

**Traditional Justice and States' Obligations for Serious  
Crimes under International Law: An African Perspective**

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## Plagiarism Declaration

I, Gabriel Chembezi, hereby declare that this dissertation is original. It has never been presented to any other University or Institution. Proper references have been provided where other people's ideas have been used. Where other people's words have been used, they have been quoted and duly acknowledged.

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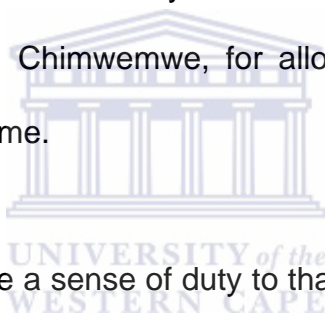
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‘Zikomo kwambiri,’ Thanks very much, ‘Vielen dank,’ ‘Baie dankie.’

## Dedication

To the loving memory of my uncle and mentor, late Evans Masowa, who passed away on 17 February 2010, just within a month of my Masters Degree programme.



## List of Abbreviations

ECHR	European Court of Human Rights
IACHR	Inter-American Court of Human Rights
ICC or the Court	International Criminal Court
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
LRA	Lord's Resistance Army
Rome Statute	The Rome Statute of the International Criminal Court
SCSL	Special Court for Sierra Leone



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## Chapter I

### Introduction to the Research Problem

#### 1.1. Background to the Study

The role of traditional justice as an option for dealing with the legacy of the past in African countries under transition, has gained increasing recognition over the recent years. Rwanda, through its use of the traditional *gacaca* courts alongside the Western modelled courts, has been a moving example of an attempt to attain comprehensive justice in dealing with the legacy of the genocide.<sup>1</sup> In Uganda, the proposed juxtaposition of the traditional *mato oput* ceremony alongside international justice is bringing hope to the country, as it seeks to end more than two decades of armed conflict.<sup>2</sup> Likewise, in Mozambique, the local communities have on their own initiative resorted to the traditional *magamba* ritual ceremony in seeking justice for the atrocities committed during the war, despite the government's official policy of not facing the legacy of the war.<sup>3</sup>

The situations in Rwanda, Uganda and Mozambique, which represent similar trends across the continent, have elicited very interesting questions in the transitional justice discourse. The first question is whether this is an

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<sup>1</sup> Ambos (2009:187). The post genocide period in Rwanda came to be characterised by a true proliferation of justice mechanisms with divergent aims, designed to ensure accountability for the genocide. Four transitional justice regimes were therefore designed. These were the International Criminal Tribunal for Rwanda (ICTR), the Rwandan National Courts, National Unity and Reconciliation Commission (NURC) and the local *gacaca* courts.

<sup>2</sup> The armed conflict has seen government forces fighting forces of the Lord's Resistance Army (LRA). The government of Uganda has recognised the legitimacy of the International Criminal Court by referring its situation to the Court. On the other hand, there is also a wave of opinion preferring resort to traditional justice to ensure realisation of peace and justice in Uganda.

<sup>3</sup> Igreja and Dias-Lambranca (2008:61).

indication that traditional justice in Africa is increasingly being regarded as equally legitimate to, if not more acceptable than the now universally recognised transitional justice mechanisms, such as prosecutions, truth commissions, amnesties and reparations. The other and more important question is whether traditional justice, even if it enjoys legitimacy, can effectively deal with serious crimes under international law, which usually characterise societies under transitions.

The aim of this paper is to critically provide answers to the above questions, the main emphasis being the second question. The paper analyses whether traditional justice enjoys public legitimacy to justify its application or continued application in transitional societies. Further, given that many countries under transitions have a legacy of serious international law crimes, the paper critically analyses whether traditional justice is able to deal adequately with serious crimes under international law, an area which has otherwise been traditionally reserved for the formal national or international courts.

In answering the above questions, this paper will focus chiefly on the operations of the *gacaca* Courts of Rwanda, the *mato oput* justice proceedings as implemented under the customary law of Uganda and the *magamba* ritual ceremonies of Mozambique. The paper will also make constant references to a cross-section of other African traditional justice practices, in so far as they relate to crimes analogous to those found under Western law. The focus of this paper is restricted to the African context, and

the use of the word “traditional justice” refers to “African traditional justice practices.” Further, the terms “customary law and traditional law” and “customary courts and traditional courts” will be used interchangeably throughout this paper.

## 1.2. Research Question

The experiences in Rwanda, Uganda and Mozambique have brought traditional justice and international criminal law at cross-roads. While using traditional justice to deal with the atrocities of the past, transitional countries cannot avoid dealing with serious crimes under international law, which usually characterise the bad legacy of the past.

Under the present international criminal law jurisprudence, States have a primary obligation to try and punish perpetrators of serious crimes committed by predecessor dictatorial regimes or during periods of internal conflicts. This obligation is evident in the creation of the International Criminal Court (hereinafter “the Court” or “the ICC”).<sup>4</sup> It is also found in the jurisprudence which prohibits amnesty for serious international crimes.<sup>5</sup> Further, the recognition of the principle of universal jurisdiction, under which any State

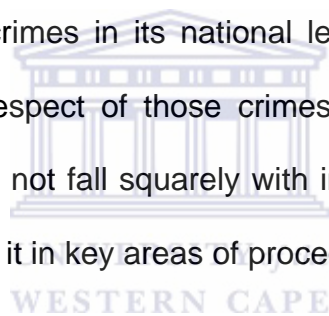
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<sup>4</sup> Rome Statute of the International Criminal Court (“The Rome Statute”) adopted on 10 November 1998 and entered into force on 1 July 2002. The main aim for the creation of the International Criminal Court was to do away with impunity by ensuring trial and punishment of persons bearing the greatest responsibility for the most serious crimes of concern to the international community as a whole. See preambles 4 and 5, and articles 1 and 5 of the Rome Statute. The creation of the ICC guarantees the primacy of States in respect of serious crimes under international law because the ICC assumes jurisdiction of a matter only if a State is unable or unwilling to try its suspects. See preambles 6 and 10, and articles 1, 17 and 20.

<sup>5</sup> See for example *Almonacid –Arellano et al v. Chile* [2006] IACHR-12.05 and *Prosecutor v. Morris Kallon and Brima Bazzy Kamara* [2004] SCSL-2004-15-AR 72 (E) and SCSL-2004-16-AR 72 (E).

can try a perpetrator of serious international crimes, also bears testimony to this fact. Finally, the obligations of States in respect of serious international crimes is also found in various treaties, including human rights treaties, which require States to undertake effective investigations in respect of those crimes.

A State can only enjoy this primacy if it incorporates serious international crimes under its national laws.<sup>6</sup> Most African States have dual legal systems comprising of the Western-modelled formal courts and traditional courts. The latter dispense traditional justice. This means that once a State incorporates serious international crimes in its national legal system, it may opt to use traditional justice in respect of those crimes. However, by its very nature traditional justice does not fall squarely with international criminal justice, as it mostly deviates from it in key areas of procedure.



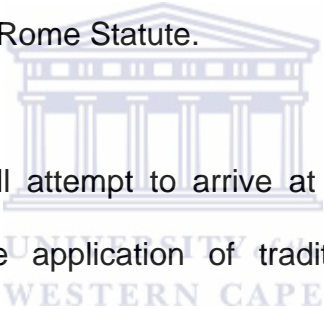
This puzzle is what this paper seeks to deal with. Thus, the main question this paper seeks to answer, which is **whether traditional justice has the capacity to handle serious crimes under international law**, has been divided into the following parts, namely:

- Whether traditional justice meets the minimum standards of accountability for perpetrators, considering the fact that it usually emphasises peaceful resolution, reconciliation and reintegration, with retribution only playing an insignificant role;

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<sup>6</sup> Young (2005:122).

- Whether traditional justice prescribes adequate reparations for victims while ensuring that the perpetrator atones for the crime committed;
- Whether traditional justice has guarantees for due process for offenders and whether it provides safeguards for victims;
- Whether recourse to traditional justice would comply with a State's international obligation of bringing perpetrators of serious crimes to justice; and,
- Whether recourse to traditional justice procedures in dealing with serious international crimes would not evidence unwillingness or inability of a State to genuinely investigate or prosecute in respect of article 17 of the Rome Statute.



In brief, this paper will attempt to arrive at an acceptable middle ground between calls for the application of traditional justice mechanisms to international crimes on the one hand, and on the other, the demands of international criminal justice.

### **1.3. Significance of the Study**

This study is timely as it seeks to respond to the controversial question being increasingly raised in contemporary legal literature, namely, whether traditional justice has any role to play in international criminal justice. Throughout the transitional justice genealogy, traditional justice has been sidelined in favour of the Western-modelled transitional justice mechanisms. The coming into force of the Rome Statute of the ICC (hereinafter “the Rome Statute”) has reinforced this situation by insisting that those bearing the

greatest responsibility for the most serious crimes be prosecuted at all cost. However, it should be noted that despite being part of the global community, African communities have their traditions which have slightly different notions of justice to the ones perceived by the international community. These notions are embedded in African traditions which enjoy legitimacy among the local communities. Prosecution of perpetrators of serious crimes will be meaningless if the process does not enjoy legitimacy of the victims, as the same plays a key role in transitions.

This study is significant as it seeks to generate wide debate on this very issue, not merely for academic reasons, but with the aim of implementation in practice. The study thus has a practical significance.



#### 1.4. Literature Review

It cannot be disputed that since the advent of the contemporary transitional justice discourse, the whole transitional justice genealogy has been dominated by Western classic transitional justice arrangements.<sup>7</sup> Teitel divides the transitional genealogy into three phases, all of which confirm this trend.<sup>8</sup> Mohammed Bedjaoui, a former president of the International Court of Justice also confirms this trend by referring to transitional justice

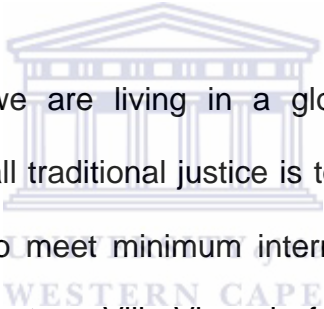
<sup>7</sup> Teitel (2000:39). The modern transitional justice discourse can be traced to the Treaty of Versailles of 28 June 1919 in which the victorious powers made attempts to make German Emperor, Wilhelm II, account for the atrocities of the World War I.

<sup>8</sup>The first phase is the post World War II period which is symbolised by the Nuremberg trials. The phase was characterised by criminal sanctions and the need for accountability for War Crimes. During this period, transitional justice was an interstate cooperation. The second phase is the post cold war period. Here transitional justice was contextual, limited and provisional. It was characterised by multiple conceptions of justice (amnesties, *ad hoc* tribunals and truth commissions). The last phase is at the beginning of the 21<sup>st</sup> century, characterised by the ICC, a permanent Court established to try war crimes, genocide, aggression and crimes against humanity. See: Teitel (2003:69-94).

arrangements which are mostly employed in transitional societies as being influenced by “the dominant euro-centric origins of international law.”<sup>9</sup>

However, McEvoy and McGregor have noted that these Western influenced transitional arrangements, though having international and national support, have relatively failed to attract legitimacy amongst the local population because of their remoteness to the people they are supposed to serve.<sup>10</sup>

Ambos has argued that legitimacy is key to transitions, which means that any preferred transitional justice arrangement needs to enjoy legitimacy of the people it is supposed to serve.<sup>11</sup>



Given the fact that we are living in a global community, writers have emphasised that if at all traditional justice is to be followed to deal with past atrocities, it still has to meet minimum international standards for it to be recognised as a satisfactory. Villa-Vicencio for example, is of the view that there is a need to find a meeting place between international justice and traditional justice. He also opines that nations committed to sustainable justice and reconciliation after deep conflict, cannot afford either to demonise or romanticise international justice or traditional mechanisms of justice and reconciliation.<sup>12</sup> He calls for an inclusive sense of justice which meets the demands of both the international community and the people of the country concerned.<sup>13</sup>

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<sup>9</sup> Smith and Fitzpatrick (1999:148).

<sup>10</sup> McEvoy and McGregor (2008:11).

<sup>11</sup> Ambos (2009:176).

<sup>12</sup> Villa-Vicencio (2009:130).

<sup>13</sup> Villa-Vicencio (2009:179).

Although traditional justice issues have been robustly debated in recent years, scant attention has been devoted as to whether traditional justice has the capacity to handle serious international crimes to a point that it can substitute international tribunals. This is the main difference between the focus of this paper and the points generally focused upon, in most of the literature on the subject of transitional justice.

### **1.5. Methodology**

This study is based on desk research. In the main, the principal reference materials are court decisions, international legal instruments, national laws, reports, law text books, commentaries and law journal articles.

### **1.6. Limitations of the Study**

The paper has a limited scope. All it does is to study the extent to which traditional African customary law procedures, such as the *gacaca*, *mato oput*, *magamba* and others, lend themselves to dealing with serious international crimes in a way in which legitimacy and accountability are not compromised.

### **1.7. Overview of the Chapters**

The first chapter, being this one, serves to introduce the topic, its scope and the general significance of the study.

Chapter two lays down the conceptual framework of this paper. It defines “traditional justice” and “serious crimes under international law.” It discusses



the law relating to the international obligations of States in respect of serious crimes under international law. The chapter also sets out a theoretical basis for arguing that traditional justice structures have the capacity to handle serious crimes under international law.

The third chapter studies African customary institutions and their characteristics. The chapter highlights common features of justice available in African traditions, notably the *gacaca*, *mato oput* and *magamba*. The chapter compares these to the principal aspects of international criminal justice, pointing out similarities and areas of divergence and exploring the potential area where both traditions could find each other.

Chapter four puts into perspective the discussion of chapter three. It looks at the possible ways of adapting traditional justice, so as to successfully accomplish its use in handling serious crimes under international law.

Finally, chapter five concludes this study with a set of recommendations.

## Chapter li

### Obligations of States for Serious Crimes Under International Law

#### 2.1. Introduction

Use of traditional justice by States in dealing with serious crimes under international law can only be lawful if it is not inconsistent with the obligations of States in respect of serious crimes under international law.<sup>14</sup> States have a primary duty to prevent, investigate and punish serious international crimes. This duty has existed under both treaty and customary international law for a long time.<sup>15</sup> In the present times, it is at the centre of the international criminal law discourse. It is highlighted in at least four areas of the international criminal law dialogue. These are: treaties, including regional human rights treaties; the prohibition of amnesties for serious international crimes; the universality principle; and the principles under the Rome Statute.<sup>16</sup>

This chapter sets out the theoretical basis for arguing that traditional justice has sufficient structures capable of handling serious international crimes. Besides, it analyses the above four referred to areas which outline the obligations of States for serious international crimes. The predominant theme of the chapter will be that since its inception, international criminal law has and continues to accord national jurisdictions priority in dealing with serious international crimes.

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<sup>14</sup> For instance, use of traditional justice to shield a perpetrator of serious international crimes will be inconsistent with obligations of the State under international law. See article 17 of the Rome Statute.

<sup>15</sup> Holmes (1999:74).

<sup>16</sup> Preambles 4 and 10, and articles 17 and 20 of the Rome Statute.

The paper makes consistent reference to the terms “traditional justice” and “serious crimes under international law”. It is therefore necessary to briefly explain these concepts, before undertaking the above-mentioned discussion.

## **2.2. What is Traditional Justice?**

The term “traditional justice” is imprecise. However, the word “traditional” refers to norms or patterns that are embedded in political, economic and social structures of a particular society.<sup>17</sup> Therefore, traditional justice refers to conceptions and practices of justice entrenched in a cultural setting of a particular society. It identifies a particular society in relation to justice as perceived by that society. Thus, resort to African traditional justice should not be seen as being primitive, but rather as a way to identify the values useful in the preservation of the African sense of justice.<sup>18</sup>

Traditional justice is based on traditional or customary law and forms part of the legal system of many countries, especially in Africa.<sup>19</sup> It co-exists side by side with the Western legal system. In some countries like Botswana it has nevertheless been fully integrated into the Western legal system.<sup>20</sup> Otherwise, traditional justice is applied and enforced in customary or traditional courts presided over by lay persons or chiefs.<sup>21</sup> In many countries

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<sup>17</sup> Huyse and Salter (2008:7).

<sup>18</sup> Latigo (2008:85).

<sup>19</sup> Preamble, Traditional Justice Bill of South Africa, No. 15 of 2008.

<sup>20</sup> Fombad (2004:173).

<sup>21</sup> The Constitution of the Republic of Malawi, 1994, Section 110 (3).

jurisdiction of customary courts is not only restricted to customary law, but also usually covers minor common law as well as statutory offences.<sup>22</sup>

Customary law manifests itself in 'informal or living' customary law and 'formal' customary law. Informal or living customary law owes its origins to the actual customary usages as currently 'lived' and practised by the community. It is enforced in informal customary courts, which are usually restricted to informal proceedings and usually not governed by rigid modes of procedure.<sup>23</sup>

By contrast, formal customary law is the official customary law recognised by States and is part of the institutions of State. Its procedure is usually enacted in Statutes. It is enforced through formal customary courts. For instance, in Botswana, the Minister of Local Government may establish such courts and assign their jurisdiction.<sup>24</sup> In Malawi, in 1969, the regime of President Kamuzu Banda established formal traditional courts in an attempt to make the administration of justice 'more palatable to the Government and the people.'<sup>25</sup> In current times, the *gacaca* courts in Rwanda have acquired formal attributes and are part of the State institution and transitional justice policy.<sup>26</sup>

Presently, courts apply traditional or customary law differently to how it was applied during the colonial period. During that time, and especially in British

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<sup>22</sup> The Constitution of the Republic of Malawi, 1994, Section 110 (3).

<sup>23</sup> Fombad (2004:176).

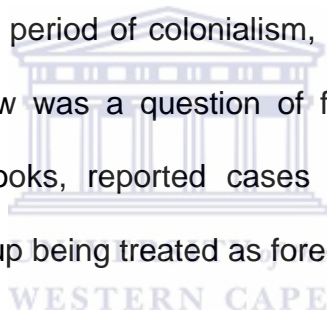
<sup>24</sup> Section 7 (2), Customary Law Act of Botswana, 1969, (Chapter 04:05).

<sup>25</sup> Brietzke (1974:37). The Traditional Courts were established by virtue of the Local Courts (Amendment) Act No. 31 of 1969.

<sup>26</sup> Huyse and Salter (2008:8).

colonies, courts applied customary law subject to the “repugnancy clause.” This means that customary law was valid as long as it was not contrary to public policy, morality, humanity and natural justice.<sup>27</sup> These terms were defined from the British point of view. The repugnancy clause thus became a weapon used to prohibit the applicability of rules of customary law that were perceived primitive, uncivilised or contrary to British morality.<sup>28</sup> In this way, the colonial masters successfully managed to abrogate many parts of customary law and procedure. Thus, most restrictions to the applicable scope of customary law today can be traced to the colonial influence.<sup>29</sup>

In addition, during this period of colonialism, the existence or content of the rules of customary law was a question of fact that had to be proven by evidence using textbooks, reported cases or expert opinions. As such, customary law ended up being treated as foreign rather than ordinary law.<sup>30</sup>



However, the perception of customary law during the current times has changed rapidly. At present, customary law is no longer subject to the repugnancy test as conceived by the British. It is rather subject to the rules of natural justice and Constitutional provisions, especially the bill of rights.<sup>31</sup>

Thus, customary law like any other law can only be invalid when it is

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<sup>27</sup> Section 2, Customary Law Act of Botswana, 1969, (Chapter 04:05).

<sup>28</sup> Fombad (2004:171).

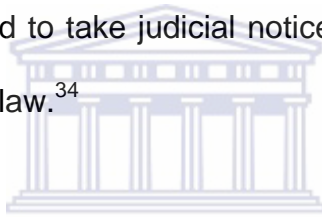
<sup>29</sup> Fombad (2004:171). For instance, section 10 (8) of the Constitution of Botswana, 1966, provided that “no person shall be convicted of a criminal offence unless it is defined and the penalty is described by law.” By implication, the application of customary law to criminal offences was watered down and made subject to statutory law, there by excluding customary law which is usually oral tradition and not written down.

<sup>30</sup> Fombad (2004:182).

<sup>31</sup> Himonga and Bosch (2000:315). Under the preamble of the Traditional Bill of South Africa, (Bill No. 15 of 2008 ), traditional justice will be applicable as long as it conforms to constitutional imperatives and values, including the right to human dignity, the achievement of equality and the advancement of human rights and freedoms.

inconsistent with the Constitution, and only to the extent of such inconsistency.<sup>32</sup> Consequently, when developing customary law, courts should not hasten to strike down customary rules which appear incompatible with their respective Constitutions, but must rather adapt them so as to bring them into accord with the spirit of the Constitution.<sup>33</sup>

Another development in the present application of traditional law has been the change of methods used to ascertain rules of customary law. Currently, the existence or content of the rules of customary law is no longer a question of fact, but rather a question of law for the court to decide. This means that judges are now allowed to take judicial notice of the existence or content of the rules of customary law.<sup>34</sup>



From the above discussion, the main crucial observation made by this paper is that in most jurisdictions, apart from handling customary law matters, customary law also handles minor statutory and common law offences. Consequently, this paper contends that since statutory and common law are modelled on the Western legal system, traditional law can therefore also handle international crimes. This is so because international criminal law is also based on the Western legal system and also largely regulated by Statutes. The paper further argues that the restriction placed on traditional law to apply only to minor statutory and common law offences, is not as a result of the lack of traditional justice structures to deal with major offences. It is rather the result of incapacity in terms of procedure and personnel to

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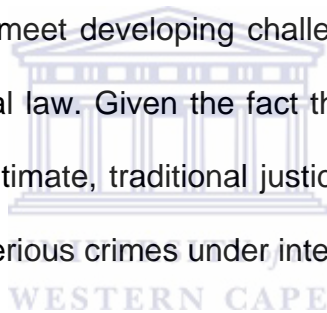
<sup>32</sup> The Constitution of the Republic of Malawi, 1994, section 5.

<sup>33</sup> Himonga and Bosch (2000:317).

<sup>34</sup> Schiller (1960:178).

handle such major offences.<sup>35</sup> This is the theoretical basis for arguing for the applicability of traditional justice to serious crimes under international law.

The above, is supported by the fact that the features of traditional justice show that it is flexible to handle serious international crimes. For instance, as observed, traditional justice is now applied subject to the bill of rights under the Constitutions of various States. Thus, judicial guarantees to fair trial can be ensured. Further, traditional justice is dynamic and constantly adapting to changing social and legal conditions.<sup>36</sup> This can be shown from the transformation in its applicability during colonialism and now. This shows that traditional justice can meet developing challenges<sup>37</sup> whether under national or international criminal law. Given the fact that transitional processes have to be credible and legitimate, traditional justice could therefore be justifiably adapted to deal with serious crimes under international law.



### **2.3. What are Serious Crimes under International Law?**

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<sup>35</sup> This argument finds support in the fact that in Malawi, traditional courts had jurisdiction over serious statutory crimes such as murder, manslaughter and treason. Having to resort to minor offences under the Malawian Constitution was because of the incapacity of lay chiefs who were unable to apply the law on these serious cases properly. See Brieztko (1974: 37-56).

<sup>36</sup> Himonga and Bosch (2000:319).

<sup>37</sup> Fombad (2004:168).

There are many crimes under international law.<sup>38</sup> However, not all crimes are considered serious crimes under international law. According to the Rome Statute, the concept of serious crimes refers to “the most serious crimes of concern to the international community as whole.”<sup>39</sup> These crimes are within the jurisdiction of the ICC. They are the crime of genocide; crimes against humanity; war crimes; and the crime of aggression.<sup>40</sup>

Regarding the crime of aggression, until the Kampala Review Conference of the Rome Statute,<sup>41</sup> the Court remained unable to exercise jurisdiction over the crime as the Statute did not define the crime or set out jurisdictional conditions.<sup>42</sup> The Review Conference however has adopted by consensus amendments to the Rome Statute which include a definition of the crime of aggression and a regime establishing how the Court will exercise its jurisdiction over this crime.<sup>43</sup> The conditions for entry into force decided upon in Kampala however provide that the Court will not be able to exercise its jurisdiction over the crime until after 1 January 2017 when a decision is to be made by States Parties to activate the jurisdiction.<sup>44</sup>

Thus, a discussion on the crime of aggression is beyond the scope of this paper. Therefore, reference to serious crimes under international law is in

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<sup>38</sup> Piracy is probably the oldest known international law crime. Another crime is torture. However nowadays, torture is usually connected to crimes against humanity when committed as part of a systematic and wide-spread attack on civilian populations.

<sup>39</sup> Article 5 (1).

<sup>40</sup> Article 5 (1).

<sup>41</sup> The Review Conference was held in Kampala, Uganda between 31 May and 11 June 2010.

<sup>42</sup> Article 5 (2)..

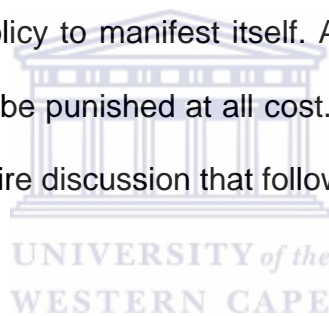
<sup>43</sup> Article 8 *bis* of the Rome Statute adopted in Kampala defines the crime of aggression as the planning, preparation, initiation or execution by a person in a leadership position of an act of aggression. The definition also contains a threshold requirement that the act of aggression must constitute an apparent violation of the United Nations Charter.

<sup>44</sup> Coalition for the International Criminal Court (2010).



this paper restricted to the crime of genocide, crimes against humanity and war crimes.

The main common features of the above-mentioned crimes are that they are committed as part of an official policy,<sup>45</sup> in the context of organised violence,<sup>46</sup> and they affect the interests of the world community as a whole.<sup>47</sup> The official policy may be encouraged either by the State or rebel groups in a country. This encouragement makes it possible for the crimes to be committed not only by State agents, but also by civilians.<sup>48</sup> Besides, the context of organised violence in which these crimes are committed makes it easy for the official policy to manifest itself. As noted, serious crimes under international law must be punished at all cost. It is the primary duty of States to ensure this. The entire discussion that follows is dedicated to this aspect



#### **2.4. Presumption in Favour of National Jurisdictions in Investigating and Prosecuting Serious Crimes**

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<sup>45</sup> See Sriram (2009:325). For instance, for crimes against humanity, article 7 (2) (a) of the Rome Statute requires commission of the offence pursuant to or in furtherance of a State or organisational policy. Likewise, under article 8 (1) of the Rome Statute, the Court shall have jurisdiction over war crimes "in particular when committed as part of a plan or policy..."

<sup>46</sup> Werle (2009:141). For instance, for genocide the context is the destruction of one of the protected groups. For crimes against humanity the context is widespread or systematic attack on a civilian population, while for war crimes the context is the existence of an armed conflict. It is this connection to the context which gives these crimes their international element.

<sup>47</sup> According to preamble 3 of the Rome Statute, the protected interests are peace, security and well-being of the world. The same is true for the aims of the United Nations Charter. See Article 1 of the Charter of the United Nations, signed on 26 June 1945. See also Werle (2009:31).

<sup>48</sup> The Rwandan genocide was encouraged by State leaders who encouraged hatred against Tutsis and moderate Hutus. This 'official' encouragement played a big role for civilians to kill each other.

National jurisdictions play a very big role with regard to serious international crimes. Since its advent, international criminal law has contained a presumption in favour of national investigation and prosecution of core crimes.<sup>49</sup> For instance, at the end of the First World War, the Allied powers deferred their rights to bring German war criminals before the military tribunals, in favour of the German national jurisdiction.<sup>50</sup> Germany was allowed to exercise jurisdiction over war crimes, and was in turn forced to pass new legislation to enable it prosecute war crimes under its national laws.<sup>51</sup>

The Allies however reserved the right to set aside the German verdicts in case of unsatisfactory results.<sup>52</sup> This meant for instance that the Allies could assume jurisdiction over the cases already tried by Germany, if for example they were meant for purposes of shielding the accused persons from responsibility. This development showed the trust accorded to national jurisdictions in dealing with serious crimes and also reflected the complementarity principle under which an international court like the ICC can only assume jurisdiction of a matter if a State is unable or unwilling to investigate or prosecute suspects of serious crimes.<sup>53</sup>

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<sup>49</sup> Kleffner (2008:1).

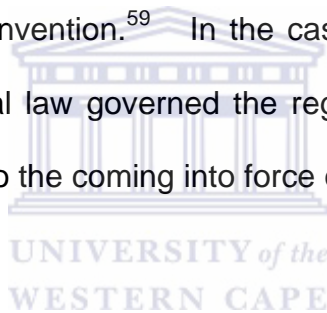
<sup>50</sup> El Zeidy (2008: 15). After the First World War, the Allied powers and Germany signed the Treaty of Versailles. According to articles 228-230 of this treaty, German was obliged to turn over suspected war criminals to the Allies for trial in the Allied Military Tribunals. See the Treaty of Versailles of 28 June 1919.

<sup>51</sup> El Zeidy (2008:16).

<sup>52</sup> El Zeidy (2008:15).

<sup>53</sup> El Zeidy (2008:16) argues that the fact that the Allies subsequently agreed to defer to the German courts rather than to enforce their rights to prosecute the alleged war criminals, denotes a shift from the notion of primacy to the more restrained notion of complementarity.

Since the Treaty of Versailles,<sup>54</sup> presumption in favour of national jurisdictions has continued to be manifested in conventional international law and customary international law, which have detailed how core crimes should be enacted into national laws.<sup>55</sup> For instance, in cases of war crimes, the four Geneva Conventions<sup>56</sup> impose a duty on High Contracting States to “enact any legislation necessary to provide effective and penal sanctions for persons committing or ordering to be committed any of the grave breaches [of the Convention].”<sup>57</sup> Likewise, the Genocide Convention<sup>58</sup> imposes a duty on High Contracting Parties to enact the necessary legislation to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in the Convention.<sup>59</sup> In the case of crimes against humanity, customary international law governed the regime of national jurisdiction for the said crimes, prior to the coming into force of the Rome Statute.<sup>60</sup>




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<sup>54</sup> Of 28 June 1919.

<sup>55</sup> Kleffner (2008:1).

<sup>56</sup> The Four Geneva Conventions of 12 August 1949.

<sup>57</sup> See Geneva Convention I (articles 49), Geneva Convention II (articles 50), Geneva Convention III (articles 129) and Geneva Convention IV (articles 146)

<sup>58</sup> Convention on the Prevention and Punishment of the Crime of Genocide. Adopted by Resolution 260 (III) of the UN General Assembly on 9 December 1948, and entered into force on 12 January 1951. Now the prohibition of genocide has evolved into a norm of customary international law and is recognised to have a *jus cogens* status. See: *Prosecutor v. Kayishema and Ruzindana* [1999] ICTR-95-1-T, paragraph 88.

<sup>59</sup> See Article 5 of the Genocide Convention. In addition, article 6 of the Genocide Convention provides a mandatory obligation to try persons charged with genocide in a competent tribunal of any State in the territory of which the act was committed or in such international penal tribunal as may have jurisdiction acceptable by States Parties. Kleffner (2008:17) has rightly argued that since such tribunal remained dormant before the coming into force of the ICC, the suppressive regime of the Genocide Convention was thus confined to national territorial criminal jurisdictions.

<sup>60</sup> According to Kleffner (2008:18), codifications were limited to the Statutes of the Nuremberg and Tokyo Tribunals and Control Council Law No. 10. Later, though the statutes of the International Criminal Tribunals for Yugoslavia and Rwanda (“ICTY” and “ICTR” respectively) were highly significant in the customary process of defining crimes against humanity, they nevertheless did not contain any rules on national suppression in respect of this crime.

In addition, treaties which contain crimes that would amount to crimes against humanity,<sup>61</sup> such as the Apartheid Convention<sup>62</sup> have also required national States to enact laws to prosecute and punish persons responsible for apartheid.<sup>63</sup> At present, the Rome Statute imposes a clear duty on States to investigate or prosecute serious crimes. It is only when a State is unwilling or unable to investigate or prosecute, that another State party to the Rome Statute or the ICC itself can assume jurisdiction over the matter.<sup>64</sup>

It therefore follows that since its inception, international law has never been interested in usurping the role of States in the handling of international crimes, including serious crimes. The presumption in favour of national jurisdictions will continue as long as States, acting in line with their obligations to prosecute serious international crimes, amend their national laws so as to meet the demands of investigating and prosecuting serious international crimes. This duty of States to prosecute serious crimes is highlighted in the following discussion that discusses four key areas where it is outlined.

## **2.5. Obligations of States for Serious Crimes under Treaty Law**

Treaty law is one area where the duty of States for serious international crimes can be derived. As pointed out above, treaties such as the Geneva Conventions, the Genocide Convention and the Apartheid Convention have

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<sup>61</sup> When committed as part of a widespread and systematic attack on a civilian population.

<sup>62</sup> International Convention on the Suppression and Punishment of the Crime of Apartheid, adopted on 30 November 1973 and entered into force on 18 July 1976.

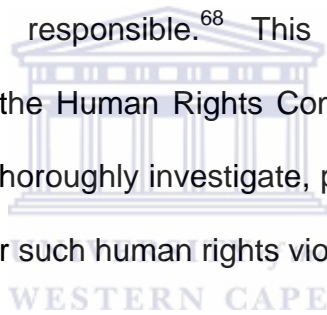
<sup>63</sup> Article IV states that State parties must adopt legislative, judicial and administrative measures to prosecute and punish in accordance with their jurisdiction persons responsible for apartheid.

<sup>64</sup> Article 17 of the Rome Statute.

persistently demanded national provisions for effective penal sanctions against those responsible for serious crimes.<sup>65</sup>

More significantly, human rights treaties<sup>66</sup> have emphasised the duty of States to respect and secure rights and freedoms of their citizens. The European Court of Human Rights (hereinafter “ECHR”) and the Inter-American Court of Human Rights (hereinafter “IACHR”) have in turn held that the obligation to respect rights and freedoms requires that there should be effective official investigations in case of serious violation of human rights.<sup>67</sup>

Such investigations should be capable of leading to the identification and punishment of those responsible.<sup>68</sup> This jurisprudence is now firmly established such that the Human Rights Committee has openly stated that States have a duty to thoroughly investigate, prosecute, try and punish those persons responsible for such human rights violations.<sup>69</sup>




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<sup>65</sup> The same applies under the Convention against Torture and Other Cruel, Inhuman Treatment or Punishment. Adopted on 10 December 1984, and entered into force on 26 June 1987.

<sup>66</sup> These treaties include the European Convention on Human Rights, adopted on 4 November 1950 and entered into force on 3 September 1953, American Convention on Human Rights, adopted on 22 November 1969 and entered into force on 18 July 1978, African Charter on Human and Peoples’ Rights, adopted on 27 June 1981 and entered into force on 21 October 1986, and the International Covenant on Civil and Political Rights, adopted on 16 December 1966 and entered into force on 23 March 1976.

<sup>67</sup> Articles 1 of the European Convention on Human Rights and American Convention on Human Rights are similar in that they impose on States a general obligation to protect and secure rights and freedoms of their citizens. On this aspect, for the ECHR, see *Assenov v. Bulgaria* [1998] ECHR-90/1997/874/1086, paragraph 102. As for the IACHR, see *Velasquez Rodriguez v Honduras* [1988] IACHR-4/1988, paragraphs 173 and 178.

<sup>68</sup> *Assenov v. Bulgaria* [1998] ECHR-90/1997/874/1086. See also *Tanis and Others v. Turkey*, [2005] ECHR-65899/01 paragraph 203.

<sup>69</sup> *Nydia Bautista de Arellana and Arbuacos v. Colombia* [1995] Human Rights Committee, paragraph 8.6. Views under article 5 (4) of the optional protocol of the International Covenant on Civil and Political Rights.

The duty of States to investigate and prosecute serious crimes can take several forms. In *Velasquez Rodriguez v. Honduras*<sup>70</sup> the IACHR held as follows:

‘This duty to prevent includes all those means of a legal, political, administrative and cultural nature that promote the protection of human rights and ensure that any violations are considered and treated as illegal acts, which, as such, may lead to the punishment of those responsible and the obligation to indemnify the victims for damages. It is not possible to make a detailed list of all such measures, since they vary with the law and the conditions of each State Party.’

Thus, the duty of States in respect of investigating and prosecuting serious crimes depends on the conditions in each State. It is not only legal conditions that are vital in determining a State’s ability to fulfil this duty. Cultural conditions should also be considered. In addition, “while the State is obligated to prevent human rights abuses, the existence of a particular violation does not, in itself, prove the failure to take preventive measures.”<sup>71</sup> Further, “the duty to investigate, like the duty to prevent, is not breached merely because the investigation does not produce a satisfactory result.”<sup>72</sup>

All this buttresses the point that the duty of States to investigate and prosecute serious crimes presupposes good faith on the part of the States. Further, this duty, apart from requiring States to enact legislation to deal with serious crimes, also presupposes resort to cultural values of the States where necessary. Thus, it is submitted that the obligation of States for

<sup>70</sup> *Velasquez Rodriguez v. Honduras* [1988] IACHR-4/1988, at paragraph 175.

<sup>71</sup> *Velasquez Rodriguez v. Honduras* [1988] IACHR-4/1988, paragraph 175.

<sup>72</sup> *Velasquez Rodriguez v. Honduras* [1988] IACHR-4/1988, paragraph 177.

serious crimes has to do with the whole of a particular State's legal and cultural system. In the context of our discussion, culture should include indigenous and traditional forms of administering justice in accordance with the culture of a given national society.

## **2.6. Obligations of States for Serious Crimes under Customary International Law**

Customary international law is a norm of international character recognised and accepted by civilised nations and is independent of any express treaty or other public Act.<sup>73</sup> It has two elements which are State practice and *opinio juris*. State practice means that the norm must be general, and universally and consistently followed by States. *Opinio juris* on the other hand means that States should abide by the norm out of a sense of legal obligation.<sup>74</sup> In *Filartiga v. Pena-Irala*, the court stated that the requirement that a customary rule should command the general assent of civilised nations in order to become binding upon them all, is a stringent one.<sup>75</sup>

Thus, certain crimes have assumed customary law status and have been recognised to be norms of *jus cogens*. These crimes are deemed to violate universally accepted norms of human rights, and States are obliged to investigate and prosecute them as a matter of obligation. War crimes,<sup>76</sup>

<sup>73</sup> See *The Paquete Habana* [1900] 175 US 677 at 708.

<sup>74</sup> *Filartiga v. Pena-Irala* [1980] 630 F. 2d 876.

<sup>75</sup> *Filartiga v. Pena-Irala* [1980] 630 F. 2d 876, at paragraph 881.

<sup>76</sup> For instance in 1946, the United Nations General Assembly urged all States including non member States of the United Nations to arrest persons responsible for war crimes during the Second World War and return them for prosecutions in the States where the crimes were committed.

crimes against humanity,<sup>77</sup> genocide<sup>78</sup> and torture,<sup>79</sup> all of which are serious international crimes, have assumed customary law status. Further, the Rome Statute is a central indicator that the obligation to prosecute serious violations of international law is supported by customary law.<sup>80</sup>

## 2.7. No Amnesty for Serious Crimes under International Criminal Law

The duty of States to investigate and prosecute serious international crimes is also contained in the jurisprudence that prohibits the granting of amnesties for such crimes. In *Barrios Altos v. Peru* it was held that “all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations...”<sup>81</sup> Likewise, according to *Almonacid-Arellano et al v. Chile*, crimes against humanity cannot be susceptible of amnesty. “States cannot neglect their duty to investigate, identify and punish those persons responsible for crimes against humanity by enforcing amnesty laws or any other similar domestic provisions.”<sup>82</sup>

<sup>77</sup> According to Bassioun (2010) crimes against humanity have been part of customary international law for a long time. He states that the term “crimes against humanity” originates from the 1907 Hague Convention Preamble which codified the customary law of armed conflict. However in the present time crimes against humanity need no connection to armed conflicts.

<sup>78</sup> The prohibition of genocide has evolved into a norm of customary international law and is recognised to have *jus cogens* status. See *Prosecutor v. Kayishema and Ruzindana* [1999] ICTR-95-1-T, at Paragraph 88.

<sup>79</sup> According to *Filartiga v Pena-Irala* [1980] 630 F. 2d 876, torture has gained a customary law status.

<sup>80</sup> The ICC codifies war crimes, crimes against humanity and genocide, all of which are customary law crimes.

<sup>81</sup> [2001] IACHR-88/2001, at paragraph 41.

<sup>82</sup> [2006] IACHR-12.05, at paragraph 114.



The discussion on amnesty is relevant to this paper because typically, traditional forms of administering justice are inclined towards achieving reconciliation and forgiveness of crimes, with little emphasis on retribution. The overriding idea is to restore social peace and harmony. However, it is a cardinal principle of international criminal law as seen so far, that, “forgive and forget provisions can not be permitted to cover up the most severe human rights violations.”<sup>83</sup> Thus, traditional justice would only be consistent with obligations of States for serious crimes if its values do not have the same effect as that of amnesties for serious crimes.

## 2.8. Universal Jurisdiction

The concept of universal jurisdiction is another sign that serious international crimes must not be left unpunished. It thus confirms the obligations of States to punish persons responsible for committing serious crimes under international law. Kwakwa<sup>84</sup> rightly connects the principle of universal jurisdiction to the ‘seriousness of an offence’ by stating that the principle refers to the “exercise of criminal jurisdiction solely on the basis of the nature of the crime.”<sup>85</sup> The principle of universal jurisdiction allows every country to exercise criminal jurisdiction over crimes under international law regardless of any link to the crime.<sup>86</sup>

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<sup>83</sup> See concurring opinion of Judge Sergio Garcia Ramirez in *Barrios Altos v Peru* [2001] IACHR-88/2001, at paragraph 11.

<sup>84</sup> Kwakwa (2002:407).

<sup>85</sup> Kwakwa (2002:407).

<sup>86</sup> Werle (2009:64).

The validity of the principle of universal jurisdiction under customary international law is generally acknowledged for genocide, war crimes in international and civil armed conflicts and in crimes against humanity.<sup>87</sup> All these are recognised as serious crimes under international law. In practice, Belgium resorted to the principle of universal jurisdiction by prosecuting two Roman Catholic nuns for complicity in the 1994 Rwandan genocide.<sup>88</sup>

The principle of universal jurisdiction therefore manifests the seriousness that States attach to serious international law crimes. Thus, resort to traditional justice for these crimes will only be meaningful if it also mirrors the same seriousness and is not merely a sham.



## **2.9. Obligations of States for Serious Crimes and the Rome Statute of the ICC**

The Rome Statute makes clear two things: First, serious crimes under international law must not be left unpunished. Second, it is States themselves which have a primary duty to investigate, try and punish these crimes.<sup>89</sup> Thus, the Rome Statute presumes the obligation to try and punish

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<sup>87</sup> Werle (2009:67).

<sup>88</sup> The nuns, Getrude Mukangango and Maria Kisito Mukabutera were convicted in 2001 and given long prison sentences of 15 and 12 years respectively. See 'Nuns Jailed for Genocide Role,' BBC News (2001).

<sup>89</sup> Under preamble 4 of the Rome Statute, States Parties affirm that the most serious crimes of concern to the international community must not go unpunished. States also affirm that they must take measures to ensure effective prosecution of serious crimes at national level, while at the same time not sidelining international cooperation in their prosecution.

serious international crimes in favour of national jurisdictions.<sup>90</sup> Consequently, the ICC is a sort of standby court in case of failure by States to fulfil this obligation. The ICC is thus complementary to national criminal jurisdictions.<sup>91</sup> This complementarity is outlined in greater detail in articles 17 and 20 of the Rome Statute. Under these articles, the complementarity principle does not only fulfil a procedural step of determining admissibility of cases before the ICC. It has also wider implications concerning the conceptualisation of the role of national criminal jurisdictions in the system of international criminal justice.<sup>92</sup>

Under article 17 of the Rome Statute, there are four instances where the ICC, acting in favour of national jurisdictions can refuse to assume jurisdiction of a crime. The first instance is where a case is being investigated or prosecuted by a State having jurisdiction over it, unless that State is unwilling or unable to genuinely investigate or prosecute.<sup>93</sup> Second, it is where the crime has been investigated by a State having jurisdiction over it and that State has decided not to prosecute. However, such decision must not have arisen from the State's unwillingness or inability to genuinely prosecute.<sup>94</sup> Third, the ICC will refuse to admit a case when the suspect has already been tried by the national courts and trial by the ICC is not permitted

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<sup>90</sup> It is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes. See Preamble 6 of the Rome Statute.

<sup>91</sup> See Preamble 10 of the Rome Statute.

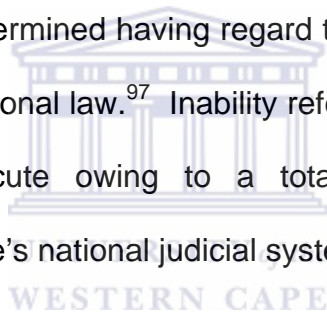
<sup>92</sup> Kleffner (2008:19).

<sup>93</sup> Article 17 (1) (a).

<sup>94</sup> Article 17 (1) (b).

under the *ne bis in idem rule*.<sup>95</sup> Finally, the ICC will refuse jurisdiction where a case is not of sufficient gravity to justify its further action.<sup>96</sup>

A State will be deemed unable to investigate or prosecute a case in three instances: when the proceedings were or are undertaken for purposes of shielding the offender from criminal prosecution; when there is an unjustifiable delay in the proceedings; and where there is no independence or impartiality in the conduct of the proceedings. The unjustifiable delay or lack of independence or impartiality must be one which is inconsistent with intent to bring the offender to justice. Most importantly, all these three instances must be determined having regard to the principles of due process recognised by international law.<sup>97</sup> Inability refers to the State's incapability to investigate or prosecute owing to a total or substantial collapse or unavailability of a State's national judicial system.<sup>98</sup>



As noted above, apart from being a procedural article, article 17 manifests the complementarity between the ICC and national jurisdictions. It outlines the role of national criminal justice systems in the scheme of international criminal justice. The basic idea of article 17 is therefore threefold. First, is to enhance national jurisdiction over serious international crimes; second, is to perfect national legal systems to meet the demands in respect of those crimes; and third, is to maintain State sovereignty for serious international

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<sup>95</sup> Article 17 (1) (c). This is where article 17 is connected with article 20.

<sup>96</sup> Article 17 (1) (d).

<sup>97</sup> Article 17 (2).

<sup>98</sup> Article 17 (3).

crimes.<sup>99</sup> Thus, complementarity implies a duty on the State to adjust both its substantive and procedural law so as to meet the demands of investigating or prosecuting international crimes.<sup>100</sup>

Since the ICC respects judicial sovereignty of a State which is able and willing to fulfil its obligations for serious international crimes, it should also be able to respect the judicial sovereignty of a State which genuinely opts to resort to traditional justice in dealing with serious international crimes as long as the demands for the same are met.

Just as *Velasquez Rodriguez v. Honduras* does,<sup>101</sup> the Rome Statute implies that the duty of States to prosecute serious international crimes presupposes good faith. Holmes<sup>102</sup> argues that reference to “genuineness” in article 17 of the Statute resembles the concept of good faith. Good faith will be exhibited if a State uses all lawful means at its disposal to carry out its obligations under the Statute in such a manner that perpetrators of serious international crimes are identified and punished.

The concept of good faith is related to the willingness as well as ability of a State to investigate or prosecute serious international crimes. For instance, a State will manifest a deceitful intent contrary to its apparent actions where it unreasonably delays the proceedings or where it prosecutes but passes a

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<sup>99</sup> Young (2005:122). See also *Prosecutor v. Germain Katanga and Mathieu Ngudjoro Chui* [2009] ICC-01/04-01/07 OA 8, paragraphs 59 and 83, where the Court stated that the principle of complementarity was designed to protect the sovereign right of States to exercise their jurisdiction in good faith when they wish to do so.

<sup>100</sup> Young (2005:126).

<sup>101</sup> [1988] IACHR-4/1988, at paragraphs 175 and 177.

<sup>102</sup> Holmes (2002:674).

lighter sentence or pardons the sentence. This would easily qualify as 'shielding the offender.'<sup>103</sup> Likewise, good faith will not be exhibited where, with intent to shield offenders from justice, the executive and legislative arms of government put pressure on the judicial system, thus compromising its independence and impartiality.<sup>104</sup> The concept of good faith equally applies when determining inability. For instance, a State would while acting in good faith, nonetheless be unable to investigate or prosecute where its national legal system or central government has collapsed due to conflict, crisis or public disorder.<sup>105</sup>

## 2.10. Conclusion

This chapter has laid down the conceptual framework of this paper. It has found that in practice, traditional justice is used in most African countries to try common law or statutory law offences as well. The chapter has set the framework for justifying the use of traditional justice in respect of serious crimes under international law.

Further, the chapter has outlined the primary obligations of States in respect of serious international crimes. The obligations require States to review their national laws so as to incorporate serious international crimes into their

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<sup>103</sup> Arbour and Bergsmo (1999:131).

<sup>104</sup> The ECHR has determined that independence means independence of the executive, the parties or even independence of the parliament. See *Ringeisen v. Austria* [1971] ECHR-2614/65, at paragraph 95 and *Campbell and Fell v. The United Kingdom* [1984] ECHR-7819/77, at paragraph 78.

<sup>105</sup> *Paper on Some Policy Issues before the Office of the Public Prosecutor* (2003:4). A good example is Somalia where there is no central government. Rwanda was also incapacitated to investigate and prosecute genocide immediately after its aftermath because of the collapse of the national and legal system. Colombia is also an example reflecting the State's incapacity to put on trial drug dealers.

judicial systems, and thus be able to resort to traditional justice where necessary. Since these obligations also require States to take into account their cultural conditions, resort to traditional justice in dealing with serious international crimes would not *per se* be inconsistent with a particular State's obligations in respect of serious international crimes.

The next chapter analyses characteristics of traditional justice. It highlights common features of justice available in African traditions and compares them to the principal aspects of international criminal justice. It points out similarities and areas of divergence between the two justice systems and explores the potential area where both traditions could find each other.



## Chapter Iii

### Traditional Justice and Obligations of States in Respect of Serious International Crimes

#### 3.1. Introduction

The use of traditional justice in enforcing the primary duty of States in respect of serious international crimes entails the adaptation of the rules of traditional justice in order to meet the challenges of investigating and prosecuting these crimes. This chapter analyses the features of traditional justice. It departs from the point that, just as in international criminal law jurisprudence, traditional justice also requires that serious crimes under tradition must not be left unpunished. In support of this argument, the chapter discusses three traditional customary law institutions, namely the *gacaca* courts of Rwanda, the *mato oput* ceremony of Uganda and the *magamba* spiritual ritual of Mozambique.

The chapter also evaluates the core aspects which are common to traditional justice mechanisms to see whether they measure up to the need to hold perpetrators of serious crimes accountable for their conduct. Finally the chapter will make out a case whether traditional justice should be encouraged as a resort for serious international crimes or should be completely ignored.



### 3.2. Traditional Justice and Duty in Respect of Serious Crimes: A Look at the Three African Traditional Customary Law Institutions

The *gacaca*, *mato oput* and *magamba* spirits are well known institutions in the African traditional justice discourse. While *gacaca* has already been tested in dealing with offences relating to genocide in Rwanda, the *mato oput* is being earmarked for dealing with offences relating to war crimes in Uganda. The *magamba* spiritual ceremony on the other hand has been restricted to communal use as the present post-conflict Mozambican government has not gone the transitional way, nor has there been any meaningful debate at national level about the need to implement transitional justice mechanisms.



#### 3.2.1. The *Gacaca* Courts

On 24 July 2009, the Rwandan government announced that it would stop taking new *gacaca* cases as of 31 July 2009 and that it intended to wind down *gacaca* operations within five months from then.<sup>106</sup> Since that proclamation, there have been two failed attempts to wind up the *gacaca* proceedings, and as of April 2010, the *gacaca* courts were still in progress.<sup>107</sup> Despite the uncertainty as to the winding up of the proceedings, the discussion on the *gacaca* institution continues to dominate the transitional justice dialogue.<sup>108</sup>

<sup>106</sup> Gordon (2009).

<sup>107</sup> 'Gacaca Courts Closure Postponed Again' (2010).

<sup>108</sup> Longman (2006:207).

To begin with, the word '*gacaca*' means 'justice on the grass.' It is derived from the word '*umugaca*,' the Kinyarwanda word referring to a plant that is so soft to sit on that people preferred to gather on it.<sup>109</sup> Originally, the primary aim of these people's gathering on the grass was to restore order and social harmony after a dispute and to a lesser extent, to establish the truth about what had led up to the dispute. It was also to determine the punishment of the offenders. Normally, such punishment could involve the payment of compensation or the giving of a gift to the complainant. Although the latter elements could be part of the resolution, they were subsidiary to the return to harmony between the lineages and a restoration or purification of the social order.<sup>110</sup>



When the first genocide trials began in 1996, the sheer numbers of accused persons overwhelmed the capacity of the Rwandan judicial system. Facing this quandary and the pressure to fight impunity, while at the same time contributing to the process of reconciliation, the Rwandan government turned to the *gacaca* justice process in 2005 to alleviate the genocide caseload that was threatening to collapse the country's criminal justice machinery.<sup>111</sup> There are five objectives of the *gacaca* courts, which are: truth telling; reconciliation and reintegration; eradicating a culture of impunity; speeding up trial; and

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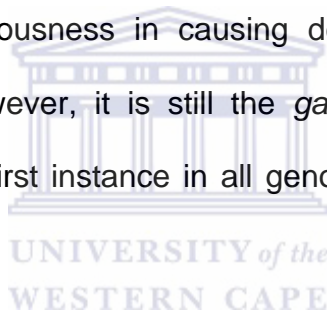
<sup>109</sup> Ingelaere, (2008:33).

<sup>110</sup> Ingelaere (2008:34).

<sup>111</sup> Longman (2006:207). According to Oomen (2009:192), the *gacaca* courts have both pragmatic and ideological background, and were resorted to after the government of Rwanda failed to cope with a backlog of 120,000 prisoners which were in Rwandan prisons by 1999.

demonstrating Rwanda's ability to solve own problems.<sup>112</sup> As of 2007, there were 12,000 existing *gacaca* courts in Rwanda.<sup>113</sup>

The *gacaca* courts have been designed to deal with crimes ranging from genocide to crimes against property. They consist of three levels; the *gacaca* courts of the cell (responsible for property crimes), the *gacaca* courts of the sector (responsible for serious attacks without intention of causing death), and the *gacaca* courts at district level (responsible for serious attacks causing death or made with intention of causing death). Category one crimes which include organising genocide, participation in rape and sexual attacks or particular overzealousness in causing deaths continue to be tried in regular courts.<sup>114</sup> However, it is still the *gacaca* courts at the cell which function as courts of first instance in all genocide cases and which classify the crimes.<sup>115</sup>



The *gacaca* courts are presided over by a minimum of 9 village judges, the *inyangamugayo*. They are formally elected in government-organised elections, and include women and all adults from the age of 21 years rather than simply the most senior men of the community. The *inyangamugayo* are required to be individuals who are morally upright, honest, trustworthy and characterised by a spirit of sharing speech.<sup>116</sup> They receive limited training in

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<sup>112</sup> Scanlon and Nompumelelo (2009:302). See also Preamble to the Organic Law No. 40/2000, of 26 January 2001, setting up "Gacaca Jurisdiction."

<sup>113</sup> Scanlon and Nompumelelo (2009:302).

<sup>114</sup> Article 51, Organic Law No. 40/2000. See also Articles 39 to 42.

<sup>115</sup> Articles 33 and 34, Organic Law No. 40/2000.

<sup>116</sup> Article 10, Organic Law No. 40/2000.

law and legal procedure.<sup>117</sup> Generally, they enjoy some credibility in their respective communities. This is because the current crop of the *inyangamugayo* is selected solely on the basis of integrity and not according to the old traditional prescriptions of “old and wise men” many of whom had to be replaced because they still had the old mentality of ethnic intolerance.<sup>118</sup>

Hearings of the *gacaca* courts are conducted at least once a week, and are held in public except for those held in camera for reasons of public order.<sup>119</sup> Community participation in the *gacaca* process is encouraged. However, reticence to participate caused government to make community participation in the proceedings mandatory as of 2004.<sup>120</sup> Failure to participate without convincing reasons attracts various sanctions, including being turned away from public medical clinics.<sup>121</sup> The Amnesty International has heavily, and rightly so, criticised this form of sanction.<sup>122</sup> Nevertheless, in the general terms, *gacaca* courts enjoy legitimacy of the community by virtue of their location, making it possible for free community participation in the proceedings.<sup>123</sup>

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<sup>117</sup> Ingelaere (2008:49).

<sup>118</sup> Ingelaere (2008:48).

<sup>119</sup> Articles 24 and 25, Organic Law No. 40/2000.

<sup>120</sup> Oomen (2009:194).

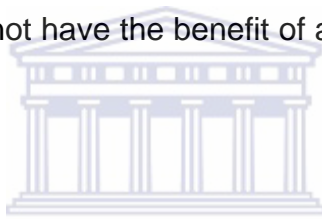
<sup>121</sup> Scanlon and Nompumelelo (2009:308).

<sup>122</sup> Scanlon and Nompumelelo (2009:308).

<sup>123</sup> For instance, according to the extensive community intervention with the assistance from John Hopkins University, 96% of Rwandans had heard of the *gacaca* courts by 2003, and as of 2002, public confidence in *gacaca* courts was high, standing at 82%. See Oomen (2009:194).

*Gacaca* courts have on the other hand been criticised for lack of competence and independence of the judges. The judges lack adequate legal training to justify the gravity of the offences dealt with. Further, their independence is at risk because they are not paid for their services. This leaves many of them prone to corruption, as the majority are just poor farmers.<sup>124</sup>

The other major criticism of the *gacaca* courts is that they provide no legal representation for defendants. The basis for the same is that doing so would distort a popular form of justice. This is unfair to the accused persons considering the fact that they are subjected to professionally gathered evidence, yet they do not have the benefit of a professionally trained defence counsel.<sup>125</sup>



Third, the *gacaca* institution has been criticised for poor witness protection policy. Since 2000, there have been 160 reprisal killings of genocide survivors, judges and witnesses connected to the *gacaca*. The witness protection programme established in 2006 in response to this, has been hampered by lack of funds and political will.<sup>126</sup>

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<sup>124</sup> Longman (2006:214-15).

<sup>125</sup> According to Article 47 of Organic Law No. 40/2000, State investigators have been gathering evidence of those involved in the genocide since 1994 and they supply whatever evidence gathered to the judges for the trial phase of the *gacaca* courts. Besides, whenever need be, *gacaca* courts are provided with assistance of judicial advisors appointed by the 'Gacaca Jurisdictions' Department of the Supreme Court. See Article 29 of Organic Law No. 40/2000.

<sup>126</sup> Scanlon and Nompumelelo (2009:308).

Finally, the fact that *gacaca* courts have not tried crimes perpetrated by the Rwandan Patriotic Front has been criticised as a form of victor's justice against the Hutus and has affected the legitimacy of the courts.<sup>127</sup>

All these criticisms are justified considering the fact that *gacaca* courts have jurisdiction to impose long prison sentences of as high as 25 years and life imprisonment.<sup>128</sup> Thus, long time incarceration of convicted persons is only justified after a fair and impartial court process.

Despite the above weaknesses, the *gacaca* institution has a sound juridical basis. It should therefore not be condemned simply because it differs from classical Western courts.<sup>129</sup> Both the old and new *gacaca* institutions are premised on the theory that serious crimes under tradition must not be left unpunished. It has been noted that in its 'old' form, the primary aim of the *gacaca* was the restoration of order and social harmony, punishment of the perpetrator and compensation. Order and social harmony could not be achieved if the *gacaca* institution entertained a culture of impunity for serious crimes under tradition. In their new form, *gacaca* courts are so serious about eradicating a culture of impunity such that among other things, they are empowered to prosecute and punish any person who refuses to testify on what he knows about the genocide.<sup>130</sup> Thus the new *gacaca* institution aims

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<sup>127</sup> Longman (2006:221) notes that in Byumba, a region where there were extensive massacres by the Rwandan Patriotic Front troops, many people expressed anger over the fact that the deaths of their family members were not included in the *gacaca* process. Thus, as a form of protest, the *gacaca* assemblies in this area were usually short of the required quorum.

<sup>128</sup> See chapter 4 (sanctions), Organic Law No. 40/2000.

<sup>129</sup> Longman (2006:213).

<sup>130</sup> Article 32, Organic Law No 40/2000.

at eradicating once and for all the culture of impunity that has persisted in Rwanda.<sup>131</sup>

### 3.2.2. The *Mato Oput* Ceremony

Following the successful experiences of the *gacaca* system, Uganda is planning setting up a transitional justice framework, which will include a traditional justice mechanism of *mato oput*, to address the atrocities committed during the last 20 years in the north of the country. Indeed resort to traditional justice such as the *mato oput* has been recognised by both the government and the LRA. Ruhakana Rugunda, Ugandan Minister of Internal Affairs and leader of the Government negotiating team at the Juba peace talks, defended the *mato oput* as an alternative to the ICC trials by stating that “the traditional methods are both symbolic and real. They have worked. Instead of rushing for Western solutions, it is good we have revived them.”<sup>132</sup> He added that the system would be upgraded to meet international standards.<sup>133</sup>

The negotiating teams at the Juba peace talks agreed in principle that the application of this traditional rite, among others, is one of the appropriate mechanisms to address the issues of accountability and reconciliation.<sup>134</sup> An analysis of the operations of the *mato oput* will help this paper determine

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<sup>131</sup> Preamble, Organic Law No. 40/2000.

<sup>132</sup> Latigo (2008:100).

<sup>133</sup> Latigo (2008:100).

<sup>134</sup> Latigo (2008:103).

whether the vision of the juba talks can be realised in the same way as the *gacaca* process.

The word “*mato oput*” can be literally translated as “drinking the bitter root.”<sup>135</sup> The *mato oput* ceremony is practised by the Acholi tribe of Uganda. It is a day-long session that, just like the *gacaca*, is aimed at restoring social harmony.<sup>136</sup>

In their tradition and religion, the Acholi society believes firmly that man is a sacred being whose blood ought not to be spilled without just cause. Within such a community, if one person happens to kill another, the killing provokes the anger of the deities and ancestral spirits of the victim. It is believed that the angered deities and ancestral spirits may permit or even invite evil spirits to invade homesteads and harm the inhabitants of the offending side. Moreover, such killings automatically create a supernatural barrier between the clan of the killer and the clan of the killed person. As soon as someone is killed, the members of the two clans immediately stop eating and drinking together and interacting socially. This supernatural barrier remains in force until the killing is atoned for and a religious rite of reconciliation has been performed to cleanse the blotch.<sup>137</sup>

The *mato oput* ritual becomes relevant for purposes of cleansing the killer and reconciling the families of the culprit and the victim. However, before this is done the killer has to pay “blood money” to the bereaved family. This

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<sup>135</sup> Sinclair-Day (2007).

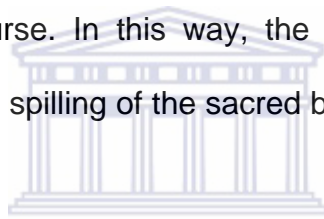
<sup>136</sup> Sinclair-Day (2007).

<sup>137</sup> Latigo (2008:103).



money is usually used by the bereaved family to pay for marriage of another woman who, in turn, will produce children to replace the dead person—a form of reparation.<sup>138</sup>

The payment of the money is followed by a process of reconciliation where both parties eat meat and drink from the same new vessel for the first time. In the drinking vessel, the master of ceremony mixes the pounded extract from the bitter roots of the *oput* tree with an alcoholic drink. Other cooked food items from both sides are served to the elders, who are allowed to mingle freely. From then on, the members of the two clans resume their normal social intercourse. In this way, the Acholi people make good the damage caused by the spilling of the sacred blood of human beings.<sup>139</sup>



This paper observes that on the positive side, the *mato oput* ceremony encourages truth and recognition of accountability for the offence by the offender and his family. It thus recognises both individual and collective guilt. It also encourages the offender's reintegration back into the community. The ceremony also promotes reconciliation, forgiveness and social harmony.

The *mato oput* is however weak in the sense that there is no meaningful reparation paid to the victim's family. All that is paid is "blood money" which can be used to pay for marriage of another woman to produce children to replace the deceased. This sort of reparation to say the least is archaic and

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<sup>138</sup> Latigo (2008:103-105).

<sup>139</sup> Latigo (2008:103-105).

cannot be encouraged if the *mato oput* is to be used as an analogue to our modern understanding of punishments and reparations.

The other shortcoming of the *mato oput* ceremony is that the original values of the traditional Acholi society have been diluted by the long war in Northern Uganda. Consequently, the Acholi no longer widely practice the ceremony. As such younger generations question its value and relevance.<sup>140</sup> Further, since the *mato oput* is a specific Acholi tribal ceremony, its value and relevance is likely to be questioned by non-Acholi tribes who live alongside the Acholi in Northern Uganda. Therefore, it is doubtful whether the *mato oput* would, if implemented for the war crimes in Northern Uganda, enjoy the support of the younger generation and the said non-Acholi tribes.

However despite these apparent shortcomings, the philosophy underlying the *mato oput* ceremony is that serious crimes under the Acholi tribe must not be left unpunished. This is evidenced by the fact that when a person kills another there is a temporary severance of relationship between the offender's family and the bereaved family until a cleansing ceremony is performed. This ritual ceremony is performed to condemn the evil act, thereby recognising that evil should not be left unattended to before the two families can reconcile.<sup>141</sup>

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<sup>140</sup> Rose and Sekkandi (2007).

<sup>141</sup> Latigo (2008:108).

### 3.2.3. The *Magamba* Spirits

*Magamba* ceremony is essentially a form restorative justice at the community level that developed in the aftermath of the 1976–92 bloody civil war in Mozambique. Although the end of the war brought massive relief to the victims, from a transitional justice perspective, the Mozambican government did not develop any specific policy with regard to the abuses that had been perpetrated during the war. The government maintained a culture of silence and just encouraged the victims to forgive and forget under the pretext of peace building and national reconciliation.<sup>142</sup>

Through the *magamba* spiritual ritual, victims of the war have found solace as this is the only forum where their plight as victims has been recognised. The ritual illustrates a local form of post-war justice in which war survivors are called upon to assume their own individual and collective responsibilities over some of the events of the war.<sup>143</sup> *Magamba* are generally perceived to be spirits of dead victims who return to the realm of the living to fight for justice. In their varied meanings and manifestations, *magamba* both heal war-related wounds and play a critical role in the realisation of restorative justice among the survivors of war.<sup>144</sup> Thus, the *magamba* ritual is based on the viewpoint that spirits of victims of atrocities will not rest until justice is done.

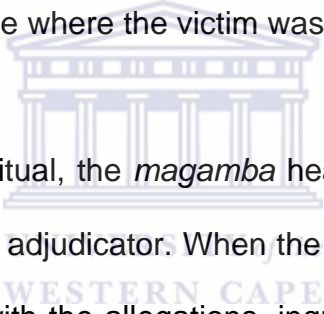
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<sup>142</sup>Igreja and Dias-Lambranca (2008:61). The fact that the Mozambican transition from civil war to peace was enacted through a negotiated process and that both Renamo and Frelimo had been involved in the perpetration of serious abuses, may have shaped the choice of transitional justice which followed. See Igreja (2009:278).

<sup>143</sup>Igreja (2009:277).

<sup>144</sup>Igreja and Dias-Lambranca (2008:62).

In the *magamba* rituals, the spirits of the dead victims come back to haunt the person who killed them or their family members. As such the killer or family members may develop disabilities, become impotent, fail to conceive, if female, or even die. When these things happen, the haunted family consults *magamba* healers whose role is to identify the spirit responsible for the suffering. Once identified, the healers invite the haunted person and his family to a healing process where the relations of the deceased victim are also present. For the healing to take place, the haunted person and his family are supposed to first acknowledge the wrong deed done and undertake to make reparations. The reparations vary and may include building a hut on the site where the victim was killed.<sup>145</sup>



During the *magamba* ritual, the *magamba* healers assume the role identical to that of a judge or an adjudicator. When the spirit reveals itself, the healers indict the perpetrator with the allegations, inquiring from him or her, while at the same time exerting pressure on him or her to accept what the spirit has said. The *magamba* institution has thus embodied a form of institutional authority which has power to enforce certain types of truths, a thing which State authorities have failed to do.<sup>146</sup> It is for this reason that it has benefited from official enforcement from State agencies like the police. For instance, police have at times issued official notifications to force unwilling relatives of sick persons to participate in the rituals. Although not part of government's

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<sup>145</sup> Igreja and Dias-Lambranca (2008:72-75).

<sup>146</sup> Igreja (2009:293).

policy, this has nevertheless become possible because most police officers share the similar beliefs in the *magamba* institution.<sup>147</sup>

The *magamba* ritual ceremony has achieved several goals of justice. First, the offender or the affected family member is healed. Second, truth, accountability and reparations for the offence are achieved. Furthermore, the process also restores the relationship between the offender's and the victim's families.<sup>148</sup>

The philosophy behind the *magamba* rituals is also identical to the one encouraged in the international criminal law discourse. The *magamba* is premised on the fact that crime must not be left unpunished. It is based on the traditional philosophy that the killing of a human being is a serious offence which "requires immediate redress through atonement rituals. If the wrong doing is not acknowledged, the spirit of the innocent victim will return to the realm of the living to struggle for justice."<sup>149</sup>

Through the study of the above-mentioned traditional justice institutions, this paper has managed to show that traditional justice also imposes a duty on society in respect of serious crimes under custom. There are certain crimes under tradition which must not go unpunished. The most obvious crime of all is killing of a human being. In this way, traditional justice and international justice are not necessarily inconsistent with each other in terms of the values they aim to achieve.

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<sup>147</sup> Igreja (2009:290).

<sup>148</sup> Igreja and Dias-Lambranca (2008:69-72).

<sup>149</sup> Igreja and Dias-Lambranca (2008:68).

### 3.3. Common Features of Traditional Justice Mechanisms

In view of the just-ended discussion, the section that follows analyses common features of traditional justice so as to test their ability to deal with serious crimes under international law.

#### 3.3.1. Reconciliation

The above discussion has shown that the effectiveness of African traditional justice in achieving reconciliation cannot be doubted. However the question is whether reconciliation can be achieved where commission of serious international crimes is alleged in traditional courts.

In Burundi, for example, *Ubushingantahe*—a local dispute resolution institution—tried to develop a processes of reconciliation. It succeeded in several communities, but failed in the majority of the others. Likewise in Rwanda, the *gacaca* courts as discussed were embedded in the notion of reconciliation.<sup>150</sup> However, because of the seriousness of the offences dealt with, their actual experiences have been inclined to retribution. The process may thus be said not to have had relative success in achieving reconciliation. Likewise, though the *mato oput* has succeeded in bringing reconciliation in the case of ordinary crimes, it is doubtful whether it can succeed in settling war crimes against senior leaders of the LRA. Indeed, much as the affected people in Northern Uganda are willing to reconcile with re-integrated child

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<sup>150</sup> The Preamble to the Organic Law No. 40/2000 states that among other things, the purpose of the *gacaca* institutions was to consider achievements of reconciliation and reconstitution of the Rwandese society, though eradication of a culture of impunity was also one of the main goals.

soldiers, they nevertheless desire that the rebel leaders be punished for their criminal deeds.<sup>151</sup>

This shows that although African traditional justice mechanisms promote reconciliation, they cannot guarantee this when it comes to serious international crimes. However, even though this is the case, traditional justice is better on the aspect of reconciliation than international criminal law which focuses on retribution.

### 3.3.2. Accountability and Truth-Telling

African traditional justice encourages offenders to tell the truth and to appreciate and accept responsibility for their actions. It is generally accepted that accountability may result in some discomfort to the offender. However traditional justice controls the accountability process in such a way that it is not as harsh as to degenerate into further antagonism and animosity, thereby further alienating the offender.<sup>152</sup>

The paper has observed that the practice of *mato oput* is predicated on full acceptance of one's responsibility for the crime committed. In its practice, emancipation is possible, but only through this voluntary admission of wrongdoing and the acceptance of responsibility.<sup>153</sup> In Mozambique, truth-

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<sup>151</sup> During a survey taken in 2005, 66 percent of the respondents said that they favoured "hard options" in dealing with LRA leaders, including trials, punishment, or imprisonment. Only 22 percent preferred "soft options" such as forgiveness, reconciliation, and reintegration. This shows that the victims are unwilling to reconcile with the rebel LRA leaders. See Otim and Wierda (2010:6).

<sup>152</sup> Oko (2004:18).

<sup>153</sup> Latigo (2008:103-105). Similar principles apply in reconciliation rites that are performed in neighbouring regions of Uganda.

seeking through ritual public narratives and acknowledgement of guilt by the offender is a crucial element in the *gamba* spirit scenes.<sup>154</sup> The *bashingantahe* in Burundi are not today dealing with the legacy of grave human rights violations, but the accountability component is very prominent in their customary dispute settlement sessions.<sup>155</sup> Finally, though the old *gacaca* had restoration of social harmony as the main goal, today's *gacaca* is strongly orientated towards retribution, emphasising need for some degree of accountability.<sup>156</sup>

So, the general propensity for reconciliation under traditional justice processes, does not affect the need for truth telling and accountability for the wrong done by the offender. This is in line with article 25 (2) of the Rome Statute, which entails individual criminal responsibility for offences committed. It is also in line with the duty to investigate and prosecute serious crimes, which entails holding someone accountable for the offences committed, and which is generally in line with the whole idea of transitional justice, namely the establishment of truth.

It can therefore be argued that even though under African traditional justice a wrong is owned by the whole community of the wrong doer, there are elements of individual criminal responsibility which gain currency through the requirement of holding someone accountable. Thus for once, there is similarity here between African traditional justice and international criminal justice.

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<sup>154</sup> Igreja and Dias-Lambranca (2008:69-72).

<sup>155</sup> Huyse (2008:12).

<sup>156</sup> Huyse (2008:12).



### 3.3.3. Restorative Penalties (Reparations) and Retributive Penalties

Traditional justice requires that reparations be made to the victims of the crime. This is because, as seen above, the main purpose of the ceremonial procedure is to restore social harmony and to reconcile the parties. Reparation is therefore seen as a way of maintaining the *status quo* of the victim. It usually involves payment of compensation.<sup>157</sup>

In Rwanda, the *gacaca* legislation provides for two types of reparation.<sup>158</sup> Further, contrary to general belief, traditional justice is not only concerned with restorative penalties. It is also concerned with retributive penalties or punishment. For example, among the Chewa tribe in Malawi, punishment involves payment of chickens or goats to the chief. In extreme cases, especially among the old Igbo custom in Nigeria, punishment included the death penalty, ostracism, forfeiture of valuable property and caricature on the offender's body.<sup>159</sup> The above shows that there is a sense of atonement in traditional justice systems in the same way as there is in the international criminal justice system.

However, when it comes to reparations in respect of serious international crimes, both traditional justice and international criminal justice stand on par as failures. It is doubtful whether reparations imposed by traditional courts

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<sup>157</sup>As seen in our case study, in the *mato oput* ceremony compensation involves payment of blood money, which compensates for the death of the victim, and which is usually used as payment for the purposes of marrying another woman to produce children to replace the deceased. Further, *magamba* healers emphasise on repairing the damage inflicted by the offender in order to deal successfully with the legacy of the civil war.

<sup>158</sup>Huyse (2008:13). A fund has been set to compensate individuals, their family or their clan. It is yet to become operational. The other form of reparation is of a collective nature. It prescribes community labour.

<sup>159</sup>Oraegbunam (2010).

would suffice in relation to genocide or war crimes victims. A perpetrator like Joseph Kony would arguably not be able to provide adequate reparations for the atrocities committed by the LRA over a span of 20 years. Under the international criminal justice system, the reparations regime is even worse. For instance, although under the Rome Statute the Court may order a convicted person to make reparations to, or in respect of victims,<sup>160</sup> it is disappointing to note that the Court can do this “only in exceptional circumstances.”<sup>161</sup>

### 3.3.4. Individual Restoration and Reintegration

Traditional justice employs restoration and reintegration measures in conflict resolution.<sup>162</sup> Restoration is aimed at the victim, and as Nsereko<sup>163</sup> observes, African customary legal processes do not only focus on the offender but also on the victim. The goal of justice is to vindicate the victim and protect his or her rights. The imposition of punishment if any, on the offender, aims at bringing about the healing of the victim rather than to punish the offender. That is why, according to Nsereko, the offender is usually made to pay compensation to the victim. Compensation, apart from being regarded as restitution, also represents a form of apology and atonement by the offender to the victim and the community.<sup>164</sup>

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<sup>160</sup> Article 75 (2).

<sup>161</sup> Article 75 (1).

<sup>162</sup> Restoration is usually targeted at restoring the victim's rights while reintegration aims at bringing the offender back into the community. Nevertheless the terms may be used interchangeably.

<sup>163</sup> As quoted by Oko (2004:18).

<sup>164</sup> Oko (2004:18).

On the other hand, reintegration targets the offender. As observed in the example given above, under African traditional justice the offender is not simply condemned and deserted. Attempts are made to reintegrate him into the community in order for social harmony to persist. As Oko rightly notes, traditional justice makes efforts to disapprove of wrongdoing, rather than the wrong-doer.<sup>165</sup>

Gabriel Setiloane relates the idea of offender reintegration to the spirit of *ubuntu*. He states that the whole process is about “drawing an adversary... into the community rather than leaving him outside where he is likely to cause trouble.”<sup>166</sup> According to the spirit of *ubuntu*, a person is a person through other people (*umuntu ngumuntu ngabantu*).<sup>167</sup> Thus, it can be contended that if there is a strong feature among traditional justice, it is the idea of *ubuntu*, a process that seeks to rise above isolation of an offender from the community.

In African traditional justice, reintegration or restoration usually takes the form of rituals. As observed, in the *mato oput* ceremony, restoration is symbolised by slaughtering of an animal, usually a goat, and the drinking the bitter root.<sup>168</sup> Ritual creates an emotionally charged atmosphere that

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<sup>165</sup> Oko (2008:19).

<sup>166</sup> Quoted in Villa-Vicencio (2009:113).

<sup>167</sup> Villa-Vicencio (2009:114). Though *ubuntu* is essentially South African, it is essentially reflected in almost all African traditions. The root “*ntu*,” meaning “person” essentially describes all African people, especially those south of the Sahara desert, who are generally referred to as “*Bantus*.”

<sup>168</sup> The *Nyuo Tong Gweno* ritual also in Uganda is signified by crushing a raw egg under the foot of the offender or cleansing the offender with a twig from the *Opobo* tree which is traditionally used to make soap. See Villa-Vicencio (2009:137).

touches many of the participants, victims and offenders and which arguably opens an avenue for reconciliation and lasting peace.<sup>169</sup>

Unlike traditional justice, international justice does not authoritatively promote restoration of victims' rights or reintegration of offenders. International criminal justice is usually exclusionary. Furthermore, international trials take place in places far away from the scene of the crime. Thus, though there is a regime for victim representations under the Rome Statute,<sup>170</sup> this is of little consolation to victims who are not able to follow the live court proceedings. In addition, although article 75 (6) of the Rome Statute alludes to the "rights of victims under international law," the Statute does not define these rights.<sup>171</sup> Thus, the regime for the restoration of victims under international criminal justice is unsatisfactory. On the other hand, reintegration of offenders is not even one of the main goals of the Rome Statute. The whole preamble to the Rome Statute does not even talk of reintegration of offenders.<sup>172</sup>

Having gone this far, and considering that the purpose of the Rome Statute is to deal with serious international crimes, the question is whether perpetrators of war crimes, genocide or crimes against humanity need to be reintegrated back into the community. The question is whether it would serve

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<sup>169</sup> Kelsall (2005:363).

<sup>170</sup> Article 75 (3).

<sup>171</sup> Even though the Statute outlines some rights of the victims in article 68, those rights are related to the proceedings, and not to the life of the victims beyond the trial.

<sup>172</sup> This must be contrasted with preamble 2 which recognises atrocities suffered by victims of serious crimes.

any purpose to reintegrate say, Josephy Kony or Germain Katanga back into their respective communities.

According to Albertus,<sup>173</sup> the purpose of reintegration is to ensure that the prisoner becomes a rightful and productive citizen in society. Serious crimes, by their very nature, are not committed by deviants. They are committed by ordinary members of society, usually under the supervision of intelligent superiors. Thus, assuming Katanga is convicted and incarcerated, he would still need to be reintegrated back to his community after serving his prison term. The intelligence and expertise he used to run military groups would be used productively to benefit the entire country. Thus, international justice needs to emulate the traditional justice quality of reintegration.



### 3.3.5. Community Participation

Traditional justice involves participation of the whole community in the pursuit of justice. In African communities a dispute between individuals is perceived as “not merely... a matter of curiosity regarding the affairs of one’s neighbour, but in a very real sense a conflict that belongs to the community itself.”<sup>174</sup> Each member of the community is to some extent linked to each of the disputants. As such, he or she will either feel some sense of having being wronged or some sense of responsibility for the wrong.<sup>175</sup> Thus, the need for

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<sup>173</sup> Albertus (2010:5).

<sup>174</sup> Holleman (1949:53).

<sup>175</sup> Penal Reform International (2000:22).

the whole community to be involved in addressing and seeking solutions for disputes becomes relevant.<sup>176</sup>

In traditional justice a dispute cannot be settled unless the victim and the offender agree with the final decision. On the other hand, public opinion of the community acts as a moderating force against excessive demands for compensation or the refusal to accept a reasonable demand for compensation.<sup>177</sup> Under the traditional justice system that continues to exist in Malawi, for example-

‘although judgment is delivered by the chief on the advice of the elders, everybody has a right to speak in an orderly manner, to put questions to witnesses, and to make suggestions to the court. The privilege is extended to passers-by who, although they might be complete strangers, can lay down their loads and listen to the proceedings. The chief and his wise elders will sit for hours listening to what by Western standards might be considered a mass of irrelevant details. This is done to settle the disputes once and for all so that the society can thereafter continue to function harmoniously.’<sup>178</sup>

There are many advantages of community participation in the traditional justice process. First, the opening of the proceedings to a wider public participation serves to extend the ambit of truth seeking, as the whole truth is established, rather than only the material truth, as is the case in Western criminal court proceedings. Furthermore, community participation results in the credibility of the process. When the whole community participates in the

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<sup>176</sup> Oko (2004:2).

<sup>177</sup> Penal Reform International (2000:23).

<sup>178</sup> Chimango (1977:40).

decision-making process there is satisfaction on the resolution made during the process. More importantly, when disputants are part of the decision-making process, they are more likely to accept and abide by the resolution. Finally, community participation shows that traditional justice is democratic. Legitimacy and democracy play an important role in transitions and as Ambos rightly suggests, strengthening people's perception of legitimacy should be of concern to transitional justice players.<sup>179</sup>

Unlike traditional justice, International criminal justice does not emphasise participation of the community. In most cases the trials take place in isolated court rooms in the Hague, Arusha, or the capital cities of States. The proceedings are in English or French and the interpretations do not usually capture the intricacies of the mother tongue of the victim or suspect. Thus, though States may applaud the legitimacy of international criminal courts, it is doubtful whether this legitimacy is echoed in the actual communities where the offences took place. Villa-Vicencio is therefore right when he says that to ensure acceptance and sustainable peace, demands by international bodies for individual culpability need to adjust to the implications of a broader African sense of responsibility.<sup>180</sup>

Community participation is very important for serious international crimes. By their very nature, serious international crimes affect the whole mankind. However, in true sense they strike at the lives of the communities in which they are committed. It is therefore paradoxical to try serious crimes within a

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<sup>179</sup> Ambos (2009:176).

<sup>180</sup> Villa-Vicencio (2010).

closed courtroom, thousands of kilometres from the scenes of the crimes. The Rome Statute provides that the ICC can sit anywhere. It is thus possible to exploit this provision and try serious crimes within the communities in order to achieve legitimacy.

### 3.3.6. Lack of Technicalities

Probably, the most conspicuous characteristic of traditional justice, and one that would work against its use for serious international crimes, is its lack of technicalities. While cultural laws exist to address crimes, they generally do not extend to extra-ordinary crimes encountered during conflicts.<sup>181</sup> Thus, cultural laws are flawed as regards definitions of crimes such as genocide, crimes against humanity or war crimes. They are also defective in terms of outlining the general principles governing matters such as categories of liability.<sup>182</sup> However, as already discussed, the duty to investigate and prosecute serious crimes entails incorporating serious crimes into national laws. This can therefore be cured by incorporating the elements of the international law crimes into traditional justice practices.

On the other hand, this paper argues that international criminal law is not a technical field. States that are serious in using traditional justice for grave international crimes should not find it difficult to adapt concepts such as *dolus eventualis*, common purpose and joint criminal enterprise into their traditional laws. In Malawi for instance, from 1969, concepts such as *mens*

<sup>181</sup> 'Accountability, Reconciliation and the Juba Peace Talks: Beyond Impasse' (2006:4).

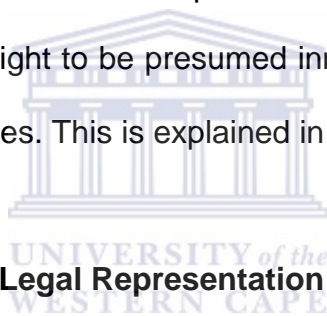
<sup>182</sup> For example, rules governing perpetration and participation, superior responsibility and defences. See Kleffner (2008:2).



*rea* and *dolus eventualis* were adapted into the local language and applied in the traditional courts, which had jurisdiction over serious crimes such as murder, manslaughter and treason.<sup>183</sup>

### 3.3.7. Quality of Procedural Safeguards

The biggest difference between traditional justice and international criminal justice lies in the provision of procedural safeguards in respect proceedings. These safeguards are aimed at ensuring fair trial. Although traditional justice offers some procedural safeguards like the right to a public trial, it is generally poor in areas such as the provision of right to legal representation, right to remain silent, right to be presumed innocent and the right to call and cross-examine witnesses. This is explained in brief below.



#### 3.3.7.1. Right to Legal Representation

Despite legal representation being recognised in the Constitutions of various African States,<sup>184</sup> accused persons under traditional justice are not entitled to legal representation. This is the case even in “formal” customary courts which have been granted high jurisdictional powers, such as the *gacaca* courts and the formal customary courts in Botswana.<sup>185</sup>

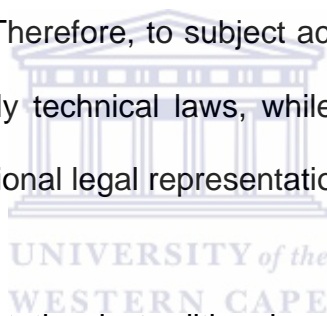
It has been noted that the basis for refusing legal representation in *gacaca* proceedings is that doing so would distort a popular form of justice. On the

<sup>183</sup> Brietzke (1974:37-56).

<sup>184</sup> For instance, section 35 (2) (b) of the Republic of South African Constitution, 1996, and section 42 (1) (c) of the Republic of Malawi Constitution, 1994.

<sup>185</sup> Section 31, Customary Courts Act of Botswana, 1969 (chapter 04:05).

other hand, in Botswana, the Government justified non provision of legal representation in customary courts on the basis that most of the presiding officers have not had high school education, such that it would be improper that lawyers should appear before these lay persons.<sup>186</sup> It is worthy mentioning that the reasons for refusing legal representation are not justifiable and do not make any sense. This is because, as Boko rightly argues,<sup>187</sup> these very same “lay persons” sit and determine the guilt or innocence of thousands of equally illiterate persons, and can sentence convicted persons to high custodial Sentences.<sup>188</sup> Further, the very same lay persons use provisions of the Penal statutes, which are barely written in the lay man’s language. Therefore, to subject accused persons to the mercy of lay persons, who apply technical laws, while at the same time to denying them a right to professional legal representation is totally inequitable.



Lack of legal representation in traditional courts has never been justifiable considering the quality of the justice dispensed by such courts which has been highly questionable, and needs constant checking. In many countries, the rate of conviction in customary courts has been and continues to be alarmingly high. In Botswana, two-thirds of the prison inmates in the whole country have been sent to prison by customary courts.<sup>189</sup> In Malawi, between 1970 and 1971, the Southern Region Traditional Court tried 25 cases of murder involving 30 defendants. All of them were found guilty and

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<sup>186</sup> Boko (2000:459).

<sup>187</sup> Boko (2000:460).

<sup>188</sup> Gacaca courts can sentence offenders up to life imprisonment. See Chapter 4, Organic Law No. 40/2000.

<sup>189</sup> Boko (2000:458).

convicted.<sup>190</sup> When it is considered that all these people are sent to incarceration without being legally represented, it is noted that lack of legal representation under traditional justice is an issue of serious concern. Thus, if traditional justice is to be used in respect of serious international crimes, States have to adapt it so as to include the right to legal representation.

### **3.3.7.2. Right to Remain Silent and to be Presumed Innocent**

Under traditional justice, offenders are not given the right to remain silent. In most cases, the offender is obliged to answer any questions put to him or her either by the court, the prosecution or the participants in the traditional court proceedings. If the offender refuses or neglects to answer questions, his or her refusal can be commented upon by the prosecution and taken into account by the court in reaching its decision.<sup>191</sup> Thus, before the abolition of the formal traditional courts in Malawi, in 1994, a person could be convicted merely because he had elected to remain silent. In this instance, presumption of innocence did not apply in the traditional courts.<sup>192</sup>

The above situation continues to dominate many traditional institutions at present. Offenders are not given the right to remain silent. They are compelled to speak. If they do not do so, they are presumed guilty. For instance, during *magamba* ceremonies, the healers compel family members

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<sup>190</sup> Brietzke(1974:39).

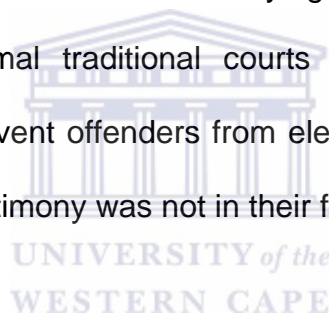
<sup>191</sup> Wanda (1996:226). This was a common practice in the traditional courts of Malawi before their abolition.

<sup>192</sup> Wanda (1996:232).

alleged to be responsible for offence revealed by the spirits, to accept it for the sake of pacifying the spirit.<sup>193</sup>

### 3.3.7.3. Right to Present and Cross-examine Witnesses

Although traditional justice provides offenders with the right to present and cross examine witness, the actual implementation of this right works against them. For instance, unlike in Western courts where an offender is able to call witnesses first, traditional courts require the offender to give evidence first before calling witnesses.<sup>194</sup> Thus, under traditional justice, an offender can not have the benefit of witnesses testifying on his behalf without himself testifying. In the formal traditional courts in Malawi, this position was exploited so as to prevent offenders from electing not to testify in the event that the witnesses' testimony was not in their favour.<sup>195</sup>



Further, traditional courts do not usually follow an adversarial procedure since there is no legal representation. Presiding officers question witnesses at length. Sometimes they even conduct cross-examination where defendants are unable or unwilling to do so. However, even if willing to conduct cross-examination, it is obvious that many defendants do not know how to properly conduct their cases. Often, defendants make statements rather than ask questions of the witness. The court usually disallows this and the defendants are in turn discouraged and more often than not fall silent.

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<sup>193</sup> Igreja (2009: 292). In a case study presented by Igreja, Julieta, who was suspected of having murdered her husband, was forced to acknowledge the accusation from the *magamba* spirit due to mounting pressure from her relations. During the follow-up session Julieta confided in the author that she had not killed her husband. She had nevertheless complied for the sake of her family.

<sup>194</sup> Wanda (1996:232).

<sup>195</sup> Wanda (1996:232).

Thus, many of the accused persons fail to offer compelling defence so as to exonerate themselves other than a simple denial of the allegations.<sup>196</sup>

In addition and connected to the issue of witnesses, lack of legal representation in traditional courts results in poor observance of the rules regarding the reception of hearsay and expert evidence. Thus, for instance, doctors are usually never present so as to be cross-examined on their medical reports. Further, defendants are not able to cross-examine on hearsay evidence since they do not know what it is.<sup>197</sup>

Worse still, under tradition, spouses are competent and compellable witnesses against fellow spouses. In this way, in Malawian formal traditional courts a wife could be compelled to testify as a state witness against her husband and vice versa.<sup>198</sup> This is still the case in informal traditional courts up to the present day.

It is thus observed that the rules as regards the right to witnesses under traditional justice are not convincing. If traditional justice is to be used in respect of serious international crimes, they need to be revised. All in all, the biggest adaptation of traditional justice to meet minimum fair trial standards is to allow provision of legal representatives and legally trained presiding officers or assessors in the operations of traditional courts. After all, there is little sense in making customary law core subject in university curricula, and

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<sup>196</sup> Brietzke (1974:53).

<sup>197</sup> Brietzke (1974:53).

<sup>198</sup> Wanda (1996:226).

encourage students to specialise in it, but still insist that they should not, as lawyers, use their knowledge to develop and improve it.<sup>199</sup>

### 3.4. Conclusion

This chapter has pointed out that traditional justice, just as international criminal justice imposes a duty on societies not to overlook serious crimes. It has observed that both traditional justice and international criminal justice have failed to adequately ensure reconciliation and reparation for serious crimes. Reconciliation, though a major feature of traditional justice, is only practicable for minor crimes under custom.

Further, on the positive side, chapter three has found that both traditional justice and international criminal justice emphasise individual criminal liability or accountability for the offence committed. This is notwithstanding the fact that there is an element of community accountability in traditional justice.

In addition, the chapter has found that traditional justice is more inclined than international criminal justice when it comes to matters such as restoration of victims, reintegration of offenders and community participation.

Finally, it has been discussed that traditional justice has been perceived to lack the formality and technicality to deal with serious international crimes.

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<sup>199</sup> Fombad (2004:189).

The chapter has also found out that traditional justice lacks procedural safeguards in respect of rights of accused persons.

In brief, chapter three has shown that there is nothing extraordinary about international criminal law in dealing with serious crimes. Traditional justice as long as adapted, can equally deal with serious crimes under international law, as it is also based on the same philosophy that serious crimes must not be left unpunished. This will not be inconsistent with the obligations of States under international criminal law. The following chapter discusses how States can in practice adapt their traditional justice mechanisms so as to be able to deal with serious international crimes.



## Chapter Iv

### **Practical Implementation of Traditional Justice in Dealing With Serious International Crimes**

#### **4.1. Introduction**

The previous chapters have shown that the use of traditional justice for serious international crimes is theoretically possible. This chapter attempts to expose the practical implementation of traditional justice in the fight against serious international crimes. The chapter will show two practical ways in which traditional justice can be used to deal with serious international crimes. The first way, referred to as 'the extremist approach,' argues for the use of traditional or customary courts in trying serious international crimes. The second way, referred to as 'the moderate approach,' argues for the continued use of Western courts in trying serious international crimes, but with a touch of traditional justice.

#### **4.2. Using Traditional Courts to try Serious International Crimes (The Extremist Approach)**

States can employ the typical traditional or customary courts to try serious crimes under international law. There are various steps that have to be taken if an international crime is to find its way into the traditional courts. This is where there is need for adaptation. In order to try serious crimes, the traditional courts, at the minimum, need the following: First, they need to have jurisdiction over the international crimes. Second, they need to have the necessary procedures to try serious crimes. Finally, they need to have



judicial officers who understand international criminal law. The following discussion expands on this.

#### **4.2.1. Jurisdiction**

In chapter two, this paper has noted that the essence of the complementarity principle of the Rome Statute is to enhance and perfect States' national legal systems in respect of jurisdiction over serious international crimes. It therefore follows that a State assumes jurisdiction to try international crimes when it incorporates them into its national laws. Thus, once the serious international crimes have been so incorporated into the national laws, a State can assign the jurisdiction over them to traditional courts.

Rwanda has shown a good example of what incorporation of serious international crimes into national laws can achieve. Although the country had been a signatory to the 1948 United Nations Genocide Convention, the country's penal code lacked the means necessary for prosecuting the crime of genocide. As a result, in 1996, the country passed the Organic Law on the Organisation of Prosecution for Offences Constituting Crimes against Humanity since 1990.<sup>200</sup>

This law outlined four categories under which individuals could be charged for their involvement in the genocide,<sup>201</sup> the procedures to be followed after confession or plea,<sup>202</sup> the penalties to be meted out to convicted offenders,<sup>203</sup>

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<sup>200</sup> Organic Law No 08/96 of 30 August 1996.

<sup>201</sup> Organic Law No 08/96, Chapter II.

<sup>202</sup> Organic Law No 08/96, Chapter III.

and it also established specialised chambers and their jurisdiction within the *gacaca* and military courts, which are courts of first instance in all genocide cases.<sup>204</sup>

In this example, jurisdiction of genocide, an international crime, was successfully assigned to *gacaca* courts which are traditional courts. This supports the argument that assignment of jurisdiction over serious international crimes to traditional courts is not rocket science. In Malawi, as early as the 1970s, traditional courts had jurisdiction over serious crimes like murder, manslaughter and treason. It is argued that like the *gacaca* courts, Malawi can assign jurisdiction over international crimes to these courts, today, if the need arises.



#### **4.2.2. Procedure**

Once a State assigns jurisdiction over international crimes to traditional courts, the next important issue would be to review the procedures to be followed in such courts. Procedures to be followed in trying serious international crimes in traditional courts must meet minimum international standards of fair trial and due process. This paper has observed that customary law procedures are irregular as they do not normally favour the rights of accused persons. The paper thus submits that the answer to correcting these and other irregular procedures lies in enacting special statutes governing procedure in traditional courts. Such procedures should

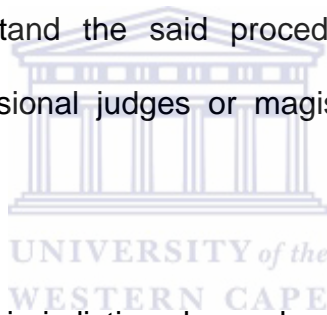
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<sup>203</sup> Organic Law No.08/96, Chapter IV.

<sup>204</sup> Organic Law No. 08/96, Chapter V. See also Articles 33 and 34, Organic Law No. 40/2000.

allow for legal representation in traditional courts, make traditional courts, courts of record, adapt local languages for use in trying international crimes and allow for conduct of trials in camera, where necessary.

To begin with, the presence of lawyers in traditional courts would help presiding officers in the proper implementation of procedural rules during trial. These rules may relate to the procedure for handling confessions, for calling and examining witnesses and for the handling of offenders who elect to remain silent. The presence of lawyers would also compel States to elevate the level of presiding officers to those who have sufficient legal knowledge to understand the said procedures. Such officers may not necessarily be professional judges or magistrates, though these may be preferable.



Some customary court jurisdictions have already started relaxing their stance on exclusion of legal representation from customary court proceedings. For instance, under section 16 of the Namibian Community Courts Act,<sup>205</sup> a party to the proceedings before a community court may be represented by 'any person' of his or her choice. The paper argues that the term 'any person' may include a lawyer, such that Namibian community courts would not disallow a lawyer representing an accused person in such courts.

Second, traditional court procedures need to provide for the making of traditional courts, courts of record. Typically, traditional courts are not courts

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<sup>205</sup> Community Courts Act No 10 of 2003. This Act is based on customary law.

of record as proceedings are oral. Record-keeping would not only be important in ensuring a smooth appellate process. It would also be essential in guaranteeing the codification of the rules of customary law. Thus, like common law, there would be recorded rules of customary or traditional law, which would be resorted to with ease when adjudicating upon serious international crimes in traditional courts. In Malawi, before their abolition in 1994, the formal traditional courts were courts of record. They recorded an enormous case law that can still be used today. Currently, in Namibia, the community courts, which are based on customary law, are also courts of record.<sup>206</sup>

Third, another procedural aspect that would need to be adapted is the use of local language in respect of international crimes. There has been a protracted misconception that African languages are technically unable to cope with the expressions and principles of international criminal law. This misconception has never been dispelled.

However, the truth of the matter is that international criminal law, and law in general is not a technical subject like the sciences or economics. Therefore, there is nothing in international criminal law that cannot be captured in *Kiswahili* or *Kinyarwanda* languages for instance. States can use a local language when incorporating the international law crimes into the national laws and during the subsequent court trials. During the trial of Saddam Hussein, the deposed President of Iraq, Arabic was the official language

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<sup>206</sup> See section 18.

used by the Iraq tribunal. It therefore serves no purpose to stereotype African languages as unable to deal with legal concepts. It is high time the international community appreciated the ability of African languages in the international criminal law discourse.

Finally, traditional courts need to adopt the provision of trials in camera. Although traditional courts have been perfect in guaranteeing public trial to offenders, thereby ensuring accountability and community participation, they have nevertheless been disinclined towards offering trials in camera. This is against the background that sometimes, there may be need to hold trials in camera so as to protect the interests of minors or other victims. Procedure of traditional courts needs to be adapted to allow holding of trials in camera where necessary. The *gacaca* courts already provide for trials in camera where necessary, for purposes of public order or good morals.<sup>207</sup> The same could be extended to all traditional courts. This would ensure the protection of victims' rights.

#### **4.2.3. Provision of Professional Judicial Officers to Traditional Courts**

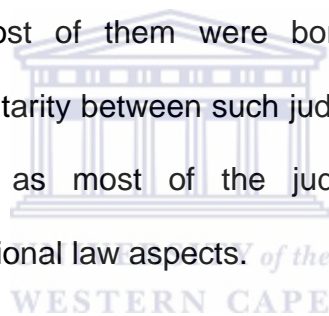
Provision of professional judicial officers to traditional courts is essential for the capacity of such courts in dealing with serious international crimes. Professional judicial officers, unlike lay officers in law, are likely to understand international criminal law concepts and the necessary court procedure. For a long time, traditional courts have culturally been presided over by chiefs, most of whom are laymen. However, the *gacaca* institutions

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<sup>207</sup> Section 24, Organic Law No. 40 of 2000.

have transformed this trend by providing legal training to its presiding officers, the *inyangamugayo*.

Thus, States can achieve success in using traditional justice for serious international crimes by combining traditional leaders and professional judges in presiding over traditional court proceedings. The role of the traditional leaders would be to maintain the traditional aspect while that of the judges would be to maintain the international law aspect. The professional judges would also guide the courts on matters of procedure. In most countries, most of the judges presiding over cases in Western courts are not strangers to traditional justice. Most of them were born and bred in the villages. Therefore, complementarity between such judges and traditional leaders can be easily achieved, as most of the judges would understand both international and traditional law aspects.



Further, the professional judges would also be justified to impose prison sentences. This is because with their presence, convictions and sentences would most likely be arrived at after due process. The prison sentences imposed in the *gacaca* courts are imposed by the *inyangamugayo*, who have limited legal knowledge. Thus, a sentence imposed by a professional judge is more likely to be a meaningful one.

### **4.3. The Moderate Approach**

The second way of bringing an interface between traditional justice and international crimes is what this paper has referred to as the 'moderate

approach.’ This approach would not involve actual use of traditional courts. Rather it would involve continued use of Western courts, but using traditional structures.

Under this approach, an international crime can still be tried in the Western-modelled national or international tribunal, but within the traditional or community setting where the offences were committed. The Rome Statute provides a motivation for this proposition. Article 3 (3) of the Statute provides that the ICC ‘may sit elsewhere whenever it considers it desirable.’ It is thus submitted that the ICC can move its seat from the Hague to the community setting where the serious international crimes were committed. This can ensure community participation and credibility of the proceedings.



The justification for this approach is that the support for traditional justice does not necessarily mean that the trials be tried in the traditional courts. The paper has observed in chapter two that traditional justice refers to conceptions and practices of justice in a particular society. Among other things, justice in African societies is perceived to be inclusionary rather than exclusionary. Traditional justice values would therefore be satisfied if communities are able to follow the proceedings and see the perpetrators showing remorse for their offences, even though the trials are conducted by a Western tribunal. Accordingly, it should be possible for the ICC to stage the trial of Germain Katanga and Mathieu Chui for war crimes in the Ituri region of the Democratic Republic of Congo where the alleged offences were committed. Likewise, it should also be possible for the trial of LRA leaders by

the ICC to take place in Northern Uganda, among the Acholi tribe, the most affected by the conflict.

This approach is however, not without problems. It may be challenged on several grounds. The first challenge would be the security concerns for the ICC judges, court staff, prosecutors, defence counsels, accused persons themselves and witnesses. This is because the areas which are under the jurisdiction of the ICC are mostly volatile areas where governments have lost control. They are also usually areas which are difficult to reach. It is submitted that this argument makes sense. However, at the same time, it could be argued that there are some areas under the ICC jurisdiction which are relatively safe. Kenya is an obvious example. Thus, this approach may easily work in countries like Kenya. It may also work where, with the passage of time, the once volatile regions of Darfur, Northern Uganda and Ituri have become relatively safe.

The second challenge to the moderate approach would be the issue of logistics and costs. It may be logistically difficult and costly to move the judges, court staff and all concerned parties from the Hague to Northern Uganda, for instance. However, it should also be noted that trying the cases at the Hague is equally expensive since it requires the transferring of the accused persons and witnesses to the Hague. Therefore, the argument of expense might not be very convincing.



This paper notes that there may be practical challenges for the ICC to try the cases within the communities where the atrocities were committed. However, it is not impossible. By enacting article 3 (3) in the Rome Statute, States Parties knew or had reason to believe that the ICC would at one point be required to sit elsewhere apart from the Hague. Thus, where possible, the ICC's sitting within the communities can underline the authenticity of the proceedings, thereby bringing an interface between serious international crimes and traditional justice.

#### **4.4. Conclusion**

African traditional justice has all the structures necessary for dealing with serious crimes under international law. Its practical implementation in this regard however requires massive adaptation so as to meet the consequential demands of dealing with serious international crimes. Time has come to let the African sense of justice manifest itself in the international criminal law discourse. There is need to completely abandon views which always treat the West as rational, objective and progressive, and Africa as irrational, subjective and archaic.<sup>208</sup>

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<sup>208</sup> Frankel and Shenhav (2003:1537).

## Chapter V

### Conclusion and Recommendations

#### 5.1. Overview

The role of traditional justice as an option for dealing with the legacy of the past in countries under transitions has increasingly gained recognition over recent years.<sup>209</sup> Transition is usually followed by the need to deal with past atrocities, which usually involve commission of serious crimes under international law, such as crimes against humanity, war crimes and genocide. Although traditional justice has enjoyed an increased level of legitimacy among the communities heavily affected by the atrocities, there have been little or no attempts to consider its role in dealing with serious crimes under international law. Since traditional justice continues to enjoy an increased level of such legitimacy, this paper was aimed at justifying its use in dealing with serious crimes under international law, an area which has otherwise traditionally been reserved for the formal national or international courts.

Under international criminal law, States have a primary obligation to try and punish serious international crimes emanating from periods of transitions. It is in this light that the question arose as to whether resort to traditional justice would not amount to unwillingness or inability of a State to fulfil its international law obligations. The paper has noted that resort to traditional

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<sup>209</sup> This has been manifested in the increased use of the *gacaca* in Rwanda, *mato oput* ceremony in Uganda and *magamba* rituals in Mozambique in dealing with the legacies of the past in these countries.

justice *per se* is not inconsistent with the duty of States in respect of serious crimes under international law. There are both theoretical and practical justifications which validate use of traditional justice in trying serious international crimes. This paper has outlined these justifications.

This paper has outlined three major steps that States need to follow in order to try serious international crimes successfully under traditional courts. First, States have to incorporate serious international crimes into their national laws and assign jurisdiction over them to traditional courts. Second, States have to adapt traditional justice procedure and practices so as to meet the demands of trying international law crimes. The necessary adaptations have been proposed in chapter four. Finally, the paper has noted that use of traditional justice in trying serious international crimes, can only be meaningful if States try the said crimes within the regions affected by the atrocities.

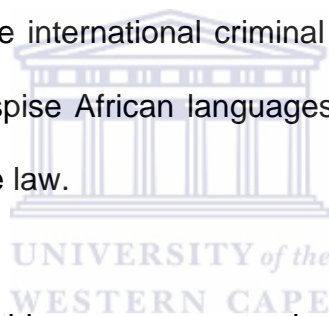
## **5.2. Recommendations**

States can use traditional justice to deal with crimes against humanity, war crimes or genocide. However, to do this States have to firstly incorporate these crimes into their national laws. This will enable them to meet the obligations to investigate and prosecute these crimes.

Second, States need to give increased capacity to their traditional justice structures so that they can be called upon to try serious international crimes when need arises. This includes increasing the threshold of statutory

offences that can be tried in traditional courts, reviewing the procedure used in traditional courts, authoring international criminal law texts in local languages and training lawyers and law students in customary laws and procedure.

Third, African States and people need to shrug off the attitude of inferiority when it comes to international law matters. The system of international criminal justice is based on the Western legal system. Yet as it stands presently, all the situations before the ICC are from the African continent, which ironically takes pride in its traditional justice. It is wrong to despise traditional justice in the international criminal justice discourse, in the same way it is wrong to despise African languages as being unable to cope with the technicalities of the law.



In the final analysis, this paper asserts that the whole idea of punishing perpetrators of serious crimes under international law is to discourage a culture of impunity, thereby ensuring respect for the rule of law and security of the world. However, this goal will continue making little sense where measures taken to ensure its fulfilment do not enjoy credibility in the eyes of the people who are sought to be protected from the atrocities. This paper maintains that where possible and practicable, perpetrators of serious international crimes should be subjected to the traditional justice of the areas where they committed the atrocities.

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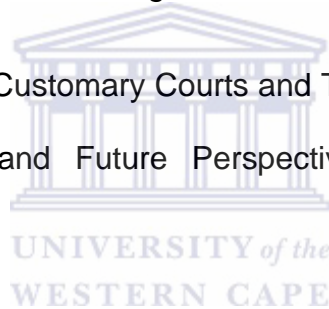
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