] ICC-01/04-01/07-3319-tENG/FRA.*
[656] *The Prosecutor v. Mathieu Ngudjolo Chui [2012] ICC-01/04-02/12-3-tENG* § [6, 17, 10, 16].
[657] *The Prosecutor v. Mathieu Ngudjolo Chui [2012] ICC-01/04-02/12-3-tENG* § [110].
[658] *The Prosecutor v. Mathieu Ngudjolo Chui [2012] ICC-01/04-02/12-3-tENG* § [115].

Kambutso, and twice to Bogoro where they met several people, but no witnesses came forward neither was anyone willing to provide any information related to the case. In other words, the Chamber invited parties and participants, but they did not provide any relevant details about the events. Furthermore, both the Defence and the Chamber concluded that the Prosecution had not proven beyond reasonable doubt that Ngudjolo committed the alleged crimes.[659] Many critics faulted the method used by the Office of the Prosecutor to conduct its field investigations. The team conducting the field investigation in the eastern DRC failed primarily due to security problems because militias were still active in the region and gunshots could be heard all the time, and the team could not conduct any investigation outside the city of Bunia which was under the protection of UN Mission.[660] Even after Bunia became stable, further field investigations were not conducted. Therefore, in its deposition on 18 December 2012, the Chamber unanimously declared Ngudjolo not guilty and consequently acquitted him of all the charges against him (war crimes and crimes against humanity) in this case.[661] On 20 December, the OTP appealed the verdict and the following day he was released from custody. However, on 27 February 2015, the Appeals Chamber confirmed the acquittal.[662]

B. Comments

In this case, besides the attack on Bogoro, there was the issue of children under the age of 15 being forced to participate actively in combat in the battle of Mandro and the attack on Bunia respectively on 4 and 6 March 2003, and from 11 to 12 May 2003 in Bunia which the OTP could decide to prosecute together. Thus, Ngudjolo who became the Chief of Staff of FNI/FRPI alliance on 22 March 2003 assumed responsibility as a military commander under Article 28 of the Statute.

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[659] *The Prosecutor v. Mathieu Ngudjolo Chui [2012] ICC-01/04-02/12-3-tENG* § [68-70, 89, 110].
[660] Read Buisman 2013 *NJIHR* 34.
[661] *The Prosecutor v. Mathieu Ngudjolo Chui [2012] ICC-01/04-02/12-3-tENG* 197. There were seven counts of war crimes against Ngudjolo namely using children under the age of 15 to take active part in the hostilities, directing an attack against a civilian population as such or against individual civilians not taking part in hostilities, wilful killing, destruction of property, pillaging, sexual slavery, and rape. The three counts of crimes against humanity included murder, rape and sexual slavery.
[662] ICC-CPI-20150227-PR1089 http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1089.aspx (Date of use: 25 March 2015).

The following case deals with charges against Katanga.

4.3.1.2.2 The Prosecutor v. Germain Katanga [2014] ICC-01/04-01/07-3436

A. Facts and decision

After September 2002, Germain Katanga became the leader of the Ngiti combatants in the Walendu-Bindi merger. Following the FNI/FRPI alliance on 22 March 2003, he became the Commander-in-chief and President. On 24 February 2003, the Ngiti militias attacked the village in Bogoro. Therefore, on the basis of Article 25(3)(a) of the Statute, the Prosecution argued that Katanga must be held responsible for the crimes committed by the militia members in Bogoro.[663] The Defence argued that in Aveba, Katanga extended his control only to 60 men quartered in Atele Nga, but he did not exercise authority over local commanders in other sectors of Walendu-Bindi. Furthermore, the Defence argued that the attack on Bogoro was planned, ordered and directed by the *Etat Major Opérationnel Intégré* or Integrated Operational General Staff (EMOI) "set up by the Kinshasa Government" and the APC (armed wings of RCD-ML), based at that time in Beni, North Kivu.[664]

The Trial Chamber II ("the Chamber") noted that the Ngiti combatants from Walendu-Bindi and the Lendu combatants from the Bedu-Ezekere band attacked Bogoro on 24 February 2003 receiving reinforcements from the APC when the attack was being conceived and prepared. However, the Chamber was not able to affirm that Katanga was present or that he participated in the fighting. Indeed, Katanga helped the Ngiti militia from the Walendu-Bindi side to mount the operation against Bogoro which the Ngiti commanders and combatants organised locally. Due to his contribution, Katanga knew of the intention of the group to commit the crimes which formed the common purpose:[665]

[663] *The Prosecutor v. Germain Katanga [2014]* ICC-01/04-01/07-3436 Summary of Trial Chamber II's Judgment of 7 March 2014 pursuant to article 74 of the Statute [13].
[664] Summary of Trial Chamber II's Judgment of 7 March 2014 pursuant to article 74 of the Statute § [14].
[665] Summary of Trial Chamber II's Judgment of 7 March 2014 pursuant to article 74 of the Statute § [16, 76, 85].

> Accordingly, the Chamber considered that these findings as a whole established beyond reasonable doubt that Germain Katanga's contribution to the crimes of murder, attack against the civilian population, destruction and pillaging committed in Bogoro on 24 February 2003 was significant and made in the knowledge of the intention of the group to commit the crimes.[666]

Therefore, the Trial Chamber II convicted Katanga of being an accessory to four counts of war crimes (murder, attacking civilian population which did not participate in the hostilities, destruction of enemy's property, and pillaging) and one crime against humanity – of murder. Unanimously, the Trial Chamber II did not found the accused guilty of three counts of war crimes (rape and sexual slavery, and using children under the age of 15 years to participate actively in hostilities) and two crimes against humanity of rape and sexual slavery. Consequently, he was acquitted.[667] Furthermore, on 23 May 2014, the Trial Chamber II sentenced Katanga to a total of 12 years' imprisonment and ordered that the time spent in detention at the ICC (between 18 September 2007 and 23 May 2014) be deducted from the sentence.[668] On 25 May 2014, Katanga accepted the judgement of the Chamber and the sentence imposed on him. He expressed his sincere regret to all those who have suffered as a result of his conduct, including the victims of the Bogoro conflict. Therefore, the Prosecution discontinued its appeal against the Article 74 Judgment regarding the Katanga case.[669]

By 18 September 2015, Katanga had served the statutory two thirds of his sentence (8 years). Taking into account Article 110(4) (a) of the Statute and Rule 223(a) of the Rules of Procedure and Evidence, the Panel decided to reduce Katanga's sentence by three years and eight months on 13 November 2015. Consequently, the date for the completion of his sentence was shifted to 18 January 2016 from 18 September 2019.[670]

[666] Summary of Trial Chamber II's Judgment of 7 March 2014 pursuant to article 74 of the Statute § [86].
[667] Summary of Trial Chamber II's Judgment of 7 March 2014 pursuant to article 74 of the Statute 29-30.
[668] *The Prosecutor v. Germain Katanga [2014] ICC-01/04-01/07-3484* § [170].
[669] *The Prosecutor v. Germain Katanga [2014] ICC-01/04-01/07-3498* § [2-3].
[670] *The Prosecutor v. Germain Katanga [2015] ICC-01/04-01/07-3615* § [5-6, 113-116].

B. Comments

In this case, finding Katanga guilty of being an accessory to the crimes committed on 24 February 2003 would mean that there is still a need to prosecute other principal suspects who continue to walk free such as commanders and other superiors who had effective authority and control over the combatants in the conflict. Additionally, leaders of the APC who supplied the weapons and ammunition, and who reinforced the militia when the attack was being conceived and prepared must be held accountable for their role in the conflict or in the attack on Bogoro.

4.3.1.3 The Prosecutor v. Bosco Ntaganda

Bosco Ntaganda, a Rwandan-born fighter, served in several armed groups in Rwanda (Rwandan Patriotic Front "RPF" and then the Rwandan Defense Forces "RDF") and in the DRC (ADFL, RCD, RCD-ML, FPLC, CNDP, and founder of the M23).[671]

A. Facts

In this case, Ntaganda is prosecuted by the ICC as a former deputy chief of general staff for military operations in Lubanga's UPC/FPLC for his personal criminal responsibility in the alleged war crimes of conscripting, enlisting children under the age of fifteen and using them to participate actively in hostilities in Ituri. Therefore, two warrants of arrest were issued against him on 22 August 2006[672] and on 13 July 2012.[673] Ntaganda is the fourth warlord to appear before the ICC regarding the situation in the DRC. By the end of February 2013, the two sides of the M23 (Movement of 23 March), one led by Ntaganda in Kibumba and the other by Makenga in Bunagana, were engaged in heavy fighting in Kibumba where several high-ranking rebels were killed.[674] On 18 March 2013, Ntaganda voluntarily surrendered to the United States

[671] Stearns "Bosco Ntaganda" 1-3.
[672] *The Prosecutor v. Bosco Ntaganda [2006] ICC-01/04-02/06-2-US-tEN or ICC-01/04-02/06-2-Anx-tENG.* However, the Pre-Trial decided to dismiss that arrest warrant on the ground that Bosco Ntaganda's position was not high enough in the hierarchy. The ruling was reversed on appeal. See Schabas *Court* 46.
[673] *The Prosecutor v. Bosco Ntaganda [2012] ICC-01/04-02/06-36-Red.*
[674] Stearns "Bosco Ntaganda" 3.

Embassy in Rwanda where he requested that his case be transferred to the ICC, and on 22 March of the same year, his case was transferred to the ICC in The Hague.[675]

B. Comments

Like Lubanga his former accused Commander-in-Chief, Ntaganda will probably be found guilty of committing, ordering or supervising the alleged aforementioned crimes. Moreover, as Chief of Staff of the CNDP and the founder of M23, Ntaganda is alleged to have committed serious crimes in the North Kivu Province of the DRC. Those crimes included the massacre of about 186 individual civilians who did not participate directly in the hostilities in Kiwanja during the operation that he allegedly commanded personally 4-6 November 2008,[676] as well as complicity in numerous killings, rapes and other serious abuses committed by the M23 rebels.[677] Therefore, there are reasonable grounds to believe that the Prosecutor will investigate crimes committed in Kivu against the accused and other warlords who are still walking free.

The next case is the first investigation of crimes committed by foreign armed groups in the Kivu Provinces by the ICC. The case was an opportunity for the ICC to hold accountable foreigners who allegedly committed crimes on the territory of the DRC and to deliver justice to victims.

[675] Malekian *Jurisprudence* 475.
[676] Tunamsifu 2013 *A38JIL* 247-248 and Stearns "Bosco Ntaganda" 2.
[677] HRW http://www.hrw.org/news/2013/07/22/dr-congo-m23-rebels-kill-rape-civilians (Date of use: 24 July 2013); UNJHRO. http://monusco.unmissions.org/LinkClick.aspx?fileticket=Pj7jOWjAxWo%3D&tabid=10662&language=en-US (Date of use: 13 May 2013).

4.3.1.4 The Prosecutor v. Callixte Mbarushimana [2011] ICC-01/04-01/10-465-Red

A. Facts

Callixte Mbarushimana, a Rwandan national, was the Executive Secretary of the *Forces Démocratiques pour la Liberation du Rwanda* or Democratic Forces for the Liberation of Rwanda (FDLR). The FDLR is a Hutu armed group which, over time, consisted of Rwandan refugees in the DRC especially some members of the former *Forces Armées Rwandaises* or Armed Forces of Rwanda (ex-FAR) and militias (Interahamwe), implicated in the genocide of 1994 in Rwanda as well as exiled Rwandans seeking political change in Rwanda.[678]

The FDLR allegedly launched a campaign aimed at attacking the civilian population in the Kivu Provinces in the DRC in January 2009 in order to draw the world's attention to their political demands. As a result, several war crimes and crimes against humanity were committed. Due to Mbarushimana's ability to transform those crimes into political capital,[679] the Prosecution submitted an application for a warrant of arrest against Mbarushimana on 20 August 2010. He was accused of being criminally responsible for war crimes (attacks against the civilian population, murder, mutilation, torture, rape, inhuman treatment, destruction of property and pillaging) as well as for crimes against humanity (murder, torture, rape, inhumane acts and persecution) that were committed by the FDLR in the North and South Kivu Provinces in the DRC. The situation created a humanitarian catastrophe in both the North and the South Kivu Provinces. Therefore, two joint militaries operations were launched; the RDF joined the FARDC in the operation known as *Umoja Wetu* in December 2009 and a follow up military operation known as *Kimia II* in which the UN Forces supported the FADRC against FDLR was begun in February 2010.[680]

Following the information provided by the prosecution, the Pre-Trial Chamber I issued a sealed warrant of arrest on 28 September 2010. On 11 October 2010, the French authorities arrested Mbarushimana and on 25 January 2011, he was transferred to the ICC detention centre

[678] *The Prosecutor v. Callixte Mbarushimana [2011] ICC-01/04-01/10-465-Red* § [3].
[679] *The Prosecutor v. Callixte Mbarushimana [2011] ICC-01/04-01/10-465-Red* § [6, 13].
[680] *The Prosecutor v. Callixte Mbarushimana [2011] ICC-01/04-01/10-465-Red* § [108, 242, 106].

in The Hague. On 28 January 2011, he appeared before the Chamber. After agreeing to conduct an international media campaign in support of the FDLR, the Pre-Trial Chamber I concluded on 17 December 2011 that there were no substantial grounds to believe that Mbarushimana contributed to the crimes in Kivu. Therefore, the Chamber declined by majority to confirm the charges against Mbarushimana,[681] and on 23 December 2011, he was released from the ICC's custody.[682]

B. Comments

The ICC exercised jurisdiction over this case based on Article 12 2(a, b) of the Statute even though Mbarushimana is a citizen of Rwanda which is a non-State Party to the Rome Statute. In this case, crimes were committed against Congolese civilians in the DRC and the accused was arrested in France (both the DRC and France are States Parties). Therefore, regardless of their nationality, the Prosecutor has the duty to prosecute foreigners who bear the greatest responsibility for the crimes committed in the eastern part of the DRC based on the territorial principle. Thus, in order for the OTP to have a good understanding of crimes committed in the Kivu Provinces and elsewhere, its officials were strongly advised to travel to the DRC.

4.3.1.5 The Prosecutor v. Sylvestre Mudacumura

A. Facts

Sylvestre Mudacumura, a Rwandan national, was the Supreme Commander of the armed wing of the FDLR for the relevant period charged.[683] Between 20 January 2009 and the end of September 2010, the FDLR allegedly committed several crimes in North and South Kivu Provinces of the DRC including attacking and killing of civilians, raping women and girls, mutilating civilians and meting out cruel treatment, and destruction of properties. It is alleged

[681] *The Prosecutor v. Callixte Mbarushimana [2011] ICC-01/04-01/10-465-Red* § [14-16, 134].
[682] The Prosecutor v. Callixte Mbarushimana http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200104/related%20cases/icc01040110/Pages/icc01040110.aspx.
[683] *The Prosecutor v. Sylvestre Mudacumura [2012] ICC-01/04-01/12-1-Red* § [29].

that those acts were committed following an order issued by Mudacumura to combatants to create "a chaotic situation in Congo" through a "humanitarian catastrophe".[684] In the Prosecutor's view, the FDLR had planned to conduct a widespread and systematic attack against the civilian population. Therefore, on 13 June 2012, the Prosecutor submitted an Application to the Chamber for a warrant of arrest against Mudacumura.[685]

Following the Prosecution's submission, the Chamber found that the FDLR issued no directive to attack the civilian population; as such, there was insufficient evidence that the political and military leadership of the FDLR agreed to target civilians. However, the Chamber found reasonable grounds to believe that Mudacumura's order had a direct effect on the commission of crimes and he was aware that by issuing such orders, crimes would be committed. Accordingly, the Chamber was satisfied that there are reasonable grounds to believe that under Article 25(3)(b) Mudacumura is criminally responsible for crimes committed by the FDLR within the period charged.[686] In order to prevent him from continuing to commit crimes, the Chamber, on 13 July 2012, issued a warrant of arrest against Mudacumura who remains at large.

B. Comments

In this case, the Pre-Trial Chamber II agreed that the armed conflict that occurred in the Kivu Provinces from 20 January to 25 February 2009, 2 March to 31 December 2009 and January 2010 to end of September 2010 was a non-international armed conflict. However, because in the conflict the FDLR, a Rwandan organised group, was pitched against the FARDC which fought alone or in coalition with the RDF during the operation *Umoja wetu* and with the UN forces during the operations *Kimia II* and *Amani Leo* on the territory of the DRC, this research supports the Chamber's qualification. It appears that the support of a foreign army within a non-international armed conflict changed the nature of the conflict which became internationalised due to the support of the RDF and/or of the UN forces in this case.

[684] *The Prosecutor v. Sylvestre Mudacumura [2012] ICC-01/04-01/12-1-Red* § [25].
[685] *The Prosecutor v. Sylvestre Mudacumura [2012] ICC-01/04-01/12-1-Red* § [61, 7].
[686] *The Prosecutor v. Sylvestre Mudacumura [2012] ICC-01/04-01/12-1-Red* § [62, 66-67, 71, 76].

4.3.1.6 Comment on the ICC's role

Since the establishment of the ICC as a permanent and independent court on 1 July 2002, it has demonstrated that in the fight against impunity, no one is immune from accountability as arrest warrants have been issued to sitting Heads of States, members of parliament[687] as well as few warlords, and therefore, the likelihood of punishment has increased. Nevertheless, the situation in the DRC where several high-ranking rebel leaders were integrated into the FARDC and the Police and many were promoted complicates the deterrent effect of the ICC's efforts. When Lubanga was persuaded to arrest Ntaganda, the pressure occasioned a mutiny that resulted in rebellion on the part of the M23 instead of curbing the atrocities. This experience cannot be generalised but it will possibly produce the same effect wherever the former rebel leaders still have influence on their former combatants who are now integrated into public institutions.

The investigation procedure followed by the ICC Prosecutor remains questionable however, as it was not possible to prove the commission of certain crimes beyond reasonable doubt. Due to the passage of time, the ICC Prosecutor did not travel to the DRC and therefore the Chamber has expressed its doubts about the investigation procedures which did not comply with[688] Article 54(1)(a) of the Statute. The Article states that in order to establish the truth, the Court has to investigate "incriminating and exonerating circumstances equally". However, Song Sang-Hyun claims that on the long run, trials held at the ICC will strengthen deterrence both in the country where crimes occurred as well as elsewhere because the public proceedings would demonstrate that perpetrators of international crimes, regardless of their official positions, cannot count on impunity.[689] It is in this regard that the ICC serves the same purpose as other transitional justice mechanisms.

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[687] The President of Sudan, Omar Hassan Ahmad al-Bashir, President of Kenya, Uhuru Muigai Kenyata, and his deputy President, William Samoei Ruto were all subpoenaed by the ICC. Similarly, Jean Pierre Bemba Gombo, elected senator and former deputy in the DRC was prosecuted for the situation in the Central African Republic.

[688] See Laborde-Barbanègre, Mushiata, and Regue "Affaires Katanga et Ngudjolo" 4-5; Laborde-Barbanègre, Mushiata, and Regue "Affaires Mbarushimana et Mudacumura" 3.

[689] Sang-Hyun 2013 *AJIL* 208.

The following section addresses the challenges encountered by the national (DRC) judicial system in handling the war crimes on the domestic level in a disrupted context.

4.3.2 Challenges of the DR Congolese judicial system in handling criminal cases

Before the adoption of the Organic Law or *Loi Organique No. 13/011-B du 11 Avril 2013,*[690] Congolese military courts and tribunals had exclusive jurisdiction to deal with crimes under international law in the DRC as provided by Article 161[691] of the Military Code or *Loi No. 024/2002 du 18 Novembre 2002*[692] *portant Code Pénal Militaire*. In other words, before the Organic Law *No. 13/011-B du 11 Avril 2013,* there were no trials in civilian courts for crimes which are chargeable under international law. Following the era of military dictatorship and of the various armed conflicts, the judicial system was already in ruins and unable to deal with widespread crimes that were committed during the period. Moreover, the country had become "divided" and each part was governed according to the policy of the rebel group that controlled the region. Accordingly, each region had its own political administration, armed forces and police as well as judiciary. Those who adhered to the rebels' policies were recruited or they retained their posts within the judiciary, while those who did not support the cause of the rebels were dismissed or forced into early retirement, as was the case with many magistrates. Thus, delegates to the ICD agreed on the need for the reunification of the country and of all public institutions. In the judiciary, the government decided to rehabilitate and reinstate civil and military magistrates that have been collectively dismissed or forced into early retirement (Resolution No: DIC/CPJ/07).

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690 *Loi organique No. 13/011-B du 11 avril 2013 portant organisation, fonctionnement et compétences des juridictions de l'ordre judiciaire*.

691 Article 161: « *En cas d'indivisibilité ou de connexité d'infractions avec des crimes de génocide, des crimes de guerre ou des crimes contre l'humanité, les juridictions militaires sont seules compétentes*. » Therefore, the Military Criminal Code follows the definition of the Rome Statute crimes. Article 164 defines the crime of genocide, Articles 165-166, crimes against humanity, and Articles 173-174 war crimes.

692 The Military Criminal Code of November 2002 replaced the Military Code of Justice adopted in September 1972 (Ordonnance-Loi No. 72/060 du 25 septembre 1972 portant Code de Justice Militaire). Both Codes contain provisions for war crimes and crimes against humanity. However, the 2002 Military Criminal Code is broader than the 1972 Military Code of Justice because it has incorporated the definition provided by the ICC's Rome Statute.

Given that the armed conflicts were characterised by widespread human rights violations and serious violations of IHL, and the importance of putting an end to the reign of impunity, it was difficult for the integrated or reunified judiciary to deal with such a situation. Thus, delegates to the ICD recommended that an international criminal court be established for the DRC (Resolution No: ICD/CPR/05). After the government of national unity and transition took office, between late September and October 2003,[693] judicial as well as political officials acknowledged the weakness of the local judiciary to prosecute the high profile political cases or cases involving high-ranking military officers when there was the risk of subordination of military justice to the military hierarchy. They "expressed desires to enhance the capacity and effectiveness of the domestic judiciary" in order to hold Congolese offenders accountable in national courts.[694] In this regard, President Joseph Kabila, in his speech before the UN General Assembly in September 2003, made the following statement:

> In the peace of process now underway, an area which is of critical importance and an imperative is that of independent justice, whose equitable administration would mark the end of impunity. On the domestic level, the Transition Government is working to conclude successfully the reform advocated here… On the international level we believe that the major objective is the establishment, with the assistance of the United Nations, of an international criminal tribunal for the Democratic Republic of the Congo, to deal with crimes of genocide, crimes against humanity, including rape as a weapon of war, and mass violations of human rights…[695]

By requesting the creation of an *ad hoc* tribunal, the DRC was not trying to evade its responsibility to prosecute cases, but ensuring justice in a post-conflict context was difficult as the judicial system was already in a state of collapse[696] and the need to reform the judicial sector was very urgent. It is important to note that while requesting for the establishment of the *ad hoc* tribunal, the DRC had reformed its military criminal law and had become a State Party to the Rome Statute which could not be used to prosecute crimes committed before 1 July 2002.

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[693] On 17 January 2003, the former government, through the Congolese Ambassador to the UN, addressed a letter to the President of the Security Council requesting the creation of an international tribunal solely for crimes committed in Ituri. See Borello *Road to a Just Peace* 33.

[694] Burke-White 2005 *LJIL* 570-573.

[695] Human Rights First https://www.humanrightsfirst.org/wp-content/uploads/pdf/DCR_Bckgrnd%283%29.pdf (Date of use: 04 July 2014).

[696] Luzolo and Bayona talk of the "*effondrement quasi total de l'appareil judiciaire Congolais*" that is, "the near total collapse of the Congolese judicial system". See Luzolo and Bayona *Procédure Pénale* 763.

It is helpful to understand the significance of the *ad hoc* tribunal because it could deal with crimes prosecutable under international law which were committed during the political crisis and the successive armed conflicts that occurred from 30 June 1960 as recommended by delegates to the ICD (Resolution No: DIC/CPR/05). The UN remained silent to the DRC's request, and Ralph Zacklin, the Assistant UN Secretary-General for Legal Affairs, asserts that the ICTY and ICTR were established as acts of political contribution rather than parts of a policy promoting international justice. However, because *ad hoc* tribunals were too costly, too inefficient and too ineffective, they exemplify an approach that is no longer politically or financially viable according to Zacklin:

> The bare truth is that it is impossible today to envisage the establishment of an ICTY type Tribunal in new situations, however egregious the violations of international criminal law may be, e.g., in Liberia, the Democratic Republic of Congo or the Ivory Coast. This has not dissuaded governments or civil society from trying to deliver justice in post-conflict societies, but it has made it imperative to find alternative ways for doing so.[697]

Rather than request again for the creation of an *ad hoc* tribunal, the DRC decided to refer the criminal cases to the ICC. The letter by the President of the DRC to the Prosecutor states that "because of the exceptional situation in my country, the competent authorities are unfortunately not capable of investigating the above-mentioned crimes [crimes under international law] or of carrying out the required prosecutions without the contribution of the International Criminal Court".[698]

In order to fulfil its international obligations to investigate, prosecute and judge serious crimes on the domestic level, the DRC decided to prosecute some ongoing cases which are not related to armed conflicts before the military courts. Such cases include those from Songo Mboyo, Lemera, Maniraguha, Walikale and Bunia.

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[697] Zacklin 2004 *JICJ* 545,542.

[698] The OHCHR *Report Mapping Exercise* § 973 The French version states that "*en raison de la situation particulière que connaît mon pays, les autorités compétentes ne sont malheureusement pas en mesure de mener des enquêtes sur les crimes mentionnés ci-dessus [crimes internationaux] ni d'engager les poursuites nécessaires sans la participation de la Cour pénale international*". See HCDH *Rapport du Projet Mapping* § 969.

4.3.2.1 TMG of Mbandaka, RP 084/05/ RMP154/PEN/SHOF/05 (Songo Mboyo case)

The parties to the Global and All Inclusive Accords of 2002 on the armed forces agreed through Resolution No: DIC/CDS/04 on the formation of a restructured and integrated National Army which would include all the previous hostile forces.

A. Facts and decision

This case refers to the crimes committed during the process of integrating the former MLC's rebel forces into the National Army. As a logical consequence of that integration, the campaign ration allowance applied during the MLC's rebellion was increased fivefold in line with the FARDC payment structure. However, the official in charge of the payments, Captain Ramazani, withheld the allowances of the soldiers for five days. This led to widespread discontent and the desperate insurgents turned against the civilian population in the night of 21 to 22 December 2003. They went on a looting rampage of movable property and raped women over 80% of whom were left with sexually transmitted infections. One of the rape victims also died. Subsequently, an investigation was launched and almost two years after the incident, the Prosecutor in charge of the investigation submitted the case before the Military Garrison Tribunal in Mbandaka on the 12 September 2005. The alleged perpetrators were identified[699] and charged with crimes against humanity, military conspiracy, incitement of soldiers to arm themselves against the civilian population, insurbordination, treasonable felony, diversion of arms, reckless discharge of firearm and looting.

After the hearing, the Military Garrison Tribunal declared all the men not guilty of military plot and they were acquitted of that specific charge. The Tribunal acquitted five of the accused soldiers (Eliwo Ngoy, Kalemba Sekwalo, Bwanzu Masambi, Botonga Ilunga and Mambe Soyo) because there was no evidence that they committed these acts and they were immediately released. Two soldiers (Motuta Alondo and Mahombo Mangbutu) were acquitted

[699] The accused were Eliwo Ngoy, Bokila Lolemi, Vonga Wa Vonga, Mahombo Magbutu, Kalema Sekwalo, Yangbanda Dumba, Mambe Soyo, Bwazu Musambi, Motuta Alondo, Botonga Ilunga, Mombanya Nkoy, and Kombe Mombele.

because they were not found guilty of misappropriation and reckless discharge of firearm. One soldier (Bokila Lomemi) was acquitted of the treasonable felony charge.

However, the tribunal found Bokila Lomemi guilty and sentenced him to 5 years' imprisonment for insurbordination and 20 years' imprisonment for incitement to harm the civilian population. Four soldiers (Bokila Lomemi, Vonga Wa Vonga, Kombe Mombele and Yangbanda Dumba) were found guilty and sentenced to 10 years' imprisonment for misuse of firearm and 10 years in prison for the reckless discharge of firearm. Five soldiers (Bokila Lomemi, Vonga Wa Vonga, Yangbanda Dumba, Kombe Mombele, and Mahombo Mangbutu) were found guilty and sentenced to 20 years' imprisonment for looting. Moreover, seven soldiers (Bokila Lomemi, Vonga Wa Vonga, Yangbanda Dumba, Kombe Mombele, Mahombo Mangbutu, Mombanya Nkoy, and Motuta Alondo) were found guilty of crimes against humanity, sentenced to life imprisonment and each was ordered to pay a fine of 20 000FC. Four soldiers (Yangbanda Dumba, Kombe Mombele, Motuta Alondo, and Mombanya Nkoy) were demoted while three soldiers (Bokila Lomemi, Vonga Wa Vonga and Mahombo Mangbutu) were dismissed from the army. Acting *ex acquo et bono*, the tribunal also ordered the Congolese State in his capacity as principal to pay each plaintiff a specific amount as damages.

B. Comments

This case had to do with crimes committed by twelve former MLC's rebels in the process of integration under Resolution No: DIC /CDS/04. Thus, it is important to consider the Prosecutor's investigation in the successful referral to the Military Garrison Tribunal in Mbandaka. The conviction of these former MLC's rebels demonstrated a real commitment to fight impunity in terms of crimes committed during the transitional period. Unfortunately, crimes which were committed by the former rebel groups and by the soldiers of the Congolese Army during the armed conflicts were never prosecuted. Nonetheless, the OHCHR acknowledges that the Songo Mboyo case was the first successful trial. It should be noted however that investigations were carried out only after the intervention of the UN Mission and the Minister for Human Rights, which forced the military auditor or the military prosecutor to open and investigate the case file after two years of waiting on the part of the victims (that is

from December 2003 to April 2006). Due to the delays, several soldiers were acquitted for lack of evidence and many more escaped prosecution.[700] When such crimes are committed, the military prosecutor should not have to be reminded to investigate and submit the case to a competent court. It should be noted that the no action was taken against the captain who unilaterally withheld the soldiers' allowance. Thus, condemning the Congolese State was a preventive measure to warn that failure to discharge its duties would not be tolerated.

4.3.2.2 TMG of Uvira- RP No. 132/ RMP No. 0933/KMC/10 (Lemera case)

A. Facts and decision

The Lemera case involved crimes committed during the military operation called "Kimia II" which was carried out by the FARDC in order to track down and neutralise foreign negative forces such as the FDLR. After defeating the enemy on 24 July 2009, the Third Battalion of the FARDC settled around Kishagala/Mulenge. When the people who fled from the hostilities were informed that their village had been secured and was under the control of the FARDC, some men decided to accompany their wives to regain their farms on 8 August 2009. When they got to the school in Kishagala, they were surprised to see hostile soldiers coming towards them who accused the women of having affair with their enemies and giving their daughters to the FDLR men. The men managed to escape from the trap while the armed soldiers took turns to rape the women in separate classrooms. The victims were terrified and could not report the action of the soldiers for fear of reprisals. As news of the rape had spread throughout the village, when a new Battalion was deployed to that area, the victims brought the case to the attention of the judicial authorities. Thus, the alleged rapists were arrested and referred to the Military Garrison Tribunal in Uvira.

On 30 October 2010, the tribunal convicted five soldiers (Ndaguimana Sekuye, Okelo Tange, Kamona Manda, Mambwe Mukebu Justin, and Gahungu Maniragaba Sengiyumva) for crimes against humanity including mass rape, sentenced them to life imprisonment, and ordered

[700] OHCHR *Report Mapping Exercise* §863.

that they be demoted of their ranks in the FARDC. The tribunal therefore sentenced the soldiers subjecting them to civil liability *in solidum* with the State and ordered them to pay the equivalent of fifty thousand dollars (U$D50, 000) in Congolese francs to each of the victims as compensation for any damage and for pain and suffering. On appeal, the Military Court in Bukavu[701] confirmed the verdicts against these five soldiers on 4 November 2011.

B. Comments

In this case, it is regrettable that the FARDC's soldiers deployed to fight the enemies raped women instead of protecting them on their way to the farm. Considering that such acts are prohibited and punishable irrespective of circumstances either in time of peace or in war, it was imperative to prosecute these soldiers according to the law. The court based its action on Articles 167, 168 and 169 of the Military Criminal Code and Article 7(1) of the Rome Statute which offers a definition of crime against humanity.

However, it may be instructive to ask questions about the tribunal's understanding of "crime against humanity". Is any mass/gang rape a crime against humanity? Following the Songo-Mboyo's judgement, the *Avocat Sans Frontieres* (ASF) argued that a precedent seems to have been established within military courts to mechanically qualify any mass rape as a crime against humanity. As the soldiers committed an act of misconduct through mass rape (whcih had become a norm in situations of war), the ASF concluded that the tribunal would retain the view of rape as a crime under common law[702] or as a violation of the right to physical integrity.

Taking into account the context of the eastern DRC which has experienced an alarming rate of internationalised armed conflicts in which rape and other forms of sexual violence remain the major abuse perpetrated by both state and non-State actors,[703] and which is therefore described as the "Rape Capital of the World",[704] this judgement could be justified for two reasons. Convicting these soldiers was seen as good news because, often, some armed soldiers 'believe' that they are above the law. Thus, the penalty was meant to serve as a deterrent to

[701] RPA 0180/RMP 0802/BMN/10.
[702] ASF *Jurisprudence Congolaise* 84, 90.
[703] Tunamsifu 2015 *AHRLJ* 474-476.
[704] Bonneau and Carboni *Sexual violence* 66. Read also Musubao *Jurisprudence Congolaise* xiii-xvi; 23.

others who might try to commit similar acts. In short, it was necessary to punish the offenders in order to demonstrate that the law has zero tolerance for such crimes. Applying the Rome Statute was justified because the soldiers used their weapons to intimidate the women and to rape them systematically. The DRC has the responsibility to protect its population and secure their property and because it failed to do this, the State was found civilly liable since individuals acting on its behalf did not take their responsibilities seriously. As proof, the judgment does not indicate any decision or sanction by the military commander against these soldiers. It is also regrettable that the tribunal did not hold accountable the military commander under whose effective control those soldiers operated. Indeed, after defeating a rebel group, the State has the obligation to deploy the police to protect the population. The question is why in this case were police officers not deployed to secure the areas controlled by the FADRC in order to protect the civilian population who were returning to their properties after fleeing from the FDLR?

4.3.2.3 TMG of Bukavu- RP 275/09 and 521/10/RMP 581/07 and 1573/KMC/10 (Maniraguha case)

A. Facts and decision

This case involved the Military Garrison prosecutor in Bukavu and the civilian plaintiffs, 400 in total, against two Rwandan FDLR militias, Maniraguha Jean Bosco and Sibomana Kabanda. Following a widespread and systematic attack in the period between June-July 2006 and January 2007, the two FDRL's militias were prosecuted for having raped women and girls, killed men and looted property in several villages of the Bunyakiri are, and for illegally holding weapons of war.

As the two accused were Rwandans, the tribunal based its jurisdiction on the fact that both men had military training in Masisi (DRC) and they illegally carried weapons and ammunitions of war. With regard to Articles 97, 98(1) and 112(6) of the Military Judicial Code and Articles 161 and 165(2) of the Military Criminal Code, the military courts can prosecute anyone who commits crimes on the Congolese territory under their jurisdiction. The tribunal

therefore justified its jurisdiction under Article 100 of the Military Judicial Code which stipulates that, "the military courts have jurisdiction with regard to everyone who is an author, co-author or accomplice of the facts under their jurisdiction committed abroad".

The tribunal found that the first accused (Maniraguha) was guilty of the charges for which he was prosecuted. These include rape, torture, murder, imprisonment or other severe deprivation of physical liberty, which all constitute crimes against humanity. He was also guilty of illegal possession of weapons and ammunitions of war. Therefore, the accused was sentenced to life imprisonment under Article 78(3) of the Rome Statute. The second accused (Sibomana) was not found guilty of rape or murder. He was therefore acquitted on both charges. Nevertheless, the tribunal found him guilty of crimes against humanity including torture and imprisonment or other severe deprivation of physical liberty. He was sentenced to 30 years' imprisonment under Article 78(3) of the Rome Statute. Ruling on the civil liability, the tribunal found that the Congolese state was civilly liable because it had failed in its civic responsibility to secure people and their property. Therefore, the DRC was ordered to pay compensations for damages suffered by the victims.

B. Comments

This case is an illustration of widespread crimes committed by the FDLR on the Congolese territory for which unfortunately only a few people were prosecuted. The tribunal established the failure of the Congolese State to disarm former Rwandans soldiers and militia at the border before admitting them into its territory. Consequently, for the inability to monitor all illegal carriers of firearms and failing to protect its population, the Congolese state was found civilly liable for crimes committed by Rwandan militias against the Congolese population. The civil liability verdict indicates that there is a need to restore the State's authority. For more than two decades, several villages and towns remained under the control of foreign armed groups which sadly are known for killing civilians, raping women and girls and looting civilian properties. On the issue of the Tribunal's jurisdiction, the tribunal based its claim of jurisdiction on Articles 111(2) and 112(6) of the Military Judicial Code, as the two militias were not soldiers of the regular army. Indeed, Article 111(2) provides that the military courts have jurisdiction in respect

of ...“rebel factions, militias or insurgent bands”, while Article 112(6) stipulates that “members of insurgent bands” could be tried by military courts.

4.3.2.4 TMG of Goma, RP 356/09, RMP 00421KNG/09 of 24 April 2009 (Walikale case)

A. Facts and decision

In the Walikale case, the Military Garrison prosecutor and the civilian plaintiffs consisting of 24 women and girls brought charges against 11 soldiers of the FARDC six of whom were unidentified fugitives. These soldiers were accused of committing widespread abuse against civilians including systematic rape of women and girls, looting civilian property and committing acts of violence against Pygmy men. These acts were committed in Karumia villages, Charora, Kasoni, Kisa and Butuma in the Walikale area on 18 and 19 March 2009, as these soldiers marched towards Hombo following the order received from the operational command in North Kivu to conduct military operations against the FDLR militia.

Although Articles 165 to 169 of the Military Criminal Code recommends different penalties for such offenses such as death penalty or life imprisonment, the tribunal applied the Rome Statute. In the case of the crimes the soldiers were accused of, the provisions of Article 7(1.g) of the Statute are more favourable towards the victims and the recommended punishment is less severe. For instance, the Statute sidelines the death penalty unlike the Military Criminal Code. Thus, the accused Baseme Olindi, Fami Mushungani, Sadiki Muhindo, Aluta Baliangabo and Kalambay wa Mutongo were found guilty of crime against humanity, that is, of rape, and each was sentenced to life imprisonment. The soldiers who absconded (Mandaima Kofi, Mango, Mukeke, Mukumu and Djimi) were convicted by default or in absentia. The tribunal ordered the dismissal of all accused from the FARDC. The tribunal also sentenced the accused jointly with the State rendering them civilly liable to pay civil reparations to the victims to the tune in Congolese francs of U$D1.5 million.

B. Comments

Walikale is one the territories of North Kivu where there is no court of law which has jurisdiction over rape or other crimes of sexual violence.[705] Thus, when on 18 and 19 March 2009, soldiers of the 85th brigade of the FARDC raped women, looted civilian property and committed acts of violence against the Pygmy people, the Military Garrison Tribunal of Goma decided to travel to the scene of the incident and establish a mobile court.

In this case, the tribunal did not institute any charge against military commanders and other superiors, but because the soldiers were on their way to undertake military operations against the FDLR, it is logical to assume that a military commander would have led them. For failing to exercise effective control over soldiers of the 85th brigade, the tribunal should have found the military commander criminally responsible for the crimes committed under their command as stated by Article 28 of the Rome Statute. Unfortunately, as Luzolo and Bayona pointed out, to ensure impunity for senior officers, the military justice system uses terminologies that make it difficult to establish the liability of certain officers or even certain civil authorities and officials. The authors point out that, "the concept of '*hommes en armes* or armed men' automatically excludes official (civil authority); and the concept of '*éléments incontrôlés* or rogue/uncontrolled elements' automatically excludes the hypothesis of organized crime, which it can back up the line to (*sic*) senior officers'".[706]

[705] See also Tunamsifu 2015 *AHRLJ* 473, 491-494.

[706] Translated from the original in French: *"Le concept 'homme en armes' exclut automatiquement les officiels (autorités civiles); et le concept 'éléments incontrôlés' exclut automatiquement l'hypothèse des crimes organises, qui elle, peut remonter la ligne jusqu'aux officiers civiles ou officielles"*. See Luzolo and Bayona *Procédure Pénale* 735

4.3.2.5 RPA No. 003/2007, RP No. 101/2006, RMP No. 545/PEN/2006 (Bavi case)

A. Facts and decision

This case involved the Military Garrison prosecutor and civilian plantiffs consisting of nineteen people versus nine military officers and soldiers of the First Integrated Brigade of the FARDC based in Ituri. The defendants were Captain François Mulesa Milombo, Captain Bede Kodozo Hassan, Captain Paluku Manzekele Muhamed, Corporal Dowe Gelembali, Lieutenant Masudi Orbano Asani, Sergent Major Mbipa Mobato Raman, First Sergeant Lokwa Basanga, Corporal Kutwa Lumande Saleh, and Sergeant Masembo Ndjumba Pitchen. They were charged as authors or co-authors in the murder of several IDPs captured during military patrols. Nineteen people were killed in the territory of Avegi on 11 August 2006, nine people were killed in the Sorodo area on 17 September 2006; two young people were killed in Kelege in November 2006, and one person was killed in Singo in October 2006. They were also accused of the rape and murder of five women on 11 August 2006, looting civilian property in Olongba, burning civilian houses in Avengi and violating operational order No. 10/S3-OPS/06 issued by the General Staff (*l'Etat-Major*). In addition, Captains Bede and Paluku were accused of contempt of court, as they deliberately denied knowledge of different murders ordered by Captain Mulesa.

On 10 August 2006, the Military Garrison Tribunal in Ituri found Captain Mulesa guilty of war crimes of murder, rape and looting, and he was sentenced to life imprisonment. In addition, for violating the military instructions, the tribunal sentenced him to 10 years of imprisonment, and based on Article 7 of the Military Criminal Code, the court recommended a stronger single sentence or life imprisonment, and ordered his dismissal from the FARDC.

As for the other accused, Bede, Paluku, Assani, Mbipa, Lokwa, Masembo, Kutwa, and Dowe, the tribunal found them guilty of war crime of murder, sentenced them to life imprisonment, and ordered their dismissal from the FARDC. Ruling on the civil claims, the tribunal sentenced all the accused jointly or *in solidum* with the State and ordered them to pay damages to all the victims.

However, on 18 June 2007, they appealed against the judgment before the Military Court of the Eastern Province (Kisangani). In its judgment of 28 July 2007, the Military Court confirmed the sentence imposed by the Military Garrison Tribunal in Ituri. The military court also convicted the other accused but admitted that there were mitigating circumstances which related to the psychological pressure put on them by Captain Mulesa. As they cooperated with the Court, the accused Paluku, Bede, Assani, Mbipa, Lokwa, Masembo, Kutwa Dowe and Maboso were sentenced to 15 years for war crime of murder (except Paluku who was sentenced to 10 years), and the Court ordered their dismissal from the FARDC.

B. Comments

Unlike the Walikale case in which the tribunal avoided convicting the military commander, this case set a precedent in the sense that both the soldiers and their military commander were found guilty and the court ordered that they be dismissed from the FARDC. Unfortunately, the tribunal did not prosecute the higher officer to whom Captain Mulesa was answerable. Indeed, the case was prosecuted after the discovery by the UN mission of six mass graves around the FARDC camp in Bavi and following witness statements that military personnel had carried out summary execution of civilians within the region at various times between late 2005 and early 2006.[707] This means that without the testimonies and the mass graves found in Bavi or the intervention of the UN mission the accused would have gone scot-free.

4.3.2.6 Remarks on the prosecution by the Congolese criminal justice system

The Songo Mboyo, Lemera, Maniraguha, Bavi and Walikale cases illustrate attempts to suppress the gang rapes committed against women and girls by both State and non-State actors. These cases were prosecuted and judged in accordance with Article 161 of the Military Criminal Code that recognised the jurisdiction of the military courts over crimes committed in the DRC by foreign parties. Before 2013, only the military courts had exclusive jurisdiction over such cases but the courts and tribunals, according to Luzolo and Bayona, have since made commendable efforts in carrying out prosecutions. However, the number of adjudicated cases

[707] OHCHR *Report Mapping Exercise* §876.

remains insignificant because they relate to only a few low-level criminals. The military justice system is still very hesitant about applying the principle known as "irrelevance of official capacity". The military justice system was based in particular on the concept of "*hommes en armes*/ armed men" which helps to avoid identifying the immediate commanders or superiors who should be criminally responsible for crimes committed by soldiers under their command for failing to exercise proper control over them or for failing to prevent such crimes.[708]

It is shown that the cases were prosecuted mostly because of the constant pressure from the UN mission and some NGOs. Due to the lack of political will to prosecute the crimes on the part of the government, the UN mission adopted the strategy of conducting private investigation of cases involving serious violations of human rights and international humanitarian laws. Thereafter, the UN mission had to increase pressure, at times with the assistance of various NGOs, on the military prosecution department to do something about the cases.[709] Nevertheless, many of the judgements were strongly criticised for lacking impartiality and independence or for political interference.[710] Factors that affected the operations of the judiciary include insufficient funding of the judicial sector, shortage of magistrates, lack of technical and material support, poor working conditions and hindrances to investigations such as lack of transportation, insufficient training of or specialisation among magistrates in crimes chargeable under international law, endemic corruption, security problems, etc.[711]

Against those criticisms, Congolese authorities and international partners including the UN Mission tried to see to the proper functioning of the military criminal courts as in the Songo Mboyo case.[712] Crimes under international law that were committed since 30 June 1960 and those committed during the internationalised armed conflicts of 1996 and 1998 remained unpunished while prosecution focused only on the transitional policy. The ICC has however initiated charges in Ituru district against some leaders alleged to be most culpable and two charges in the Kivu Provinces against foreign rebel leaders in respect of crimes committed after

[708] Luzolo and Bayona *Procédure Pénale* 757.
[709] OHCHR *Report Mapping Exercise* § 889.
[710] OHCHR *Report Mapping Exercise* § 858.
[711] OHCHR *Report Mapping Exercise* § 903, 909, 911, 912, 915 and 975; read also Borello *Road to a Just Peace* 14.
[712] OHCHR *Report Mapping Exercise* § 862.

1 July 2002. However, the crimes allegedly committed by the Congolese rebel leaders in the Kivu Provinces remained unprosecuted at the national and international level. On the domestic level, the lack of political will[713] to prosecute serious violations of human rights and IHL can be attributed to a number of factors.

Before 2013, only military courts had jurisdiction over these crimes, as the judicial system was still under reform and did not have sufficient resources to handle the cases. In addition, all armed groups in the conflicts including the AFDL[714] were involved directly or indirectly in the commission of crimes from the perspective of international law. Subsequently, former rebel leaders were granted important positions in public institutions making it difficult for judges to initiate charges against them. Besides, former rebel leaders still have influence on their former combatants who have been integrated into the FARDC, the national police force and other security service units, which means they could regroup and start a new rebellion if there is a threat from the prosecutor's office. The lack of prosecution of those crimes does not prevent the creation of new situations in which crimes under international law may be committed in the DRC. Unfortunately, the Congolese judicial system which is still under reform could not handle the large number of crimes committed.

In the course of handling those cases, the provisions contained in the Rome Statute such as Article 7 and 8 were applied directly by the military criminal court for three reasons. The first is that under Articles 215 and 153(4) of the Constitution of 2006 as revised in 2011, the DRC as a State Party is bound to the Rome Statute and the Statute has higher authority than the domestic laws. The second reason is that the provisions of the Statute are clearer and better drafted than the Military Criminal Code, and the third reason is that the Statute did not approve the death penalty like the Military Criminal Code. Thus, judges may choose to apply the softer or more lenient law (*la loi la plus douce*). For example, in the Songo Mboyo case, one victim died as a result of rape and in the Bavi case, victims were killed after being systematically gang raped.

[713] Studies undertaken by the UNHROHC, Davis and Hayner, Borello, etc., show that on the domestic level, there was no political will to address impunity especially crimes committed by former warring parties. Davis and Hayner *Peacemaking* 35; OHCHR *Report Mapping Exercise* §48, 86, 126; Borello *Road to a Just Peace* iv, 14, 19, 25.

[714] The AFDL regime is the period from 17 May 1997 to 30 June 2003 when the Government of National Unity and Transition was formed based on the sharing of political power.

Articles 166(2) and 167 of the Military Criminal Code together provide that when the violation of the right to physical integrity (rape) causes the death of one or many people, the accused must be sentenced to death.

Furthermore, in the Maniraguha case as well as in the Songo Mboyo case, the civilian population was attacked with the knowledge that the victimes were *hors de combat.* Articles 166(10, 14) and 167 of the Military Criminal Code also provide that in such attacks in which many civilians are killed, the accused should be handed the death penalty. For the crimes tried under international law based on Article 5 of the Rome Statute, Articles 77 and 78 of the Statute recommends a sentence of 30 years' imprisonment or life imprisonment as the highest individual sentence that may be pronounced. Thus, it is clear that the penalties stipulated in the Rome Statute are softer or less severe on the accused than the Military Criminal Code.

It is helpful to note however that the Congolese legal order is characterised by the principle of monism that requires the incorporation of treaties into the domestic legal order. Therefore, once an edict is published in the *Journal Officiel de la RDC*, there is no distinction between national and international law. Nevertheless, since the ratification of the Rome Statute by the *Décret-loi No. 0013/2002*, the military criminal courts began to apply the provisions contained in the Rome Statute directly without recourse to the Congolese domestic legal order. Bategana Mbokani and Kazadi Mpiana assert that the situation has pushed judges to rely on the constitutional provision that allows them to apply the Rome Statute directly in the cases submitted to them.[715] The author also argues that there is a risk of confusing crimes under international law with the provisions of domestic law by the military criminal courts. He therefore suggests that the fight against impunity does not necessarily imply the application of legal characterisations from the Statute, even when these characterisations are inappropriate, and that it is still possible to achieve this goal by applying legal characterisations from domestic law.[716]

On the point that the ICC serves to complement the Congolese judicial system which is under reform, it is observed that the courts do not have jurisdiction over crimes committed

[715] Read Mbokani 2014 *RDIDC* 115 and Mpiana 2012 *RQDI* 75.
[716] Mbokani 2014 *RDIDC* 114.

before their establishment (from June 1960 to June 2002), which means they could only cover a limited number of crimes committed from July 2002 to date. They would also be unable to deal with the numerous perpetrators who are most culpable in the crimes. Thus, the Congolese victims who were affected directly or indirectly by those crimes committed during the armed conflicts continue to wait for justice to be rendered.

Could the African Court of Justice and Human and Peoples' Rights then serve as an alternative justice mechanism in dealing with the crimes committed in the DRC? Since there is still a high degree of the lack of political will on the part of the Congolese judiciary to prosecute serious crimes committed during various internationalised armed conflicts, the following section discusses the possibility of intervention by the African Court. As victims of crimes can submit cases to the African Court individually, the discussion considers the nature of the Court's jurisdiction and whether the Court can serve as a viable option in holding those who bear the greatest responsibility for the acts accountable as well as in the fight against impunity.

4.3.3 African Court of Justice and Human and Peoples' Rights - an alternative justice mechanism?

The Protocols establishing the African Court on Human and Peoples' Rights and of the Court of Justice of the African Union were adopted respectively in 1998[717] and on 11 July 2003. However, both courts lacked jurisdiction over serious international crimes (Article 28 of the African Court on Human and Peoples' Rights and Article 19 of the Court of Justice of the African Union). On 1 July 2008, the Assembly of the Union decided to merge both courts into the African Court of Justice and Human and Peoples' Rights. The decision was motivated by the "financial and logistical constraints to establish two different courts",[718] and the "need was to rationalize the two African Courts and to make them efficient and cost effective".[719]

[717] The Protocol that established the African Court on Human and Peoples' Rights in 1998 entered into force on 25 January 2004.
[718] Girmachew *Right of Intervention* 40.
[719] Ouguergouz "African Court" 120.

The Court has a very broad jurisdiction. Regarding its jurisdiction *rattione materiae*, Article 28 provides that "the Court shall have jurisdiction over all cases and all legal disputes submitted to it in accordance with the Statute…" On its jurisdiction *ratione personae*, Article 29 identifies entities which shall be entitled to submit cases to the Court such as the States Parties to the Protocol which are members of the Union. Article 30(f) provides also that individuals or relevant Non-Governmental Organisations accredited to the African Union can appeal to the Court. However, considering the right of the Union to intervene in situations in a Member State from 15-16 May 2014, in accordance with Article 4(h, j) of the Constitutional Act, the Specialized Technical Committee on Justice and Legal Affairs adopted the draft Protocol which is an amendment of the Protocol on the Statute of the African Court of Justice and Human Rights. The draft grants the Court jurisdiction over Genocide (Article 28B), crimes against humanity (Article 28C) and war crimes (Article 28D). Private individuals are also eligible to submit cases to the Court (Article 16f). Unfortunately, the draft protocol provides immunity to sitting AU Heads of State or Government and other senior state officials based on their functions before the African Court (Article 46A*Bis*). In addition, the Court does not deal retroactively with crimes committed before the entry into force of its Protocol and Statute (Article 46E 1), and as of mid-February 2015, these had not yet entered into force.

In the light of the above issues, the African Court of Justice and Human and Peoples Rights would not be the appropriate instrument for addressing the situation in the DRC where people want the past to be redressed by holding individuals accountable for serious crimes which have been committed from 1960 irrespective of their positions, for two reasons. The first is based on the Court's jurisdiction *ratione temporis* and the second has to do with the immunity granted to persons based on their official position.

The following section analyses the role played by the TRC as part of the transitional justice mechanism during the transition in the DRC.

4.4 Role of the TRC during the Transition Period (2004-2006)

Since the colonial administration, the DRC has experienced several incidents which have plunged the country into the sombre phase of its history. In order to move the DRC forward in the aftermath of those events which were characterised by large-scale violations of human rights and of IHL, national reconciliation was the leitmotif of the discussions of the parties to the Lusaka Ceasefire Agreement (1999) and of the delegates to the ICD (2002). The need to establish the truth also became the *passage obligé* for national reconciliation in view of the heinous nature of the crimes committed. Congolese victims that were affected directly or indirectly by the crimes have the inalienable right to truth as previously noted (Chapter 2 [2.5.2]). To uphold the right to truth, delegates to the ICD resolved to set up a national and independent TRC through Resolution No: DIC/COR/04 that was approved by the Transitional Constitution or the Interim Constitution of the DRC of 5 April 2003. During the transition, the TRC was among five independent institutions[720] set up to support democracy as stated in Article 154 of the Transitional Constitution. Besides, Article 160 of the Transitional Constitution stipulates that an Organic Law would establish the TRC. Thus, the TRC of the DRC was established by the Organic Law No. 04/018 of 30 July 2004 which outlines its structure, duties and functions (TRC law).[721] In other words, the Global and Inclusive Agreement on Transition in the DRC, the Transitional Constitution of April 2003 and the Organic Law of July 2004 created the framework for the TRC in the DRC.

The following sub-section presents the duties, objectives, and structure of as well as the period covered by the DRC's TRC.

[720] The five institutions included the Independent Electoral Commission, the National Watchdog on Human Rights or the Human Rights National Observatory, the High Authority of the Media, the TRC, and the Commission on Ethics and the Fight against Corruption.

[721] Loi No. 04/018 du 30 Juillet 2004 *portant organisation, attributions et fonctionnement de la Commissions Vérité et Réconciliation*. As this law is available only in French, all citations are translated from the original.

4.4.1 Duties, objectives and structures of and period covered by the TRC of the DRC

The TRC was among five institutions that were set up to support democracy during the transition period in the DRC. The Commission was supposed to begin its operations in June 2003, but it was delayed for one year due to the lack of a legal framework. Thus, this subsection analyses its duties, its objectives and structures as well as the period it was expected to cover.

4.4.1.1 Duties of and period covered by the TRC

Delegates to the ICD, through Resolution No: DIC/COR/04, resolved to charge the TRC of the DRC "with the responsibility of re-establishing the truth, and promoting peace, justice, forgiveness and national reconciliation". Thereafter, Article 155 of the Transitional Constitution states that the task of the TRC of the DRC would be to consolidate national unity among Congolese through a veritable reconciliation process. In order to consolidate national unity, the Commission was established to promote peace, justice, reparation, forgiveness and reconciliation based on Article 5 of the TRC law. The Commission was also charged to provide a space in which victims/survivors could express themselves and know the truth about what happened to them or their loved ones. The Commission equally received the mandate to prevent or manage conflicts by mediating between rival communities, to manage the healing of trauma and to re-establish mutual trust between Congolese people.

As a temporary institution, the mandate of the TRC of the DRC covered the period from 30 June 1960 to the end of the transition. In other words, the period includes the era of the assassination of Patrice Lumumba and the Mobutu regime. The first paragraph of Article 196 of the Transitional Constitution allowed 24 months for the transitional period, but it was extended for an additional 18-month period due to the election arrangements. This extension however violates the second paragraph of Article 196 that states that the transition period could be extended for six months and should be renewable only once. The TRC of the DRC had jurisdiction over any Congolese including the DRC State, the military, police officers, members

of the security arm and persons bearing immunity (Article 6 of the TRC law). In order to achieve its mission, the TRC had to pursue some objectives.

4.4.1.2 Objectives and structure

Based on Resolution No DIC/COR/04 of the ICD, Article 7 of the TRC law outlines ten objectives of the TRC of the DRC that would enable it to achieve its mission. The Commission was to:

a) Consolidate national unity and cohesion as well as social justice;
b) Re-establish the truth on political and socio-economical events which occurred in the DRC;
c) Reconcile, on the one hand, the political role-players and military personnel, and on the other hand, reconcile these two parties with the people, while also reconciling the people to themselves;
d) Contribute to the emergence and the consolidation of the rule of law within the RDC;
e) See to the rebirth of a new national and patriotic consciousness;
f) Promote peace between the leaders and the people ;
g) Re-establish a climate of mutual trust between different communities and encourage peaceful coexistence among different ethnic groups;
h) Acknowledge crimes committed against the State;
i) Acknowledge individual and collective responsibilities for injuries and crimes committed and make reparation;
j) Work towards the eradication of tribalism, nepotism, intolerance, exclusion and all forms of heinous acts.

Furthermore, Article 8 tasks the TRC to:

a) Develop rules of its procedure;
b) Receive complaints, accusations, confessions of perpetrators or testimony of witnesses in connection with the massive violations of human rights, particularly those related to the rape of women and girls in war;
c) Investigate the nature, causes and scale of political crimes and massive violations of human rights committed against the nation and/ or the Congolese population in the country or abroad by both Congolese and foreigners from 30 June 1960 until the end of the transition.
d) Investigate the political and socio-economic events that disrupted peace and justice in the RDC.
e) Identify perpetrators and individual or collective responsibilities in the commission of these crimes and violations.
f) Identify the victims and determine the scale of harm suffered.
g) Seek appropriate mechanism to protect those who fear for their safety following their testimony.

h) Propose to the competent authority the acceptance or rejection of any individual or collective amnesty application for acts of war, political crimes and crimes of opinion.
i) Train the members of the TRC on techniques for conflict resolution and peaceful transformation.
j) Capitalise on the achievements of the Sovereign National Conference and of the Inter-Congolese Dialogue.
k) Cooperate with other national, sub-regional, regional and international initiative pursuing the same objectives to consolidate peace.
l) Develop a comprehensive report on the activities of the Truth and Reconciliation Commission on the results obtained, the proposed measures and the reforms needed to prevent further human rights violations as well as the commission of crimes accompanying them.

From the above and from the description of the mandate of the TRC in Chapter 2, it can be deduced that the TRC of the DRC has been charged beyond the task that is common to TRCs. As conflicts and tensions persisted in some areas, it was urgent to resolve them at the community level. Thus, besides the mandate to investigate crimes committed from 30 June 1960 to December 2006, identify victims as well as perpetrators, encourage forgiveness between victims and offenders, etc., the TRC of the DRC had to engage in conflict mediation and resolution between communities torn by conflicts (Article 5 of the TRC law). Since the Commision was to operate within a limited period, it would have been better to divide its mandate into different specialised areas. The TRC of the DRC was expected to offer hope to the Congolese population in dealing with the past as a whole, thus, Resolution No: DIC/COR/04 as well as the Organic Law No./04/018 of 30 July 2004 tasked the TRC of the DRC with an unreasonable mandate.

Regarding its structure, Article 9 of the TRC law outlines the composition of the TRC – twenty-one members including eight officers. Based on the principle of inclusiveness, officers were appointed to represent elements and entities involved in the ICD as provided by Article 157 of the Transitional Constitution and the Global and Inclusive Agreement. The other members included representatives of churches, the academic community, women's organisations and other associations with objectives similar to the TRC. Based on Article 11 of the TRC law, members of the TRC were presented to the National Assembly on 10 December 2004 for approval before they took the oath of office before the Supreme Court of Justice on 13

December of the same year.[722] As provided by Article 15 of the TRC law, the TRC had four units: plenary, bureau, special permanent committee, and provincial and local committee. Within the TRC, two special committees namely the permanent select truth committee and the permanent select reconciliation committee were formed. The first was supposed to deal with political crimes and massive violations of human rights, social and economic crimes, environmental and ill-gotten gains and violence against women and children. The second is composed of three sections dealing respectively with peaceful coexistence among different ethnic groups; restoration, reintegration, forgiveness and amnesty; and prevention, conflict mediation and education for a culture of peace (Article 25 of the TRC law). Provincial and local level committees represented the TRC at the provincial and local level. They were charged with the task of implementing decisions and recommendations in their respective areas, and of collecting and transferring the complaints of the people to the relevant government bodies (Article 26).

Six members of the Bureau were male while two were female, and based on a power sharing principle, eight members of the Commission were appointed from units and entities of the ICD. The President/Chair, Bishop Dr Jean-Luc Kuye-Ndondo wa Mulemera was from the civil society, the first Deputy President, Mr Benjamin Serukiza, was from the RCD/Goma; the second Deputy President, Prof Ngoma Binda, represented the unarmed civil opposition, and the third Deputy President, Mr Yaya Swedy Kosco, represented the Mai-Mai. The chief reporter, Mr Claude Olenga Sumaili, was from the RCD-K/ML; the first assistant reporter, Mr Partiel Musimwa Bisharhwa, was a government official; the second assistant reporter, Mrs Vickie Buboyo Idey, was from the RCD/N; and the third assistant reporter was from the MLC.[723]

From the above, it is clear that five of the eight members of the Commission were from rebel groups such RCD/Goma, Mai-Mai, RCD-K/ML, RCD/N and MLC which had allegedly committed international crimes. For instance, Mr Benjamin Serukiza was appointed by the RCD/Goma, a rebel group that was controlling the eastern DRC from 1998-2003. As of 24

[722] RDC *Rapport Final de la CVR* 3.
[723] RDC *Rapport Final de la CVR* 7-8, Wakenge et Bossaerts www.eurac-network.org/web/uploads/documents/20060915_8220.doc (Date of use: 04 Septembre 2014).

August 1998 when the Kasika massacre was perpetrated by RCD troops[724] in South Kivu, Mr Serukiza was the Deputy-Governor of the South Kivu Province under the administration of the RCD.

The following sub-section considers the powers and achievements of the TRC of the DRC.

4.4.2 Powers and achievements

In the subsections below, the analysis is focused on the powers invested in the Commission and on its achievements.

4.4.2.1 Powers

Under Article 8(g) of the TRC law, the TRC of the DRC had the power to propose amnesty for acts of war, political crimes and crimes of opinion. In other words, the TRC of the DRC was not empowered to grant amnesty for crimes against humanity, war crimes or crimes of genocide. The TRC also had the power to subpoena anyone (including those who bear immunity, Article 36) and if s/he declined to appear before the Commission for the third time, the TRC had the power to order the court that had jurisdiction to adjudicate crimes allegedly committed by such a person (Article 35 of the TRC law). The Commission also had the power to conduct questioning under oath (Article 38 of the TRC law) and to hold public and private hearings (Article 39 of the TRC law), as well as the ability to grant confidentiality if required (Article 40 of the TRC law).

Under Article 32 of the TRC law, victims had the right to complain whether before the courts and tribunal or before the TRC of the DRC. However, the consent of the direct victim

[724] Reports show that, "On Monday, 24 August 1998, more than 856 people were massacred at Kasika, in Lwindi chieftaincy and in the territory of Mwenga. The bodies, which were strewn over an area of 60 km from Kilungutwe to Kasika, were mainly of women and children. The women had been raped before being killed by their attackers, who had used knives to slit their bodies from the vagina to the abdomen. 400 (*sic*) Mai-Mai were burnt to death at Luhuindja and 200 at Luindi". See *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda) [1999]* ICJ *White Paper* 150/24 and 174/48.

was required for the TRC to transfer a case to the courts (*saisine d'office*). If the investigation required testimony outside the country or involved foreigners, Article 34 of the TRC law stipulates that the TRC had to request the help of the authorities or of the diplomatic corps. However, no prosecution could be undertaken regarding any testimony or opinion made before the TRC (Article 46 of the TRC law). The TRC of the DRC also had the right to access any official document needed for its investigation. In cases which the TRC is found wanting, affected parties could bring such cases before the courts and the tribunals (Article 37 of the TRC law).

As the Commision was composed of representatives of the different units and entities of the ICD (including warring parties), if in the course of reviewing a case, the neutrality of a member was in doubt or questioned, the member should declare his/her stance, but if the affected parties challenged the member, s/he should recuse himself or herself (Article 45 of the TRC law).

4.4.2.2 Achievements

Almost all the transitional institutions took office by 30 June 2003, but the Organic Law establishing the TRC of the DRC was adopted one year later by the National Assembly and the Senate and was promulgated into law by the President on 30 July 2004. The delay in the adoption of the TRC law means that the TRC would not start its investigations after 30 June 2003 but after 30 July 2004 whereas the TRC was supposed to function during the transitional period and present its final report at the end of that period (Article 55 of the TRC law). After their appointment, members of the TRC presented their schedule in August 2003 and this included the drafting of law and the rules of the TRC, organising seminars to train its members, and travelling to South Africa where members of the RSA's TRC could share their experiences with them. However, because the TRC operated on a lean budget, some officials of the

Commission travelled to Belgium, Germany, Norway and Sweden in late 2003 to meet with potential donors who could support the cause of the TRC.[725]

From 2004, the TRC focused on increasing publicity at the local level and involving the Congolese population in the process of revising the draft of the TRC law. This campaign was followed by the selection of members of provincial and local committees. Further, in order to pacify the people as well as the politicians and to restore an atmosphere of mutual trust, activities relating to reconciliation, mediation and conflict resolution as well as peaceful coexistence between rival communities were undertaken in the North and South Kivu Provinces, Eastern Province, and Katanga and Bas Congo Provinces. The TRC also had meetings with the Congolese refugees living in the camp in Tanzania.[726] Most of the activities were geared towards ensuring peace in the country and paving the way for the success of the approaching elections. In this regard, the Chairperson Bishop Dr Jean-Luc Kuye-Ndondo made the following statement:

> We ourselves have to work with the political leaders to make the way for elections to take place, and prepare a solid arena where we can talk about peace. But until there is security, we cannot talk about truth, the truth of what happened. There are some villagers who were victims of crimes, and there are some among the authorities who committed crimes against humanity. There are even belligerents in the office of the TRC itself.[727]

From the above statement, it can be deduced that the time for dealing with past abuses was not actually ripe and the structure of the Commission could not be trusted. Consequently, the main tasks of the TRC were not executed or enforced, that is, investigating past crimes and holding public hearing, establishing truth and healing of trauma caused by acts of war, making recommendations for reparations and restorations in cases of prejudice, and proposing amnesty as well as promoting peace and national reconciliation.[728] In his assessment of the work of the TRC, the former Chairperson of the Commission, Elie P Ngoma-Binda, argues that the TRC did

[725] RDC *Rapport Final de la CVR* 18-20.
[726] RDC *Rapport Final de la CVR* 23-28.
[727] Baldauf http://www.csmonitor.com/2006/1114/p06s01-woaf.html/(page)/2 (Date of use: 12 July 2013).
[728] RDC *Rapport Final de la CVR* 67-68.

not fulfil its main its mandate.[729] According to Luzolo and Bayona, the Commission could be considered a "*mort-née* or still-born" essentially due to political factors during the transition.[730] However, it is important to keep in mind that the TRC was also given the mandate to prevent, manage and resolve conflicts through mediation. Although, strictly speaking, this mandate was not part of transitional justice, it was prioritised, and the Commission succeeded in mediating peace between communities torn by conflict particularly in the North and South provinces which therefore facilitated the preparations for the 2006 elections. It appears that the Commission actually succeeded in mediation and conflict management, but not in establishing the truth.

The following sub-section examines the constraints and difficulties encountered by the Commission as well as its recommendations.

4.4.3 Constraints, difficulties encountered, and recommendations

The findings from the previous paragraphs indicate that the Commission did not achieve its objectives. Thus, this subsection examines some of the constraints and difficulties encountered by the Commission, as well as some of its recommendations.

4.4.3.1 Constraints and difficulties encountered[731]

The TRC of the DRC functioned in an unfavourable political, security and diplomatic context which made it difficult for the Commission to achieve its objectives. On the political level, the transitional government was composed of former belligerent officers some of who ruled the country during the Second Republic and were accused of committing massive human rights violations and looting of public property. Many of them did not cooperate with the TRC, making it difficult for the Commission to establish the truth desired by the Congolese nation. As

[729] Ngoma-Binda *Justice Transitionnelle* 9.
[730] Luzolo and Bayona *Procédure Pénale* 759.
[731] RDC *Rapport Final de la CVR* 69-70.

many of them were candidates seeking re-election to their their various offices, they believed that coming out with the truth might decrease their chances of being re-elected.

Regarding security, some areas under the control of national and foreign armed groups in the eastern part of the country were unsafe and therefore inaccessible to the TRC. There was no guarantee of the safety of victims, witnesses, perpetrators and even members of the TRC during the transitional period in the territories where the authority of the State was not fully felt.

In terms of the diplomatic context, the UN Mission in the DRC and the International Committee were supposed to support the transition and garner international aid for the TRC. Unfortunately, both bodies did not appreciate the establishment of the TRC during the transitional period due to the fragile peace and insecurity in the country as well as the composition of the TRC. Consequently, external donors were not motivated to contribute aid to the TRC.

4.4.3.2 Recommendations of the report

The TRC of the DRC was given a mixed mandate to establish the truth about the violations that took place and to consolidate peace. Therefore, at the end of the transitional period, it presented its recommendations to the Parliament and the government of the Third Republic on its double commission to establish the truth and foster reconciliation.

On the issue of truth, the TRC recommended that after the 2006 elections, the government should establish a National Commission for Truth and Reconciliation whose mandate would be for a specific period devoted exclusively to the establishment of the truth and would be backed by an appropriate edict. The Commission should establish a program to carry out reparations, financial compensation, restitution, rehabilitation, and redress, and guarantee non-repetition of past events. The government should also make available the necessary human

and financial resources for the improved functioning of the new National Commission for Truth and Reconciliation to ensure its independence and financial autonomy.[732]

On the issue of reconciliation or pacification, the TRC recommended the creation of a National Commission of Pacification that would be exclusively in charge of consolidating peace and pursuing reconciliation and peaceful coexistence among the various ethnic groups, as well as of conflict prevention and management. If conflicts occur, the Commission would mediate peace, reconciliation and tolerance between rival groups or communities and educate them on the importance of cultivating a culture of peace.[733] However, to succeed in mediation and reconciliation, Luzolo and Bayona argue that it is important to initiate a specific forum that would draw on local traditions and customs as well as the experiences of other people in similar circumstances.[734] In the same vein, Kazadi Mpiana argues that the Congolese could learn from the model of the *Gacaca Court* by setting up a forum led by representatives of the civil society which would promote national reconciliation, peace and peaceful coexistence.[735]

4.5 Findings

In terms of the research problem, the discussion in this chapter responds to two sub-questions. The first relates to the analysis of the role of criminal prosecution and the second to the role played by the TRC in dealing with past abuses in the DRC. However, the chapter also considered the reasons the TRC failed to achieve its objectives.

The history of the DRC demonstrates that crimes have been committed in its different periods, and by failing to support institutions established to deal with the atrocities of the past, the country lost an opportunity to hold individuals who bear the greatest responsibility accountable for the past crimes and to reconcile the nation. After independence, the post-colonial government did not investigate and prosecute the brutal activities of the colonial administration. The inhumane treatments inflicted on the people included deliberately inflicting

[732] RDC *Rapport Final de la CVR* 76.
[733] RDC *Rapport Final de la CVR* 77.
[734] Luzolo and Bayona *Procédure Pénale* 760.
[735] Mpiana 2012 *RQDI* 86.

physical harm on citizens (for instance amputating the right hand of an alleged offender) and engaging in killings that resulted in the diminution of the colonial population by about two-thirds. It could be assumed that the colonial administration "intended to destroy, in whole or in part",[736] the colonised people. In this regard, the colonial administration failed under Article 2 of the Convention on Genocide of 1948, but the post-colonial government decided to leave the atrocities of the colonial era unpunished, an attitude which characterised subsequent regimes.

Under the government of the First Republic (1960-1965), many crimes were committed including the assassination of the nationalist and first Prime Minister of the DRC Patrice Lumumba whose assassins remain officially unknown.[737] The Second Republic under President Mobutu's dictatorship (1965-1997) witnessed the commission of various crimes but the President dismissed the CNS when it decided to hold his regime accountable for some of the crimes. Eventually, Mobutu's regime was ousted by the rebel group the AFDL and this resulted in successive armed conflicts in which all the actors were accused of committing crimes under international law. Then in 2002, delegates to the ICD resolved to deal with past abuses through retributive and restorative justice (that is, by requesting the creation of an international tribunal and of a TRC for the DRC). It is evident that the transition from one Republic to another was marked by the commission of serious crimes but unfortunately, attempts to deal with these crimes have failed.

[736] Article 2 of the Convention on the Prevention and Punishment of the Crime of Genocide stipulates that "[i]n the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group".

[737] Patrice Lumumba was the symbol of the Congo's independence, an anti-imperialist and icon of the liberation of Africa which earned him the identity of a communist. The United States of America allegedly financed Lumumba's opponents to demonstrate against him while the CIA explored ways to eliminate him physically. Therefore, when Lumumba was arrested, he was taken to the secessionist territory of Elizabethville (Lubumbashi). However, the UN peacekeepers refused to take any steps to protect him. Then, on 17 January 1961, Lumumba along with two of his supporters, Maurice Mpolo and Joseph Okito, was assassinated in the presence of the secessionist leader, Moise Tshombe, and at least two Belgians - Police Commissioner Frans Verscheure and Captain Julien Gat. See Deibert *Hope and Despair* 22-27. According to Bruce Fetter, Ludo De Witt proved that "the Eyskens government in Belgium was party to Lumumba's assassination" Fetter *JAH* 359. Indeed, forty-one years later (1961-2002), the Belgian government admitted and apologized for its moral responsibility in the events surrounding the assassination of Patrice Lumumba. See Demos *Spectropoetics* 15.

As stated above, crimes were committed during the colonial and the post-colonial periods, under Mobutu's dictatorship as well as during the different periodss of the armed conflicts. The dilemma of the government then was whether to deal with the crimes committed throughout the history of the DRC or focus on recent events in which crimes were committed during armed conflicts. However, because the leaders of the different armed groups refused that prosecution and truth disclosure should focus solely on them and because actors of the Mobutu era refused to ignore crimes committed between 1960 and 1965, delegates to the ICD agreed that mechanisms of transitional justice must deal with crimes committed since the country attained independence in 1960.

Although the DRC indicated willingness to hold perpetrators accountable for crimes committed since the period after 1960, the UN did not respond to the DRC's request to establish an *ad hoc* tribunal for it. The alternative to the UN's silence was to refer the cases of crime to the ICC even it would cover only a limited period (from July 2002). The DRC's judiciary was already ruined and therefore unable to deal with crimes committed in the period that was not covered by the ICC neither could it prosecute those who could not be prosecuted by the ICC. In addition, because many politicians and military commanders under the transitional government were alleged perpetrators and the legal order was under reform, there was no political will on the part of the government to initiate fair prosecution. Recourse to prosecution was not the sole option; it was supposed to complement the operations of the DRC's TRC. However, the outcomes of both mechanisms appear to be similar because the end of the transition coincided with the presidential and parliamentary elections in which many formers rebel leaders who were suspected of committing crimes were candidates. Therefore, political leaders did not encourage the work of the TRC because exposing the truth about the abuses of the past would tarnish their image and jeopardize their integrity in the elections.

From the above, the following findings may be highlighted:

- The atrocities of the colonial era were left unpunished not only because of the lack of political will on the part of government and because of the fear of exposing sensitive evidence, but also because credible witnesses were unknown, dead or unavailable.

- The ICD was established when members of the AFDL were ruling the country. The AFDL was a former rebel group that ousted Mobutu after negotiating power with other dissidents (e.g. the RCD) composed essentially by former AFDL members. Thus, members of the AFDL, RDC, MLC, RCD-ML, RCD-N and Mai-Mai shared power in the transitional government. Accordingly, members of those groups were never held accountable for their crimes by the DR Congolese courts or by the ICC. The truth is prosecution cannot afford to be one-sided, and these findings may help to understand the *raison d'être* behind the political interference with the judiciary that made it unable to deal with the pending cases.
- Ten years after signing the legal agreement with the DRC based on the principle of complementarity, the ICC continues to play an important role in the war against impunity. In 2012, it issued its first judgement in which Lubanga was declared guilty of charges of war crimes including enlisting and conscripting child soldiers, and was sentenced to 14 years' imprisonment. In addition, Katanga was convicted of being an accessory to crime and sentenced to 12 years' imprisonment, but Ngudjolo and the FDLR leader Mbarushimana were acquitted and released because no charges were confirmed against them. It is remarkable that the ICC has focused its investigation on Ituri District and against FDLR leaders in the Kivu Provinces, and this is seen as the first important step in the fight against impunity. Nonetheless, the ICC has not yet prosecuted any Congolese warlord who was integrated into and promoted by the army, the police or the government for the armed conflicts in the Kivu Provinces. Considering that most of the various armed conflicts involved nationals of other countries, it is baffling that the ICC has not yet prosecuted a single non-State actor involved in the criminal acts. Thus, a regional solution to the issue of past absuses in the DRC would be crucial.
- Regarding the matter of the ICC's limitation, the Prosecutor of the ICC, responding to questions asked by the researcher during the conference held in Kinshasa on 13 March 2014,[738] recalled that the DRC cases were referred as a whole. He explained that the ICC

[738] The conference which took place at the Hotel du Fleuve in Kinshasa on 13 March 2014 was organised by the Prosecutor of the ICC, Fatou Bensouda, in conjunction with the Organisations of Civil Societies. On that occasion, she responded to the following questions asked by the researcher: (1) Why did the ICC limit its investigations in Ituri having prosecuted only a handful of perpetrators out of the thousands, if not millions, of perpetrators in the DRC? (2) What could the ICC do to prosecute those who bear the greatest responsibility for

began prosecution in Ituri because the situation there at that time was very critical and required urgent prosecution. Moreover, the ICC was not trying to apply selective justice but if there is evidence, whoever committed crimes would be prosecuted. However, she also pointed out that it is not possible for the ICC to just enter into any country and begin to investigate people.

- The Congolese military court prosecuted and sentenced few cases often after criticism and intervention by the UN mission as well as some NGOs. Unfortunately, military courts have failed to establish the culpability of military commanders and other superior officers.
- The TRC operated under fragile peace and therefore did not open a single case against Congolese perpetrators due to the lack of political will to set up independent and fair mechanisms for accountability. As foreigners have also had a hand in past abuses, they should be given a chance to to tell the truth about what happened. By focusing essentially on the mediation of peace between communities torn apart by conflicts in order to pave way for the 2006 elections, the DRC lost an opportunity to establish reconciliation in the society.

In the internationalised armed conflicts in the DRC, Congolese as well as foreign State and non-State actors were accused of perpetrating widespread crimes. Mechanisms established to deal with past abuses did not succeed in holding individuals who bear the greatest responsibility accountable for the abuses, neither was the truth behind the atrocities revealed. It is important to consider the regional dimension of these conflicts in order to establish mechanisms for dealing with the violations that ensued from them, as the past cannot be ignored. A regional based mechanism would not only identify the root causes of conflicts in the region, it would also identify and deal with those who bear the greatest responsibility for past abuses in the DRC. For this to happen, there must be political will on the part of the governments of the countries involved in these conflicts.

The next chapter presents a comparative appraisal of the research findings.

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the ten million people killed in the Kivu region of the DRC since the Congolese justice system is unwilling to prosecute former Congolese warlords?

CHAPTER 5

PRESENTATION AND DISCUSSION OF FIELD RESEARCH: A COMPARATIVE APPRAISAL OF FINDINGS

5.1 Introduction

The overarching research problem of this thesis sought to identify "the transitional justice mechanisms for justice and reconciliation in the RSA and in the DRC". In dealing with past gross violations of human rights in both countries, judicial and non-judicial mechanisms of transitional justice were adopted (but with different approaches). The goal of transitional justice is to make perpetrators accountable for the violations of the past and to contribute to national reconciliation. Therefore, this chapter articulates the main goal of this study which is to analyse the significance of the transitional justice mechanisms observed in both case studies. It also makes recommendations for building a sustainable peaceful future, while atking into account all the secondary research problems presented in the first chapter of this study.

The present chapter is constructed essentially on data collected during the fieldwork research and analysed in the light of the findings of previous researchers. The first section provides an overview of the research methodology which was used to collect and analyse data practically (5.2). The second section presents the profile of the research participants (5.3). It indicates the gender of key informants, the number of focus groups per organisation from each country and the gender of participants as well as the number of key informants per organisation and the names of the organisations from each country.

The third section presents the results in both cases studies (5.4). The section is constructed on four themes viz., the role of criminal prosecution under transitional justice, the role of the TRC in dealing with past abuses, ways of restoring victim's dignity, and suggestions for building a sustainable peaceful future in the RSA and in the DRC. The fourth section discusses the results of a comparative appraisal of the findings in both the RSA and the DRC

(5.5). The results of the fieldwork are based on three themes from the study objectives as mentioned above. The similarities and differences are presented in a tabular form followed by a brief reflection. The fifth and last section represents a summary and conclusion of the chapter followed by a synthetic diagram that summarises the research findings (5.6).

5.2 Research Methodology and Procedure

This section begins by describing, briefly, the methods employed in collecting and analysing data, as well as the ethical consideration made for the human participants in the study.

5.2.1 Data collection

The paragraphs below show the use of purposive sampling to select research participants, the profile of participants, the ethical considerations and approval, and the procedure for collecting data.

5.2.1.1 Sample and sampling method

Using a non-probability sample, the researcher used the purposive sampling method to deliberately select individuals (or organisations) as participants in the research according to their experiences of transitional justice mechanisms that are relevant to this study. However, the researcher was flexible enough to employ snowball sampling as an alternative recruitment strategy to reach unidentified participants who fit the criteria of desirable participants recommended by key informants.

5.2.1.2 Data collection procedure

In this study, data was collected through direct interaction with participants or face-to-face interviews, through Skype calls and through direct interaction with participants in a group setting or focus group discussion (in English and in French). Thus, the interview and focus

group guides provided semi-structured and open-ended questionnaires that were administered directly in order to collect data.

The interview guide was administered to the victims' organisations, the former TRC commissioners, the national prosecuting authorities/*Procureur Général de la République* and the representative of the ICC based in Kinshasa/DRC. Field research was undertaken in two stages. In South Africa, data was collected between November 2014 and September 2015 in Pretoria, Johannesburg and Cape Town according to the availability of the key informants. In the DRC however, data was collected between December 2013 and March 2014, as the researcher travelled from one province to another to locate key informants especially in North and South Kivu Provinces, Ituri and Kisangani in the eastern Province and lastly in Kinshasa, the DRC's capital city.

5.2.2 Data analysis

With the consent of participants, data collected from the interviews and focus groups were handwritten (or noted) and recorded for this qualitative study. To facilitate transcription into a Word file, notes handwritten during the fieldworks were used to complement the audiotapes. In comparing the South African and the DRC cases, the differences and similarities were presented in a table and interpreted in order to throw light on both contexts and identify what each context can learn from the other.

5.2.3 Ethical considerations

To obtain information from the key informants, the researcher developed an interview and focus group guide, drafted the consent letter and obtained a letter of permission. However, as the study involves human participants, it required approval from the College of Law Research Ethics Review Committee in accordance with the Policy on Research Ethics of the University of South Africa. Both the letter of permission and the informed consent letter stated the study objectives, the expected outcomes of the research and the approximate duration of the interviews or

discussions as well as the assurance of the confidentiality, anonymity and participant's right to withdraw at any stage without any penalty.

To ensure confidentiality and the anonymity of participants, each participant was allocated a hashtag with a chronological number followed by the abbreviation of the country. For instance, the first participant in the DRC was coded as #01DRC[739] and in South Africa as #01RSA.[740] Both the letter of permission and the informed consent letter specified the contacts details of the researcher, the supervisor, and the University of South Africa where the researcher is enrolled. The details would allow participants to contact the researcher or the supervisor after the interview or focus group discussion if it was important to do so. All participants agreed to sign the consent form.

5.3 Profile of Research Participants

The profile of respondents selected after the purposive sampling was based on their area of expertise or roles as representatives of organisations that care or advocate for victims, former TRC commissioners, or officials of the national prosecuting authorities and of the ICC. The biographical information about participants is presented in the tables below.

Table 1: Gender of key informants in interviews in the RSA and in the DRC

Gender	Number	Percentage
Male	34	68%
Female	16	32%
Total	50	100%

Regarding gender presentation, the table indicates that males represented 68% and females 32% of the participants. The inequality is justified by the fact that many of the organisations had

[739] Key informant #01DRC interviewed in Goma on 16 December 2013.
[740] Key informants #01RSA interviewed in Pretoria on 3 October 2014.

more males than females. Accordingly, more males than females were appointed by their respective organisations to hold interviews with the researcher.

Table 2: Number of focus groups per organisation and gender of participants

Organisations	Number of focus groups	Country	Number of participants	
			Male	Female
Comité du Fonds de Solidarité des victimes de la guerre de 6 jours à Kisangani	1	DRC	10	2
Réseau Haki na Amani	1	DRC	4	6
Khulumani Support Group	1	RSA	3	6
Total			**17**	**14**
Percentage			**54.8**	**45.2**

The table above indicates that two focus groups were organised in the DRC and one in South Africa, and that males were more represented than females in the DRC, while in South Africa, females were more represented than males. This suggests that women are more active in institutions that deal with past abuses than men.

Table 3: Number of key informants per organisation

Number	Name of organisation	Country	Number of respondents
01	Centre for the Study of Violence and Reconciliation	RSA	1
02	Commission of the Truth and Reconciliation Commission	RSA	2
03	Human Rights Media Centre in South Africa	RSA	1
04	Institute for Justice and Reconciliation	RSA	2

05	Khulumani Support Group	RSA	2
06	National Prosecuting Authority	RSA	1
07	South African Department of Defence Archives	RSA	2
08	South African History Archive	RSA	1
09	Truth and Reconciliation Commission UNIT (Department of Justice and Constitutional Development)	RSA	1
10	Actions et Réalisations pour le Développement	DRC	1
11	Association des Mamans Anti Bwaki	DRC	1
12	Association du Barreau Americain	DRC	2
13	Caritas Bunia	DRC	1
14	Cadre de Concertation inter-ethnique d'Uvira	DRC	1
15	Centre de Recherche de l'Institut Supérieur Pédagogique de Bunia	DRC	1
16	Cité d'Uvira	DRC	1
17	Coalition pour la Cour Pénale Internationale	DRC	1
18	Commission Vérité et Réconciliation	DRC	1
19	Commission Justice et Paix de la Province Orientale	DRC	1
20	Communauté Hema	DRC	1
21	Communauté Lendu	DRC	1
22	Congo en Images	DRC	1
23	Coopération Internationale (COOPI)	DRC	1
24	Coordination de la Société Civile de Bunia	DRC	1
25	Coordination de la Société Civile du Nord Kivu	DRC	1
26	Coordination de la Société Civile du Sud Kivu	DRC	1
27	Coordination de la Société Civile en Province Orientale	DRC	1
28	Cour Pénale Internationale/ Kinshasa	DRC	1
29	Genre Actif pour un Devenir Meilleur de la	DRC	1

	Femme		
30	Haute Cour Militaire	DRC	1
31	Hôpital Général de Panzi	DRC	1
32	Hôpital Heal Africa	DRC	4
33	International Centre for Transitional Justice	DRC	3
34	Justice Plus	DRC	1
35	Nouvelle Société Civile Congolaise	DRC	1
36	Paroisse Rein de Tous les Saints de Kaniola	DRC	1
37	Paroisse Saint Jean Apôtre à Burhale	DRC	1
38	Parquet Général de la République	DRC	1
39	Union pour le Développement de la Province Orientale	DRC	1
40	Village de MAKOBOLA	DRC	1

Table 3 above indicates that the researcher contacted more organisations in the DRC than in South Africa. Three reasons may explain this occurence. The first is due to the use of the snowball sampling method that allowed selected organisations in the DRC to refer the researcher to other relevant organisations in their social networks whose work relates to the topic of this research. The second is that many organisations dealing with the legacy of past conflicts in the DRC have remained active due to on-going armed conflicts in the country. The third reason is that, geographically, the DRC is a larger country than South Africa. The DRC is the second largest African country by land area (2,344,858 square kilometres) while South Africa is the ninth largest African country by land area (1,221.037 square kilometres). Considering the size of the African continent that is 30,221,532 square kilometres, the DRC represents 7.75% and South Africa 4.04% of this total land mass, which means that the DRC's land area is almost double that of South Africa.[741]

[741] Africa http://www.worldatlas.com/webimage/countrys/aflandst.htm (Date of use: 16 July 2015).

5.4 Presentation of Findings

This section presents data collected from the fieldwork in both the RSA (5.4.1) and the DRC (5.4.2). The data for each of the countries is grouped into four themes viz., importance of the criminal prosecutions under the transitional justice system; role of the TRC in dealing with past abuses; ways of restoring the dignity of victims; and recommendations for building a sustainable peaceful future.

5.4.1 Data from the RSA

5.4.1.1 Theme 1: Importance of the criminal prosecutions under the transitional justice system

Under this theme, three questions were posed to enable respondents to provide information that would cover the first study objective.

Question 1.1: How were victims affected by past abuses and what are the profiles of perpetrators?

According to four key informants[742] and participants in the focus group #1FG/RSA,[743] brutal acts committed under the apartheid regime include torture, imprisonment, extra-judiciary killing through assassination and murder, and causing the disappearance of opponents or keeping them in prolonged detention without trial, dispossessing people of their land, as well as abduction, racial classification and forced relocation of residents. For example, key informant #01RSA said that those who committed such abuses due to the demands of their jobs were not held accountable for the abuses. The main problem with the TRC of the RSA was that whatever was considered legal under apartheid was not an abuse. Therefore, acts that were recognised as abuse by the TRC were a fraction of the abuses that people actually experienced. In addition, key informant #09RSA explained that:

[742] Key informant #07RSA interviewed in Pretoria on 23 June 2015; Key informant #09RSA interviewed on Skype from Cape Town on 26 June 2015, and Key informant #11RSA interviewed in Cape Town on 12 August 2015.
[743] Participants in the focus group #1FG/RSA in Mamelodi on 24 July 2015.

> The apartheid regime was a brutal system of oppression, essentially institutionalised racism and marginalising Black people (*sic*) on the basis of race. The system established the supremacy of Whites and access of all basic elements in term of health care, access to education, places to live, etc (*sic*). Blacks and coloured were marginalized and deprived of their rights as human beings and also essentially excluded from the political processes. There were also an element of political repression and when Black (*sic*) rose to try to protest against the system, they were suppressed brutally by the apartheid regime. It is for instance torture (case of Steve Biko who was tortured because he was the leader of conscientious Black (*sic*) movement); individuals were killed (through assassination by the security and intelligence services), lands dispossessed (*sic*) in Cape Town and Johannesburg and people were placed in township where the living conditions were very brutal. All these led to the history and legacy of violations that created the subsequent tensions of what is seen (*sic*) in the society today.

Key informant #08RSA[744] clearly stated that the security services were allowed to operate against anti-apartheid activists without being held accountable for their actions which caused the suffering of many people. Thus, according to key informants #02RSA[745] and #08RSA, the majority of black people suffered exclusion from basic rights, access to equal education and health care, being unable to live where they chose or stay where they were born. They were also denied the freedom to enjoy and exercise their political and civil rights (the right to vote). Such past atrocities can be grouped under different human right violations such as violations of the right to life, to physical integrity, to liberty and security of the person, and to property.

A. Violations of the right to life

Violations of the right to life observed by four key informants[746] and participants in the focus group #1FG/RSA included extra-judiciary killings that led to loss of loved ones and prolonged detention of people without trial.

B. Violations of the right to physical integrity

Three key informants[747] noted that torture and cruel, inhuman and degrading treatment were committed against activists who opposed the apartheid policies.

[744] Key informant #08RSA interviewed in Johannesburg on 24 June 2015.
[745] Key informant #02RSA interviewed in Johannesburg on 3 November 2014.
[746] Key informants #01RSA, #07RSA, #09RSA, #11RSA.
[747] Key informants #01RSA, #07RSA and #09RSA.

C. Violations of the right to liberty and security of the person

Five key informants[748] and participants in the focus group #1FG/RSA revealed that abduction, disappearance, racial classification of people, forced relocation of people and denying them of access to education were some of the abusive practices of the apartheid regime.

D. Violations of the right to property

Five key informants[749] and participants in the focus group #1FG/RSA revealed that dispossessing people of their land and burning their houses were some of the atrocities committed by the apartheid regime.

On the profile of the abusers, the perpetrators of past abuses were found in different categories. These key informants, based on their personal knowledge, revealed that the first category of perpetrators would be the former regime which implemented its apartheid policies together with political leaders who conceptualised the framework of apartheid (the Afrikaner Broederbond ("brotherhood"); and senior architects of the apartheid. The second would be the beneficiaries of apartheid including organisations and businesses or companies that played crucial role to sustain the policy of apartheid such as General Motors, Ford, International Business Machines Corporation, to mention a few. The third would be individuals who played a central role in formulating (thinkers) and implementing the apartheid policy in the RSA such as former President Pieter Willem Botha, Minister Francois Magnus Malan, members of the SADF and of the South African Police (SAP) as well as third forces recruited forcefully by the apartheid regime to attack others or ethnic black people.

[748] Key informants #01RSA, #02RSA, #07RSA, #08RSA and #09RSA.
[749] Key informants #01RSA, #02RSA, #07RSA, #08RSA and #09RSA.

Question 1.2: What is your opinion about the role played by the judiciary and why was your country unable or unwilling to prosecute past crimes?

Regarding the issue of prosecution on the domestic level, findings revealed that in the aftermath of the apartheid, there was a lack of judicial reform, of reluctance to prosecute, and of political will, etc. However, the South African judicial system played a minor role in that it occasionally threatened offenders in order to force them to come forward, but only few of such offenders were prosecuted.

A. Lack of judicial reform

According to four key informants,[750] the judiciary was not transformed after the end of apartheid, but key informants #03RSA and #04RSA[751] noted that the prosecutor was reluctant to prosecute presumably due to lack of evidence and lack of community will, as those with information or evidence about past abuses were unwilling to come forward and testify.

On the question of the transformation of the judiciary, key informant #11RSA for example noted that, "There was the need for a really drastic transformation of the judiciary to deal with the past. We could not come from one regime, with racist magistrates and segregationist laws and expect such magistrates to perform". Key informant #08RSA added that, "The judicial system did not have a chance to play a role because South Africa chose the restorative justice, but also the judiciary was not transformed". In addition, key informant #02RSA believed that "The judiciary was not transformed after the apartheid that is why the progress was very limited to what people expected". Nevertheless, key informant #03RSA contended that, "It takes time to change the legal order and all judges appointed by the old system were staying in their positions. It is a fact that the old system and old structures were still in place because we cannot change things magically".

On the reluctance to prosecute, key informant #04RSA noted that, "If all TRC's recommendations could have been implemented, it could have reduced the few concerns from

[750] Key informants #02RSA, #03RSA, #08RSA and #11RSA.
[751] Key informant #03RSA interviewed in Pretoria on 22 January 2015; Key informant #04RSA interviewed in Pretoria on 5 February 2015.

people on when perpetrators are going to be prosecuted. About prosecution, the prosecutor is willing to receive people with evidence because without evidence and official documentation, prosecution will be difficult". However, for key informant #03RSA, it is difficult to prosecute past State crimes committed in secrecy when people involved the acts choose to remain silent due to political loyalty. However, such people are encouraged to disclose the truth in order for prosecutor to have evidence. Therefore, key informant #04RSA noted that "South Africa as constitutional democracy cannot leave the past alone saying that let us forget the past because the right to justice is guaranteed by the constitution". Key informant #06RSA[752] also called on the NPA to start prosecution with the little evidence that is available.

B. Lack of political will

According to five key informants,[753] the post-apartheid government lacks the political will to prosecute apartheid crimes especially crimes committed by those who did not apply for amnesty or those to whom amnesty was denied. However, key informant #03RSA argued that the "prosecution does not need a political will but a community will to prosecute. For that, the civil society and the ordinary people must be part of this kind of investigation", assisting the prosecutor with whatever evidence is at their disposal.

Again, key informant #09RSA argued that, "The TRC's recommendations will not be undertaken because the government is not interested to prosecute former leaders of National Party who are still controlling the sector of economy". Key informant #06RSA also pointed out that, "The issue is that the government does not prosecute those who failed or did not apply for amnesty". Key informant #08RSA regretted that, "The government failed to implement the TRC's recommendations on prosecution and reparation while it has requested people to trust the TRC. Thus, people will no longer trust the government due to impunity". Therefore, key informant #07RSA urged that, "The government should take into account the people's will in order to prosecute alleged perpetrators as recommended by the TRC's report". Key informant #09RSA tried to show that "the government has failed to implement recommendations in trying to balance the myth of the rainbow nation or the myth of the united South Africa which begin to

[752] Key informant #06RSA interviewed in Johannesburg on 26 February 2015.
[753] Key informants #06RSA, #07RSA, #08RSA, #09RSA and #11RSA.

clamber now (*sic*). The reason is that some of the people that would be prosecuted are former leaders of the National Party who are in Parliament, and some of them are part of the ANC. Thus, prosecution of the apartheid era is not in the agenda". For his part, key informant #06RSA argued that, "South Africans have to force the government to take action and prosecute perpetrators as recommended by the TRC".

C. Few prosecutions

Six key informants[754] and participants in the focus group #1FG/RSA argued that few cases were prosecuted which means that the judiciary played a minor role in dealing with past abuses. For example, key informant #09RSA affirmed that, "The judicial system played a minor role in prosecuting some perpetrators. The rest of the cases were brought to the amnesty committee to allow the reconciliation". Key informant #03RSA also agreed that not only were there few prosecutions *inter alia* State v. Eugene De Kock and State v. Dr Basson, but also few special investigation teams that prepared courts cases. Those cases encouraged alleged perpetrators to take part in the TRC process. However, as the criminal justice system could not prosecute every case, it is important for the TRC and the prosecution to work together. Furthermore, key informant #03RSA said that "justice, during the transitional justice process, is not a formal justice, but criminal prosecution would be much better because people who admitted torture got amnesty".

[754] Key informants #01RSA, #03RSA, #07RSA, #08RSA, #09RSA and #11RSA.

Question 1.3: What is your view of the collaboration between the ICC and the national judicial system and the complementary nature of their operations?

The responses from key informants agree that the application of the Rome Statute of the ICC in respect of crimes committed during the apartheid regime in South Africa was non-retroactive.

A. The Rome Statute as non-retroactive

Four key informants[755] noted that the ICC could not deal with the apartheid-era crimes in South Africa prior to the entry into force of the Statute. For example, key informant #01RSA noted that, "The ICC cannot be retroactive for crimes committed during the apartheid era". Key informant #07RSA also asserted that, "The ICC was created after the apartheid and does not have jurisdiction. Therefore, it is difficult to try South African cases regarding apartheid".

On the issue of complementarity of functions, key informants #02RSA and #03RSA recognised the importance of the ICC in the fight against impunity. For example, key informant #03RSA appreciated the ICC's independence, arguing that it does not have any inhibitions about prosecuting international crimes. However, there is an issue with the principle of complementarity because local courts have limited funds and other resources to operate with, and in the case of South Africa, key informant #02RSA acknowledged that apartheid as a crime against humanity was not prosecuted in South Africa due to the matter of public policy which focused on reconciliation.

[755] Key informants #01RSA, #02RSA, #03RSA and #07RSA.

5.4.1.2 Theme 2: Role of the TRC in dealing with past abuses

Three questions were posed to gather information about the role of the TRC.

Question 2.1: Did victims welcome the establishment of the TRC and what were their expectations?

Eight key informants[756] and participants in the focus group #1FG/RSA noted that the establishment of the TRC was good for reconciliation, important for victims to speak out, a better opportunity for perpetrators to disclose abuses, a hope for victims, an excited opportunity, a political decision and an important compromise.

According to key informant #04RSA, for example, "The establishment of the TRC was a political decision for the country to opt for reconciliation instead of prosecution in the sense to avoid more bloodshed". Thus, key informant #02RSA, stated that, "The establishment of the TRC was seen to be important setting form that enables victims to speak out the violence they went through… It was also a better opportunity for perpetrators to disclose the abuses committed, the way and where those abuses were committed, acknowledge the suffering of victims". In addition, key informant #09RSA agreed that, "The establishment of the TRC was a good opportunity and significant for victims of expressing their views (*sic*) and to have the story heard and told". Nevertheless, key informant #01RSA noted that, "The TRC was good, but victims were not prepared with the process. It seems that it was not created for victims, but for perpetrators to reveal the truth and receive amnesties and therefore to make peace and to do reconciliation". For key informant #06RSA, "South Africa went in that direction because it was an important compromise at that time". Hence, the amnesty was from both the civil and the criminal prosecutions.

Regarding expectations, key informants #04RSA and #06RSA as well as participants in the focus group discussion #1FG/RSA noted that victims expected from the TRC the promotion of reconciliation and nation building, the willingness of the previous regime to make full disclosure, more investigations, reparation, and participation in reparation process of all

[756] Key informants #01RSA, #02RSA, #4RSA, #06RSA, #07RSA, #08RSA, #09RSA and #11RSA.

beneficiaries of the apartheid. For example, key informant #06RSA said that, "The first expectation was that the other side will come to the process willingly with full disclosure. The second expectation was to do more investigations, and the third was that all beneficiaries of the apartheid regime will participate in the reparation process". Similarly, participants in the focus group discussion #1FG/RSA expected that "senior leaders and commanders of the previous regime will be prosecuted for the shooting, assassination of Black leaders and bombing houses, etc."

Question 2.2: How would you you rate the achievements of the TRC

According to seven key informants[757] and participants in the focus group discussion #1FG/RSA, the TRC was successful because a number of perpetrators came forward to testify and to admit past atrocities allowing victims/survivors to know the truth. Public hearings were successfully broadcasted on Radio and TV, and the TRC had set the pace for reforms including the the drafting of the current constitution. It also contributed to the healing, restoration and welfare of victims, and facilitated the promotion of reconciliation. Thus, the establishment of the TRC was a starting point for the country's transformation process. Hence, key informant #01RSA argued that:

> The main achievement was that the TRC had forced people to acknowledge the atrocities of the past because the way the country was organised, the majority of white people denied that they even knew the things were happening so that denial could not continue any longer. People were forced to accept the terrible things that have been done in their name.

In the same vein, key informant #06RSA claimed that, "The achievement of the TRC seems successful; many perpetrators came forward to testify that they were responsible of a number of crime". Key informant #04RSA also agreed that, "The TRC had contributed at certain level working in progress (individual reparation, medical assistance, renaming the streets and building monuments, community rehabilitation; healing of people who suffer from the past regime). The TRC contributed to the healing, health assistance, etc." However, four key informants

[757] Key informants #01RSA, #02RSA, #04RSA, #06RSA, #08RSA, #09RSA and #11RSA.

acknowledged that the TRC did not achieve reconciliation, redress was not fully accomplished and most of the perpetrators enjoyed impunity. For example, key informant #01RSA revealed that, "White people, after being integrated, did not give back what they benefited unfairly and they did not want to lose advantages/powers or required to contribute to the healing of the victims in anyway". Key informant #02RSA also argued that, "Most of the perpetrators enjoyed impunity as no prosecution took place against them, against the previous regime or against corporations". For key informant #08RSA, "There are some issues to be raised: issues of delimitation (criteria of selecting victims), timeframe, failing to hold senior (*sic*) and corporation to account, lack of popular TRC's reports in local languages that would help people to know more about the work of the TRC. South Africans must hold to account the government to implement the TRC's recommendations".

Question 2.3: Have victims been affected by the amnesty?

Six key informants[758] and participants in the focus group discussion #1FG/RSA noted that victims were affected in the sense that senior police officers responsible for torture were not prosecuted, alleged perpetrators remained in their previous positions, and victims were denied the possibility of any civil claims. For example, key informant #02RSA said that, "Amnesty was granted to perpetrators who acknowledged abuses. However, under international law, amnesty does not stop civil claims against individuals and corporations. However, in the RSA, amnesty process also covered civil claims". In addition, key informant #02RSA revealed that perpetrators did not make full disclosure of their roles because they chose what to say or what was convenient to say, in order to get amnesty. They have never been prosecuted and this may provoke conflicts because justice is not yet done.

[758] Key informants #01RSA, #02RSA, #07RSA, #08RSA, #09RSA and #11RSA.

5.4.1.3 Theme 3: Ways of restoringthe dignity of victims

Question 3.1: What could be done to restore the victim's dignity?

The results indicate that the dignity of victims can be restored by carrying out a follow up of the TRC's recommendations, ensuring access to basic rights, and recognition of victims, trauma counselling, and continuing to follow up cases of missing people.

A. Follow up of the TRC's recommendations

According to four key informants,[759] the government must follow up on the TRC's recommendations which include reparation and prosecution. For example, key informant #01RSA suggested that the restoration of victims' dignity should pass through "the process of reparation, redress, and restitution, compensation that will address the social, economic, political and cultural justice". Key informant #08RSA also thought that, "There should be a follow up of that TRC's recommendations (*sic*) about reparation and prosecution of those who did not come forward to the TRC". In this regard, key informant #11RSA proposed that, "The parliament must adopt a law requesting the government to implement the TRC's recommendations". Key informants #02RSA and #11RSA also suggested that, "The Presidential trust fund should be allocated to compensate survivors for at least six months".

B. Access to basic rights

Two key informants[760] as well as participants in the focus group #1FG/RSA acknowledged that addressing socioeconomic issues would restore victims' dignity in South Africa. For example, key informant #07RSA argued that "socioeconomic issues should be addressed, black South Africans should be empowered, have access to education and then create opportunities for them (*sic*) so that they can change their situation". Key informant #09RSA agreed that, "Victims' life should be improved, access to education, health care and youth employment guaranteed and granted". However, participants in the focus group #1FG/RSA suggested that "Mamelodi,

[759] Key informants #01RSA, #02RSA, #08RSA and #11RSA.
[760] Key informants #07RSA and #09RSA.

should be transformed, conditions of life should be improved in townships where blood was shed during the struggle (they feel that they are neglected) and improve their infrastructure (*sic*). Women should be empowered and there should be programmes to fight poverty and illiteracy".

C. Recognition of victims

On the issue of recognition of victims, key informants #08RSA and #11RSA, and participants in the focus group #1FG/RSA advise that the government should stop ignoring victims/survivors. For example, key informant #11RSA suggested that, "There should be consultation with victims' community, listening and hearing affected community". In addition, participants in the focus group #1FG/RSA proposed that, "There should be a commemorative day to remember *young lions* killed in Mamelodi".

D. Trauma counselling

Key informants #02RSA and #09RSA acknowledged that there should be trauma counselling of affected parents and their children, and victims/survivors should also be compensated. For example, key informant #09RSA stated that, "There should be psychological support to (*sic*) the victims/survivors because people still carry the wounds of the past".

E. Following up on cases of missing people

Key informants #09RSA and participants in the focus group #1FG/RSA maintained that people should continue telling the truth regarding missing people. Participants in the focus group #1FG/RSA demanded that, "Those who still have information about missing people, should disclose because families are still waiting for the remains of missing people in order to bury them in dignity".

5.4.1.4 Theme 4: Recommendations for building a sustainable peaceful future

Question 4.1: What do you suggest should be done to redress past abuses, reconcile the nation, rehabilitate and compensate victims, and build a sustainable future?

Three key informants[761] stated that an assessment or a follow up of the TRC's recommendations is important in order to identify which of these were implemented and which were yet to be implemented. The result would help to advocate for the full implementation of recommendations that are yet to be carried out. Key informant #04RSA stressed that, "The Constitution must be promoted to build a peaceful community and promote sustainable peaceful future". Thus, key informants proposed the following recommendations to the government, the judiciary and the South African community.

To the Government

Key informants recommended that the government should:

- Recognise every person (black, coloured and white) who took an important stance in the struggle against apartheid and document the history of all communities that resisted apartheid, that is, besides the activities of the liberation movement in exile;[762]
- Rewrite the history of South Africa to enable people to understand what happened in the past in order to avoid a repetition of history. Such historical texts should also include African history of which most South Africans are ignorant. South Africans should also be made aware of the roles played by other African countries in the liberation of South Africa;[763]
- Adopt policies which grant people access to economic resources or restore the economic system/capital and create jobs;[764]

[761] Key informants #02RSA, #08RSA, and #11RSA.
[762] Key informants #01RSA and #11RSA, and participants in the focus group #1FG/RSA.
[763] Key informants #07RSA and #08RSA, and participants in the focus group #1FG/RSA.
[764] Key informants #01RSA, #07RSA and #09RSA.

- Considerably reduce inequality and discrimination by implementing existing laws;[765]
- Facilitate access to inclusive medical care and provide funds for psychological treatment of traumatised people;[766]
- Support local organisations that run programs to change the life of ordinary people in their communities or empower people to transform themselves;[767]
- Fully implement the presidential trust fund for victims in order to compensate victims of apartheid;[768]
- Interact with survivors in collaboration with the Khulumani Group in townships and locations,[769] etc.

To the judiciary

Key informants also recommended that the judiciary should:

- Recognise apartheid as a crime against humanity under international law;[770]
- Implement the TRC's recommendations by prosecuting alleged perpetrators of past abuses who did not come before the TRC where evidence exists and hold accountable international companies that profited from the apartheid government;[771]
- Encourage people to get involved in efforts to prosecute perpetrators who are most culpable of the crimes.[772]

[765] Key informant #02RSA and #07RSA.
[766] Key informant #01RSA.
[767] Key informants #01RSA and participants in the focus group #1FG/RSA.
[768] Key informants #01RSA, #02RSA, #11RSA and participants in the focus group #1FG/RSA.
[769] Participants in the focus group #1FG/RSA.
[770] Key informant #06RSA.
[771] Key informants #01RSA, #02RSA, #04RSA, #06RSA, #08RSA, and #11RSA.
[772] Key informant #03RSA.

To the South African society

Furthermore, the key informants advised the South African society to:

- Continue with the process of telling stories of the people's experiences as part of the national heritage;[773]
- Continue the dialogue between all affected parties and the civil society in order to demystify racial differences that make people emotional and think about the past;[774]
- Continue reconciliation and to identify key perpetrators;[775]
- Encourage people to promote reconciliation built on neighbourly principle wherever they find themselves and involve the private sector in this process;[776]
- Encourage people to co-operate sincerely with the government;[777]
- Continue working on truth recovery;[778]
- Protect the judiciary and consolidate Chapter 9 of the Constitution, thereby help the people to understand South African institutions.[779]

[773] Key informant #01RSA.
[774] Key informant #02RSA.
[775] Key informant #03RSA.
[776] Key informant #04RSA.
[777] Key informant #04RSA.
[778] Key informants #03RSA and #06RSA.
[779] Key informant #08RSA.

5.4.2 Data from the DRC

Data collected in the DRC relied on the same interview and focus group guides. Therefore, the themes relate to the study objectives.

5.4.2.1 Theme 1: Importance of the criminal prosecutions under transitional justice

Three questions were posed under this theme which enabled the respondents to provide information that covers the first study objective.

Question 1.1: How were victims affected by past abuses and what are the profiles of perpetrators?

The findings indicate that the Congolese population was traumatised physically and psychologically by past abuses as a result of the various armed conflicts. During the various armed conflicts, several crimes were committed against the civilian population as 31 key informants[780] confirmed. The key informants noted that the crimes included killings, large-scale massacre, torture, mutilation, rape and other forms of sexual violence, the spread HIV/AIDS,

[780] Key informant #01DRC interviewed in Goma on 16 December 2013; Key informant #02DRC interviewed in Goma on 17 December 2013; Key informant #03DRC interviewed in Goma on 17 December 2013; Key informant #04DRC interviewed in Goma on 17 December 2013; Key informant #05DRC interviewed in Goma on 17 December 2013; Key informant #06DRC interviewed in Goma on 18 December 2013; Key informant #09DRC interviewed in Bukavu on 20 December 2013; Key informant #10DRC interviewed in Uvira on 21 December 2013; Key informant #11DRC interviewed in Uvira on 22 December 2013; Key informant #12DRC interviewed in Kaniola on 23 December 2013; Key informant #13DRC interviewed in Kaniola on 23 December 2013; Key informant #14DRC interviewed in Burhale on 23 December 2013; Key informant #15DRC interviewed in Uvira on 2 January 2014; Key informant #17DRC interviewed in Uvira on 03 January 2014; Key informant #18DRC interviewed in Bunia on 20 January 2014; Key informant #20DRC interviewed in Bunia on 21 January 2014; Key informant #21DRC interviewed in Bunia on 21 January 2014; Key informant #22DRC interviewed in Bunia on 21 January 2014; Key informant #23DRC interviewed in Bunia on 22 January 2014; Key informant #24DRC interviewed in Bunia on 22 January 2014; Key informant #25DRC interviewed in Bunia on 22 January 2014 ; Key informant #26DRC interviewed in Bunia on 23 January 2014; Key informant #30DRC interviewed in Bunia on 24 January 2014; Key informant #31DRC interviewed in Kisangani on 29 January 2014; Key informant #32DRC interviewed in Kisangani on 30 January 2014; Key informant #33DRC interviewed in Kisangani on 31 January 2014; Key informant #35DRC interviewed in Kisangani on 30 January 2014; Key informant #38DRC interviewed in Kisangani on 01 February 2014; Key informant #40DRC interviewed in Kinshasa on 21 February 2014; Key informant #41DRC interviewed in Kinshasa on 6 March 2014, and Key informants #42DRC interviewed in Kinshasa on 6 March 2014.

looting and destruction of civilian properties, systematic looting of natural resources, forced displacement of civilians, and deportation, etc.

According to the key informants, unknown people wearing uniform and identified as combatants from armed groups allegedly perpetrated some of these violations. However, the identified armed groups, according to key informants include the ADFL, FDLR, ADF/NALU, UPC, FNI, RCD, RCD/ML, CNDP, the Rwandan and Ugandan Armies, the Congolese army or FARDC, demobilised combatants, member of the national police, agents of the National Intelligence Agency, and Congolese militias. For example, key informant #6DRC recalled that Congolese militias committed targeted killings, engaged in the destruction of crops and arson, and committed rape and other forms of sexual violence. The members of the FDLR and ADF/NALU have stood out in terms of kidnapping and malicious destruction of property as well as forced recruitment of young people and rape. Rwandan and Ugandan soldiers have worsened the spread of AIDS, and committed economic crimes such as destruction of harvests, looting of resources in North Kivu and issuing threats. Key informant #09DRC remarked that:

> In South Kivu Province, various international crimes were committed. Elements of the RCD armed group, the Rwandan and Ugandan armies have committed rape as a weapon of war and have recruited and use children in battlefield. The AFDL had as well recruited and used (*sic*) children. The RCD elements were involved in killings and massacres in Kasika, Makobola, Kavumu, and forced the population to leave their places, etc., but also they had buried women alive in Mwenga. Agents of the CNDP committed economic crimes such as looting natural resources, burning schools and markets in Kadutu and Nyawera as well as public infrastructures, and they had raped more than 300 women.

Key informant #31DRC revealed that when the RCD Goma rebel group was in control of Kisangani, the activities of some RCD combatants together with Ugandan and Rwandan soldiers stood out when it comes to crimes committed during the *guerre de six jours* (six days' war). The combatants include Jean Pierre Bilusa, Gabriel Amisi also called 'Tango Fort', Laurent Nkunda and Colonel Byamungu. As in the case of the RSA, the atrocities committed in the DRC can also be grouped under different human rights' violations such as violations of the right to life, to physical integrity, to liberty and security of the person, and to property.

A. Violations of the right to life

In the DRC, murders and large-scale massacres were carried out during the different armed conflicts in the past. According to key informant #06DRC, because most of the targets were men, the country witnessed a great increase in the number of widows and orphans. Key informant #09DRC specified that the RCD rebel group in Mwenga buried women alive, and carried out massacres in Kasika, Makobola and Kavumu in South Kivu Province. Similarly, key informant #13DRC revealed that Rwandan refugees and the FDLR carried out other killings in Kaniola. In Makobola, the RCD had appealed to the internally displaced people (IDPs) to return to their homes, but key informant #11DRC noted that those who returned to their homes were locked up in their houses and then burned as an act of revenge of the attacks against the RCD by the Mai-Mai militias.

Furthermore, nine key informants[781] noted that combatants of the UPC, FNI, the Ugandan army, and the RCD/ML, as well as Rwandan military instructors carried out large-scale massacres in Bunia. The participants in the focus group discussion #1FG/DRC[782] also confirmed this information. Key informant #23DRC revealed that in Ituri, pregnant women admitted to the hospital were disembowelled while other patients were slaughtered like animals. Acts of cannibalism were performed for magical reasons, according to key informant #21DRC, and key informant #30DRC noted that IDPs were killed in Ituri. On 14 May 2000, the Rwandan and Ugandan armies massacred the population in Kisangani. Key informants #31DRC and #35DRC confirmed that the cruelty of the Rwandan army was indescribable.

B. Violations of the right to physical integrity

Violations of the right to physical integrity include torture, mutilation and sexual violence. The acts of sexual violence included gang rape, sexual slavery, rape of minors, sodomy, and inserting sticks and weapons into the vagina of women. Key informant #03DRC said, “I was coming from Walikale territory where the FDLR entered in my house at midnight, killing my husband and bringing me into the forest. I had been raped several times even in the anus and

[781] Key informants #18DRC, #20DRC, #21DRC, #22DRC, #24DRC, #25DRC, #26DRC, #29DRC, #30DRC
[782] #1FG/DRC Focus Group discussion held in Bunia on 20 January 2014.

wounded, tortured and fractured the right hand". This testimony is horrible and demonstrates how women have long suffered the horrors of various armed conflicts in the DRC.

According to key informant #06DRC, Rwandan and Ugandan soldiers also began to spread HIV/AIDS. Participants in the focus group discussion #1FG/DRC affirmed that survivors of rape were abandoned, humiliated and rejected by their families and the community. Key informants #08DRC[783] and #09DRC recalled that some rapists who spoke the Kinyarwanda and Lingala languages were identified to be Rwandan and Ugandan soldiers, and fighters of the RCD and CNDP rebel groups. Key informant #10DRC noted that rape was considered clearly a weapon of war hence militia members raped, killed and inserted pieces of wood and weapons into the vaginas of the victims.

C. Violations of the right to liberty and security

As a result of the conflicts between different rebel groups or between the FARDC and rebel groups, civilians decided to leave their natural environment (areas) to become IDPs and others crossed the borders of neighbouring countries such as Burundi, Rwanda and Uganda to become refugees. According to key informant #20DRC, the population of Ituri was exiled, while key informant #06DRC noted that local and foreign rebel groups were busy with the abductions and forced recruitment of young people.

D. Violations of the right to property

Violations of the right to property include mainly looting and destruction of civilian property and businesses owned by public figures. Participants in the focus group discussion #2FG/DRC[784] as well as key informant #38DRC noted that Rwandan and Ugandan soldiers plundered costly goods and vehicles in Kisangani. Three key informants argued that both armies engaged in the looting of natural resources and burned markets and the homes of civilians in Kisangani. Participants in the focus group #1FG/DRC as well as key informant #30DRC reported that there was looting of livestock in Bunia. Three key informants[785] confirmed the

[783] Key informant #08DRC interviewed in Bukavu on 20 December 2013.
[784] #2FG/DRC Focus Group discussion held in Kisangani on 30 January 2014.
[785] Key informants #25DRC, #26DRC and #35DRC.

systematic destruction of public and private infrastructure in Ituri. In Bukavu, key informant #09DRC confirmed that the CNDP agents had burned schools, and destroyed and looted the markets in Kadutu and Nyawera.

Question 1.2: What is your opinion about the role played by the judiciary and why was your country unable or unwilling to prosecute past crimes?

Regarding factors which hindered prosecution of cases on the domestic level, findings revealed that the lack of judicial reforms, lack of political will, lack of judicial independence, and political interference as well as insufficient funds for investigating past violations.

A. Lack of judicial reform

According to key informants #41DRC[786] and #42DRC, the judicial sector is not yet reformed enough to deal with widespread human rights abuses and gross IHL violations committed since 1996. In this light, key informant #041DRC stated that, "The judicial system has serious operational problems to prosecute crimes (*sic*) committed since 1996. Thus, there is the need to reform the Congolese justice system". In addition, key informant #42DRC argued that, "Before any investigation, it was necessary to begin with the reform of the legal framework that include the adoption of a legislation incorporating the Rome Statute into the domestic law. However, only the ordinary and the military criminal codes were reformed".

B. Lack of political will

According to six key informants,[787] the current government of the DRC does not have any interest or the political will to prosecute alleged perpetrators of crimes committed since 1996. For example, key informant #38RDC said that, "Most of those who committed crimes were promoted to higher ranks in the army, in the police and in the government. The people have little faith in the government because no legal action has been taken against them". Key

[786] Key informant #41DRC interviewed in Kinshasa on 6 March 2014.
[787] Key informants #14DRC, #31DRC, #33DRC, #38DRC, #42DRC and #43DRC. Key informants #43DRC was interviewed in Kinshasa on 25 March 2014.

informant #43RDC also noted that, "Prosecutors are afraid to take action for the lack of political will, but also to wake the old rivalries with the risk for former rebels to be rearmed. The Prosecutor General of the Republic cannot act against the political will by being overzealous with the risk of being disavowed by those in power".

C. Lack of independence/political interference

Twelve key informants[788] and participants in the focus group #1FG/DRC and #2FC/DRC noted that due to lack of independence or political interference, the Congolese judicial system did not investigate past human rights violations and gross IHL violations. For example, key informant #41DRC observed that, "The judicial system has serious problems of operation and lack of independence to fully play its role as those who committed the crimes found themselves in power. There is a saying that 'wolves do not eat each other'. They are not ready (*sic*) for the judiciary to prosecute crimes committed since 1996". Again, key informant #32DRC noted that, "The Congolese justice system is not independent and therefore, it had not done much because magistrates do not have courage and are afraid to prosecute alleged perpetrators protected by the current government". Many of the alleged perpetrators who are most culpable are still walking free. Key informant #33DRC cited the case of Azarias Ruberwa, Gabriel Amisi (called 'Tango Fort') and Bizima Karaha,[789] among others. After the inclusive power sharing formula proposed during the transition, Azarias Ruberwa became the Vice-president in charge of the political committee, and Gabrier Amisi was promoted to the rank of General and appointed as Commander of the 8th Military Region of the North Kivu Province and then the Chief of Staff of the Land Forces (*Forces Terrestres*) of the FARDC.

D. Lack of sufficient funds

According to six key informants,[790] the Congolese judicial system was ineffective due to inadequate financial resources. For example, key informant #05DRC noted that, "The capability

[788] Key informants #09RDC, #11DRC, #13DRC, #14DRC, #23DRC, #30DRC, #32DRC, #33DRC, #38DRC, #41DRC, #42DRC, #44DRC. Key informants #44DRC was interviewed in Kinshasa on 28 March 2014.
[789] Those individuals were former leaders of the RCD rebel group that controlled the eastern DRC between August 1998 and June 2003.
[790] Key informants #05DRC, #06DRC, #18DRC, #21DRC, #41DRC, and #42DRC.

of the Congolese judicial system to deal with past violations is limited due to the lack of financial resources to conduct field investigations". In addition, key informant #06DRC noted that, "The judiciary is working in unacceptable conditions due to inadequate financial resources and poor equipment".

Question 1.3: What is your view of the collaboration between the ICC and the national judicial system and the complementary nature of their operations?

The responses from participants revealed that the ICC complemented the functions of the Congolese judiciary. However, the effectiveness of the ICC was limited becaquse it undertook selective prosecutions, its proceedings were prolonged and crimes committed before the entry into force of the Rome Statute could not be prosecuted retroactively.

A. Complementarity

Thirteen key informants[791] and participants in the focus group #1FG/DRC said that the ICC's jurisdiction over international crimes and its complementarity to the Congolese judicial system is well appreciated because it brought some relief in the fight against impunity considering the lack of political will on the part of the government to prosecute alleged perpetrators. For example, key informant #44DRC remarked that, "The complementarity of the ICC to the Congolese judicial system is significant because it alleviates the immunities and privileges of alleged perpetrators who were promoted in public institutions. Thus, the ICC has annihilated the political weight that can be carried internally". Key informant #22DRC also noted that:

> The intervention of the ICC in the DRC is normal because the DRC is a state-member to the Rome Statute. However, the population is very concerned about the techniques employed by the ICC to conduct field investigations that result in the lack of evidence against alleged perpetrators and therefore unconfirmed charges.

[791] Key informants #08DRC, #11DRC, #13DRC, #17DRC, #18DRC, #21DRC, #22DRC, #24DRC, #25DRC, #30DRC, #31DRC, #38DRC, and #44DRC. Key informants #44DRC was interviewed in Kinshasa on 28 March 2014.

However, key informant #39DRC[792] argued that, "with only one Prosecutor for all the countries, the ICC will not be able to prosecute all individuals bearing the greatest responsibility in the DRC. Thus, under the principle of complementarity, it is appropriate for Congolese courts that have the first responsibility to commit themselves and prosecute other alleged criminals".

B. Selective prosecution

According to eleven key informants[793] and participants in the focus group #2FG/DRC, the ICC is selective because it prosecuted some perpetrators and freed others (mostly the leaders), and it limited its action to crimes committed in Ituri and ignored those committed in the Kivu provinces. For example, participants in the focus group #2FG/DRC said that, "The ICC is selective because it has not prosecuted alleged criminals who were promoted in the public institutions including former Vice President Azarias Ruberwa, and Rwandan and Ugandan militaries including their respective generals Kabarebe and Kazini". Similarly, key informant #42DRC believed that, "The ICC is selective and it has prosecuted on ethnic basis in Ituri, but in Kivu Provinces prosecutions are directed against Rwandan rebels while Congolese rebels have not yet been prosecuted as is the case Nkunda and Ruberwa, etc." However, key informant #39DRC explained that, "The ICC's Prosecutor decided to begin investigations in Ituri due to the gravity of the crimes committed there. However, the Congolese courts must be encouraged to prosecute alleged perpetrators because the ICC's Prosecutor will not be able to prosecute all individuals bearing the greatest responsibility of crimes committed in the DRC".

C. Delay in proceedings

Six key informants[794] and participants in the focus group #1FG/DRC noted that the achievement of the ICC is below the expectations of the population due to the prolonged nature of the proceedings. For example, participants in the focus group #1FG/DRC remarked that, "The jurisdiction of the ICC is in order because the DRC is a State Party to the Rome Statute, but the population is concerned about the slowness of proceedings and the longer trials". Key informant

[792] Key informant #39DRC interviewed in Kinshasa on 18 February 2014.
[793] Key informants #08DRC, #10DRC, #11DRC, #20DRC, #23DRC, #26DRC, #30DRC, #32DRC, #33DRC, #41DRC, and #42DRC.
[794] Key informants #10DRC, #18DRC, #20DRC, #21DRC, #24DRC, and #40DRC.

#10DRC also noted that, "The ICC is too slow and this slowness worries victims because since 2002 it has prosecuted very few perpetrators only one of which was convicted; Mr Thomas Lubanga".

D. Non-retroactivity

According to six key informants,[795] the ICC does not have retroactive jurisdiction for crimes committed in the DRC before its entry into force. For example, key informant #30DRC confirmed that, "The Congolese population welcomed the investigation of the ICC however the population deplores the fact that it will not have retroactive jurisdiction for crimes that were committed before its entry into force in the DRC".

5.4.2.2 Theme 2: Role played by the TRC in dealing with past abuses

In order to uncover information about the role of the TRC in dealing with past abuses, three questions were posed.

Question 2.1: Did victims welcome the establishment of the TRC and what were their expectations?

Key informants presented different views on the establishment of the TRC in the DRC. Whereas some informants were in favour of the establishment of the Commission, others opposed it. Unfortunately, most of the Congolese population was not informed about the establishment of the TRC. According to fourteen key informants,[796] the idea to establish the TRC was welcome as an opportunity to promote reconciliation, for victims to know the truth and articulate their experiences, to listen to perpetrators, to make confessions and ask for forgiveness, to receive restoration/compensation, and for the Commission to receive and investigate complaints. However, victims were disappointed by the composition of its officials.

[795] Key informants #30DRC, #32DRC, #35DRC, #38DRC, #40DRC, and #41DRC.
[796] Key informants #01DRC, #09DRC, #11DRC, #13DRC, #15DRC, #17DRC, #18DRC, #21DRC, #26DRC, #31DRC, #38DRC, #40DRC, #41DRC, and #45DRC. Key informant #45DRC was interviewed in Kinshasa on 28 March 2014.

For example key informant #13DRC said that "victims had welcomed the TRC very well believing that justice will be done to them and peace returned, punish the perpetrators, the fight against impunity (*sic*), and the law respected". Key informant #17DRC noted that:

> When the TRC was established, following the model on the South African TRC, it was a boom for the victims. In fact, it was an opportunity for them to be one day in front of their perpetrators, facing the authors of these abuses. The victims were also waiting to express what they have suffered publicly to obtain justice and compensation.

In addition, key informant #21DRC confirmed that:

> The TRC was very much welcomed by the population expecting to know the truth (*sic*), to receive symbolic reparation and psychological treatment for the crimes committed, forgiveness and prosecutions against perpetrators. However, the population was disappointed with the commissioners: former members of entities and components (*sic*) involved in the crimes committed during the armed conflicts. This showed that the truth would not be restored and that the TRC would not be neutral.

According to key informant #041DRC, "The TRC was well received because victims were waiting for an opportunity (and still waiting) to understand why these abuses of the past occurred and to understand the motivation behind those crimes. However, it should not be synonymous with impunity".

Three other key informants[797] opposed the establishment of the TRC. For example, key informant #33DRC said that, "Victims who were not ready to forgive their offenders did not appreciate the establishment of the TRC". Likewise, key informant #40DRC noted that, "victims who were expecting prosecutions against perpetrators did not welcome the establishment of the TRC". For key informant #42DRC, "victims were in total indifference about the establishment of the TRC and most of them were not aware about its mission and how it is going (*sic*) to operate".

[797] Key informants #33DRC, #40DRC and #42DRC.

Question 2.2: How would you rate the achievement of the TRC?

There are convergences of results from key informants. The first group revealed that they were not aware of any achievement of the TRC in the DRC while the second group acknowledged that the Commission achieved some goals. However, both groups pointed out the reason why it failed.

According to nine key informants[798] and participants in the focus group discussion #1FG/DRC, the TRC of the DRC achieved nothing. For example, key informant #14DRC said that, "The TRC existed legally but we are not informed of its achievements". Similarly, key informant #41RDC noted that, "Formally, the TRC has existed in name only, but in substance, it did not work because alleged perpetrators were in power. There was no way of exposing them in public".

Seven other key informants and participants in the focus group discussion #2FG/DRC acknowledged that the activities of the TRC were focused on meetings of the commissioners, their training abroad and opening of local offices. For example, participants in the focus group discussion #1FG/DRC argued that, "The TRC had received only limited statements from victims and nothing else". Key informant #15DRC also revealed that:

> The TRC did not achieve the objectives for which it was created. After the appointment of Commissioners, it was supposed to start the investigation, receive testimony from witnesses and identify perpetrators, but witnesses were afraid of their security because some warlords were still active. The composition of the TRC was also biased because some Commissioners were appointed from armed groups involved in serious crimes.

However, according to key informants #20DRC and #42DRC, the TRC was involved in pacification and mediation. For example, key informant #20DRC revealed that:

> Coexistence, investigations and revealing the truth were among tasks that the TRC was supposed to do. About coexistence between populations, much was done, and about reconciliation, the TRC focused its activities on reconciling politicians. About the truth-

[798] Key informants #01DRC, #12DRC, #13DRC, #14DRC, #22DRC, #24DRC, #26DRC, #32DRC, #33DRC, and #41DRC.

> seeking, it was difficult for leaders to disclose during the transitional period. They did not give the TRC an opportunity to work well; they have not even provided a sufficient budget for the TRC to work properly. They were saying that the TRC had to wait, wait, and not searching the truth speedily (*sic*). Thus, we began to pacify some areas of the country in order for the 2006 elections to take place. When donors abstained to support financially, the TRC could not achieve its objective.

Other reasons for the failure of the TRC included the issue of insecurity and lack of sufficient funds. In this regard, key informant #45DRC noted that:

> Considering the insecure environment in country, we had to pacify the country; that is why we met national and foreign armed groups to allow the country to function. There were political leaders who were fighting, therefore the TRC went to meet them in order to fix the problem and found a friendly solution. But also, members of the international community represented in the DRC requested very often the TRC (*sic*) not to investigate cases in order for the politicians to not boycott the 2006 elections. When the TRC was established in the DRC, there were still rebel groups active in the forests, how could the TRC register a complaint while alleged perpetrators still carried weapons in their hands? We had to pacify the country and thereafter, start recording complaints otherwise it was difficult.

Question 2.3: How did the amnesty affect victims?

Ten key informants[799] and participants in the focus group discussion #1FG/DRC opined that the amnesty laws promote impunity and create frustration for victims/survivors who were expecting prosecution as well as compensation for the wrongful acts committed against them. Thus, amnesty laws affected victims/survivors as they continue to see alleged perpetrators walk freely because they are deemed untouchable. For example, key informant #11DRC said that, "The amnesty laws have prevented prosecutions against those who attacked and killed unarmed civilian population". Key informant #10DRC also noted that, "Several amnesties laws have frustrated victims/survivors and those who benefited from them are not bothered because the same players have rearmed themselves and commit crimes. Consequently, nothing changes. There is no way to grant amnesty to those who committed serious crimes as it is the case of rebel groups such as RCD, CNDP and M23".

[799] Key informants #01DRC, #06DRC, #09DRC, #10DRC, #11DRC, #13DRC, #15DRC, #18DRC, #21DRC, and #25DRC.

However, twelve key informants[800] and participants in the focus group discussion #1FG/DRC noted that amnesty did not affect victims because crimes committed are imprescriptible. For example, key informant #04DRC claimed that, "The amnesty laws excluded international crimes and the perpetrators do not escape prosecution. The untouchables are protected by the current government, but they will not be protected forever".

5.4.2.3 Theme 3: Ways of restoring the dignity of victims

Question 3.1: What do you think could be done to restore the dignity of victims?

The results in the DRC indicate that the victims' dignity can be restored through the establishment of a new TRC, reparation or compensation programmes, memorialisation, restoration of the State's authority and equitable justice.

A. Establishment of a new TRC

Eight key informants[801] agreed that a new TRC could help to talk about what happened and therefore reconcile the Congolese people. For example, key informant #18DRC believed that "re-establishing a new TRC would help people to talk about the past and heal the wounds". Key informant #45DRC agreed that, "The DRC needs a new consensual TRC (*sic*) whose members would be selected within the civil society organisations and churches and be endorsed by the parliament". However, key informant #42DRC suggested "the creation of a Regional TRC involving countries whose citizens have had hands in past violence such as Burundi, Rwanda and DRC so that people can talk together and know the truth".

Furthermore, nine key informants[802] and participants in the focus group #2FG/DRC agreed the past should be officially acknowledged, alleged perpetrators should tell the truth and apologise publicly in order to avoid the repetition of history. For example, key informant

[800] Key informants #04DRC, #05DRC, #08DRC, #13DRC, #20DRC, #22DRC, #24DRC, #29DRC, #30DRC, #31DRC, #40DRC, and #41DRC.
[801] Key informants #17DRC, #18DRC, #20DRC, #21DRC, #24DRC, #32DRC, #42DRC and #45DRC.
[802] Key informants #05DRC, #09DRC, #11DRC, #20DRC, #23DRC, #29DRC, #30DRC, #31DRC, and #38DRC.

#20DRC felt that "the offenders should tell the truth and ask for forgiveness publicly in order to avoid the repetition of history". Similarly, key informant #23DRC pointed out that "the government should recognise past abuses and its failure, and then formally and official apologise".

B. Reparation

Eighteen key informants[803] and participants in the focus group #2FG/DRC agreed that victims should be compensated and reparation must be made for damages suffered. Participants in the focus group #2FG/DRC noted that, "Just reparation and individual compensation are necessary for victims". Key informant #41DRC added that, "A special fund for the compensation of victims should be created". Six key informants[804] noted that reparation should be symbolic in the form of community reparation. For example, key informant #42DRC suggested that, "Collective reparation should be through building hospitals, schools and vocational training centres in memory of victims". In addition, key informants #31DRC and #38DRC called on Uganda to compensate victims of the Six Days' War in Kisangani.

C. Memorialisation

Nine key informants[805] and participants in the focus group #2FG/DRC suggested that a day be set aside to remember people killed during different armed conflicts and that memorial museums should be part of symbolic/community reparation. For example, key informant #14DRC said that, "The construction of monuments/memorials would provide relief for the affected population that will see the names of their members killed during different armed conflicts". Key informant #21DRC noted that in like manner, "The State should build an official memorial where victims would be remembered and dedicate a day to remember past atrocities".

[803] Key informants #03DRC, #05DRC, #08DRC, #10DRC, #11DRC, #14DRC, #15DRC, #22DRC, #24DRC, #25DRC, #26DRC, #30DRC, #31DRC, #33DRC, #38DRC, #40DRC, #41DRC, #42DRC. Key informant #25DRC was interviewed in Bunia on 22 January 2014.
[804] Key informants #22DRC, #24DRC, #26DRC, #32DRC, #33DRC and #42DRC.
[805] Key informants #09DRC, #11DRC, #14DRC, #15DRC, #21DRC, #22DRC, #24DRC, #25DRC, 32DRC.

D. Restoration of the State's authority

Eight key informants[806] agreed that peace should be re-established, the the country secure and the people pacified in order to restore theauthority of the State throughout the territory of the DRC. For example, key informant #10DRC said that, "the security should be restored in order to prevent what happened not to happen (*sic*) again". Key informant #20DRC also suggested that, "The youth should be educated on the culture of peace, peaceful coexistence and reconciliation", and key informant #06DRC agreed that "the authority of the State should be restored throughout the whole national territory".

E. Justice/prosecution

According to fourteen key informants[807] and participants in the focus group #1FG/DRC, good administration of justice in which the law is applied to all would restore the dignity of victims. For example, key informant #05DRC believed that the "the judiciary should play its role in order for perpetrators to be held accountable for what they did". Key informant #10DRC also agreed that, "Alleged perpetrators must be held accountable and the hearings should be conducted in the areas where crimes were committed". However, key informants #35DRC and #38DRC argued that, "the international justice should prosecute Rwandan and Ugandans soldiers who committed crimes in Kisangani".

[806] Key informants #04DRC, #05DRC, #06DRC, #07DRC, #10DRC, #13DRC, #18DRC, and #20DRC. Key informant #07DRC interviewed in Goma on 18 December 2013.

[807] Key informants #01DRC, #02DRC, #04DRC, #05DRC, #06DRC, #10DRC, #11DRC, #13DRC, #14DRC, #24DRC, #35DRC, #38DRC, #40DRC, and #42DRC.

5.4.2.4 Theme 4: Recommendations for building a sustainable peaceful future

Question 4.1: What do you suggest should be done to deal with the past abuses, reconcile the nation, rehabilitate and compensate victims, and build a sustainable future?

To the Government of the DRC

Respondents called on the DRC government to:

- Restore peace and the State's authority throughout the national territory, secure the population and its property, secure rural areas and eradicate armed groups;[808]
- Secure all borders especially the borders between the DRC, Rwanda and Uganda and therefore urge neighbouring countries to stop interfering in the country's internal affairs and cultivate a good neighbourhood policy;[809]
- Reform the security services (army and national police) and ensure that former militias are well trained (especially in human rights law and IHL) before their integration into the security services;[810]
- Create jobs in areas affected by armed conflicts by prioritising the development of youth whom rebel groups often target for recruitment;[811]
- Improve the Congolese life, access to health care, access to education, and public transportation, and carry out maintenance of agricultural feeder roads;[812]
- Enable the land law reform to begin in order to prevent land conflicts, promote human rights law and improve local governance and transparency in public affairs;[813]
- Re-establish the "Barza *inter-communautaire*" as a permanent organ of reconciliation which would afford people the time and opportunity to talk about the conflicts without

[808] Key informants #05DRC, #06DRC, #13DRC, #17DRC, #18DRC, #21DRC, #22DRC, #24DRC, #30DRC, and #33DRC.
[809] Key informants #05DRC, #06DRC, #23DRC, and #26DRC.
[810] Key informants #18DRC, #21DRC, #33DRC, #42DRC and participants in the focus group discussion #1FG/DRC
[811] Key informants #13DRC, #14DRC, and #22DRC.
[812] Key informants #15DRC, #22DRC, #24DRC, and #41DRC.
[813] Key informants #02DRC, #13DRC, #14DRC, #15DRC, #21DRC, #22DRC, #24DRC, #30DRC, #32DRC and participants in the focus group discussion #1FG/DRC and #2FG/DRC.

inhibition and restore inter-ethnic confidence as people begin to accept one another and allow their broken hearts to heal.[814]

On the establishment of the TRC

Respondents also called on the government to:

- Summon the courage to face the past by restoring or creating a new TRC with a sufficient budget that would match its mission, and involve the Congolese population in the process of establishing the TRC and of appointing the TRC's members chosen by the people.[815] However, commissioners should be representatives of the Congolese civil society as well as other experienced Africans;[816]
- Encourage victims/survivors to speak out (de-traumatisation) without fear of stigma in order to ensure that they are not doubly victimised by silencing them;[817]
- Encourage alleged perpetrators to confess their crimes, tell the truth and sincerely ask for forgiveness;[818]
- Create a fund administered by the TRC to compensate victims and to redress damages incurred in order to guarantee also non-recurrence of the crimes;[819]
- Build schools to grant free access to education as guaranteed by the Constitution, public halls or auditoriums, maternity and female training centres, monuments or museums as well as prisons in various chiefdoms in memory of victims of past atrocities and as community reparation in areas affected by armed conflicts such as Makobola, Kaniola,

[814] Key informants #05DRC, #06DRC, #09DRC, #14DRC, #17DRC, #18DRC, #20DRC, #23DRC, #25DRC, #30DRC, and #32DRC.

[815] However, key informants #10DRC and #25DRC opposed the idea of establishing a new TRC. They believed that it might shock the sensibilities of some people and awaken old hatred. Rather, they suggest that the idea of the creating a framework or institution for permanent dialogue where survivors will express themselves without fear of stigma can heal the broken-hearted. See Key informant #25DRC interviewed in Bunia on 22 January 2014.

[816] Key informants #02DRC, #04DRC, #05DRC, #06DRC, #11DRC, #13DRC, #14DRC, #17DRC, #21DRC, #35DRC, #38DRC, #40DRC, #41DRC, #45DRC and participants in the focus group discussion #1FG/DRC.

[817] Key informants #06DRC, #14DRC, #17DRC, #21DRC, #24DRC, #38DRC, and #42DRC.

[818] Key informants #11DRC, #13DRC, #21DRC, #23DRC, #30DRC, #40DRC and participants in the focus group discussion #1FG/DRC and #2FG/DRC.

[819] Key informants #03DRC, #04DRC, #09DRC, #13DRC, #17DRC, #20DRC, #32DRC, #33DRC, #35DRC, #38DRC, #41DRC, #45DRC and participants in the focus group discussion #1FG/DRC and #2FG/DRC.

Ituri and Kisangani.[820] However, key informants #35DRC and #38DRC and participants in the focus group discussion #2FG/DRC advised that reparation for victims of the Six Days' War in Kisangani should be for individuals and not the community;

- Encourage the Congolese government to acknowledge past atrocities officially as well as its failure to protect the population especially the residents of Ituri;[821]
- Encourage the participation of the population in the reconciliation efforts at the local level and restore the "Barza *Inter-communautaire*" as a permanent traditional mechanism for conflict resolution and reconciliation;[822]
- Sensitise women to issues of conflict transformation because to educate a woman is to educate an entire nation and this would help to prevent history from repeating itself;[823]
- Organise a roundtable conference for reconciliation of the civil societies from the DRC, Rwanda and Uganda to promote reconciliation between the Congolese population and Rwandan as well as Ugandan population following the crimes committed by Rwandans and Ugandans armies in the DRC.[824]

To the Congolese judiciary

Respondents called on the judiciary to:

- Prosecute alleged perpetrators of past abuses and sentence those found guilty as a deterrence to others, prevent relapse, and make it difficult for prisoners to escape once in prison;[825]
- Avoid the culture of impunity by applying the law fairly to everyone, ensure that victims are not victimised twice and curb corruption;[826]

[820] Key informants #20DRC, #21DRC, #22DRC, #25DRC, #35DRC, #38DRC, #40DRC, and #45DRC.
[821] Key informants #14DRC, #23DRC, #24DRC, #33DRC and participants in the focus group discussion #2FG/DRC.
[822] Key informants #05DRC, #17DRC, #22DRC, #23DRC and #25DRC.
[823] Key informant #20DRC.
[824] Key informants #31DRC, #32DRC, and #45DRC.
[825] Key informants #01DRC, #02DRC, #13DRC, #14DRC, #20DRC, #35DRC and participants in the focus group discussion #1FG/DRC and #2FG/DRC.
[826] Key informants #02DRC, #13DRC, #18DRC, #32DRC and participants in the focus group discussion #1FG/DRC and #2FG/DRC.

- Ensure the independence of the judiciary and allocate sufficient funds to ensure that judges are well paid so that they are not tempted to practice corruption. However, the State must also respect the law and the decisions of the courts if the State is found to be a co-offender;[827]
- Revoke the procedure that requires victims to pay 6% before having access to reparations because victims are almost always vulnerable;[828]
- Reform the judicial sector;[829]
- Summon the courage to apply the vetting/lustration process that calls for the removal from public office those who committed crimes in the past.[830]

To the ICC

Respondents urged the ICC to:

- Effectively apply the complementarity principle in order to prosecute and convict individuals bearing the greatest responsibility including Rwandan and Ugandan soldiers;[831]
- Extend its coverage to the whole of the DRC to avoid being labelled as one-sided and slow;[832]
- Create a courtroom at the local level in the DRC.[833]

[827] Key informants #05DRC, #09DRC, #10DRC, #21DRC, #32DRC, #38DRC, #40DRC, #41DRC, #42DRC, #43DRC, and #44DRC
[828] Key informant #44DRC.
[829] Key informants #18DRC, #21DRC, #30DRC, #33DRC, #42DRC and participants in the focus group discussion #1FG/DRC.
[830] Key informants #41DRC and #45DRC.
[831] Key informants #39DRC, #44DRC and participants in the focus group discussion #1FG/DRC.
[832] Key informant #18DRC, participants in the focus group discussion #1FG/DRC and participants in the focus group discussion #2FG/DRC.
[833] Key informant #10DRC.

To the UNSC

Respondents called on the UNSC to:

- Create a special court for the DRC to prosecute under international law crimes committed before the entry into force of the Rome Statute;[834]
- Initiate an international investigation of the incidents in Makobola and Kisangani in order to reveal the truth about the crimes to the international community since the DRC government is unwilling to make any move in this regard.[835]

5.5 Discussion of Findings - A Comparative Appraisal of the Situations in the RSA and the DRC

This section considers differences and similarities in the study objectives in the two case studies. Findings from the fieldwork were confronted with the literature in order to determine their points of convergence and of divergence. The observed differences and similarities are then presented in a table followed by an explanation to demonstrate what the DRC can learn from the South African experience. The section is therefore divided into three sub-sections based on the following themes: the role of the criminal prosecutions under transitional justice; the role of the TRC in dealing with past abuses, and ways of restoring the dignity of victims.

5.5.1 Theme 1: Role of the criminal prosecutions under the transitional justice system

This subsection discusses the data on past abuses; prosecutions on local and international levels, and similarities and differences in the RSA and DRC cases.

[834] Key informants #33DRC and #41DRC.
[835] Key informants #11DRC, #12DRC, #37DRC and participants in the focus group discussion #2FG/DRC.

5.5.1.1 Past abuses

A. In the RSA

Commenting on the context of past violations in the RSA, respondents recalled that black South Africans were traumatised physically, economically and psychologically during the apartheid era. Past abuses included extra judiciary killings, prolonged detention of people without trial, torture, cruel, inhumane and degrading treatment, rape, abduction, forced disappearance, racial classification, forced relocation of residents, denying youths access to education; dispossession of lands, arson and destruction. State and non-State actors committed those violations during the struggle against the segregationist regime. The findings corroborate with the statements of some authors presented in the previous chapters.

For instance, in Chapter 3 (section 3.2.1), some of the findings from literature include Priscilla B. Hayner's observation that under the apartheid regime, massacres, killings, torture, lengthy imprisonment of activists, etc., were some of the acts committed against the majority non-white population. Piers Pigou also showed that during the apartheid era the political leadership was aware of abuses committed by the security forces. In Chapter 3 (section 3.5.4), the testimony by Eugene De Kock confirmed that torturing anti-apartheid activists was legitimated by the state because the accused police officers were doing their job even though they operated above the law without fear of punishment. In addition, De Kock and Willie Esterhuyse attested that the Minister of Law and Public Order awarded medals and Police Stars to these officers for outstanding service to the Minister of Police. Section 3.2.1 of this study also cites the statement by Parker and Mokhesi-Parker that protecting the interest of the white minority required the control of black labour and land which resulted in land dispossession and forced labour enforced by white courts as much as by private terror.

However, the international community as a whole denounced the racial segregationist regime in South Africa. Thus, in chapter 2 (section 2.4) and chapter 3 (subsection 3.2.1), a number of resolutions which condemned the apartheid policy in South Africa and the massive violations of international law were outlined. These resolutions were adopted by the UNSC (Resolutions 392(1972) and 473(1980)) as well as by the UNGA (Resolutions 2189(XXI) of

1966, 2262(XXII) of 1967, 2326(XXII) of 1967, 2671(1970) and Resolution 33/183B(1979)). Thus, at the international level, the effects of the apartheid policies were considered crimes against humanity which were committed during an international armed conflict in which the black majority fought against the white racist regime.

Indeed, findings from the fieldwork are corroborated in some way by the literature, but the main difference is that the literature demonstrates that acts committed were prohibited officially. However, the political leadership was aware of the activities of the security forces against opponents of the apartheid regime even though it decided to turn a blind eye.

B. In the DRC

The findings from the fieldwork reveal that during the covered period by this study, the Congolese population was traumatised by killings, large-scale massacre, burial of women alive, torture, rape and other forms of sexual violence, forced relocation, abduction, forced recruitment, looting and destruction of civilian properties, etc. Thus, the findings corroborate the views of some authors presented in chapter 4 of this thesis. For instance, subsection (4.2.1) and section (4.3) show that the UNHROHC, HRW, Tunamsifu, and the UNSC demonstrate that all actors (including foreigners) in armed conflicts were involved directly or indirectly in gross human rights violations and violations of IHL.

In this regard, findings from the fieldwork corroborate the literature and indicate that participants were aware or even witnesses of those past atrocities committed by the parties (Congolese and foreign State and non-State actors) involved in the different armed conflicts.

C. Similarities and differences between past abuses in the RSA and in the DRC

This subsection presents some similarities and differences in past violations in both the RSA and the DRC which are outlined in the table below.

Table 4: Similarities and differences between past abuses in the RSA and in the DRC

	Similarities RSA and DRC		Differences	
			RSA	**DRC**
Classification of human rights violations	Violations of the right to life	- Extra judiciary killings	- Prolonged detention of people without trial	- Large-scale massacres - Burial of women alive
	Violations of the right to physical integrity	- Torture - Rape	- Cruel, inhumane and degrading treatment	- Mutilation
	Violations of the right to liberty and security	- Abduction	- Disappearance - Racial classification - Forced relocation of people - Denial of access to basic education	- Forced recruitment of young people as militants - Forced displacement
	Violation of the right to property	Destruction of properties	- Dispossession of lands - Burning of houses	- Looting

Source: compiled by the researcher

The table above indicates that widespread violations were committed in the past which called for appropriate transitional justice mechanisms. Thus, from the table, the following explanations can be made.

1. Violations of the right to life

Regarding the violations of the right to life, findings reveal similarities in the large-scale killings that occurred in both the RSA and the DRC. It is estimated that several millions of people lost their lives in both countries. However, in the case of the DRC, approximate statistics reveals that

between six and twelve million persons were killed in various armed conflicts from 1996, but there is no approximate statistics in the case of South Africa because it is difficult to determine the number of people who died from the atrocities of the apartheid regime. In the DRC, murders were committed as a result of indiscriminate attacks against civilian populations, directed against a particular unarmed population as an act of revenge (e.g. burying women alive) or because the victims belonged to a specific group (as in the case of the massacre of Rwandan refugees during the 1996-1997 internationalised armed conflict), etc. In South Africa, acts of murder were perpetrated against anti-apartheid activists often during (but not limited to) demonstrations and during acts of sabotage by the liberation movement.

2. Violations of the right to physical integrity

In South Africa, detained anti-apartheid activists were subjected to torture and other inhumane and degrading treatments to extract information from them; those acts resulted in the death of many victims. In the DRC, civilians suspected of supporting a rival group or accused of complicity with rebel groups or national forces were subjected to torture and other inhumane and degrading treatment to intimidate and discourage them. However, widespread torture in South Africa was part of a policy implemented against opponents which resulted in the death of thousands of victims.

As regards rape and other forms of sexual violence committed in the DRC's *"zone de combat"* in the period covered by this study, reports show that thousands of women and girls were sexually violated (and many remain victims). Those acts, including genital mutilation, were used as weapons of war in the armed conflicts in order to humiliate and traumatise local communities. In South Africa, it seemed that under the apartheid regime rape and other forms of sexual violence were committed in isolation due to Act No. 55 (1949) that prohibited marriages between whites and blacks. However, it is reported that a relatively large number of coloured people trace their roots "to forced sexual relations between white men and black women", and[836] even though it was considered an act of immorality, some white and black couples were attracted to one another and fell in love.

[836] Haussman http://www.cengage.com/resource_uploads/downloads/1111832552_336155.pdf (Date of use: 20 July 1015).

3. Violations of the right to liberty and security

Abduction was one of the violations of the right to liberty and security that were common to both countries. For example, in South Africa, most of the people who were abducted simply disappeared. However, in the DRC, rebel groups abducted women and young girls essentially to use them as sex slaves. In South Africa, as a result of the racial classification, black people were relocated to townships and deprived of access to good education. This situation left a gap that cannot be filled for now. In the DRC, forced displacement occurred as a result of the armed conflicts. Many people became displaced and others crossed the borders to become refugees in neighbouring countries. Consequently, there were shifts in the school calendar year following the movement of people fleeing from the armed conflicts.

4. Violations of the right to property

In South Africa, many people of colour were dispossessed of their lands, States records were almost completely destroyed by the previous regime while members of the liberation movement damaged public structures in efforts to sabotage the apartheid regime. In the DRC, destruction of public and economic structures occurred either as a result of indiscriminate attacks or because they were military targets. However, civilian properties were destroyed as a result of indiscriminate attacks or as acts of revenge. The difference in both countries is that black people were dispossessed of their lands to protect the interests of white farmers in the RSA, but in the DRC, widespread looting of civilian property occurred during the different armed conflicts.

From the above, it can be understood that past abuses in both countries followed similar trends. Large-scale violations resulted in the large number of victims (millions of them), and in tens of thousands of perpetrators. In both cases, State and non-State actors were involved in the atrocities. However, in the DRC, the abuses had a regional dimension due to the involvement of foreign actors. In South Africa where people fought against a racist regime, apartheid was considered an international armed conflict, whereas the involvement of foreign States in what was supposed to be a non-international armed conflict internationalised the armed conflict in the DRC.

The findings from literature and key informants revealed that people were traumatised and that there were fundamental reasons for operating the TRC along with the prosecutions. In responding to the past abuses, both countries opted for transitional justice mechanisms in order to meet the need of reconciliation and of justice with different approaches.

5.5.1.2 Prosecutions at the local level

A. In the RSA

Regarding national justice in the RSA, findings revealed that there was lack of judicial reform of the previous legal order and the lack of political will to prosecute gross violations of the past. However, respondents acknowledged that few prosecutions were undertaken.

A.1 Lack of judicial reform

Findings revealed that during the apartheid regime, the policy of racial segregation was institutionalised and the previous legal order helped to sustain the apartheid policy. Thus, it was unfair to pretend that the same legal order could render justice to the victims. These findings corroborate with the views of some authors that there was lack of reform in the judiciary.

For example, in chapter 3 (sub-section 3.5.2.1), we see that the Center for the Study of Violence and Reconciliation has noted that the judiciary during the apartheid era functioned as part of the apartheid legal order and contributed to legitimising and sustaining that system. In this regard, Volker Nerlich has demonstrated that laws build on the negation of equality cannot be considered laws at all. Hence, the NDPP Bulelani Ncquka denounced the lack of transformation of the judiciary following the acquittal of Michael Luff. Mia Swart has argued also that the South African criminal justice system was ill equipped to prosecute opponents of the apartheid state. Furthermore, in chapter 1 (subsection 1.9.1/B), the views of Alison Bisset, Lovell Fernandez, Tyler Giannini *et al*, etc. demonstrate that many white prosecutors and judges who remained in their positions after the apartheid were unwilling to prosecute former senior officials of the apartheid era.

Therefore, the researcher is of the opinion that societies in political transition where the previous legal order was built to sustain the oppressive system or the segregationist regime, as in the case of South Africa, have the urgent task to reform the legal order and apply the lustration process.

A.2 Lack of political will

Findings revealed that the post-apartheid government lacks the political will to prosecute many perpetrators of apartheid era crimes especially those who did not apply for amnesty or those to whom amnesty was denied as recommended by the TRC. These findings corroborate with the literature referred to in chapter 3.

For example, in chapter 3 (subsection 3.4.2.3), it is noted that the TRC's report (vol 5) recommended that prosecution should be considered where evidence exists. However, in section 3.5 (footnote 451), we cite Lovell Fernadez who claims that the government is unwilling to go ahead with prosecution, and Louise Mallinder who argues that the promise of prosecution was a false one.

The researcher is of the opinion that failing to comply with the TRC's recommendation that there be prosecution of those who were denied amnesty or failed to apply for amnesty regardless of their previous or current positions or ranks demonstrates the lack of commitment to fight impunity in accordance with the government's obligation under standard international law. Nevertheless, investigation and prosecution become difficult when perpetrators of gross violations of human rights are found on both sides. Therefore, South Africans should challenge the government's unwillingness to implement the TRC's recommendation to prosecute offenders because no one is above the law. It is also important to consider that it is not possible to prosecute every perpetrator, but those who bear the greatest responsibility should be held accountable for their crimes.

A.3 Few prosecutions

The results from the fieldwork demonstrate that only a few cases of those who failed to apply for amnesty were prosecuted. These few cases however encouraged other perpetrators to apply

for amnesty. For instance, in Chapter 3, the Gideon Nieuwoudt Case's (3.5.1), Dr Basson and Blani Cases (3.5.2) and Chikane case (3.5.3) were analysed. In the same chapter (3.3.3), we note that Volker Nerlich and Ole Bubenzer as well as Alison Bisset in chapter 1 (1.9.1/B), all argue that the threat to prosecution was used as the impetus for perpetrators to offer testimony and therefore receive amnesty. In this regard, Volker Nerlich (see 3.3.3) affirms that the criminal justice played a crucial role in encouraging perpetrators to apply for amnesty in order for victims to know the truth.

It is estimated that there are millions of victims and tens of thousands of perpetrators, and this research notes that during the transition, healing broken relationships was prioritised through the TRC as a measure of restorative justice. Therefore, prosecutions were not organised as is normal practice in criminal justice. The judiciary then played a minor role by prosecuting few cases, a role which can be likened to a drop of water in the mighty ocean. Besides, the constitutionality of the TRC Act (see chapter 3, section 3.5) was not a limitation to the victims' right to justice against perpetrators who had failed to apply for amnesty or who were denied amnesty. Therefore, for South Africans to be assured that justice indeed prevails, the TRC's recommendation to prosecute those who failed to apply for or who were denied amnesty should be implemented.

B. In the DRC

On the factors that hindered prosecutions of cases on the domestic level in the DRC, findings revealed that these include the lack of judicial reforms, lack of political will, lack of judicial independence or political interference, and lack of sufficient funds to investigate past violations.

B.1 Lack of judicial reform

Results from the fieldwork show that the Congolese judicial system is faced with serious challenges and it has not yet undergone complete reform that would enable it to deal with widespread violations committed from 1996 upward. This point corroborates the views of Federico Borello, Laura Davis and Priscilla Hayner and the OHCHR noted in chapter 1 (1.9.2/B) and in chapter 4 (4.3 and 4.4), about the need for judicial reform in the DRC which has experienced protracted armed conflicts.

However, this study also admits that from 2002, significant reforms have been carried out which include the adoption of the Military Code of 2002 and of the Congolese Criminal Code (for civilians) of 2004. Two laws on sexual violence were adopted in July 2006 defining and criminalising different acts of sexual violence respectively, [837] and which relate to the criminal procedure,[838] while the Organic Law of 2013 enables civilian courts to try crimes under international law (see Chapter 4, section 4.4). In trying cases of crimes under international law, the Congolese criminal justice system applies the Rome Statute. In this regard therefore, it is important that the parliament adopt a law that would incorporate the Rome Statute into the domestic legal framework.

B.2 Lack of political will

The findings from the fieldwork reveal that the present government of the DRC does not show any interest or political will to prosecute alleged perpetrators of crimes committed from 1996. In the same vein, Federico Borello, Laura Davis and Priscilla Hayner and the OHCHR (see Chapter 1, 1.9.2/B and Chapter 4, section 4.4) argue that there is no political will on the part of the government to instruct the Congolese judicial system to prosecute crimes committed by former warring parties. The researcher is of the opinion that such stance encourages impunity and may not deter similar violationsin the future.

B.3 Lack of independence/political interference

Findings from the fieldwork also confirm that the Congolese judiciary did not investigate past violations due to lack of independence and political interference. This observation corresponds with the views of Federico Borello, Laura Davis and Priscilla Hayner, UNHROHC, Savage and Kambala wa Kambala (see Chapter 1, 1.9.2/B and Chapter 4, 4.4) that lack of independence due to political interference is one of the factors that hindered the Congolese judiciary from prosecuting past violations. Besides, HRW (2010) and the OHCHR (see chapter 4, 4.2.2.) argue that the fact that abusers were promoted or granted important posts in the army, National Police

[837] *Loi No. 06/018 du 20 juillet 2006 modifiant et complétant le Décret du 30 janvier 1940 portant Code Pénal Congolais.*

[838] *Loi No. 06/019 du 20 juillet 2006 modifiant et complétant le Décret du 06 août 1959 portant Code de Procédure Pénale Congolais.*

and the diplomatic corps gave the impression that the government encourages impunity in the name of peace and national unity.

The researcher is of the opinion that in the aftermath of various armed conflicts, it is difficult on the domestic level to investigate and prosecute crimes that involve prominent figures.

B.4 Insufficient funds (low budget)

The results from the fieldwork also show that the ineffectiveness of the Congolese judicial system was due to inadequate financial resources. This finding corroborates the arguments by Federico Borello and the OHCHR (see Chapter 1 1.9.2/B and Chapter 4 section 4.4) that the Congolese justice system is crippled by inadequate funding which results in a low budget.

The researcher is of the opinion that depriving the Congolese judicial system of sufficient financial resources that would enable it to investigate and prosecute cases of those who committed crimes amounts to putting the past on hold in a way that would continue to haunt the future.

5.5.1.3 Prosecutions at the international level - the case of the ICC

A. In the RSA

A.1 Non-retroactive function of the Statute

The results from the fieldwork reveal that the ICC could not deal with apartheid-era crimes committed in South Africa prior to the entry into force of the Rome Statute. This finding corroborates with Act 27 of 2002 about the implementation of the Rome Statute in South Africa. Indeed, Act 27 integrated the Rome Statute in its Annexure and therefore, Article 24 entitled *non-retroactivity, ratione personae* is reproduced in the same manner. Article 24(1) states that, "No person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute".

We argue here that the Rome Statute does not have jurisdiction to deal with apartheid-era crimes committed in South Africa. However, in its Preamble, the Statute states that in order to put an end to impunity, "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". It also stipulates that, "It is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes". By failing to do so, South Africa is therefore violating its commitment.

Instances in which South Africa tried to comply with its obligation to cooperate occurred during the first inauguration of President Zuma in 2009 and the opening ceremony of the World Cup in South Africa in 2010, which President Al-Bashir was invited to attend. However, as Al-Bashir was under an international arrest warrant delivered by the ICC in 2009 and 2010 for war crimes, crimes against humanity and genocide committed in Darfur, he declined both invitations since South African officials confirmed their resolve to arrest him if he entered the country.[839]

However, a few years later, President Al-Bashir expressed his willingness to attend the African Union Summit in South Africa scheduled for 7-15 June 2015. This constituted a third test of South Africa's obligation to cooperate as a State Party to the Rome Statute. Thus, on 15 April 2015, the ICC's Chamber issued its orders to the Registrar to notify South Africa to arrest and hand over the fugitive to the Court.[840] Again, on 28 May 2015, the Registrar through a *note verbale* reminded the South African Embassy in The Hague of the need to fulfil its obligation to the Rome Statute.[841]

Nevertheless, the South African government decided to welcome President Al-Bashir to the country, arguing that the host agreement with the AU Commission provides for privileges and immunities to all delegates attending the Summit. Considering that the agreement violated Article 27 of the Rome Statute, the High Court decided that agreement could not trump South Africa's obligation and therefore issued a provisional order to the Director General of Home Affairs to prevent President Al-Bashir from leaving South Africa pending a final ruling to

[839] Mangu 2015 *AJDG* 186.
[840] *The Prosecutor v. Omar Hassan Ahmad Al Bashir* ICC-02/05-01/09-247 04-09-2015 2/7 SL PT.
[841] *The Prosecutor v. Omar Hassan Ahmad Al Bashir* ICC-02/05-01/09-249 15-10-2015 2/6 NM PT.

charge him or transfer him to the ICC. Unfortunately, on 15 June 2015, President Al-Bashir was helped to disregard the court order and to flee the country in violation of South Africa's domestic and international obligation. This is what Professor André Mbata Mangu describes as "government's backpedalling on human rights and the rule of law in post-Mandela South Africa".[842] Having failed to fulfil its obligation, the government of President Zuma played with the idea of withdrawing South Africa from the Rome Statute.

B. In the DRC

Regarding prosecutions at the international level, specifically at the ICC, findings reveal that there is complementarity of operation between the ICC and the Congolese judicial system. However, criticisms levelled against the ICC claim that it undertakes selective prosecutions; its proceedings are too slow and there is no retroactive application of its laws for crimes committed before the entry into force of the Rome Statute.

B.1 Complementarity

Findings from the fieldwork further reveal that the ICC's jurisdiction over international crimes and its complementarity to the Congolese judicial system reinforce the immunities and privileges enjoyed by alleged perpetrators who were appointed to public institutions. The findings also corroborate Article 1 of the Rome Statute and the views of Song Sang-Hyun and El Zeidy (see chapter 4, 4.3) that applying the principle of complementarity to the national criminal jurisdictions is fundamental, but it does not replace national jurisdictions. On the conduct of the ICC during field investigation, Buisman (see chapter 4, 4.3.2.1) argues that the concern for security in the affected areas was the principal reason for outsourcing the investigation.

Thus, the researcher is of the opinion that the ICC's jurisdiction over the cases due to the unwillingness to prosecute on the local level is an alternative mechanism in the fight against impunity. However, the investigative failures of the team of the Office of the Prosecutor deprive

[842] Mangu 2015 *AJDG* 183-194.

the court of sufficient evidence making victims who expected the alleged perpetrators to be convicted appear as losers.

B.2 Selective prosecution

The analysis of the fieldwork reveals that the ICC is selective in its handling of cases because it prosecuted some perpetrators and left others (presumably the leaders) untouched, and it limited its operation to crimes committed in Ituri and not those committed by Congolese warlords in the Kivu provinces. This allegation of bias in the ICC cases in a sense validates the argument by Alana Tiemessen, Tim Murithi, John Mukum Mbaku and Max du Plessis, Tiyanjana Maluwa and Annie O'Reilly (see chapter 2, 2.5.1.5) that the prosecutions conducted by the ICC's Prosecutor have become selectively biased against Africans and the ICC has failed to demonstrate its independence and impartiality.

The researcher is of the opinion that findings from the fieldwork and literature in this regard differ only in terms of nuances because the literature notes that the ICC selectively prosecutes mostly African cases while respondents accuse the ICC of focusing mainly on Ituru neglecting other provinces of the DRC. Thus, at the local level, prosecutions are selective because the ICC has focused mainly on Ituri and has not yet carried out serious prosecution of former Congolese warlords or officials who are now integrated into and promoted within public institutions and are alleged perpetrators of crimes committed in the Kivu provinces. However, even in Ituri District, no arrest warrant has been issued to Ugandan and Rwandan soldiers who allegedly committed crimes during the internationalised armed conflicts in Ituri. No effort has yet been undertaken at the local level, but the principle of complementarity would work better if prosecution targets perpetrators from all sides of the conflicts in provinces affected by conflict.

B.3 Delay in proceedings

Findings from the fieldwork also reveal that the Congolese population is concerned about the slowness of the proceedings and the prolonged trials. This finding corroborates with the observation of a number of authors such as Rowe and Steger, Mihajlov, Laborde-Barbanègre M and Cassehgari R, and of the War Crimes Research Office (see chapter 2, 2.5.1.5), confirming

the issue of the slowness of the proceedings of the ICC as well as of the Appeals Chamber to issue its judgements.

The researcher is of the opinion that the frustration of the millions of victims (compared to the hundreds of thousands of perpetrators) about the delay in proceedings and trials is understandable. If the ICC does not expedite his proceedings and its trials, many victims would be dead before a final verdict is reached their case.

B.4 Non-retroactivity

The analysis of the fieldwork shows that the population deplores the fact the ICC does not have retroactive jurisdiction for crimes committed in the DRC before the entry into force of its Statute. This finding corresponds with Article 24 of the Rome Statute (see Chapter 2, 2.5.1.5) that guarantees the principle of non-retroactivity *ratione personae*. The principle implies that the ICC has jurisdiction only over crimes committed after the entry into force of the Rome Statute on 1 July 2002.

This research notes that respondents are aware that according to Article 24 of the Rome Statute, the Court cannot exercise jurisdiction over any crime committed before 1 July 2002.

5.5.1.4 Similarities and differences between prosecutions at the local and international levels in the RSA and in the DRC

This sub-section presents some similarities and differences in the judicial mechanisms employed in dealing with past violations in both the RSA and the DRC. The table below outlines the major differences and similarities.

Table 5: Similarities and differences in judicial mechanisms

Level	Similarities (assessment)	Differences	
		RSA	**DRC**
Local level	- Lack of judicial reform - Lack of political will	Few prosecutions	- Lack of independence/political interference - Lack of sufficient funds
International level - the ICC	- Non-retroactive laws		- Complementarity - Selective justice - Delay in proceedings

Source: compiled by the researcher

From this table, the following deductions can be made.

1. **National justice**

The findings from both countries reveal similarities on the local level which include lack of judicial reform and lack of political will to prosecute past violations. However, regarding judicial reform, during the transitional period, the former legal order in South Africa was found to be unjust and in need of reform in order to deal with the past, while in the DRC, the former legal order needed to be updated in accordance with the international legal order. Hence, in the DRC, the reform process started in 2002 before the political transition and it is still in progress. On the lack of political will, it is demonstrated that it is difficult to hold people accountable on the local level in both countries especially when high-ranking leaders on all sides allegedly committed crimes. For this reason, only a few cases were prosecuted in South Africa, while in the DRC, victims are still waiting for government to see to the prosecution of crimes committed during the different armed conflicts.

In short, the situations in South Africa and the DRC differ in terms of the lack of independence or political interference from government quarters and the lack of sufficient funds. In the DRC, the lack of political will to prosecute crimes committed during various armed conflicts results from the interference of the executive in the functions of the judiciary. Additionally, the very low budget due to insufficient funds allocated to the judiciary constrains

it from carrying out fair investigation and prosecution of cases. Therefore, the past will continue to haunt the future if justice is not served.

2. International justice - the ICC

There are similarities between the two countries in terms of the non-retroactive nature of the ICC Statute in respect of crimes committed before the entry into force of the Rome Statute. Clearly, apartheid-era crimes committed in South Africa as well as crimes committed during the different armed conflicts which all occurred before 1 July 2002 cannot be tried before the ICC. However, the difference between both countries is that in the DRC, crimes prosecutable under international law continued after the adoption of the Rome Statute due to the recurring cycle of armed conflicts and persistent violence by different interest groups. Thus, when the principle of complementarity was applied to the Congolese judicial system by the ICC, few prosecutions took place. Indeed, findings reveal that many Congolese believe that the ICC is executing a form of selective justice by focusing on some people in Ituri without prosecuting former leaders or commanders of rebel groups many of whom were promoted by the government of the DRC. In the meantime, many victims have become frustrated by the slowness of the proceedings and the prolonged trials at the ICC.

In response to the first sub-question, "What was the role of criminal prosecutions under transitional justice policy in the RSA and the DRC?", this research discovers that at the national level, both countries failed to fulfil their obligations under international customary law to investigate and prosecute those who bear the greatest responsibility for the crimes. Therefore, with regard to the principle *Aut dedere Aut judicare*, victims/survivors could request their government either to prosecute or to extradite alleged perpetrators in countries where the universal jurisdiction is applied if they brought their cases there. At the international level, we find that in both cases, the ICC does not have jurisdiction over crimes committed before July 2002 in both countries. However, because in the DRC, crimes were (and are still) committed after the entry into force of the Rome Statute, the ICC has jurisdiction over such cases. Even though, the research admits that the ICC would not be able to try every one of those who bear the greatest responsibility, there is need for a hybrid international tribunal that would have

jurisdiction *ratione temporis* to prosecute crimes committed before the entry into force of the Rome Statute. The members of that tribunal may include Congolese judges as well as other judges from the African Great Lakes Region since nationals of countries that comprise that region allegedly committed serious crimes in the DRC which are of concern to the regional community.

5.5.2 Theme 2: Role of the TRC in dealing with past abuses

The role played by the TRC in dealing with past abuses in both countries relates to the second sub-question of this study, and it includes the establishment of the TRC and the expectations of the victims, the achievements of the TRC, and the granting of amnesty. The summary then outlines the similarities between the achievements of the RSA's TRC and those of the DRC's TRC.

5.5.2.1 Establishment of the TRC and victims' expectations

A. In the RSA

Data from the fieldwork reveal that respondents considered the establishment of the TRC important as it helped to uncover the truth about the past and reconcile the nation. The finding supports the observation by Elizabeth Stanley (see 1.3) that the establishment of the TRC was important for the reconstruction of a deeply divided South African society that would lead to a more peaceful future. Section 3(1) of the TRC Act (1995) (see 3.4.1 and 3.4.2.1 above) states that objectives of the Commission include the promotion of national unity and reconciliation. Thus, Andrea Lollini notes that that transitional justice in South Africa was extremely important to the post-apartheid political and constitutional order (see Chapter 1, 1.3).

Considering untold sufferings of the past in the RSA, the researcher agrees that it was important for victims to know the truth about the abuses they suffered and to hear the testimonies of the witnesses. The findings also reveal that victims expected members of the

previous regime to come forward to make full disclosure of their crimes, acknowledge the harm done, sincerely ask for forgiveness and rebuild broken relationships.

B. In the DRC

Findings from the fieldwork reveal that respondents appreciated the establishment of the TRC which was seen as an opportunity for victims to know the truth, to grant reparation and compensation, to reconcile the nation and to prosecute perpetrators. These findings corroborate the views of Ngoma-Binda, UNHROHC, Savage, Vinck and Pham, Borello, Davis and Hayner, Vanspauwen and Savage, and Savage and Kambala wa Kambala (see Chapter 1, 1.9.2/B). The authors note that the victims in the DRC had great expectations from the Commission, for instance, that it would ensure the disclosure of the truth about the crimes and grant reparation to the victims for their losses; but the Commission was not able to carry out its mandate, as it encountered many problems. On the other hand, the legal framework for the political transition in the DRC met the expectations of victims. Resolution No: DIC/COR/04, the Transitional Constitution of 2003 (Article 155) and the TRC Law No./04/018 of 30 July 2004 (Article 5) establishing the TRC states that the responsibility of the TRC was "to re-establish the truth and promote peace, justice, reparation, forgiveness and reconciliation, with a view to consolidate national unity".

5.5.2.2 Achievements of the TRC

A. In the RSA

The results from the fieldwork indicate that the TRC was successful on a certain level, as a number of perpetrators came forward to testify and admit their past atrocities, enabling victims/survivors to know the truth. These findings, compared with the literature, demonstrate that the TRC in the RSA had a balanced sheet. On the one hand, Verbeeck, Hayner, Lollini, Boraine, and Bisset, among others (see Chapter 1, section 1.9.1/A) agree that South Africa's TRC is regarded as the ultimate model all over the world due to its achievement. On the other hand, Koppe, Cole, and Boraine, among others point out that victims/survivors were

disappointed due to the symbolic and inadequate reparation offered to vitims and to the lack of prosecution of many perpetrators. However, the TRC report (vol 5) declares that the Commission had contributed to the healing and reconciliation of South Africans (see 3.4.2.2). Thus, Njabulo Ndebele and Alex Boraine (see 3.4.2.3 above) opine that, as a process, reconciliation should continue.

The researcher is of the opinion that dialogue should continue through the SACTJ and it should involve elders of different South African communities who could encourage those who still have information about the remains of missing persons to disclose such.

B. In the DRC

Regarding the achievements of the TRC in the DRC, some respondents argue that the TRC achieved nothing and that the Commission was a complete failure, while others said that the TRC succeeded in its efforts to pacify some communities. The findings corroborate the writings of Ngoma-Binda, UNHROHC, Laura Davis and Priscilla Hayner, Federico Borello, among others (see Chapter 1, 1.9.2/A), who proffer reasons why the TRC was not able to carry out its mandate effectively. Some of the reasons for the shortcoming include the lack of consultation with the Congolese population, the issue of the transitional power-sharing mechanism that allowed the appointment of members from rebel groups as commissioners, dual and unrealistic mandate (truth-seeking and mediation), insufficient funds, lack of political will, issues of insecurity in affected areas, and so forth.

However, Savage, Borello, Davis and Hayner, Vanspauwen and Savage, Savage and Kambala wa Kambala (see Chapter 1, sub-section 1.9.2/A) agree that the TRC has recorded some degree of success in respect of pacification, mediation and conflict resolution.

The researcher is of the opinion that the presence of some commissioners who have been suspected of crimes in different committees of the TRC raised the issue of lack of trust because these commissioners were seen as biased judges who cannot maintain neutrality. It was difficult therefore for victims/survivors to obtain the truth about what happened to them or their loved ones and take advantage of the opportunity to relate their sufferings. However, victims/survivors

should not lose hope but should continue to wait and seek for the truth, reconciliation and justice because their right to see these crimes prosecuted is imprescriptible.

5.5.2.3 Amnesty

A. In the RSA

Findings from the fieldwork confirm that victims were affected by the fact that senior police officers who were responsible for torture were not prosecuted and they remained on their former jobs, while victims were denied the right to any civil claims against their offenders. A number of authors including Van Schaack and Ronald C Slye, Andrea Lollini, Alex Boraine, and Antonio Cassese (see 2.5.2.4 above) affirm that the amnesty granted protects the beneficiary from both criminal and civil liability. However, Laura M Olson and the IACHR in the Barrios Altos case as well as the UNSC S/1999/836 (see 2.5.2.4 above) contend that the amnesty granted by the TRC to prevent prosecution of the crimes are inadmissible under international law and would not guarantee immunity from prosecution outside the country. In this regard, South African victims through South African Coalition of Transitional Justice (SACTJ) or survivors interested in the prosecution of past abuses may appeal to countries which subscribe to the principle of universal jurisdiction. South Africa would then be requested to comply with the principle *aut dedere aut judicare*.

B. In the DRC

The analysis of the fieldwork reveals that amnesty laws promote impunity and frustrate victims/survivors expecting prosecution of and compensation for wrongful acts committed against them. Mahnoush H. Arsanjani, Darryl Robinson, Van Beth Shaack and Ronald C Slye (see 2.5.2.4) explain that the amnesty laws were adopted because amnesty is a tool for de-escalating conflicts so that an agreement could lead to the end of hostilities. It is seen as a price for peacebuilding since it grants immunity to former abusers as in the DRC cases.

In Chapter 4 (4.2.2), we note that the Lusaka Ceasefire Agreement (Article III(22) and Chapter 9(9.2) of Annex "A" to the Ceasefire agreement requested relevant authorities to pass

laws granting amnesty to former perpetrators. Following Resolution No: DIC/CHSC/02 of the Global and Inclusive Agreement on Transition in the DRC, the Amnesty Decree Law No. 03-001 of 15 April 2003 was signed to grant provisional amnesty to certain offenders. However, the Lusaka Ceasefire Agreement and the Final Act of the Global and Inclusive Agreement on Transition as well as the Transitional Constitution (Article 199) and the TRC Law (Article 8(g)) all of which state the conditions for granting amnesty excluded crimes prosecutable under international law.

The researcher is of the opinion that the legal framework of the DRC is in accordance with the relevant instruments of international law. Thus, alleged perpetrators who bear the greatest responsibility for serious crimes committed in the DRC should be held accountable for their deeds irrespective of the length of time that has elapsed after the commission of the acts because the victims' right to justice regarding those crimes is imprescriptible.

5.5.2.4 Differences in the roles played by the TRCs in the RSA and the DRC

This sub-section presents some differences in the roles played by the TRC in both countries, as outlined in the table which follows.

Table 6: Differences between the two TRCs

TRC	South Africa	DRC
Establishment and achievements of the TRC	- Population consulted for the nomination of Commissioners - Leadership committed to support the work of the TRC - A number of perpetrators testified and acknowledged their atrocities - Truth revealed - Public hearing broadcasted on radio and television - Contribution to healing, medical assistance offered - Symbolic reparation - Monuments built - Prosecution recommended	- Population not consulted before the nomination of Commissioners (power sharing formula) - Lack of political will - No hearing, no investigation - Truth not revealed - Focused on training and meetings of Commissioners - Focused on pacification and conflict mediation - Insufficient funds - Insecure environment
Amnesty	- Conditional amnesty for gross violations of human rights politically motivated - Amnesty granted to perpetrators who made full disclosure - Amnesty granted for criminal and civil liability to achieve reconciliation - Victims/survivors were frustrated because those who confessed to using torture got amnesty	- Partial amnesty for acts of war, political crimes and crimes of opinion - Amnesty excluded crimes under international law - Amnesty was a tool for conflict resolution - All warring parties were granted partial amnesty - Victims/survivors were frustrated as those who committed international crimes were untouchable

Source: compiled by the researcher

From this table, the following explanation can be offered.

1. Establishment of the TRC and its achievements in the RSA and in the DRC

Regarding the establishment of the TRC, findings from both countries reveal that widespread human rights violations and gross IHL violations were committed against millions of victims by tens of thousands of perpetrators. Thus, the political negotiations paved the way for the promotion of national reconciliation and reconstruction. In each of the two countries, a TRC was established to deal with past gross violations. Findings from the fieldwork and literature reveal that the populations in both cases were excited and optimistic about about the TRC and its outcome. They believed it was time to know the truth, to receive reparation/compensation for the suffering and the loss they had experienced, and for perpetrators to confess their crimes. In South Africa, the process was designed in the spirit of *Ubuntu* to promote the restoration of broken relationships, healing of wounds and redress of wrongdoings. However, key informants noted that victims expected prosecution of former leaders and officers of the security services. In the DRC, the main argument was that national reconciliation would not be achieved if impunity and justice denied were held sacrosanct.

In South Africa, the population was consulted in the process of nominating the commissioners, but this was not the case in the DRC where commissioners were appointed based on inclusive power sharing formula between the different parties to the inter-Congolese dialogue. The victims were disappointed by the idea of power sharing which made room for some alleged perpetrators to be appointed as commissioners. Thus, the lesson that the DRC can learn from the South African experience is to allow the people own the process of reconciliation by involving them in the selection process leading to the appointment of the TRC members. This is important in a context where people were traumatised following crimes committed by State actors. The people would begin to trust the institutions only when they are directly involved in the process.

About the achievements of the TRC, in South Africa, almost all the TRC's goals were achieved. The process has contributed to healing the nation from the brutalities of the former regime in the sense that the truth was revealed and the dignity of people of colour was more or less restored. However, the findings reveal that as a process, reconciliation must continue, for

instance, through the SACTJ which should involve elders of different South African communities in its activities. Furthermore, survivors were disappointed because not all recommendations by the TRC were implemented. In the DRC, expectations were not met due to lack of political will, insufficient funds, lack of involvement of the people, lack of trust of the composition of the TRC, and continuing insecurity in the country. However, the TRC had an extra assignment to reconcile politicians, mediate conflict between musicians/politicians and pacify the country so that the 2006 elections would hold peacefully.

The DRC can learn from the South African experience regarding the commitment of all participants in the TRC process, political will of the government to support the work of the TRC and community engagement at an early stage. However, the findings show that the Congolese people are still waiting for the re-establishment of the TRC in order to know the truth about what happened, acknowledge the pain of victims and promote reconciliation.

2. Amnesty in the RSA and in the DRC

In South Africa, people who made full disclosure of their role in politically motivated crimes were granted amnesty and absolved of criminal and civil liability while in the DRC the amnesty process was not applicable to crimes prosecutable under international law. However, it is important to note that such amnesty in South Africa is valid only on domestic level.

In both countries, victims/survivors were affected by the fact that alleged perpetrators who were high-ranking politicians and commanding officers of rebel groups have not been prosecuted. In this regard, the execution of the TRC's recommendation that those who were denied or who failed to apply for amnesty in South Africa should be prosecuted should be considered urgent. In the DRC, the process of granting amnesty took into account international legal frameworks. However, it is crucial that all those who bear the greatest responsibility be prosecuted so that Congolese victims can experience a sense of justice.

5.5.3 Theme 3: Ways of restoring the dignity of victims

In the paragraphs below, ways of restoring the dignity of victims in the RSA and in the DRC are considered along with the similarities and differences in the suggestions.

A. In the RSA

Regarding the restoration of the dignity of the victims, the respondents agreed that there should be a follow up of the TRC's recommendations particularly in respect of access to basic rights, recognition of victims, trauma counselling, and following up on cases of missing people. This answer corroborates the view of John de Gruchy (see 3.4.2.3) that the TRC's recommendations on reparation be taken seriously. Francis Wilson also stresses the importance of addressing poverty and inequality and improving the access to and the quality of education and training.

B. In the DRC

The results from the fieldwork reveal that the dignity of Congolese victims could be restored through the establishment of a new TRC, reparation or compensation programmes, memorialisation of victims, restoration of the State's authority and ensuring access to equitable justice. These findings are in line with the suggestion by Roth-Arriaza, USIP, OHCHR and Magarrell (see 2.5.2.5) that victims of human rights violations and serious violations of IHL can be restored through the mechanisms of transitional justice such as the establishment of a truth commission, acknowledgement of harm, reparations, accountability and reform. Those mechanisms should meet the *pillars of transitional justice* such as the right to justice, the right to truth, the right to reparation, and the guarantee of non-recurrence of violations (see 2.6).

C. Differences in ways of restoring the dignity of victims in the RSA and the DRC

In what follows, some differences in ways of restoring the dignity of victims in both the RSA and the DRC are presented along with a table that outlines the points.

Table 7: Differences in ways of restoring the dignity of victims

Themes	South Africa	DRC
Restoration of victims' dignity	- Follow up of the TRC's recommendations (reparation and prosecution) - Access to basic rights - Recognition of victims/survivors - Trauma counselling - Follow up on cases of missing people	- Establishment of a new TRC - Reparation - Memorialisation - Restoration of the State's authority - Justice/prosecution

Source: compiled by the researcher

From the table above, certain deductions can be made.

1. Restoration of the dignity of victims in the RSA and in the DRC

The table above indicates two different processes. The first process in South Africa was not fully implemented and the second, in the DRC, failed to achieve the purpose for which it was established. In South Africa, restoring the victims/survivors requires a follow up of the TRC's recommendations which include reparation and accountability. However, in the DRC, for the victims/survivors to be restored, a new TRC needs to be re-established which would conduct a thorough investigation of past abuses, reveal the truth, and grant reparations, among other things, since the previous Commission had failed to fulfil its mission. Thus, the DRC can learn from the South African experience where the government fully supported the work of the TRC, the community was involved in the process of selecting the commissioners and symbolic reparation was offered. However, there are similarities regarding accountability, as individuals bearing the greatest responsibility continue to walk free without being held accountable for their deeds. In South Africa, the TRC recommended prosecution of offenders where evidence exists, but high-ranking politicians on both sides were not prosecuted, except few cases of foot soldiers.

In the DRC, few cases were prosecuted locally and at the ICC, and alleged perpetrators were promoted instead of being held accountable for their deeds. Therefore, respondents argued that victims/survivors believe that accountability of individuals who bear the greatest responsibility in the commission of the crimes would restore their dignity.

Regarding extra efforts to be made in South Africa, the previous regime that enforced racial segregation and inequality in terms of wealth distribution, education, etc. had left an inestimable damage that continues to haunt the current generation of black people. Respondents believe that poverty and inequality should be addressed and that access to basic rights, recognition of victims/survivors by listening to them, trauma counselling, and following up of cases of missing people would restore their dignity. However, in the DRC, victims/survivors do believe that annual tribute to the victims of the different armed conflicts, and building memorials in honour of those victims would restore victims' dignity besides the restoration of the State's authority over the national territory.

5.6 Findings

In terms of the sub-question about the role played by the TRC in both countries, the findings from the fieldwork which were compared to existing literature show that:

- In the RSA, the TRC played a positive role in the healing of the nation as well as the task of reconciliation. The Commission involved the population in the process of appointing commissioners. Truth was revealed in exchange for amnesty, and reparation was recommended. However, it is argued that, as a process, reconciliation should continue. In the DRC, on the other hand, the population was not consulted in the process of nominating candidates for appointment as commisioner and the TRC failed to achieve its objectives. It is noted that it is important to make room for people to talk about their experiences, address the root causes of the conflicts and restore broken relationships.
- Some of the reasons for the failure of the TRC in the DRC included the fact that the Commission was established while the environment was still insecure, the TRC had insufficient funds, some commissioners were alleged perpetrators of crimes, and there was

lack of political will on the part of the government. Consequently, during the transitional period, the DRC should have designed a legal framework which could address the past and which could be implemented by an elected post-transitional government.

- On other ways to restore the dignity of victims in South Africa, it is suggested that the TRC's recommendations be revisited, and measures to redress poverty and inequality as well as access to basic rights should be promoted.
- In terms of the future of transitional justice in the DRC, restoring the State's authority should be considered priority. The DRC could learn from the South Africa's selection process of appointing commissioners by holding consultations with the people and establishing a memorialisation process. However, establishing a regional TRC which includes representatives from the African Great Lakes Region could go a long way in redressing the injuries of the past since nationals of several countries in the region were involved in the violations.

The synthetic diagrams below represent a summary of the results from the fieldwork conducted in both the RSA and the DRC beginning with the context of past gross violations of human rights and of IHL. Following the political compromise in each of the countries, transitional justice mechanisms were adopted. The diagrams therefore also indicate the outcomes of judicial and non-judicial mechanisms in both countries. The diagrams are followed by the final chapter of this study which presents the conclusion and recommendations.

Table 8: Synthetic diagram of the findings from the RSA

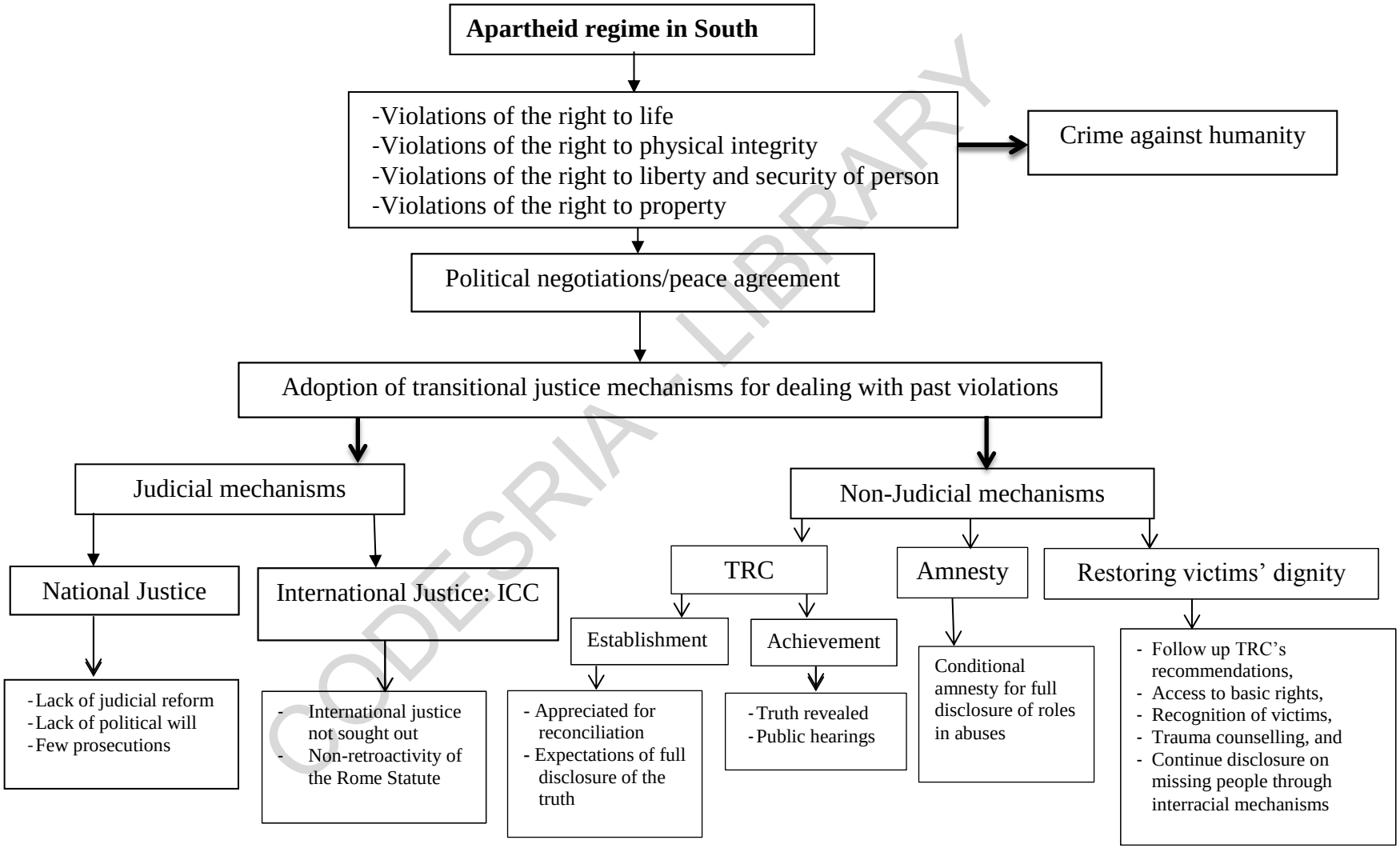
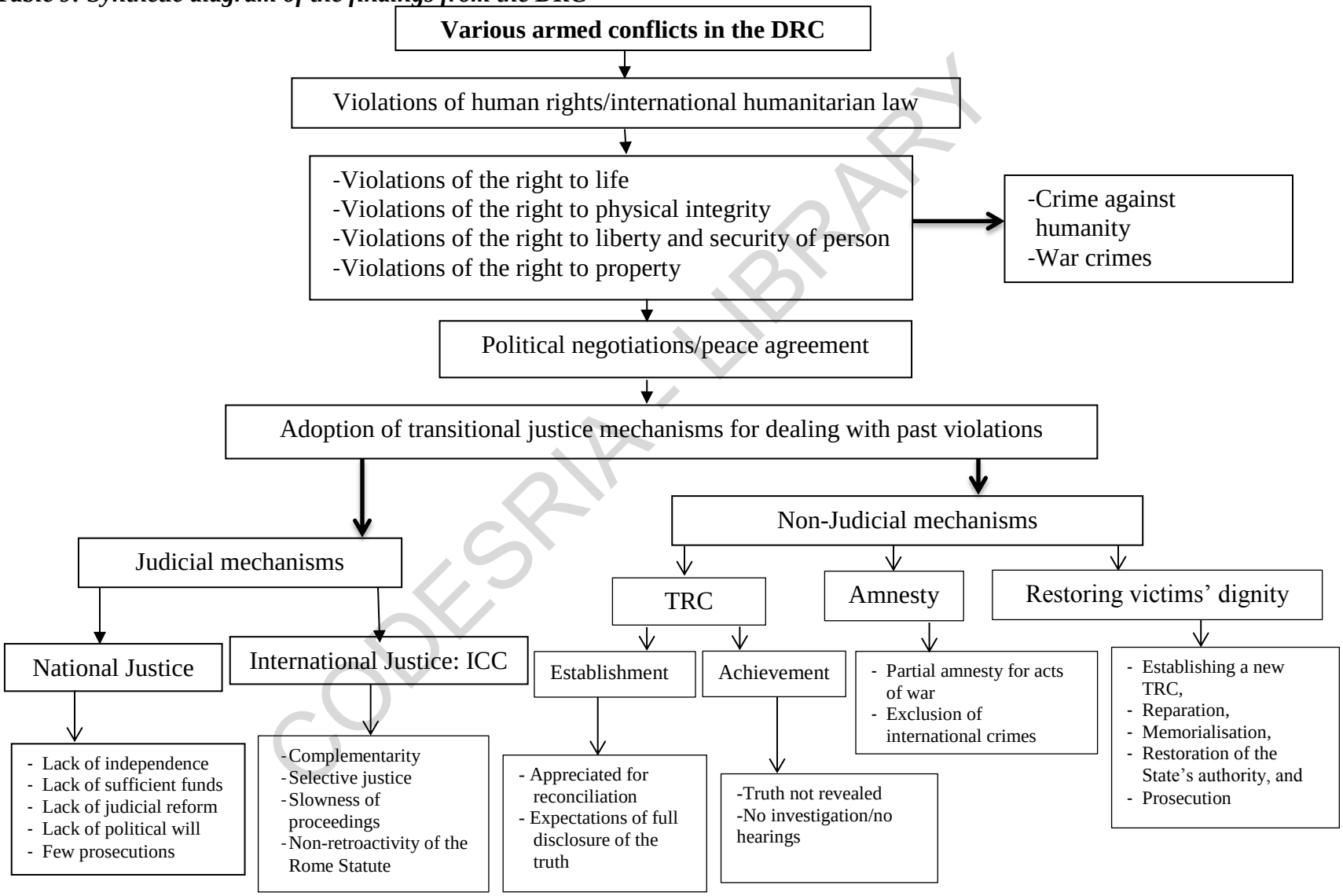


Table 9: Synthetic diagram of the findings from the DRC



CHAPTER 6

CONCLUSION AND RECOMMENDATIONS

In dealing with the legacies of past gross violations of human rights and of IHL committed during dictatorships, authoritarian rule, military regimes, apartheid, or during armed conflicts that created hatred among the population and bereaved them, national courts and tribunals may be unable to investigate and prosecute many of the perpetrators and reconcile the affected population. Thus, transitional justice mechanisms that accommodate a middle ground approach including punishment and reconciliation appear to be the appropriate responses to the legacies of past gross violations which can also enhance opportunities for transformation. In this regard, Martien Schotsmans argues that in the aftermath of conflict in which grave and massive violations of human rights were committed, transitional justice is only one link in the long chain of building a lasting peace.[843]

In the course of the apartheid and the struggle against it in South Africa on the one hand, and of the various political crises and internationalised armed conflicts in the DRC on the other hand, serious crimes of concern to the international community were committed. Following political negotiations, mechanisms of transitional justice were adopted to deal with past abuses. The main goal of this research is to make a scholarly contribution to the existing body of knowledge by analysing the role played by the transitional justice mechanisms in the two case studies and offering practical solutions. Thus, the study has analysed the role played by the criminal prosecutions under transitional justice policy as well as the role played by the TRC in each of the countries.

The sources of information of this study include legislations, textbooks, judicial decisions and journal articles from libraries and the Internet, along with empirical field research on transitional justice mechanisms in the RSA and the DRC. The findings from the fieldwork were obtained through interviews of 50 key informants from different organisations and

[843] Schotsmans 2006-2007 *Annuaire* 227.

institutions dealing with the legacies of past abuses. In addition, three focus group discussions were organised composed of 31 participants based on their status or experiences of abuse in the past, both in the RSA and in the DRC. This study has employed a non-probability sample, primarily the purposive sampling method to select research participants. A snowball sampling method was also used as an alternative recruitment strategy to reach unidentified participants working in the field of transitional justice. The tools used during data collection were the interview guide and the focus group guide.

The present chapter summarises the findings according to the study objectives and makes recommendations for future action.

6.1 Summary

Chapter 1 introduces the reader to the concept of transitional justice, the background to the study, the subject matter and problem statement, and the study objectives. It also presents the rationale for the study, delimitation of the study, research design and research methodology, and a brief literature review before describing the framework of the research.

Chapter 2 offers the definition of the major terms employed in the study and of mechanisms of transitional justice. It identifies the point of departure and the assumptions, distinguishing also between retributive justice and restorative justice while offering an analysis of transitional justice. The chapter explores justice in post-conflict situations, the goals of transitional justice (which depend on how societies in transition choose to respond to the legacies of gross past violations), and mechanisms of transitional justice (that is, judicial and non-judicial mechanisms). The analysis then shifts to the victims' right to remedies which include the right to justice, the right to truth, the right to reparation, and the guarantees of non-recurrence of violations.

Chapters 3 and 4 focus on specific mechanisms of transitional justice that were adopted respectively in the RSA and in the DRC as in the case of the criminal prosecutions and the TRC. Chapter 3 considers the context of apartheid and the legal framework of transitional justice

mechanisms employed by the RSA; the role of the prosecution during the TRC period in the RSA; the role of the TRC in dealing with apartheid-era crimes in the RSA; and the post-TRC Prosecution as an unfinished task. Accordingly, Chapter 4 analyses the context of serious crimes and the legal framework of transitional justice mechanisms employed by the DRC as well as the role of prosecution in dealing with past abuses. This is followed by a discussion of the jurisdiction of the ICC as a complementary mechanism to the national criminal jurisdictions of the DRC courts, the challenges faced by the DR Congolese judicial system in addressing the crimes, and the possibility of the African Court of Justice and Human and Peoples Rights as an alternative mechanism. The role of the TRC during the transition period from 2004 to 2006 is also examined (that is, the TRC's objectives, powers and achievements, constraints and recommendations). Chapter 4 further discusses the failure of the DRC's TRC to achieve any of its objectives.

Chapter 5 is a comparative appraisal of the findings from the field research conducted in each of the two countries that served as case studies. The data from the fieldwork were obtained from key informants and participants in the focus groups discussions and then compared to the findings from existing literature. It is important to recall that respondents were guided by the questionnaires developed from the study objectives.

Chapter 6 presents the conclusion and recommendations. The summary is followed by the findings which are based on the study objectives. The results are presented under the following themes – the role of criminal prosecutions under transitional justice, the role of the TRC in dealing with past abuses, and the ways and means of restoring the dignity of victims. Lastly, suggestions for building a sustainable and peaceful future in both the RSA and the DRC are offered.

6.2 Findings in Terms of the Study Objectives

The findings in terms of the study objectives begin with the role of the criminal prosecution under the transitional justice system, followed by the role of the TRC in dealing with past abuses, and the ways and means of restoring the dignity of victims.

6.2.1. Role of the criminal prosecution under transitional justice

In the RSA, the historical context showed that gross violations of human rights involving State and non-State actors were committed within and outside the borders of South Africa, but some States actors were awarded medals *for Outstanding Service in the regime's interest.*[844] During the apartheid, the legal order was built to sustain the segregationist regime and no competent courts of law had jurisdiction to challenge any legislation passed by the parliament. Thus, the apartheid crimes were not qualified as crimes against humanity, but as political crimes even though they were characterised as crimes against humanity by the international community through different resolutions such as UNSC Res 392 (1976), UNGA Res 33/183B (1979) and UNSC Res 473 (1980), among others.

Furthermore, during the transition to democracy, South Africa's post-apartheid judiciary was not reformed. While implementing transitional justice mechanisms through the TRC Act, the judiciary did not play an active role in redressing the legacy of past violations. Thus, there was a need to foster national unity and reconciliation among South Africans and to carry out reparations. In *AZAPO and Others v. TRC and Others (1996),* the Constitutional Court ruled that the TRC Act (1995) was constitutional. The Court stressed that granting amnesty for truth telling was to be prioritised over prosecution.[845] Perpetrators were threatened with legal action in order to urge them to make full disclosure about what happened in the past in exchange for individualised amnesties for politically motivated crimes.

By contrast, in *AZAPO and Others v. President of the Republic of South Africa and Others (1996)*, Section 20(7,a) of the TRC Act was faulted for violating Section 22 of the Interim Constitution because beneficiaries of amnesty were not criminally or civilly liable. Thus, the Court ruled that, in terms of Section 232(4) of the interim Constitution, amnesty and limitation of the right to justice were permitted in order to achieve reconciliation and reconstruction.[846] However, Section 20(7) could not be extended to the period after the TRC and

[844] Esterhuyse *Endgame* 38; De Kock and Gordin *Damage* 85-86, 109, 100.
[845] *AZAPO and Others v. Truth and Reconciliation Commission and Others* [1996] 3 All SA 15 (C).
[846] *AZAPO and Others v. President of the Republic of South Africa and Others* 1996 (8) BCLR 1015 (CC) § [51].

it does not deprive the victims the right to justice where amnesty was denied or not applied. Hence, in the *Motherwell Four* and *the Pebco-Three* cases, Gideon Nieuwoudt, a former security police colonel, and his colleagues, Marthinus Ras and Wahl du Toit, were prosecuted and sentenced because their amnesty was denied.[847] In the De Kock case,[848] his application for amnesty for some crimes was granted but he was prosecuted for the remaining crimes. Similarly, Johannes Velde van der Merwe, Adriaan Johannes Vlok, Christoffel Lodewikus Smith, Gert Jacobus Louis Hosea Otto, and Hermanus Johannes van Staden did not apply for amnesty and they were therefore prosecuted as recommended by the TRC.[849]

In the interest of national reconciliation, the judiciary prioritised the process of allowing alleged perpetrators to apply for amnesty. Nevertheless, many of those who did not apply for amnesty were not prosecuted even though the State has the responsibility to investigate and prosecute people who have been implicated in grave violations of human rights.

The criminal justice system played a crucial role in threatening the perpetrators to come forward with their testimonies so that victims would know the truth. Thus, few cases of those who were denied amnesty were prosecuted, but the white élite prosecutors who remained on their former jobs were unwilling to prosecute former apartheid figures who did not qualify or failed to apply for amnesty. For example, after admitting to the commission of horrible crimes, De Kock was sentenced, but the higher officials from which he received instructions were not prosecuted. This means that justice was not equitable and the State has failed in its responsibility to prosecute.[850] The unanswered question the victims would like to know is why those individuals have not yet been prosecuted.

Consequently, with the lack of lustration process and of judicial reform, it was pointless dealing with past abuses based on the pre-existing discriminatory and unjust legislations. Successive governments have also failed to redress past violations because many prominent leaders of liberation movements were also involved in past violations. This is a breach of both

[847] Fernandez "Post-TRC Prosecutions" 66-67.
[848] Payne *Unsettling* 268.
[849] *The State v. van der Merwe, Vlok, Smith, Otto, van Staden* § [57].
[850] De Kock and Gordin *Damage* 249, 270.

conventional and customary international legal obligation to investigate and prosecute those bearing the greatest responsibility for grave human rights violations. There is no reason for not prosecuting those to who were denied or who failed to apply for amnesty. However, findings reveal that the NPA did not initiate prosecution because not only was it difficult to find evidence for past violations that were committed in secrecy, but documents which relate to the past were also deliberately destroyed and the testimonies of witnesses could not always be trusted due to the passage of time. Furthermore, although the RSA is a State Party to the Rome Statute, it was found that the ICC had no jurisdiction over apartheid crimes due to the principle of non-retroactivity for human rights violations committed before the entry into force of the Statute.

In the DRC on the other hand, serious violations of human rights and of IHL were committed during the colonial era, the post-colonial government, the period of Mobutu's dictatorship as well as under different phases of internationalised armed conflicts involving State and non-State actors (Congolese and foreigners). Affected by the long regime of dictatorship and the various armed conflicts, the judiciary was unable to deal with the large number of perpetrators of serious violations committed between 30 June 1960 and the period of the different armed conflicts. While there was little reform, the lack of judicial independence due to political interference hindered the judiciary from dealing with the legacies of past gross violations of human rights and of IHL. Instead of being prosecuted, alleged perpetrators who bore the greatest responsibility for the violations were promoted or appointed to public offices. Some of the challenges encountered by the judiciary included insufficient funding, shortage of magistrates, lack of technical and material support, poor working conditions and hindrances to investigations due to lack of transportation, insufficient training of magistrates to adjudicate crimes using international law, endemic corruption, and security problems.

Furthermore, crimes related to different internationalised armed conflicts have not yet been prosecuted, but due to the intervention of the UN mission and the support of NGOs, the Congolese military criminal justice succeeded in prosecuting and sentencing some perpetrators, for example, in the Songo Mboyo and Bavi cases. In Songo Mboyo case, the military tribunal in Mbandaka found seven soldiers guilty and sentenced them to life imprisonment for crimes

against humanity which included rape and looting,[851] and in Bavi case, the Military Garrison Tribunal in Ituri convicted 13 accused persons to life imprisonment for war crimes of murder, rape and looting.[852] In both cases, the military courts sentenced the State jointly with the accused ordering it to pay all damages in favour of the victims. Unfortunately, the State has not yet paid any money to the victims in those cases.[853]

Although it is the primary responsibility of the State to investigate and prosecute crimes, in the DRC, experience has shown that the UN mission was the first to begin investigations and it requested that the government bring to justice individuals presumed to be perpetrators of serious crimes even if it was through military tribunals.[854]However, because the judiciary was already in bad shape in the aftermath of the different internationalised armed conflicts in which widespread crimes were committed, the DRC requested the UN to establish an *ad hoc* tribunal that would hold perpetrators accountable. As the UN was unwilling to establish a tribunal, the situation of crimes committed in the territory of the DRC was referred to the ICC. Under the principle of complementarity, the ICC prosecuted a few cases which represented an important breakthrough in the fight against impunity. For example, in the *Prosecutor v. Thomas Lubanga Dyilo* case, the ICC found Lubanga guilty and sentenced him to 14 years' imprisonment as a co-perpetrator of the crimes of conscripting and enlisting children under the age of 15 years and using them to participate actively in hostilities in Ituri.[855] Unfortunately, he was not charged for crimes of murder, rape, torture, looting, and destruction of property committed against the Lendu people under his leadership.[856]

In the Katanga case, the Trial Chamber II convicted Katanga of being an accessory to war crimes and crimes against humanity and he was sentenced to 12 years' imprisonment.[857] Due to lack sufficient evidence, Ngudjolo and Mbarushimana were released, but the process of investigation followed by the Prosecutor was questioned. In the *Prosecutor v. Mathieu Ngudjolo*

[851] *TMG of Mbandaka, RP 084/05/ RMP154/PEN/SHOF/05.*
[852] RPA N0 003/2007, RP N0101/2006, RMP N0545/PEN/2006.
[853] OHCHR *Report Mapping Exercise* §1093.
[854] See OHCHR *Report Mapping Exercise* §863, 865, 867, 870, 879, 880.
[855] *The Prosecutor v. Thomas Lubanga Dyilo [2012] ICC-01/04-01/06-2901* § [107].
[856] *The Prosecutor v. Thomas Lubanga Dyilo [2012] ICC-01/04-01/06-2879* § [23].
[857] *The Prosecutor v. Germain Katanga [2014] ICC-01/04-01/07-3484* § [170].

Chui case, the accused was acquitted of all the charges and released because the Prosecution did not prove beyond reasonable doubt that Ngudjolo committed the alleged crimes.[858] In the *Prosecutor v. Callixte Mbarushimana* case, the Chamber was also unable to confirm the charges against the accused because there were no substantial grounds to believe that Mbarushimana participated in the crimes.[859] Although the number of cases are few, they demonstrate that the ICC had taken an important step to resist the idea of granting impunity to the perpetrators of international crimes.

However, the ICC has no jurisdiction over crimes committed between June 1960 and June 2002 before its entry into force (which means it could cover only a limited number of crimes committed from July 2002). It would also be unable to prosecute the numerous perpetrators who bear the greatest responsibility for the crimes. Again, the ICC was criticised for concentrating its efforts on Ituri District, without prosecuting alleged Congolese perpetrators who committed crimes in the Kivu provinces or those who were promoted in public service. This act was characterised as selective justice. While focusing its operation on Ituri, the ICC took no action against Ugandan and Rwandan soldiers who allegedly committed serious crimes during the different internationalised armed conflicts. The ICC's proceedings are said to be too slow and victims have become disappointed by the prolonged trials and the fact that they have to wait indefinitely for the conviction of their persecutors as well as for reparations. The study considers the possibility of employing the Protocol on the Statute of the African Court of Justice and Human and Peoples Rights as an alternative means of prosecution. However, it is argued that the Court would not be appropriate due to non-retroactivity *ratione personae and ratione temporis* (Article 46(E,1) of the draft Protocol on amendments to the Protocol on the Statute) *and due to immunity granted to certain individuals based on their official status* (Article 46A*Bis*).

[858] *The Prosecutor v. Mathieu Ngudjolo Chui [2012] ICC-01/04-02/12-3-tENG* § [89, 110].
[859] *The Prosecutor v. Callixte Mbarushimana [2011] ICC-01/04-01/10-465-Red* § [134].

6.2.2. Role of the TRC in dealing with past abuses

In the RSA, the TRC was granted quasi-judicial powers to search premises and impound evidence, subpoena witnesses, conduct questioning under oath, hold public and private hearings, and grant individualised amnesty for politically motivated crimes. The amnesty protected individuals from both criminal and civil liability. Thus, the process of granting amnesty functioned as an alternative mechanism of accountability. South Africans were consulted in the process of appointing members of the TRC. The TRC's mandate covered investigation of gross human rights violations committed within or outside the borders of the Republic,[860] but it ignored those who were victims of human rights violations in the period between 1948 and 1960 during which families were dispossessed of their lands and forced to separate due to unjust legislations. No doubt, apartheid was characterised by the international community as a crime against humanity, but the Commission was tasked solely to consider gross human rights violations because the legal order did not recognise apartheid as a crime against humanity. With regard to past atrocities, the TRC condemned both sides, but, unfortunately, because the lustration process was not applicable, the most notorious perpetrators who opposed apartheid as well as high-ranking figures of the apartheid regime were untouched and they continued to hold powerful public positions.

Considering the secrecy associated with past abuses, the idea of truth-for-amnesty encouraged perpetrators to reveal the truth in exchange for amnesty so that victims/survivors would know what happened to their loved ones. As a result, findings reveal that a number of perpetrators testified and acknowledged their culpability, truth was revealed, public hearing was broadcasted, symbolic reparations were made; monuments and museums were established; medical aid was granted, and conditional amnesty was granted to those who made full disclosure of political motivated gross violations of human rights. Amnesty was granted to cover criminal and civil liability in order to achieve reconciliation. Thus, the power of investigation granted to the TRC, according to Andrea Lollini, allowed the Commission to contribute to the

[860] The Preamble of the TRC Act 34 of 1995 states that the Commission was: "To provide for the investigation and the establishment of as complete a picture as possible of the nature, causes and extent of gross violations of human rights committed during the period from 1 March 1960 to the cut-off date contemplated in the Constitution, within or outside the Republic, emanating from the conflicts of the past…" Read also Section 1(a), Section 5(l) and Section 20(2) of the Act.

gradual creation of a collective memory. For the first time the black population was given a voice officially and information about past abuses as well as data concerning deep-rooted social dynamics of the apartheid era was gathered.[861]

However, the TRC recommended the prosecution of those who did not apply for or who were denied amnesty. The TRC therefore succeeded in laying the foundation of a culture of human rights, establishing museums, renaming streets, and making recommendations that would prevent the repetition of history. In this regard, the TRC could be said to accomplish its primary task even though it was criticised for its minimal contribution to the task of reconciliation. Thus, many survivors who wanted prosecution did not attend the hearings. However, because reconciliation is seen as a process which cannot be achieved within a limited timeframe, the study participants suggested that it should continue.

In case of the DRC, it is estimated that millions of people were killed in the almost two decades of a vicious cycle of internationalised armed conflicts. Those conflicts (such as the 1998 conflict by the RCD and others rebel groups and the 2004 conflict involving the CNPD) were resolved through peace agreements between the leaders of the warring parties,[862] leaving the affected populations to handle their own predicaments in what is seen as a top-down approach to the conflicts. During the peace talks, one of the mechanisms aimed at dealing with the legacies of past gross violations of human rights and of IHL through Resolution No: DIC/CPR/05, which the Congolese delegates to the ICD opted for was the creation of an international *ad hoc* tribunal and a TRC. As the country has witnessed many serious crimes since the colonial administration, the TRC covered the period between the Independence Day (30 June 1960) and the end of the transition (2006). The TRC was asked among others to investigate the legacies of past gross violations, identify perpetrators and victims, consolidate national unity by promoting genuine reconciliation among Congolese and re-establish the truth

[861] Lollini *Constitutionalism* 98.

[862] Examples are the Lusaka Ceasefire Agreement (10 July 1999), the Global and Inclusive Agreement on Transition in the DRC: Inter-Congolese Dialogue - Political negotiations on the peace process and on transition in the DRC (16 December 2002), *l'Acte d'engagement* (2008), *Accord de paix entre le Gouvernement et le CNDP* (23 Mars 2009), etc.

about the events in the DRC.[863]The process was engineered without due consultations with the Congolese people, and because the TRC functioned under fragile peace, it focused essentially on mediating peace between war torn communities and between politicians in order to facilitate preparations for the 2006 elections.[864] However, the TRC has failed to investigate past abuses or restore the dignity of victims in the DRC.

Based on an inclusive power sharing formula between the various interest groups that participated in the ICD, several high-ranking rebel leaders were integrated into and promoted within the transitional institutions including the TRC. Afraid that revealing the truth would reduce the chances of some contenders during the 2006 elections, political transitional authorities did not support the TRC.[865] Thus, the following factors hindered the DRC's TRC from achieving its objectives and paving the way for reconciliation in the country:

- Lack of consultation with the population;
- Lack of credibility as some commissioners were appointed from rebel groups which allegedly committed serious crimes;
- Issue of fragile peace because the TRC began its operations when some rebel groups were still active;
- Dual and unrealistic mandate of establishing truth as well as conflict management;
- Lack of political will;

[863] Resolution No DIC/COR/04 of the ICD, Articles 5 and 7 of the TRC law; Article 155 of the Transitional Constitution of 2003.

[864] RDC *Rapport Final de la CVR* 23-28; Borello *Road to a Just Peace* 45; Baldauf http://www.csmonitor.com/2006/1114/p06s01-woaf.html/(page)/2 (Date of use: 12 July 2013); Key informant #20DRC interviewed in Bunia on 21 January 2014; Key informants #45DRC interviewed in Kinshasa on 28 March 2014.

[865] The final Report of the TRC in the DRC states (in French) that, "*Le Gouvernement de transition est composé de différentes forces politiques belligérantes et non belligérantes mais aussi de certains gestionnaires durant les 32 ans de la dictature que le pays a connue. Ces belligérants et anciens gestionnaires du pays sont accusés de violation massive de droits humains et de spoliation du patrimoine commun. Pendant que ces derniers sont à la commande des affaires publiques, la collaboration n'était pas assurée pour l'établissement de la vérité souhaitée par la nation congolaise. En effet, la transition devant se terminer par l'organisation des élections où bien des animateurs étaient candidats à leur propre succession, le travail de rétablissement de la vérité risquait de diminuer les chances de certains prétendants*". RDC *Rapport Final de la CVR* 69.

- Lack of sufficient funds (the government failed to finance the TRC's budget and the international donors abstained from supporting the TRC financially due to the nature of its composition).[866]

6.2.3. Ways and means of restoring the dignity of victims

Findings reveal that in order to restore the dignity of victims in the RSA, a follow up of the TRC's recommendations on reparation and prosecution was important. The President's Fund would provide payment to victims to cover reparations, and those who did not come forward to testify before the TRC would face prosecution as recommended. To avoid the culture of impunity, the State has the responsibility to ensure that alleged perpetrators are held accountable for the crimes they committed. The lack of political motivation to prosecute such individuals sends a message that crime does pay. Jeremy Sarkin argues that failing to prosecute high profile cases perpetuates a lack of respect for the rule of law and human rights among citizens, which further undermines the legitimacy of the courts.[867]

The apartheid created imbalance in terms of income and education between white people and the non-white majority. Clearly, "apartheid's dehumanizing effects have pervaded every sphere of life".[868] Findings reveal that measures taken to address poverty and inequality, grant access to basic rights, improve the quality of education and training, improve living conditions in the townships, and so forth would restore the dignity of victims/survivors. It was also noted that many people are still missing. Therefore, people should continue working on truth recovery in order to encourage families who still do not have information about their missing loved ones or their remains not to give up and to go for trauma counselling. It is equally important that civil society organisations especially the SACTJ encourage individuals to keep the dialogue going

[866] For example, in 2005, the government allocated 257.182.277FC which was spent solely on the salary of the members of the Commission. The Norwegian Church Aid (NCA) financed some of the activities of the TRC viz., training officials in South Africa (U$D23.000), pacification mission in Mbuji-Mayi (U$D 5000) and training in Kinshasa (U$D 42.508). The UNDP also financed some programmes which include pacification mission (U$D 68.052) and training in Kinshasa (U$D 48.754). Subsequently, the Commission reported that it had many financial difficulties that hindered it from acccomplishing its mission besides the lack of political will on the part of some members of the government. See RDC *Rapport Final de la CVR* 41; 58.

[867] Sarkin 1998 *HRQ* 644-645.

[868] Sarkin 1998 *HRQ* 664.

and to involve elders of different South African communities in order to sustain reconciliation and to sensitise South Africans on the culture of human rights in the RSA.

Jeremy Sarkin notes that for over half a century, the apartheid state defied the UN and dismissed the core of human rights' instruments as communist propaganda.[869] Since the end of apartheid, South Africa's Constitutions guarantee and protect the people's fundamental rights through what is commonly referred to as the Bill of Rights.[870] For the new constitutional order to be respected it has to be cultivated among South Africans. In this respect, the State needs to continue to pay attention to human rights education so that people would respect the Constitution and Bill of Rights as well as the processes and mechanisms for their enforcement.[871]

Similarly, in order to restore the dignity of victims in the DRC, this study offers certain recommendations which are outlined below.

A. Restoration of peace

Since 1996, perennial conflicts have fostered hatred among Congolese people and delayed the country's development. According to Tunamsifu, "Peace, security and stability are an excellent combination and necessary preconditions for the development. Otherwise, there cannot be any development around the world without peace, security and stability".[872] Thus, the restoration of peace is a precondition for the establishment of mechanisms that can be used to address the legacy of past abuses in order to reconcile the nation and accelerate its reconstruction. A review of the many peace agreements between warring parties will establish the level of their implementation and create conditions for preventing a fresh resurgence of conflicts.

[869] Sarkin 1998 *HRQ* 634.
[870] See the Interim Constitution of the Republic of South Africa Act No. 200 of 1993 Chapters 3, 7 and 8, and the Constitution of 1996 Chapters 2, 8 and 9.
[871] Sarkin 1998 *HRQ* 665.
[872] Tunamsifu *Good Governance* 107.

B. Restoration of the State's authority

For almost two decades, the DRC government has failed to control and secure many areas that became the bastion of rebel groups. Due to the loss of State control, those areas do not receive State subsidy as they are under control of armed groups. Restoring the State's authority could be an opportunity for the State to exert control over the national territory and improve local governance. Thus, urgent efforts need to be made to move the country from the atmosphere of gunshots and violence and to restore peace, consolidate the State's authority, and adequately address the root causes of conflicts to avoid their recurrence.

C. Establishment of a Great Lakes Regional Court for the DRC

Both the ICC and the African Court on Justice and Human and Peoples Rights have jurisdiction over international crimes, but they cannot handle all of the past crimes or deal with crimes retroactively. Besides, the African Court grants immunity for sitting Heads of States and senior State officials hence it might not be an appropriate medium for dealing with serious crimes committed in the DRC.

Since 1996, the DRC has been plunged into various armed conflicts in which State and non-State actors from Burundi, the DRC, Rwanda and Uganda participated and allegedly committed serious crimes whose prosecution under international law is imprescriptible or which are not subject to any limitations of time. Thus, in addition to the government's responsibility to prosecute the crimes, a homegrown solution or a regional response to the crimes committed in the DRC is needed in order to bring to book individuals who bear the greatest responsibility for the crimes.

Being willing to respect good governance and the strict observance of the principles of IHL, Member States of the ICGLR adopted the Pact on Security, Stability and Development in the Great Lakes Region (thereafter the Pact on Security) at a forum which took place on 14-15 December 2006. Article 7 of the Pact on Security provides the Protocol on Judicial Cooperation in which Member States undertake "to cooperate in matters of extradition, judicial investigation and prosecution". They are also committed to prevent and punish crimes under international law

and against the rights of peoples (Article 8). Thus, based on the Protocol on Judicial Cooperation, a Member State of the ICGLR may request another State to extradite individuals alleged to have committed serious crimes under international law on its territory. Even though such request is in accordance with the Pact on Security, the extradition would be effective only if the domestic criminal law of the requested State is consistent with the international and domestic laws to which the requesting State is a party. As the death penalty is not yet abolished in the DRC,[873] the Rwandan government for instance may reject the Congolese application for extradition based on the excuse that Rwanda has abolished the death penalty.[874] This indicates the limitation of the judicial interaction between States at the regional level. To overcome such obstacles, it is important that the ICGLR establish a Great Lakes Regional Court to deal with international crimes committed in Member States.

Indeed, since it is estimated that the number of victims of serious crimes prosecutable under international law is in millions, there is reason to consider that the situation of crimes in the DRC a threat to regional peace and security. Based on Article 23 of the Pact on Security, the DRC could call for an extraordinary session of the ICGLR's Summit to consider the establishment of a Great Lakes Regional Court in accordance with Article 18(a) of the Pact on Security that provides for the establishment of regional mechanisms to combat impunity. Senior judges and prosecutors could be appointed from each Member-State of the ICGLR together with experienced judicial officers and staff from the international scene. The establishment of the Great Lakes Regional Court however needs a high political will from concerned Member States such as Burundi, the DRC, Rwanda and Uganda. This proposition is in line with the AU report known as the *Ezulwini Consensus* which was adopted during an extraordinary summit of Heads of State and Governments in Addis Ababa on 7-8 March 2005. The report affirms that in cases of crimes prosecutable under international law, regional organisations in areas near the conflicts should be empowered to take action.[875] The report also maintains that in such circumstances which require urgent action, the UNSC should offer its approval and assume responsibility for

[873] See Article 167(2) which stipulates that perpetrators of crimes under international law that have caused death of people be liable for the death penalty.

[874] See Organic Law No. 31/2007 of 25/07/2007 onthe abolition of the death penalty. If read together, Articles 2 and 3 stipulate that, "the death penalty is hereby abolished and is substituted by life imprisonment".

[875] International Coalition for the Responsibility to Protect (ICRtoP) http://www.responsibilitytoprotect.org/index.php/africa?format=pdf (Date of use: 5 August 2013).

financing initiatives that constitute homegrown solution to the problem.[876] Clearly, the DRC could request the creation of the Great Lakes Regional Court from the ICGLR which would be approved and funded by the UNSC in order to fight impunity of serious crimes committed in the DRC that constitute a significant threat to peace, security and development in the entire African Great Lakes Region.

At the national level, both the Congolese military and civilian courts have jurisdiction over crimes prosecutable under international law since the adoption of the *Loi organique No. 13/011-B du 11 Avril 2013*, but jurisdiction was restricted solely to the military criminal justice. However, under Articles 91 and 95 of the Organic Law, civilian courts such as the Court of Appeal (*Cour d'Appel*) and the Court of Cassation (*Cour de Cassation*) have jurisdiction over the prosecution of crimes of genocide, war crimes and crimes against humanity committed by persons under their jurisdiction. The main challenge faced by the Congolese judicial system regarding the prosecution of individuals bearing the greatest responsibility remains the lack of independence due to political interference. It is remarkable that prominent leaders who have been integrated into public service and who allegedly committed crimes during the different armed conflicts have never been prosecuted. Thus, high political will is required on the part of the State for it to carry out its responsibility to prosecute offenders effectively.

D. A Great Lakes Regional TRC

Different internationalised armed conflicts in the DRC have produced a large number of victims as well as hatred and division among the people. The TRC which was established in 2004 failed to investigate a single case, but people still need to talk about their pain, know the truth and rebuild relationships that have broken down. This need could be fulfilled through a new TRC as mentioned in different peace agreements such as the Lusaka Ceasefire Agreement (1999) and the Joint ICGLR-SADC Final Communiqué (2013).[877] In addition, the findings from the fieldwork strongly recommend the need to uncover the abuses of the past publicly through such mechanisms of transitional justice. All affected families have the right to the truth and to testify

[876] African Union http://responsibilitytoprotect.org/files/AU_Ezulwini%20Consensus.pdf (Date of use: 12 August 2013).
[877] For further details, read "High-level Attempts to Address the Past" Tunamsifu 2015 *AJCR* 72-79.

about the abuses they suffered. They also have the right to know the identities of the perpetrators and to an effective remedy.

For a new TRC to achieve success, high political will at the leadership level is required in the DRC as in the case of the TRC in the RSA. However, considering the internationalised nature of the different armed conflicts in which Congolese as well as foreign State and non-State actors are suspected of being perpetrators, a regional response to the creation of a Great Lakes Regional TRC is crucial for regional reconciliation and stability based on Articles 23 and 18(a) of the Pact on Security. The process shall be, *mutatis mutandis*, of the establishment of a Great Lakes Regional Court which would require high political will of concerned Member States of the ICGLR such as Burundi, the DRC, Rwanda and Uganda. In this regard, Tim Murithi and Lindsay McClain observe that more than half of contemporary conflicts in Africa have cross-border dimensions. The authors argue that for concerned African countries and their communities to enjoy stability, the regionalisation of violent conflicts calls for a coordinated regional approach to reconciliation or cross-border reconciliation instead of national solutions.[878] Martien Schotsmans further argues that even if the TRC is able to analyse causes of the regional conflict and make recommendations, the recommendations will be at best enforceable by the Congolese government. The establishment of a TRC for the Great Lakes Region is certainly appealing, but there is no doubt that it could encounter some political roadblocks.[879]

However, the proposed Great Lakes Regional TRC, for instance, could consist of two sub-commissions – a regional sub-commission dealing with individuals bearing the greatest responsibility (from Burundi, the DRC, Rwanda and Uganda), and a national and decentralised sub-commission dealing with the other actors at the national and local levels in the DRC. At the regional level, commissioners of the regional sub-commission should individuals with a high sense of morality representing civil society organisations from each Member State of the ICGLR. Some of the commissioners should also be appointed from a pool of experienced international commissioners. This sub-commission could hold hearing sessions in Burundi, the

[878] Murithi and Opiyo "Cross-border Transitional Justice" 3.
[879] Schotsmans 2006-2007 *Annuaire* 227.

DRC, Rwanda and Uganda, especially in neighbouring cities or provinces that are easily accessible to victims/survivors, and it should have power to subpoena anyone who allegedly committed crimes in the DRC. The obstacle to implementing regional mechanism to reconciliation however would be "the reluctance of nation-states to devolve their sovereignty and adopt processes that might be seemingly outside of their sphere of authority and control through the establishment of cross-border institutions".[880] Hence, the establishment of the Great Lakes Regional TRC would require high political will from the governments of Burundi, the DRC, Rwanda and Uganda to promote regional reconciliation and stability.

At the national level, commissioners with high moral integrity from the national and decentralised committees would be representatives of various Congolese civil society organisations as well as experienced international commissioners. However, as the previous TRC in the DRC failed to achieve its objectives it would be helpful to consider the following goals that could enable the Great Lakes Regional TRC to succeed.

- The Commission should aim to put an end to armed conflicts and restore peace and security in the region.
- It should set up a mixed committee made up of experts from fields such as transitional justice, human rights, IHL, international criminal law, political science, conflict analysis, sociology, psychology, and theology from Burundi, the DRC, Rwanda and Uganda. The members should be mandated to engage in dialogue with the affected Congolese population, civil society organisations and traditional leaders through roundtable meetings and workshops in order to draft the Statute of the Great Lakes Regional TRC to be submitted to the ICRGL Summit of Heads of States.
- To ensure the credibility of the Great Lakes Regional TRC, commissioners should be impartial individuals with high moral integrity who are appointed from the civil society organisations or experienced formers commissioners from the international community.
- Its mandate should be realistic and limited to gross violations of human rights and of IHL covering the period from 1990 to December 2016. The 1990s witnessed major

[880] Murithi and Opiyo "Cross-border Transitional Justice" 5.

events such as the massacre of students at the *Université de Lubumbashi* (University of Lumbashashi) in 1990, the 1991 looting spree that resulted in the collapse of business sector, the interethnic conflicts that started in Masisi in 1993, and more. Individuals would be encouraged to come forward, acknowledge their crimes, request public forgiveness from the nation and commit to participate in the reparation process. The Congolese would also be involved in development projects with the guarantee that no prosecution would be undertaken against them. However, the reconciliation process should be built on the cultural values of the areas where the crimes were committed. Criminal prosecution should be initiated against those who fail to come forward at the end of the TRC either at the Great Lakes Regional Court or at the national level.

- Sufficient funds from the UNSC, concerned governments and external donors should be allocated to the Commission to help it achieve its objectives.
- At the end of its deliberations, the Great Lakes Regional TRC should make recommendations on reparation, the reform of the security and judicial sectors, prosecution of those who fail to respond to its invitation, and propose mechanisms for a commission that would help to monitor or assess the implementation of its recommendations.

6.3 Role of Civil Society Organisations with Regard to the Lack of Official Action on Past Abuses

In the RSA, the transitional period paved the way for adopting a legal framework that would address past abuses. The Interim Constitution (Act No. 200 of 1993) was drafted from which the South African Parliament passed the Promotion of National Unity and Reconciliation Act (Act no. 34 of 1995). This legal framework has facilitated the reconciliation process as it stipulates that the truth about past abuses be uncovered and amnesty be granted to individuals who made full disclosure of politically motivated crimes which they committed. However, Desmond Tutu acknowledged that the TRC was not accepted by all parties to the conflict and the most high-ranking officials in the security sector of the former regime were unwilling to cooperate with the

Commission even when they were implicated by the foot soldiers who applied for amnesty. The leaders of the liberation movements also refused to apply for amnesty arguing that they conducted a "just war" and therefore their action did not constitute gross violation of human rights.[881] At the end, the Commission submitted that both factions have engaged in oppression and resistance to apartheid.

Therefore, in the case of those who failed to apply for amnesty or who were denied amnesty, the Commission recommended prosecution where evidence exists that an individual had committed a gross human rights violation. To avoid repetition of past abuses in the future, the Commission recommended the development of a strong human rights culture.[882] However, Desmond Tutu admitted that the implementation of the TRC's recommendations in the post-Mandela government was not effective, that is, including the reparations program. There had been few prosecutions of individuals who failed to apply for amnesty or who were refused amnesty by the TRC, prompting Desmond Tutu's admission that, "the failure to prosecute disillusioned many victims and encouraged the view that the government had strengthened impunity and that the beneficiaries of apartheid had escaped accountability for their actions".[883]

With regards to the culture of human right, Jeremy Sarkin argues that many South Africans have little understanding of the functions and purposes of the Constitution and the Bill of Rights within a democratic society, much less the practical application of these principles in daily life.[884] Hence, non-governmental organisations which focus on human rights are well positioned to play an influential role in issues of human rights abuse. The experience garnered by such organisations could help greatly in the promotion of human rights and the development of a human rights culture.[885]

On the legacy of the Commission, the action of the SACTJ is also very crucial. The SACTJ is constituted by organisations working to advance the rights of victims of past conflicts

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[881] Tutu http://global.britannica.com/topic/Truth-and-Reconciliation-Commission-South-Africa (Date of use: 29 October 2015).
[882] Republic of South Africa, *Truth Commission* (Vol 5) 309, 311.
[883] Tutu http://global.britannica.com/topic/Truth-and-Reconciliation-Commission-South-Africa (Date of use: 29 October 2015).
[884] Sarkin 1998 *HRQ* 664.
[885] Sarkin 1998 *HRQ* 660-662.

and to hold the South African government accountable to its obligations. The member organisations are committed to helping secure the rights of victims of apartheid-era human rights violations and raising awareness about these rights.[886] Regarding the lack of prosecution for example, the SACTJ supports neglected cases where impunity still prevails and requests the NPA to honour its obligation to prosecute those perpetrators who were denied amnesty or who failed to apply for amnesty. It is the case for instance of Nokuthula Simelane who was betrayed by a comrade and kidnapped by the Security Police in 1983. As the location of her remains was not yet disclosed and her murderers were not yet prosecuted even though the TRC found that she had been kidnapped, tortured and forcibly made to disappear, on 22 May 2015, the SACTJ supported Nokuthula's family in fighting for truth and justice.

This case, reports the SACTJ, is one example of hundreds of other that was neglected "due to the gross political interference in the constitutionally mandated work of the NPA. Such interference constitutes a serious violation of the rule of the law. The Coalition deplores this interference and calls on the government to respect and uphold the independence of the NPA".[887] Thus, the SACTJ should continue denouncing the failure to implement the TRC's recommendations including the failure of the NPA to prosecute past abuses as well of the lack of the political will by the State to fulfil its obligation to make reparations to victims of gross human rights violations. If the State fails to do this, the SACTJ should consider employing the principle *Aut Dedere Aut judicare* to submit cases to countries which apply the principle of universal jurisdiction where there are reasonable grounds to believe that evidence exists. The third country could then request that South Africa prosecute or extradite its nationals who are alleged perpetrators.

[886] The SACTJ consists of the Institute for Justice and Reconciliation, Khulumani Support Group, Centre for the Study of Violence and Reconciliation, International Centre for Transitional Justice, South African History Archives, Human Rights Media Centre, Freedom of Expression Institute and the Trauma Centre for Survivors of Violence and Torture.

[887] SACTJ http://www.ijr.org.za/uploads/SACTJ20Press20Release20SIMELANE2020.05.2015.pdf (Date of use: 14 March 2016).

From the South African experience, four lessons can be learned:

- The transition period designed the framework that was implemented by the elected government.
- The TRC was given the power to grant individual amnesty which protected applicants from both criminal and civil liability.
- During the transition, the threat of prosecution was used as the impetus for perpetrators to offer testimony and to make full disclosure of their roles in exchange for amnesty.
- The achievement of South Africa's TRC was due largely to the commitment by the country's top political leadership to prioritise reconciliation in order to prevent the repetition of past violation in the future.

During the peace talks in the DRC, warring parties agreed that institutions that would deal with the past be established during the transition and constituted by the same actors in the conflicts based on a power sharing formula. As many individuals who were part of the transitional authorities were alleged perpetrators, by the end of the transition in December 2006, the TRC had failed to investigate a single case due to the lack of political will and other reasons presented in 6.2.2 above. However, the need to establish a new TRC is still strongly recommended in different peace agreements. Considering the nature of the different armed conflicts in the DRC which some scholars have referred to as the *Great African War,*[888] *the Inter-African War,*[889] the *First African World War*[890] or the *First African Continental War,*[891] and so forth, this study submits that a regional response is crucial to regional reconciliation and stability. Since Congolese as well as foreign State and non-State actors are alleged perpetrators of the abuses, the research proposes that a Great Lakes Regional TRC be established as a matter

[888] Reyntjens *The Great African War;* Nzongola-Ntalaja *The Congo* 215-252; Ewald J *et al Great Lakes Region* 23-32.
[889] Nzongola-Ntalaja http://projectcongo.org/images/The_20International_20Dimensions_20of_20the_20Congo_20Crisis.pdf (Date of use: 29 April 2011).
[890] Pérouse De Montclos "Politics of Armed Conflicts" 59; Jordan *Hidden Voices* 107; Häussler "Peace Missions" 268; Cater "Political Economy of War" 37.
[891] Weiss *War and Peace* 1; Nemeth *Cultural Security* 164.

of urgency. On the issue of accountability, the study calls for the creation of a Great Lakes Regional Court for the DRC that would enable the country to deal with serious and widespread crimes committed from the 1990s to the present.

From a pragmatic point of view, it should be acknowledged that the unwillingness of the current Congolese political leaderships to establish a new TRC as recommended in all peace agreements is not an innocent act because some members of the ruling party and their allies are alleged perpetrators. However, the present situation in which fighting continues between the FARDC and some local and foreign rebel groups in some areas cannot provide an atmosphere that is conducive for such an initiative. Besides, considering the nature of the different armed conflicts in which all rebel groups benefited from the support of neighbouring countries, the initiative to create a Great Lakes Regional Court for the DRC remains crucial notwithstanding the possibility of resistance from concerned ICGLR's Member States. The initiative will probably receive little support from the current leadership of affected States which would be unwilling to support the establishment of a Great Lakes Regional Court that would prosecute and judge their top politicians or commanders of the security sector who are alleged perpetrators of serious crimes in the DRC.

In order to push affected Member States of the ICGLR to agree to the creation of both regional mechanisms, this study urges the civil society organisations from Burundi, the DRC, Rwanda and Uganda to organise a roundtable conference that would consider the creation of an unofficial Great Lakes Regional Commission of Inquiry. The Commission should be given the task of investigating crimes which emanated from internationalised armed conflicts in which State and non-State actors from Member States of the ICGLR participated from 1996 to the present. In the end, a final report should be presented to the different parliaments of ICGLR Member States, to the Executive Secretary of the ICGLR, to the Chairperson of the AU and to the UN Secretary General. To achieve regional reconciliation and stability in the African Great Lakes Region, the final report should call for the creation of a Great Lakes Regional TRC and a Great Lakes Regional Court for the DRC which would deal with past abuses and which would be constituted by affected ICGLR Member States.

6.4 Recommendations

In the light of the research findings considered above, this study offers the following recommendations.

For the RSA

- In order to honour the fighters for freedom and justice in South Africa, the South African government is obliged to implement the TRC's recommendations.
- The NPA should be reminded of its obligation to prosecute perpetrators who were denied amnesty or who failed to apply for amnesty in cases where there is sufficient evidence.
- In neglected cases and cases which reparation was denied, the SACTJ should continue to fight impunity by reminding the State of its obligations under international customary law to investigate and prosecute those bearing the greatest responsibility for gross human rights violations. On the issue of reparation, the government should, among other ways, consider drawing on the Presidential Trust Fund to compensate survivors/victims.
- The post-apartheid government supported the work of the TRC; therefore, successive governments cannot afford to discontinue the implementation of its recommendations. Otherwise, it will be found 'to be spitting on the graves of South African freedom fighters' who lost their lives in the struggle against apartheid. Thus, the SACTJ should consider ways to make the government accountable and compel it to implement the TRC's recommendations.
- If the previous recommendation fails, the SACTJ should consider employing the principle *Aut Dedere Aut judicare* to submit cases to countries that apply the principle of universal jurisdiction where there are reasonable grounds to believe that evidence exists. Thus, the third country would request South Africa to prosecute or extradite its nationals who are alleged perpetrators.
- About the remains of missing victims, the SACTJ should continue to encourage anyone who has information about the cases to come forward. To sustain reconciliation efforts,

the SACTJ should also maintain ongoing dialogues and involve elders of different South African communities in such.

In the DRC

In the DRC, widespread crimes have continued as a result of the different armed conflicts which also involved citizens of neighbouring countries. For justice and reconciliation to be attained, what is needed is a regional approach to justice and reconciliation or a regional homegrown solution to the internationalised conflicts rather than a national solution. Thus, this study recommends:

- Based on Articles 23 and 18(a) of the Pact on Security of the ICGLR and on the *Ezulwini Consensus*, the creation of a Great Lakes Regional Court and of a Great Lakes Regional TRC by the ICGLR. The UNSC shall approve and finance these mechanisms which could be used to fight impunity in respect of serious crimes committed in the DRC which constitute a serious threat to peace, security and development in the entire Great Lakes Region.
- That both regional mechanisms be constituted by judicial officers, commissioners and staff from all Member States of the ICGLR in addition to a percentage of international experts that would be appointed to be part of its composition.
- If the previous recommendation fails, the civil society organisations from Member States of the ICGLR should consider organising a regional roundtable which would recommend the creation of an unofficial Great Lakes Regional Commission of Inquiry that would investigate crimes-related to armed conflicts. The final report of the Commission should then be submitted to the different parliament of the affected countries, to the Executive Secretary of the ICGLR, to the Chairperson of the AU and to the UN Secretary General.
- Based on the *Loi Organique No. 13/011-B du 11 Avril 2013*, the government needs to demonstrate high political will in fulfilling the State's responsibility and to enable both the Congolese military courts and the civilian courts that have the right jurisdiction to prosecute crimes chargeable under international law.

- The ICC, which complements the efforts of the Congolese judicial system, should avoid selective justice and its OTP should consider travelling to the DRC to gather sufficient forensic evidence to prove that alleged perpetrators are guilty of international crimes beyond reasonable doubt.
- The DRC government should also consider creating a national commission that would handle issues of pacification and mediation and collaborate with existing bodies such as *Barza Intercommunautaire* in order to mediate and resolve conflicts in war-torn communities.

In sum, in opting to deal with the legacies of gross past violations through the mechanisms of transitional justice, the findings of this study demonstrate that political will, a secure environment, and sufficient funds are crucial to effective operation of those mechanisms. Hence, an elected government could take advantage of the transitional period to pave the way for implementing those mechanisms. In other words, societies in political transition should take advantage of the transitional period to reform the previous legal order and consult the population on the nature and the goals of those mechanisms as South Africa did.

However, it is important also to consider that the transitional period is not a suitable time to deal with the past as the DRC tried to do. Rather, the period could be employed to establish criteria that the post-transitional government or elected government in consultation with the population could apply in dealing with the past. After the transitional period, the elected government should be committed to redressing past violations. In the DRC, transitional institutions failed to deal with the past, and ten years after, widespread crimes are still being perpetrated in which Congolese from the DRC and foreign State and non-State actors are alleged perpetrators. This study has not only called for the restoration of peace and of the State's authority, but also for a regional approach that would help deal with crimes committed in the DRC. Thus, high political will from the top leadership of the governments of Burundi, the DRC, Rwanda and Uganda, among others within the region, is required in order to establish the proposed Great Lakes Regional Court and Great Lakes Regional TRC.

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Interviewees and Focus Groups

RSA

Key Informants

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Key informant #02RSA interviewed in Johannesburg on 3 November 2014. Staff of the Centre for the Study of Violence and Reconciliation (CSVR)

Key informant #03RSA interviewed in Pretoria on 22 January 2015. Staff of the National Prosecuting Authority Head Office in Pretoria

Key informant #04RSA interviewed in Pretoria on 05 February 2015. Staff of the Truth and Reconciliation Commission Unit, Department of Justice

Key informants #05RSA interviewed in Pretoria on 6 March 2015. Staff of the South African Department of Defence Archives

Key informant #06RSA interviewed in Johannesburg on 26 February 2015. Former Commissioner of the TRC in South Africa and in Sierra Leone

Key informant #07RSA interviewed in Pretoria on 23 June 2015. Staff of the Institute for Justice and Reconciliation

Key informant #08RSA interviewed in Johannesburg on 24 June 2015. Staff of the South African History Archives

Key informant #09RSA interviewed on Skype from Cape Town 26 June 2015. Staff of the Institute for Justice and Reconciliation

Key informant #11RSA interviewed in Cape Town on 12 August 2015. Representative of Human Right Media Centre in RSA

Focus Group

Participants in the focus group #1FG/RSA in Mamelodi on 24 July 2015

DRC

Key informant #01DRC interviewed in Goma on 16 December 2013. Staff of Hôpital Heal Africa de Goma

Key informant #02DRC interviewed in Goma on 17 December 2013. Victim found at Hôpital Heal Africa de Goma

Key informant #03DRC interviewed in Goma on 17 December 2013. Victim found at Hôpital Heal Africa de Goma

Key informant #04DRC interviewed in Goma on 17 December 2013. Staff of Association du Barreau Américain à Goma

Key informant #05DRC interviewed in Goma on 17 December 2013. Staff of Association du Barreau Américain à Goma

Key informant #06DRC interviewed in Goma on 18 December 2013. Member of the Coordination Provinciale de la société civile du Nord Kivu à Goma

Key informant #07DRC interviewed in Goma on 18 December 2013. Victim found at Hôpital Heal Africa de Goma

Key informant #08DRC interviewed in Bukavu on 20 December 2013. Person at Hôpital Général de Panzi à Bukavu

Key informant #09DRC interviewed in Bukavu on 20 December 2013. Member of the Coordination Provinciale de la société civile du Sud-Kivu

Key informant #10DRC interviewed in Uvira on 21 December 2013. Staff ofGenre actif pour un devenir meilleur de la femme (GAD) à Uvira

Key informant #11DRC interviewed in Uvira on 22 December 2013. Staff of the entity Village de Makobola à Uvira

Key informant #12DRC interviewed in Kaniola on 23 December 2013. Staff of the Paroisse Reine de tous les Saints de Kaniola à Bukavu

Key informant #13DRC interviewed in Kaniola on 23 December 2013. Staff of the Bureau d'écoute Justice et Paix at the Paroisse Reine de tous les Saints de Kaniola à Bukavu

Key informant #14DRC interviewed in Burhale on 23 December 2013. Staff of the Paroisse Saint Jean Apôtre de Burhale à Bukavu

Key informant #15DRC interviewed in Uvira on 02 January 2014. Staff of the Cité d'Uvira in Uvira.

Key informant #17DRC interviewed in Uvira on 03 January 2014. Staff of the Cadre de Concertation inter-ethnique de Uvira

Key informant #18DRC interviewed in Bunia on 20 January 2014. Staff of Caritas Bunia

Key informant #20DRC interviewed in Bunia on 21 January 2014. Staff of Association des Mamans Anti Bwaki de Bunia and former Commissioner of the Commission Vérité et Réconciliation in the DRC.

Key informant #21DRC interviewed in Bunia on 21 January 2014. Staff of Ecole de la Paix des Missionnaires d'Afrique in Bunia

Key informant #22DRC interviewed in Bunia on 21 January 2014. Staff of Coopération Internationale in Bunia

Key informant #23DRC interviewed in Bunia on 22 January 2014. Staff of the Centre de recherche de l'Institut Supérieur Pédagogique de Bunia

Key informant #24DRC interviewed in Bunia on 22 January 2014. Staff of Justice Plus in Bunia

Key informant #25DRC interviewed in Bunia on 22 January 2014. Representative of the Hima community of Bunia

Key informant #26DRC interviewed in Bunia on 23 January 2014. Member of the Coordination de la Société civile de Bunia

Key informant #30DRC interviewed in Bunia on 24 January 2014. Person representing Lendu community of Bunia

Key informant #31DRC interviewed in Kisangani on 29 January 2014. Staff of Congo en Images in Kisangani

Key informant #32DRC interviewed in Kisangani on 30 January 2014. Staff of Actions et Réalisations pour le Développement de Kisangani

Key informant #33DRC interviewed in Kisangani on 31 January 2014. Member of the Coordination Provinciale de la société civile de Kisangani

Key informant #35DRC interviewed in Kisangani on 30 January 2014. Staff of the Commission Justice et Paix de la Province Orientale

Key informant #38DRC interviewed in Kisangani on 01 February 2014. Staff of Union pour le développement de la Province Orientale

Key informant #39DRC interviewed in Kinshasa on 18 February 2014. Staff of the Bureau de la representation de la CPI à Kinshasa

Key informant #40DRC interviewed in Kinshasa on 21 February 2014. Staff of Coalition pour la CPI à Kinshasa

Key informant #41DRC interviewed in Kinshasa on 06 March 2014. Member of la Nouvelle Société civile Congolaise à Kinshasa

Key informants #42DRC interviewed in Kinshasa on 06 March 2014. Staff of the International Center for the Transitional Justice in Kinshasa:

Key informants #43DRC interviewed in Kinshasa on 25 March 2014. Staff of the Parquet Général de la République in Kinshasa

Key informants #44DRC interviewed in Kinshasa on 28 March 2014. Staff of Haute Cour Militaire à Kinshasa

Key informants #45DRC interviewed in Kinshasa on 28 March 2014. Former Commissioner of the Commission Vérité et Réconciliation in the DRC.

Focus Groups

Participants in the focus group #1FG/DRC held in Bunia on 20 January 2014. Staff of at Réseau Haki na Amani in Bunia

Participants in the focus group #2FG/DRC held in Kisangani on 30 January 2014. Focus group with the Comité du fond de solidarité des victimes de guerre de 6 jours à Kisangani

APPENDICES

b

Appendix 1: **Letter of permission, Informed Consent, Interview Guide and Focus Group Guide (English Version)**

UNISA university of south africa

Letter(s) of permission from relevant bodies

Dear .....,

I am very pleased to write to you seeking permission to involve your institution in my doctoral research.

The topic of my doctoral thesis is "A Comparative Study of Transitional Justice in the Republic of South Africa and in the Democratic Republic of the Congo" in the Department of Public, Constitutional, and International Law, University of South Africa (UNISA), Pretoria. The study is under the supervision of Dr. Andreas Gerhardus Velthuizen of the Institute for Dispute Resolution in Africa (IDRA) of the same University. The objectives of this research are to analyse the role of criminal prosecutions under transitional policy and to assess the role played by the TRC dealing with past abuses in the RSA and in the DRC. Besides this, it will identify ways and means of restoring victims' dignity in the RSA and in the DRC.

Indeed, to conduct the study, I need to interview one representative of your institution because of his position within the institution (or to have a group discussion with victims because of their being members of your association) in February 2014. The interview (or the focus group) will be semi-structured, with open-ended questions, and will take no more than two hours. I sincerely assure you that the consent of participants will be sought with the guarantee for them to be allowed withdraw from the study without penalty, and all interviews (or focus group discussion) will respect the confidentiality and anonymity of the participants.

I am confident that your institution will grant me the permission to get in touch with your institution's representative to hold an interview (or with your association's representative or access to victims to have a group discussion).

I am looking forward to hearing from you.

Yours sincerely,

Tunamsifu Shirambere Philippe
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UNISA, Pretoria, RSA
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PO Box 392 UNISA 0003 South Africa
Telephone: +27 12 484 1104 Facsimile: +27 12 429 8136
Email: IDRA@unisa.ac.za

A. *Appendix 2:*

UNISA university of south africa

Informed Consent Form

Research Project Title: "A Comparative Study of Transitional Justice in the Republic of South Africa and in the Democratic Republic of the Congo"

I agree to participate in an academic research study being conducted by Tunamsifu Shirambere Philippe of the Department of Public, Constitutional, and International Law, University of South Africa (UNISA), Pretoria. I understand that the study is under the supervision of Dr. Andreas Gerhardus Velthuizen of the Institute for Dispute Resolution in Africa (IDRA) of the same University. The objectives of this research are to analyse the role of criminal prosecutions under transitional policy and to assess the role played by the TRC dealing with past abuses in the RSA and in the DRC. Besides this, it will identify ways and means of restoring victims' dignity in the RSA and in the DRC.

I am participating in this study voluntarily and I have the right to withdraw at any stage of the research without giving any reason and without any penalty. I may request not to answer any particular question. I may also request confidentiality with respect to responses that I give. I can make this request before, during, or after the interview, although I must make this request before the final report is completed. The completion date of this research project is end of June 2015. I understand that I may make this request of confidentiality on or before end of June 2015. I may be able to contact the researcher directly on +27837484398 and +243997741301 or on email: tusphil@yahoo.fr and 51000644@mylife.unisa.ac.za if I have any questions or concerns before, during, or after the interview.

If I choose to end the interview entirely, I may ask that the final report and related articles and/or presentations will not use my responses in any way and all my notes and audio (tape) recordings will be destroyed. As a participant in this study, I realize that I will be granting an interview to the researcher that will take no more than two hours. I understand that all the audio tapes and electronic data will be kept in a secure manner by the researcher, who, together with his supervisor and the Ethics Review Committee, has sole access to the data.

Signing this consent form signifies that I agree that the researcher may openly use my responses as quotations or statements in the final dissertation document, conference presentations, classroom presentations, and academic publications related to the dissertation research, unless otherwise specified as outlined above. I understand that my consent will be sought at all times for the present interview and any future research.

I acknowledge that I have been informed about the objectives of this study. I have read and understood my role and rights as an interviewee, and I freely consent to participate in it.

Names: .....

Signature: ..... Date: .....

Institute for Dispute Resolution in Africa
University of South Africa
Room 2-10 Building 1, Sunnyside Campus, City of Tshwane
PO Box 392 UNISA 0003 South Africa
Telephone: +27 12 484 1104 Facsimile: +27 12 429 8136
Email: IDRA@unisa.ac.za

B. Appendix 3: Interview Guide

Interview guide

A. Place:
B. Gender:
C. Interviewer:
D. Date:
E. Start:
F. End:

1. Role of the criminal prosecutions under transitional justice in the RSA and in the DRC

1.1. How were victims affected by past abuses and what are the profiles of perpetrators?

1.2. What is your view of the role of the judicial system and explain why your country was unable or unwilling to prosecute past crimes?

1.3. What is your view of the collaboration between the ICC and the national judicial system and the complementary nature of their operations?

2. Role of the TRC in dealing with past abuses

1.1. Did victims welcome the establishment of the TRC, and what were their expectations?

1.2. How would you rate the achievements of the TRC?

1.3. Have victims been affected by the amnesty?

3. Ways of restoring the dignity of victims

3.1. What do you think could be done to restore the victims' dignity?

4. Suggestion to build a sustainable peaceful future

4.1. What do you suggest should be done to redress past abuses, reconcile the nation, rehabilitate and compensate victims, and build a sustainable peaceful future?

C. Appendix 4: Focus Group Guide

Focus group guide with victims in the RSA and in the DRC

Place:

Number of participants:

M: …… F: ..… Moderator:

Interviewer: Note-taker:

Date: Transcriber :

Start: End:

1. **Role of the criminal prosecutions under transitional justice in the RSA and in the DRC**
   1.1. How were victims affected by past abuses and what are the profiles of perpetrators?
   1.2. What is your opinion about the role played by the judiciary and why was your country unable or unwilling to prosecute past crimes?
   1.3. What is your view of the collaboration between the ICC and the national judicial system and the complementary nature of their operations?

2. **Role of the TRC in dealing with past abuses**
   1.1. Did victims welcome the establishment of the TRC, and what were their expectations?
   1.2. How would you rate the achievements of the TRC?
   1.3. How have victims been affected by the amnesty?

3. **Ways of restoring the dignity of victims**
   3.1. What do you think could be done to restore the dignity of victims?

4. **Suggestions for building a sustainable peaceful future**
   4.1. What do you suggest should be done to deal with past abuses, reconcile the nation, rehabilitate and compensate victims, and build a sustainable peaceful future?

ANNEXE II: Lettres d'autorisation; de Consentement; Guide d'interview; et Guide de Focus group (French Version)

A. Annexe 1:

UNISA university of south africa

Lettre d'autorisation aux institutions et Associations

A Madame/ A Monsieur

Je suis très heureux de vous écrire pour vous demander la permission de faire participer votre institution dans mes recherches doctorales.

Le sujet de ma thèse de doctorat est «A Comparative Study of Transitional Justice in the Republic of South Africa and in the Democratic Republic of the Congo/ Une étude comparative de la justice transitionnelle en République d'Afrique du Sud et en République Démocratique du Congo» dans le Département de Droit international public et constitutionnel à l'Université d'Afrique du Sud (UNISA) à Pretoria. L'étude est sous la supervision du Dr. Andreas Gerhardus Velthuizen de l'Institut pour la résolution des différends en Afrique (IDRA) de la même université. Les objectifs de cette recherche sont d'analyser le rôle des poursuites pénales pendant la transition politique et d'évaluer le rôle joué par la Commission vérité et réconciliation face aux violations passées en Afrique du Sud et en République Démocratique du Congo. En outre, elle identifiera les voies et moyens pour restaurer la dignité des victimes en Afrique du Sud et en République Démocratique du Congo.

En effet, pour réaliser cette étude, je dois interviewer 1 représentant de votre institution en raison de sa position au sein de l'institution (ou je dois avoir une discussion de groupe avec les victimes en raison de leur statut de membre de votre association) en Février 2014. L'interview (ou le groupe de discussion) sera semi-structuré, avec des questions ouvertes et ne prendra pas plus de deux heures. Je vous assure sincèrement que le consentement des participants sera indispensable avec la garantie pour eux de se retirer de l'étude sans pénalité, et toutes les interviews (ou discussions de groupe) respecteront la confidentialité et l'anonymat des participants.

Je suis convaincu que votre institution va me donner l'autorisation d'entrer en contact avec le représentant de votre institution à tenir cette entrevue (représentant de votre association ou l'accès aux victimes et d'avoir une discussion de groupe).

Espérant avoir une suite favorable de votre part, nous vous prions d'agréer l'expression de notre sincère et profonde gratitude.

Cordialement,

Tunamsifu Shirambere Philippe
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B. Annexe 2:

Lettre de Consentement

Titre du projet de la recherche: «A Comparative Study of Transitional Justice in the Republic of South Africa and in the Democratic Republic of the Congo/ Une étude comparative de la justice transitionnelle en République d'Afrique du Sud et en République Démocratique du Congo"

Je suis d'accord pour participer à cette étude universitaire menée par Tunamsifu Shirambere Philippe du Département de Droit international public et constitutionnel de l'Université d'Afrique du Sud (UNISA) à Pretoria. Je suis informé que l'étude est sous la supervision du Dr. Andreas Gerhardus Velthuizen de l'Institut pour la résolution des différends en Afrique (IDRA) de la même université. Les objectifs de cette recherche sont d'analyser le rôle des poursuites pénales pendant la transition politique et d'évaluer le rôle joué par la Commission vérité et réconciliation face aux violations passées en Afrique du Sud et en République Démocratique du Congo. En outre, elle identifiera les voies et moyens pour restaurer la dignité des victimes en Afrique du Sud et en République Démocratique du Congo. Ainsi, votre expérience personnelle peut être utile pour mener à bien cette étude.

Je participe à cette étude volontairement et j'ai le droit de me retirer à tout stade de la recherche, sans donner de raison et sans aucune pénalité. Je peux demander de ne pas répondre à une question particulière. Je peux aussi demander la confidentialité des réponses que je donne. Je peux faire cette demande avant, pendant ou après l'entrevue. Cependant, je dois faire cette demande avant que le rapport final soit achevé. La date d'achèvement de ce projet de recherche est fin Juin 2015. Je comprends que je peux faire cette demande de confidentialité au plus tard fin Juin 2015. Je peux être en mesure de contacter le chercheur directement sur +27837484398 et +243997741301 ou par email : tusphil@yahoo.fr et 51000644@mylife.unisa.ac.za si j'ai des questions ou soucis avant, pendant ou après l'entrevue.

Si je choisis de mettre fin à l'entrevue entièrement, je peux demander que le rapport final et articles connexes et / ou présentations n'utiliseront pas mes réponses en aucune façon et toutes mes notes et enregistrement audio (bande) seront détruit. En tant que participant à cette étude, je me rends compte que je vais accorder une interview au chercheur qui ne prendra pas plus de deux heures. Je comprends que toutes les cassettes audio et des données électroniques seront conservées et bien sécurisée par le chercheur, que seuls son superviseur et le comité d'éthique auront accès aux données.

La signature de ce formulaire de consentement signifie que je suis d'accord que le chercheur peut ouvertement utiliser mes réponses comme des citations ou des retraitements dans le document final de la thèse, dans les présentations lors de conférences, dans les présentations en classe et dans des publications académiques liées à la recherche de thèse, sauf indication contraire, comme indiqué ci-dessus. Je comprends que mon consentement sera sollicité à tout moment pour l'entrevue actuelle et toute recherche future.

Je reconnais que je suis informé des objectifs de cette étude, j'ai lu et compris mon rôle et mes droits en tant que personne interviewée, et je consens librement à participer.

Noms: ……..

Signature: ..... Date: ……

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C. Annexe 3: Guide d'Interview

A. Place:
B. Genre:
C. Intervieweur:
D. Date:
E. Début:
F. Fin:

1. Rôle joué par les poursuites pénales en vertu de la justice transitionnelle dans la RSA et en RDC

1.1. Comment les victimes ont été affectées par les abus du passé et quels sont les profils des auteurs?

1.2. Quelle est votre opinion du rôle joué par le système judiciaire et expliquer pourquoi votre pays ait manqué la volonté ou ait été dans l'incapacité de poursuivre les crimes du passé?

1.3. Comment appréciez-vous la collaboration et la complémentarité de la CPI avec le système judiciaire national?

2. Rôle joué par la CVR pour connaître les violations passées

2.1. Comment les victimes avaient saluées la création de la CVR et quelles étaient leurs attentes?

2.2. Que pensez-vous à propos des réalisations de la CVR?

2.3. Comment les victimes ont été affectées par l'amnistie?

3. Des voies pour restaurer la dignité des victimes

3.1. Que pensez-vous pourrait être faites en vue de restaurer la dignité des victimes?

4. Suggestion de construire un avenir pacifique durable

4.1. Que suggérez-vous pourrait être faites au regard des abus du passé, afin de réconcilier la nation, réhabiliter et indemniser les victimes, et de construire un avenir de paix durable en RDC / RSA?

D. Annexe 4: Guide de Focus Groupe en Afrique du Sud et en RDC

Place :

Nombre de participants :

M: …… F: ...… Modérateur :

Intervieweur : Secrétaire :

Date : Opérateur de saisie :

Début : Fin :

1. Rôle joué par les poursuites pénales en vertu de la justice transitionnelle dans la RSA et en RDC

1.1. Comment les victimes ont été affectées par les abus du passé et quels sont les profils des auteurs?

1.2. Quelle est votre opinion du rôle joué par le système judiciaire et expliquer pourquoi votre pays ait manqué la volonté ou ait été dans l'incapacité de poursuivre les crimes du passé?

1.3. Comment appréciez-vous la collaboration et la complémentarité de la CPI avec le système judiciaire national?

2. Rôle joué par la CVR pour connaître les violations passées

2.1. Comment les victimes avaient saluées la création de la CVR et quelles étaient leurs attentes?

2.2. Que pensez-vous à propos des réalisations de la CVR?

2.3. Comment les victimes ont été affectées par l'amnistie?

3. Des voies pour restaurer la dignité des victimes

3.1. Que pensez-vous pourrait être faites en vue de restaurer la dignité des victimes ?

4. Suggestion de construire un avenir pacifique durable

4.1. Que suggérez-vous pourrait être faites au regard des abus du passé, afin de réconcilier la nation, réhabiliter et indemniser les victimes, et de construire un avenir de paix durable en RDC / RSA ?