Bridging the Gap for Accountability for Serious International Crimes Using Traditional Justice Systems in Africa

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Declaration and Approval

Declaration

I declare that this work has not been previously submitted and approved for the award of a degree by this or any other University. To the best of my knowledge and belief, the thesis contains no material previously published or written by another person except where due reference is made in the thesis itself.

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Abstract

After periods of conflict in African states, both international and domestic mechanisms were employed to prosecute serious international crimes and hold perpetrators accountable. These include international tribunals like the ICTR, the SCSL and the ICC along with domestic prosecutions. While these justice mechanisms aim for retributive justice and full accountability, they face limitations and challenges that hinder their effectiveness. Following conflict and due to the challenges faced by these mechanisms in ensuring there is accountability for serious international crimes, countries like Rwanda, Uganda and Mozambique applied traditional justice systems that offer restorative justice to achieve reconciliation, social harmony and peace. However, traditional justice systems are seen as offering 'mere justice' and there is lack of consensus on whether they have capacity to address serious international crimes. In light of the foregoing concern, this study employed a descriptive research design utilizing a socio-legal methodology complemented by a doctrinal analysis too sought to examine how effective traditional justice systems can be in bridging the gap for accountability for serious international crimes.

Having analyzed the mandate of the formal justice mechanisms, the study found that despite these mechanisms making great strides in ensuring there is accountability, they face inherent challenges and limitations due to their mandate that limits them to prosecute only the major perpetrators of crimes, with a large number remaining who are not prosecuted. The study advocates for a more holistic approach to justice that combines both the formal judicial systems and traditional justice systems. The study also explores the role of traditional justice systems applied in Rwanda, Uganda and Mozambique and draws key lessons on how these traditional justice systems can be applied to bridge the gap for accountability for serious international crimes. Finally, the study recommends *inter alia*, establishing a framework for traditional justice systems to address serious international crimes and underscores the need for capacity building within this framework.

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List of Abbreviations

AU	African Union
AFRC	Armed Forces Revolutionary Council
AUTJP	African Union Transitional Justice Policy
CAR	Central African Republic
CDF	Civil Defenses Force
DRC	Democratic Republic of Congo
ECCC	Extra Ordinary Chambers in the Courts of Cambodia
ICC	International Criminal Court
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IOCD	International and Organized Crimes Division
JSC	Judiciary Service Commission
LRA	Lords Resistance Army
NGO	Non-Governmental Organization
NRM	National Resistance Movement
OTP	Office of the Prosecutor
RUF	Revolutionary United Front
SCSL	Special Court of Sierra Leone
TRC	Truth and Reconciliation Commission
TWAIL	Theory of Third World Approach to International Law
UN	United Nations
UNSC	United Nations Security Council

List of Statutory Instruments

National Laws

1. International Crimes Act (Act No. 16 of 2008) Laws of Kenya
2. Legal Notice No. 10 of 2011, The High Court (International Crimes Division) Practice Directions, 2011, Uganda.
3. *International Criminal Court Act* (2010) Laws of Uganda
4. Law 4/92 of 6 May 1992, Mozambique
5. Organic Law No. 08/96 of 30 August 1996 on the Organization of Prosecutions for Offences Constituting the Crime of Genocide or Crimes against Humanity Committed since 1 October 1990, Journal Officiel [Rwanda]
6. Organic Law N° 40/2000 Of 26/01/2001 Setting Up "Gacaca Jurisdictions" And Organizing Prosecutions for Offences Constituting the Crime Of Genocide Or Crimes Against Humanity Committed Between October 1, 1990 And December 31, 1994, Official Gazette Of The Republic Of Rwanda, N°6 (15 March 2001)
7. Organic law No. 16/2004 of 19 June 2004 establishing the Organization, Competence and functioning of Gacaca courts charged with prosecuting and trying the perpetrators of the crime of genocide and other crimes against humanity, committed between 1 October 1990 and 31 December 1994, Official Gazette of the Republic of Rwanda, Special Edition (19 June 2004)

International Instruments

1. The Rome Statute of the International Criminal Court Adopted on 17 July 1998 and entered into force on 1 July 2002
2. Statute of the International Criminal Tribunal for Rwanda, 8th November 1994 (UN Doc S/RES/955(1994), Annex, (1994) 33 ILM 1598), OXIO 139, United Nations Security Council [UNSC]; International Criminal Tribunal for Rwanda [ICTR]
3. Statute of the Special Court for Sierra Leone, annexed to the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, 16 January 2002, 2178 U.N.T.S. 137.
4. International Criminal Tribunal for Rwanda, *Rules of Procedure and Evidence*, 29 June 1995, UN Doc. ITR/3/REV.1

5. African Union Transitional Justice Policy, Adopted February 2019
6. International Covenant on Civil and Political Rights, (1996) 999 UNTS 171

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1. UN Security Council, Security Council Res. 955 (1994) on the Establishment of the International Criminal Tribunal for Rwanda, S/RES/955 (1994), 8 November 1994
2. UNSC Resolution 1315 (2000) adopted on 14 August 2000 UN Doc S/RES/1315

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1. Agreement on Accountability and Reconciliation between the Government of the Republic of Uganda and the Lord's Resistance Army/Movement, Juba, Sudan, 29 June 2007
2. Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, UN Doc. S/2002/246, 16 January 2002, Appendix II.

List of Cases

1. *Alfred Musema v The Prosecutor*, ICTR-96-13-A, Appeals Chamber, Judgment of 16 November 2001, International Criminal Tribunal of Rwanda.
2. *Augustine Ndindiliyimana, Francois-Xavier Nzuwonemeye & Innocent Sagahutu* v The Prosecutor, Appeals Chamber Judgment of 11 February 2014. International Criminal Tribunal of Rwanda.
3. *Prosecutor v Nahimana*, Case No. ICTR-99-52-t, Judgment and Sentence of 2 December 2003, International Criminal Tribunal of Rwanda.
4. *Prosecutor v Tharcisse Muvunyi*, ICTR-2000-55A-T, Judgment of 12 September 2006.
5. *Prosecutor v Charles Ghankay Taylor*, SCSL-03-01-T, , Judgment of 18 May 2012, Special Court of Sierra Leone.
6. *Prosecutor v. Uhuru Muigai Kenyatta*, ICC-01/09-02/11 OA 5, Judgment of 19 August, 2015. International Criminal Court
7. *Prosecutor -vs- Jean Kambanda* (1998) ICTR 97-23-S, Judgment and Sentence of 4 September 1998, International Criminal Tribunal of Rwanda
8. *Prosecutor -vs- Jean Paul Akayesu (1998)* ICTR-96-4-T, Judgment of 2 September, 1998, International Criminal Tribunal of Rwanda
9. *Prosecutor -vs- Michael Bagaragaza*, (2009) ICTR-05-86-S, Sentencing Judgment of 17 November 2009, International Criminal Tribunal of Rwanda
10. The Prosecutor v. Al Faqi Al Mahdi, ICC-01/12-01/15-171, Judgment and Sentence of 27 September 2016.
11. *Prosecutor v Lubanga* (Warrant of Arrest) (International Criminal Court, Pre-Trial Chamber I, Case No ICC-01/04 01/06-2-tEN, 10 February 2006)
12. *Prosecutor v. Germain Katanga*, Judgment Pursuant to Article 74 of the Statute ICC-01/04-01/07-3436, Judgment of 7 March 2014
13. *The Prosecutor v. Omar Hassan Ahmad Al Bashir,* ICC-02/05-01/09-302
14. *Prosecutor v. Jean-Pierre Bemba Gombo*, *Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, ICC-01/ 05-01/13-1989-Red, Judgment pursuant to Article 74 of the Statute of 19 October 2016
15. *Republic (through Cabinet Secretary, Ministry if Interior and Coordination of National Government) v Paul Gicheru & another* [2017] eKLR
16. Situation in the Republic of the Congo, *In the case of The Prosecutor v Bosco Ntaganda*, ICC-01/-4-02/06 A A2, Judgment of 30 March 2021.

17. Situation in the Democratic Republic of the Congo, *In the Case of The Prosecutor v Germain Katanga*, ICC-01/04/07, Judgment pursuant to Article 74 of the Statute 0n 7 March 2014.
18. Situation in the Central African Republic, *In the case of the Prosecutor v Jean-Pierre Bemba Gombo*, ICC-01/05-01/08 A, Judgment of 8 June 2018
19. Situation in Darfur Sudan, *The Prosecutor v. Omar Hassan Ahmad Al Bashir,* ICC-02/05-01/09-302; Decision Under Article 87(7) of The Rome Statute On The Non-compliance By South Africa With The Request By The Court For The Arrest and Surrender of Omar Al-Bashir
20. *Theonete Bagosora, Anatole Nsengiyumva v The Prosecutor*, ICTR-98-41-A, Appeals Chamber Judgment of 14 December 2011
21. The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido, Judgment Pursuant to Article 74 of the Statute, ICC-01/ 05-01/13-1989-Red, 19 October 2016) and The Prosecutor v. Jean-Pierre Bemba, Judgment on the appeal of Jean-Pierre Bemba Gombo against Trial Chamber III 'Judgment Pursuant to Article 74 of the Statute', ICC 01-05-01-08 A, Judgment of 8 June 2018
22. Prosecutor v Lubanga (Warrant of Arrest), Pre-Trial Chamber I, Case No ICC-01/04 01/06-2-tEN, Decision of 10 February 2006
23. *The Prosecutor v. Thomas Lubanga*, Judgment Pursuant to Article 74 of the Statute, ICC-01/04-01/06, Judgment of 14 March 2012
24. Situation in the Republic of Kenya, *The Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, ICC-01/09-02/11 OA, Judgment of 30 August 2011

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Dedication

I dedicate this thesis to my Mum, Purity, the pillar who instilled in me the power to always push through and to never give up. To my Husband, Joseph, who set the path for me and supported me throughout this journey, and to my Two Daughters, Jasmine and Janelle, whom I hope to inspire to be the best versions of themselves.

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Chapter 1: Introduction

1.1 Background to the Study

The fight against impunity is one that has developed over time within the field of international criminal justice with accountability and reconciliation taking center stage in response to atrocities committed on a large scale.[1] This fight against impunity for international crimes and the fight for the rule of law is being collectively fought at both the national and international fronts, with both state and non-state actors collectively working together to combat impunity for core international crimes such as war crimes, crimes against humanity, and genocide. [2]This obligation for States to prosecute these core crimes is provided for under customary international law and treaty law, where states are obligated to investigate and prosecute persons suspected of committing serious international crimes. As a response to this, the international criminal justice actors, in this case States, have an obligation to investigate violations of serious international crimes by taking appropriate measures with respect to alleged perpetrators are prosecuted, tried and sentenced.[3]

A number of actors both nationally and internationally have helped facilitate the prosecution of the most serious of international crimes.[4] For the international community, several mechanisms have been developed for holding accountable those responsible for committing serious international crimes.[5] First came the Nuremberg and Tokyo Tribunals that prosecuted individuals for crimes committed after the end of World War II. Then came the two *ad hoc* international criminal tribunals, the International Criminal Tribunal for Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). The two tribunals then paved the way for the International Criminal Court (ICC)[6] created by the Rome Statute as the first permanent, treaty-based international criminal court.[7] The Rome Statute also provides for the principle of complementarity, which essentially provides that the primary responsibility for prosecuting

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[1] Dickinson A L, 'The promise of Hybrid Courts', 97(2) *The Americal Journal of International Law* (2003) 295-310.
[2] Beigbeder Y, *International Justice against Impunity Progresses and Challenges*, Martinus Njihoff Publishers, Boston, 2005, 1
[3] Beigbeder Y, *International Justice against Impunity Progresses and Challenges,* 13
[4] Kaye D, 'Justice beyond the Hague: Supporting the Prosecution of International Crimes' Council on Foreign Relations (2011)
[5] Stephens B 'Accountability for international crimes: the synergy between the international criminal and alternative remedies' 21 (3) *Wisconsin International Law Journal* (2003) , 527-556.
[6] UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010), ISBN No. 92-9227-227-6, UN General Assembly, 17 July 1998 (hereinafter referred to as the Rome Statute)
[7] https://www.icc-cpi.int/sites/default/files/ICCAtAGlanceEng.pdf

international crimes lies with the national courts of a State. The matter only escalates to the ICC, if a State shows unwillingness to prosecute or is unable to do so.[8]

Additionally, hybrid courts were instituted, where these courts are categorized as judicial courts with a blend of national and international components, often operating within the jurisdiction where the crimes occurred.[9] Such hybrid courts include the Regulation 64 Panels in the Courts of Kosovo, the Special Panels for Serious Crimes in East Timor, the Special Court of Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia (ECCC), and the Special Tribunal for Lebanon.[10]

Nationally, various countries used their national courts to hold their citizens accountable for war crimes and crimes against humanity.[11] Universal jurisdiction is now accepted and used to prosecute international crimes in the national courts of various countries, an example being Argentina, which used universal jurisdiction[12] to prosecute crimes that occurred in Spain, following a request by the victims.[13]

Closer home in Africa, Rwanda has used its national courts to prosecute genocide with the perpetrators being convicted of the crime[14]. The national courts, using the special Rwandan genocide legislation, were able to convict persons for genocide by considering the gravity of the genocide offence by allowing reduced sentences for the accused persons who pleaded guilty.[15]

These mechanisms, adopted both internationally and nationally, have a common element of being retributive and hence formal in nature. Retributive justice demands that rules and

[8] This is based on the Principle of Complementarity where the Rome Statute recognizes that States have the first responsibility and right to prosecute international crimes within their jurisdiction and that the ICC can only come in where such a State is unwilling or unable to prosecute such crimes. It is implemented through Articles 17 and 53 of the Rome Statute.

[9] According to the Office of the United Nations High Commissioner for Human Rights in its report on 'Rule of Law Tools for Post Conflict States 'Maximizing the legacy of hybrid courts' accessed at https://www.ohchr.org/sites/default/files/Documents/Publications/HybridCourts.pdf

[11] Kaye D, Justice beyond the Hague: Supporting the Prosecution of International Crimes' 6

[12] Universal jurisdiction is the legal principle enabling a State to investigate and prosecute specific international crimes, irrespective of whether they occurred within its territory, involved its nationals, or affected its citizens. Such crimes encompass genocide, war crimes, crimes against humanity, and torture.

[13] Arriaza N, 'Just a 'Bubble'? Perspectives on the Enforcement of International Criminal Law by National Courts' 11(3) *Journal of International Criminal Justice* (2013) 537-543

[14] Through the *Organic Law No. 08/96 of 30 August 1996 on the Organization of Prosecutions for Offences Constituting the Crime of Genocide or Crimes against Humanity Committed since 1 October 1990, Journal Officiel [Rwanda]* persons who participated in the genocide were tried and convicted for the roles they played in the 1994 genocide.

[15] Schabas W A, 'National Courts Finally begin to prosecute Genocide, the 'Crimes of Crimes', 1(1) *Journal of International Criminal Justice*, (2003), 46

regulations that make up a given activity or institution should be consistently applied and enforced against persons who are subjected to such rules and regulations.[16] All in all, this system contributes to accountability, reconciliation, and the establishment of the rule of law by ensuring that those responsible for atrocities are tried.

In recent times, Africa has experienced severe civil conflicts that have greatly impacted its development and the lives of its people. [17] The causes of these wars are diverse, ranging from ethnic and religious tensions to the lack of democratic governance.[18] Understandably, significant efforts have been made to address past injustices and uphold the rule of law to promote peace and stability.

Having experienced conflict, various African States employed various mechanisms under the law that ensured perpetrators of international crimes were prosecuted and held accountable for their actions. For example, following the 1994 genocide in Rwanda, in addition to the ICTR and the national courts, the Rwanda government implemented the use of the *Gacaca*[19] courts in an effort to ensure delivery of comprehensive justice to address the genocide that happened in Rwanda.[20]

In Sierra Leone, following the civil war that lasted for close to 11 years, the Sierra Leone government and the United Nations (UN) entered into an agreement that created the Special Court of Sierra Leone (SCSL), a hybrid court, to prosecute persons responsible for committing atrocities as well as to also ensure there is justice and reconciliation in Sierra Leone. The Sierra Leone government also established a Truth and Reconciliation Commission (TRC) to address the atrocities. The people of Sierra Leone also adopted a traditional justice mechanism known as the *Fambul Tok*, which is a traditional concept of resolving disputes as a community.[21]

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[16] Carr C, 'The Concept of Formal Justice' 39(3) *An International Journal for Philosophy in the Analytic Tradition'*, (1981), 222

[17] Alie J, 'Traditional Justice and Human Rights in post-war African Countries: Prospects and Challenges' in Bennett T, Brems E Corradi G, Nijzink L and Schotsmans M (eds.), African Perspectives on Tradition and Justice, Intersentia, Cambridge, 2012, 96

[18] Alie J, 'Traditional Justice and Human rights in post-war African Countries: Prospects and Challenges',96

[19] Officially, the Gacaca Courts were created under Rwanda: Organic Law No. 28/2006 of 2006 Modifying and Complementing Organic Law No. 16/2004 of 19/06/2004 Establishing the Organisation, Competence and Functioning of Gacaca Courts Charged With Prosecuting and Trying the Perpetrators of the Crime of Genocide and Other Crimes Against Humanity, Committed Between October 1, 1990 and December 31, 1994, -, 27 June 2006. However, the 'old gacaca' courts referred to 'justice on the grass' where Rwandans would sit in gatherings meant to restore order and harmony.

[20] Westberg M, 'Rwanda's use of transitional justice after genocide: the gacaca courts and the ICTR', 59(2) *University of Kansas Law Review,* (2011), 331-368.

[21] Martin L, 'Deconstructing the local in peacebuilding practice: representations and realities of Fambul Tok in Sierra Leone' *Routledge Taylor & Francis Group Third World Quarterly* (2020), 1-17

In Mozambique, following the aftermath of the 1976-1992 civil war, the survivors of the war adopted the use of the *Magamba spirits*, as a way of working towards restorative justice and reconciliation.[22] Similarly, in Northern Uganda, following the conflict that has plagued Uganda since independence, the Acholi people transitioned to using the *mato oput*[23], a way of reconciliation as a traditional justice mechanism promoting retributive justice.[24]

The systems applied by Rwanda, Sierra Leone and Mozambique can be described as '*traditional*' in the sense that these systems exist outside the formal judiciary structures of the State and operate on the fringes of the established legal framework.[25] These traditional justice systems were adopted, for their cultural significance in maintaining social harmony and, more specifically, for their ability to provide complementary avenues of justice for local communities in the aftermath of conflict.[26] They played a vital role in addressing protracted disputes, restoring peace, and fostering reconciliation among affected populations.

There is therefore a paradox and growing emphasis and the shift in interest towards local accountability mechanisms which coincides with the continued application of justice systems that are retributive in nature in international criminal justice systems such as courts and international tribunals.[27] Despite their different approaches, both systems are being viewed as being part of the same process as they seek justice and accountability, complementing rather than opposing each other.[28] In light of the above, there is merit in looking beyond the use of one form of justice system in addressing the fight against impunity through the ICC, international and hybrid tribunals as well as national courts because such mechanisms as a '*one size fits all'* approach to justice may by itself, not be enough to deliver justice. It has therefore become necessary to consider whether traditional justice mechanisms as a restorative justice system can complement retributive justice mechanisms that offer retributive justice as a means

[22] Igreja V & Lambranca B, 'Restorative justice and the role of magamba spirits in post-civil war Gorongosa, Central Mozambique' in Huyse L & Salter M, *Traditional Justice and Reconciliation after Violent Conflict Learning from African Experiences*, International Institute for Democracy and Electoral Assistance, 2008, 68

[23] *Mato oput* is based on full acceptance of one's responsibility of their actions and involves a person seeking forgiveness and as a result, healing occurs.

[24] Latigo J, 'Northern Uganda: tradition-based practices in the Acholi region', in Huyse L & Salter M, *Traditional Justice and Reconciliation after Violent Conflict Learning from African Experiences*, International Institute for Democracy and Electoral Assistance, 2008, 102

[25] Olawale E F, Hooi Y K & Balakrishnan, 'The dynamics of African traditional justice systems: Perspectives and prospective', *African Security Review* 33:3, (2024), 229

[26] Olawale E F, Hooi Y K & Balakrishnan, 'The dynamics of African traditional justice systems: Perspectives and prospective'230

[27] Allen T & Macdonald A, 'Post Conflict Traditional Justice: a critical overview', *The Justice and Security Research Programme*, Paper 3 (2013), 1

[28] Allen T & Macdonald A, 'Post Conflict Traditional Justice', 1

to attain justice.[29] Together, there is a need for a discussion on how the two systems that form an important dual mechanism of justice can help States that are moving from conflict and fragility toward peace and democracy, with the experience from African societies that have integrated both approaches being instructive.

There is, therefore, a need to consider whether such a complementary 'twin process' is an ideal one whereby working together, they each fulfill the function the other lacks the capacity or mandate to do.

1.2 Statement of the Problem

The need for accountability for serious crimes in post conflict societies is needed to overcome impunity for these crimes as well as address serious international crimes. The reason for this is justice and deterrence. Ideally, retributive justice systems ought to deliver full accountability for serious international crimes as well as other serious violations and this would be the norm. Retributive justice entails holding perpetrators of these crimes fully accountable through trial and punishment to each responsible individual for the actual crimes committed. However, in practice, full accountability for serious international crimes is never attained.

In the same breath, traditional justice as a form of restorative justice has provided countries like Rwanda, Uganda and Mozambique a way to attain justice and provide accountability for perpetrators of serious international crimes. However, by its very nature, traditional justice systems do not fall squarely within international criminal justice, as they mostly deviate from it, especially in areas of procedure.

This study seeks to answer the question of whether traditional justice has the capacity to handle serious international crimes under international law and whether these systems meet the minimum standards of accountability for perpetrators.

This study therefore also seeks to attempt to answer whether there can be an acceptable middle ground between the application and use of traditional justice systems on one hand and the justice delivered by restorative justice systems.

[29] Istrefi R, 'Transitional justice and reconciliation from the international peacebuilding perspective', 20(2) *Journal for Labour and Social Affairs in Eastern Europe* (2017), 284,285

1.3 Justification/Rationale for The Study

Following periods of conflict in African societies, various mechanisms are deployed to address grievances and ensure there is accountability for the crimes committed. Various African States have used retributive justice systems such as courts and international tribunals as well as the ICC as well as restorative justice mechanisms that are rooted in traditions as well as cultural norms that help deliver justice.

With most African states employing both retributive and restorative justice mechanisms in delivering justice, the findings in this study can be a great step to addressing how best this can be done by bridging the knowledge gap on complementarity as well as providing a practical solution through which they can work together.

The lack of general consensus on the practical applicability of how traditional justice systems can be integrated to work with justice mechanisms that are retributive means that most societies emerging from conflict are left to navigate such periods within a vacuum.

The primary objectives to be answered in this thesis are therefore two-fold: a) To examine how traditional justice systems as a restorative justice mechanism can function and interact with retributive justice mechanisms in a complementary manner and (b) To consider the effectiveness and extent to which traditional justice systems can be used to address the limitations of retributive justice mechanisms to ensure there is accountability by holding perpetrators of serious international crimes accountable.

1.4 Research objectives

This study seeks to establish how traditional justice systems can be used to bridge the gap in addressing accountability for serious international crimes. The specific objectives of the study include:

a) To examine the existing justice mechanisms employed in handling serious international crimes and their role in addressing accountability and fighting impunity.

b) To explore the role of traditional justice systems applied in post-conflict countries in Africa by analyzing selected case studies of applied traditional justice systems in ensuring accountability for serious international crimes within societies.

c) To practically examine how traditional justice systems can bridge the gap in accountability and the lessons the international community can learn from the

experiences of post-conflict countries in Africa that applied traditional justice systems in ensuring there is accountability for international crimes.

d) To propose recommendations that can be undertaken to incorporate traditional justice mechanisms into the existing justice mechanisms employed in handling serious international crimes.

1.5 Research questions

To achieve its objectives, the study seeks to answer these questions:

1. What are the existing formal justice mechanisms employed in Africa with respect to serious international crimes in addressing accountability and fighting impunity?
2. How do traditional justice systems contribute to ensuring there is accountability for serious international crimes, and what lessons can be learned from case studies that have employed traditional justice systems?
3. What key lessons can the international community learn from the experiences of post-conflict countries in Africa on how applied traditional justice systems bridge the gap between retributive and restorative justice in establishing accountability for international crimes?
4. How may traditional justice mechanisms be incorporated into initiatives promoting accountability for international crimes?

1.6 Hypothesis

It is hypothesized that to effectively ensure there is accountability in the African international criminal justice system, retributive justice systems and traditional justice systems can work in a complementary manner.

1.7 Literature Review

A review of the existing literature regarding the application of traditional justice shows that traditional justice systems have been practiced by communities worldwide for centuries as literature on how traditional justice is being used in international crimes to ensure accountability continues to be discussed. The study therefore focuses on the notion of how accountability for serious international crimes has been achieved. The literature review is broken down into thematic areas as shown below:

1.7.1 Nature of international crimes

The criminalization of individual behavior under international law is a relatively recent development, particularly gaining momentum in the 1990s.[30] Prior to this shift, international law primarily focused on facilitating state cooperation in addressing crimes that harmed their collective interests such as piracy, slavery, and terrorism since these crimes affected the states' collective interests and had a significant transnational dimension. [31] The shift toward holding individuals criminally responsible at the international level has been part of a broader trend towards establishing individual responsibility for international crimes as a way of ensuring there is accountability for crimes.[32]

In fact, *David Forysthe* notes that it is after World War II that the Nuremberg and Tokyo proceedings advanced the idea of criminal prosecution for officials who authorized policies that led to major war crimes, crimes against humanity, and aggression.[33] He notes that this is where the foundation for the nature of these crimes was laid, despite terming the proceedings to be highly imperfect.[34] *Babafemi Akinrinade* further observes that the end of the Cold War sparked optimism about the potential of international criminal justice, creating new opportunities for international cooperation that could facilitate the establishment and maintenance of international penal tribunals.[35] For Africa, this period marked a shift from global indifference in the way the world responded to mass atrocities.[36]

Babafemi notes that previously, due to the rise of authoritarianism in African politics, the rise of the use of ethnicity and violence as instruments of governance and the marginalization of national/ethnic groups, civil wars were fueled as well as other variations of internal armed conflict, often accompanied by severe human rights violations. *Jallow* in fact emphasizes that Africa is no stranger to international criminal justice, having witnessed some of the most severe humanitarian tragedies in modern history including those in Sierra Leone, Rwanda, Sudan,

[30] Cassesse A & Gaeta P, *Cassesse's International Criminal Law*, Oxford University Press, United Kingdom, 2013, 18
[31] Cassesse A & Gaeta P, *Cassesse's International Criminal Law,* 18
[32] Cassesse A & Gaeta P, *Cassesse's International Criminal Law,* 18
[33] Forysthe D, 'Forum: Transitional Justice: The quest for theory to inform policy, *International Studies Review* (2011), 554
[34] Forysthe D, Forum: Transitional Justice: The quest for theory to inform policy, 554
[35] Akinrinade B, *Atrocity Crimes, Atrocity Laws and Justice in Africa*, Eleven International Publishing, The Hague, the Netherlands (2021), 2
[36] Akinrinade B, *Atrocity Crimes, Atrocity Laws and Justice in Africa, 2*

Congo, Central African Republic.[37] Despite these challenges, he notes that Africa is where some of the boldest initiatives in ensuring accountability for mass crimes have taken place albeit largely driven by the UN and the international community.[38]

Much of the conflicts that happened in Africa were accompanied by core crimes that in international criminal law are identified as the most serious of crimes. Article 5 of the Rome Statute while discussing its jurisdiction states that the ICC's jurisdiction is limited to the most serious crimes with respect to genocide, crimes against humanity, war crimes and the crime of aggression.[39]

According to *Elinor Fry*, to better understand the nature of international crimes, it is necessary to consider three factors that distinguish them from ordinary crimes: (i) the goals and functions of international criminal justice and international criminal trials to understand the underlying purpose of international criminal justice and trials; (ii) elements of the legal definitions which are the ingredients and circumstances that make up an international crime; and (iii) how to prove an international crime which focuses on the process of proving an international crime in a court of law.[40] *Fry's* analysis contributes to this literature as he identifies the legal and procedural framework for understanding serious international crimes as it shows that international crimes are not just ordinary crimes, but that they have distinct legal and structural components that set them apart.

Akinrinade further outlines the key definitional characteristics of serious international crimes that distinguish them from ordinary crimes noting they are categorized by their significant magnitude due to them being widespread, systematic or part of a large scale commission of such offenses. [41] They typically involve a large number of victims, including mass casualties, impose severe harm on noncombatant populations, involve extensive destruction of property, or violations of the laws and customs of war affecting combatants or prisoners of war. [42] These crimes can occur during war in times of peace, or during periods of violence, and may be committed within a single country or across borders. [43]These crimes generally fall within either

[37] Jallow H, 'Prosecuting International Crimes in Africa: Lessons from Rwanda and Reflections on the Future', 40 African Development 2, (2015) 2
[38] Jallow H, 'Prosecuting International Crimes in Africa: Lessons from Rwanda and Reflections on the Future',2
[39] Article 5, Rome Statute of the International Criminal Court 17 July 1998
[40] Fry E, 'The nature of international crimes and evidentiary challenges: Preserving quality while managing quantity' in Sliedregt & Vasiliev (ed), *Pluralism in International Criminal Law*, Oxford University Press, 2014, 251-272
[41] Akinrinade B, *Atrocity Crimes, Atrocity Laws and Justice in Africa,* 4,
[42] Akinrinade B, *Atrocity Crimes, Atrocity Laws and Justice in Africa,* 4
[43] Akinrinade B, *Atrocity Crimes, Atrocity Laws and Justice in Africa,* 5

of the four categories of serious international crimes; genocide, war crimes, crimes against humanity or the crime of aggression.[44] The execution of such crimes is often led by a ruling elite or powerful individuals, including rebel leaders, who plan and orchestrate the atrocities. While international law may recognize state responsibility, it also upholds individual criminal liability, as established by the long-standing practices of war crimes tribunals.[45]

This discussion has shown that serious crimes are not ordinary crimes, but rather grave violations of international law that warrant prosecution due to their scale, impact as well as the actors involved.

1.7.2 The role of individual criminal responsibility in ensuring accountability for serious international crimes

Accountability, in international human rights, refers to the need to hold individuals responsible for official acts that violate human rights.[46] *Morris* while advocating for the need to overcome impunity for international crimes and serious violations observed that in an ideal situation, full accountability for serious international crimes would be the norm.[47] This would entail appropriate trial and punishment of each person responsible for the crimes committed as well ensuring appropriate reparations are made by perpetrators to victims.[48]

Farhad Malekian in discussing the principle of the international criminal responsibility of individuals asserts that individuals are the primary actors in the commission of international crimes and are therefore liable to prosecution and punishment.[49] This applies regardless of their official position, and includes heads of states or governments.[50]He explains that within the international criminal law framework, the term 'international criminal responsibility of individuals' refers to all persons who have, in any capacity, participated in committing acts constituting international crimes.[51]

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[44] Akinrinade B, *Atrocity Crimes, Atrocity Laws and Justice in Africa,* 5
[45] Akinrinade B, *Atrocity Crimes, Atrocity Laws and Justice in Africa,* 5

[46] Ratner s, Abrams J & Bischoff J*, Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy*, Oxford University Press, New York, 2009, 3
[47] Morris M, Accountability for International crimes and serious violations of fundamental human rights'*,*29 *Law and Contemporary Problems,* 4, (1996), 29
[48] Morris M, Accountability for International crimes and serious violations of fundamental human rights'*,*29
[49] Malekian F, 'Basis of criminal accountability' in Principles of Islamic International Criminal Law: A comparative Search, *Brill* (2011), 385-398
[50] Malekian F, 'Basis of Criminal Accountability', 385
[51] Malekian F, 'Basis of Criminal Accountability', 385

According to *Farhad* while discussing the 'Basis of criminal accountability', the principle of international criminal responsibility is one of the key principles for enforcing and implementing international criminal law provisions against those who commit international crimes.[52] The principle is founded on the assumption that individuals are central to the commission of international crimes and are therefore subject to prosecution and punishment, regardless of their official status.[53] *Farhad* thus argues that within the framework of international criminal law, the term 'international criminal responsibility of individuals' refers to those who, in any capacity, may have contributed to the commission of acts that constitute international crimes. [54]

Jeremy Sarkin posits that prosecutions in trials are mostly necessary when it comes to ensuring there is accountability because they bring persons responsible for violating human rights to justice and also deter future repression.[55] However, he points out that prosecutions do not necessarily have positive results always, as he notes that victims are denied a chance to be involved in the trials because criminal trials follow international human rights principles and due process.[56]

Theodore Meron notes that despite the efforts by the international tribunals to end impunity and the evident positive momentum toward ending impunity for violations of international law, there is still a huge gap between the actual accountability efforts undertaken on one hand and the number of individuals who are believed to be responsible for atrocity crimes on the other hand.[57] The main reasons for this include the lack of capacity to bring all perpetrators of international crimes to justice.[58] National jurisdictions may have the will to act, but lack the resources and infrastructure to do so, leaving regional bodies and the international community to fill the void.[59] Also, Courts—whether international, regional, or national—must have jurisdiction over the alleged crimes and over the alleged perpetrator for any investigation or trial to take place. [60]

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[52] Malekian F, 'Basis of criminal accountability', 385
[53] Malekian F, 'Basis of criminal accountability', 385]
[54] Malekian F, 'Basis of criminal accountability', 385
[55] Sarkin, J, 'Enhancing the legitimacy, status, and role of the international criminal court globally by using transitional justice and restorative justice strategies', 6(1) *Interdisciplinary Journal of Human Rights Law*, (2011), 86
[56] Sarkin, J, 'Enhancing the legitimacy, status, and role of the international criminal court globally by using transitional justice and restorative justice strategies',97
[57] Meron T, 'Closing the Accountability Gap', *The American Journal of International Law*,3, (2018), 434
[58] Meron T, 'Closing the Accountability Gap',440
[59] [59] Meron T, 'Closing the Accountability Gap',440
[60] Meron T, 'Closing the Accountability Gap',434

1.7.3 Main actors in ensuring there is accountability

Under international criminal law, when criminal trials are undertaken, they are mostly prosecuted before national courts and international tribunals as a way of ensuring there is accountability. This is because they tend to have more resources to address prosecution of serious international crimes while also playing a crucial role in advancing the development and enforcement of international criminal norms.[61] However, this does not necessarily mean that international tribunals and national courts can effectively deter future violence by guaranteeing a reduction in the commission of international crimes. Also, delivering independence and impartiality presents a challenge because various other factors such as political pressure may affect their independence, hence affecting the willingness of states to cooperate.

David Forysthe in fact questions whether international criminal tribunals like the ICTR and ICC have effectively addressed past conflicts in ways that contribute to accountability.[62] He points out that one of the ways to do this is by examining whether retributive justice through prosecutions by considering the question of when to prosecute and when to defer to traditional justice systems or what he terms as 'local measures of healing'.[63]

Concerns have therefore been raised with criticism being leveled that the international tribunals established to ensure there is accountability for serious international crimes are predominantly '*Western'* in that their outcomes are largely focused on Western concepts. *Beitzel & Castle* argue that international tribunals especially lack credibility among the communities they are supposed to serve and are viewed as irrelevant and inaccessible to the majority of the population.[64] Also, they are arbitrary, unsupervised, and ambiguous, making them fundamentally dysfunctional and rendering their impact to be minimal on the communities they serve.[65] This highlights the need to critically reflect on the challenges faced by such courts systems, especially since they have an 'international' element in their establishment in ensuring they are effective as a mechanism of addressing the root causes of conflict.

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[61] Kritz N, "War Crimes and Truth Commissions: Some Thoughts on Accountability Mechanisms for Mass Violations of Human Rights" USAID Conference, October 30-31 1997 accessed at https://pdf.usaid.gov/pdf_docs/PNACD090.pdf on 28 June 2023

[62] Forysthe D, 'Transitional Justice: The quest for theory to inform policy', 555

[63] Forysthe D, 'Transitional Justice: The quest for theory to inform policy' 555

[64] Beitzel T and Castle T, 'Achieving Justice through the International Criminal Court in Northern Uganda: Is indigenous/restorative justice a better approach', 23 *International Criminal Justice Review* (2013), 49

[65] Beitzel T and Castle T, 'Achieving Justice through the International Criminal Court in Northern Uganda, 49

Macdonald & Allen also note the problem with international tribunals is that they are internationally sponsored judicial and non-judicial processes and their decisions appear to not be garnering support from the very States they are supposed to be benefitting[66]. Again, this shows how international tribunals most times, fail to receive adequate support from the States they intend to help, again underscoring how for international tribunals to succeed, there has to be cooperation and commitment of a State's national government. However, as outlined earlier, political pressure and interference is one of the ways in which such cooperation is hindered. For example, when Uhuru Kenyatta, then President of Kenya was charged before the ICC, the Prosecutor filed an application for a finding of non-cooperation against the Kenyan Government for failing to comply with a request to produce records relating to Kenyatta[67]. This is a clear example of how a State actively undermines the implementation of retributive justice using the ICC as a retributive justice mechanism by offering limited support for the justice efforts by the international court.

Therefore, when it comes to defusing tensions in Africa, international tribunals and the ICC face various hurdles that impede them from meeting their mandate[68]. *Schabas and Wald* specifically argue that though international prosecutions and trials can be a way to punish those who have committed serious crimes, they cannot bring back what victims have lost.[69] They are also not a substitute for tackling the underlying reasons for conflict or meeting the requirements of the communities they are intended to support.[70] This argument is in line with this thesis's argument that though retributive justice mechanisms are the most widely system used to achieve justice, they are not the best in addressing the root causes of conflict.

Furthermore, the punitive aim of criminal justice restricts the search for truth to the prosecution of individuals and crimes under the jurisdiction of the ICC, *ad hoc* or hybrid tribunals since their jurisdiction is only limited to serious crimes[71]. *Flory* argues that when dealing with post-conflict challenges, retributive justice systems encounter inherent limitations due to their judicial nature.[72] She points out that these criminal courts are limited in capacity as they often

[66] Allen T & Macdonald A, 'Post-Conflict Traditional Justice: A Critical Overview', 6

[67] Prosecutor v. Uhuru Muigai Kenyatta ICC-01/09-02/11 OA 5 Judgment of 19 August 2015

[68] Schabas W & Wald P, 'Truth Commissions and Courts working in parallel: The Sierra Leone Experience', Cambridge University Press Proceedings of the Annual Meeting (American Society of International Law), MARCH 31-APRIL 3, 2004, Vol. 98 (MARCH 31-APRIL 3, 2004), pp. 189-195,

[69] Schabas W & Wald P, 'Truth Commissions and Courts working in parallel', 195

[70] Schabas W & Wald P, 'Truth Commissions and Courts working in parallel', 195

[71] Flory P, 'International Criminal Justice and Truth Commissions', 13 *Journal of International Criminal Justice* (2015),25

[72] Flory P, 'International Criminal Justice and Truth Commissions',21

involve lengthy and expensive trials[73]. Also, she notes that such formal systems suffer from restrictions inherent to rules of evidence adopted by these courts, the strict regulation of testimony, and establishing facts rather than providing space for victims to tell their stories and their truths constrict their potential.[74] Furthermore, victims are not given the same opportunity to confront and eventually forgive perpetrators in a courtroom.[75] By outlining these limitations, she points out the limited nature of retributive justice system of being more punitive and failing to focus on truth-seeking or in general, restorative measures as a way of addressing accountability gaps. These limitations therefore again show the importance of exploring traditional justice systems as a collaborative approach to retributive justice mechanisms.

These limitations show the need for more holistic and victim centered approaches to justice and reconciliation by underscoring the importance of considering complementary approach to delivering justice.

1.7.4 The notion of traditional justice systems

This thesis uses the terms informal, indigenous, traditional, and customary justice systems interchangeably. *Kariuki* asserts that for a long time, community, customary and traditional justice systems have operated independently of justice systems that are formal in nature, often without adequate legal recognition and protection. [76] He further notes that though these systems have been labelled with various terms such as 'indigenous, 'informal', non-formal', 'non-state', or non-official justice systems-suggesting they are synonymous and share the same juridical content- they are in fact, distinct and normatively different. [77] *Olawale, Hooi* and *Balakrishnan* note these systems exist outside the formal judiciary of a State and operate on the fringe of the established legal framework.[78]

When a dispute resolution system is described as 'informal' rather than 'formal' in a jurisdiction, community or organization, it is because, in such societies, it is common for people to look to shared substantive norms to resolve problems rather than to resort to legal norms,

[73] Flory P, 'International Criminal Justice and Truth Commissions',25
[74] Flory P, 'International Criminal Justice and Truth Commissions',25
[75] Flory P, 'International Criminal Justice and Truth Commissions',26
[76] Kariuki F, 'Community, customary and traditional justice systems in Kenya: Reflecting on and exploring the appropriate terminology', *8(1) University of Nairobi Law Journal*, (2015), 2
[77] Kariuki F, 'Community, customary and traditional justice systems in Kenya: Reflecting on and exploring the appropriate terminology',2
[78] Olawale E F, Hooi Y K & Balakrishnan, 'The dynamics of African traditional justice systems: Perspectives and prospective', *African Security Review* 33:3, (2024), 229

whether or not there exists a formal system of law[79]. *Macfarlane* argues that this may be because of a lack of knowledge or awareness of people's legal rights, but she argues that the most significant reason is because of socio-economic and non-legal norms within daily life, which community norms are so strong, that a resort to formal systems of law are regarded as unethical and inappropriate[80]. *Macfarlane* also notes that to other people, informal systems are simply just more relevant in their day as they are appropriate and accessible as opposed to 'generic imposed legal norms'.[81] From this, it can be discerned that social norms and customary structures cannot be separated, because, the vast majority of human behavior is shaped and influenced by living normative frameworks inherent in customary law.

In recent years, there has been a proliferation of attempts to adapt and institutionalize forms of traditional justice as part of post-conflict policy in various countries worldwide, from Timor Leste and Afghanistan to Rwanda and Sierra Leone in Africa, as examples.[82] The actual definition of what is 'informal' is rather vague, because words such as 'customary', 'indigenous', 'non-state', and 'local' justice are as pointed out, sometimes used interchangeably, as pointed out before.[83] What all these terms have in common is that they are used to show where 'informal' systems of justice have been used alongside 'formal' systems of justice where formal justice systems have been used in delivering justice.

The African Union Transitional Justice Policy (AUTJP)[84], a regional framework adopted by the African Union underscores the significance of traditional justice mechanisms. It notes that while accountability and retribution are key aspects of justice in African transitional contexts, these processes should also incorporate elements of conciliation and restitution. [85] The AU Transitional Justice policy defines traditional and complementary justice mechanism to be:"*the local processes, including rituals, which communities use for adjudicating disputes and for restoring the loss caused through violence in accordance with established community-based*

[79] Macfarlane J, 'Working towards restorative justice in Ethiopia: Integrating traditional conflict resolution systems with the formal legal systems', 8(2) *Cardozo Journal of Conflict Resolution* (2007), 489
[80] Macfarlane J, 'Working towards restorative justice in Ethiopia, 489
[81] Macfarlane J, 'Working towards restorative justice in Ethiopia, 489

[82] Allen T and Macdonald A, 'Post-Conflict Traditional justice', 2
[83] Allen T and Macdonald A, 'Post-Conflict Traditional justice: A critical overview', 2
[84] African Union, Transitional Justice Policy, 12 February 2019 (AUTJP)
[85] Kariuki F, 'Community, customary and traditional justice systems in Kenya: Reflecting on and exploring the appropriate terminology',14

norms and practices. They include traditional adjudicative processes such as clan or customary courts and community-based dialogue[86]."

The AU Policy further goes on to note the need for such mechanisms to be used alongside formal justice mechanisms to address the justice process. The UNDP in its report titled 'Human Rights and Traditional Justice Systems in Africa defines traditional justice systems to be: *"community-level dispute resolution mechanisms with non-State origins, even if subsequently recognized and regulated by the State. They normally have long-standing cultural and historical foundations, and frequently predate colonialism."*[87]

From the above definitions, informal justice mechanisms or systems can be inferred to mean a range of community-based resolution mechanisms, rooted in shared substantive norms, cultural traditions, and practices, operating outside a formal legal framework. A community justice system may be based on the customary law of the different ethnic groups in a country. Similarly, a customary justice system can be based on ethnicity or the traditional cultural lifestyle of a people.[88] The normative content of justice systems based on ethnicity and traditional or indigenous lifestyles will most likely be African customary law.[89] However, and as argued elsewhere, the normative framework of justice systems based on culture or community of interest will not necessarily be African customary law.

Kariuki agrees that customary, traditional and community justice systems are all localized, homegrown and culturally appropriate systems operating on minimal resources and can easily be embraced by communities.[90] These systems contribute to ensuring there is access to justice as they build on existing resources within a community such as trust amongst members, interconnectedness, commitment, acceptance and belonging, diversity, mutual responsibility and common purposes.[91]

However, *Kariuki* defines traditional dispute resolution mechanisms to be mechanisms that have been practised by communities since time immemorial and passed on from one generation to the other, and having a tried and tested history. He regards traditional mechanisms as a subset of customary dispute resolution mechanisms as they are based on customary laws of a particular ethnic group practiced since time immemorial. *Kariuki* then defines customary

[86] African Union, Transitional Justice Policy, Adopted February 2019
[87] Human Rights and Traditional Justice Systems in Africa, UNHCR Doc HR/PUB/16/2
[88] Kariuki F, 'Community, customary and traditional justice systems in Kenya',14
[89] Kariuki F, 'Community, customary and traditional justice systems in Kenya',14
[90] Kariuki F, 'Community, customary and traditional justice systems in Kenya', 13
[91] Kariuki F, 'Community, customary and traditional justice systems in Kenya', 13

justice systems as a dispute resolution mechanism that develop from the customs and customary practices of people. [92] So, in defining what customary justice systems are is dependent on the meaning of custom.

Kariuki notes that customary justice systems differ from traditional justice systems because customs are dynamic and tend to change according to new trends and social norms.[93]

Traditional justice mechanisms can therefore be regarded as a subset of customary dispute resolutions as they are based on customary laws of a particular ethnic group practiced since time immemorial.[94] *Kariuki* however notes that traditions are a not 'static or absolute phenomenon' but inherently dynamic, fluid and subject to change.[95] Since customary law is dynamic, traditional dispute resolution mechanisms can also keep evolving. They can be influenced by developments over time, changing some aspects and retaining others.[96] Also, they differ from one ethnicity or tribe to another.[97] So, although they have similar structures across most ethnic communities, they have different names across different tribes and their roles and mechanisms unique to the circumstances of individual tribes. The mechanisms used to resolve disputes under traditional justice include negotiation, mediation, conciliation, settlement, consensus approach and restoration which mechanisms focus on restoring peace and maintaining social bonds.[98]

Therefore, in this thesis, the prominent term used is traditional justice systems since in adopting *Kariuki*'s definition, traditional justice systems are culturally rooted and have been practiced by communities over extended periods of time. They are embedded in the historical and cultural context of the communities they serve. Customary justice systems, as pointed out by *Kariuki* are dynamic and tend to evolve with changing social norms and values.

While this literature review relies significantly on the work of Kariuki, this is due to the fact that his work provides a detailed, well-structured and authoritative analysis of the topologies of traditional justice systems within scholarly work. The depth and clarity with which *Kariuki* categorizes and explains these topologies has not been matched in other studies. As such, their

[92] Kariuki F, 'Community, customary and traditional justice systems in Kenya', 10
[93] Kariuki F, 'Community, customary and traditional justice systems in Kenya', 11.
[94] Kariuki F, 'Community, customary and traditional justice systems in Kenya', 12
[95] Kariuki F, 'Community, customary and traditional justice systems in Kenya', 12
[96] Kariuki F, 'Community, customary and traditional justice systems in Kenya', 12
[97] Kariuki F, 'Community, customary and traditional justice systems in Kenya', 12
[98] Kariuki F, 'Community, customary and traditional justice systems in Kenya', 13

framework forms a valuable foundation for understanding and contextualizing traditional justice mechanisms in the broader discourse on accountability for serious international crimes.

Adopting the use of traditional justice systems and its framework as discussed by *Kariuki* helps to emphasize the nature of traditions used by African communities in post-conflict societies and their longstanding role in maintaining national harmony and how they honor culture and cultural heritage through traditional justice practices.

1.7.5 Traditional justice systems and international crimes

The literature reviewed on accountability for serious crimes in Africa highlights that the approaches to prosecuting international crimes have faced challenges in ensuring there is accountability for persons responsible for committing international crimes. In response, there has been a growing movement advocating for the use of informal systems with well-known cases where traditional justice mechanisms have been integrated to also ensure there is accountability.

In fact, *Macfarlane* while discussing the integration of traditional justice conflict resolution systems with the formal legal system, questions how restorative justice principles can be legally entrenched in a way that is compatible with community traditions and customs of dealing with conflict, yet ensure courts and tribunals maintain the oversight to ensure that human rights and due processes are respected.[99]

Traditional justice mechanisms play a role in resolving conflicts in the sense that the legal and normative structures within a society play a crucial role in managing social interactions and resolving conflicts.[100] Without these frameworks, the level of cooperation needed for daily life, would be challenging to achieve[101]. Norms and traditions are ingrained within the regulatory systems and institutions that govern daily activities, which in turn uphold and strengthen these systems of significance[102]. Similar to languages, regulatory systems form fundamental components of cultural norms and social organizations. Customary, informal, and non-state legal systems are prevalent in most countries worldwide where informal institutions include

[99] Macfarlane J, Working towards restorative justice in Ethiopia', (2007)
[100] Chirayath, L., Sage, C., & Woolcock, M. (2005). Customary law and policy reform: Engaging with the plurality of justice systems as accessed at https://www.burmalibrary.org/sites/burmalibrary.org/files/obl/docs23/World_Bank-2005-Customary_Law-engaging.pdf
[101] Chirayath, L., Sage, C., & Woolcock, M, 'Customary law and policy reform: Engaging with the plurality of justice systems, 5
[102] Chirayath, L., Sage, C., & Woolcock, M., 'Customary law and policy reform: Engaging with the plurality of justice systems', 5

dispute resolution mechanisms, as well as traditional methods of resolving disputes[103]. In reality, the majority of human conduct is guided and impacted by informal and customary norms.

Traditional justice systems play a role in the lives of African societies and individuals as it provides mechanisms for acknowledgment, truth telling, accountability, healing, and reparations[104]. However, little attention has been given to the role these traditions play in terms of their contribution to post-conflict transformation even though Africa has deeply rooted social and communal values of conflict resolution which can serve as a reservoir of wisdom in future justice initiatives[105]. Traditional ways of resolving conflict in African societies can therefore provide valuable insights into how to promote peace and justice in the aftermath of conflict. However, while the potential value of indigenous legal traditions in African societies is underscored, there does exist challenges to their integration and use in addressing international crimes such as the lack of standardization and formal codification of these norms, as well as the lack of recognition of traditions due to them not being integrated into national legal systems. This presents a challenge on how they can be integrated into post conflict societies.

Traditional justice is now central in many developing grassroots initiatives as it provides a, familiar framework and recognizable structure for the unfamiliar process of reintegrating communities following conflict. Traditional justice is not a new phenomenon as many communities in the world have been practicing it for over centuries. However, there is now a shift in interest in delivering justice in Africa with interest being shown in using local or indigenous dispute resolution mechanisms in post conflict societies[106].

Alie propounds two reasons for this sudden interest: (a) the hybridization of various justice mechanisms like prosecutions, truth commissions and local mechanisms and (b) the growing sense of disenchantment with international judicial approaches to post conflict justice. [107] *Iliff* illustrates this by showing how Rwanda used *gacaca courts* and Sierra Leone used *Fambul Tok* with both deploying traditional methods as grassroot justice processes having experienced

[103] Chirayath, L., Sage, C., & Woolcock, M., 'Customary law and policy reform: Engaging with the plurality of justice systems, 5
[104] Mekonnen D, 'Indigenous legal tradition as a supplement to African transitional justice initiatives', 10 *African Journal on Conflict Resolution* (2010), 115
[105] Mekonnen D, 'Indigenous legal tradition as a supplement to African transitional justice initiatives', 115
[106] Alie J, 'Traditional justice and human rights in post-war African countries', 98
[107] Alie J, 'Traditional justice and human rights in post-war African countries', 98

conflict[108]. By doing so, Iliff argues that these two traditional processes safeguarded the legitimacy of the transitional process as a way of serving the States during the transition from conflict[109].

Despite this positive view of the role of traditional justice and its application in countries like Rwanda, Sierra Leone and Mozambique it cannot be assumed that traditional justice mechanisms can provide a universal mechanism across different cultures to address post-conflict societies. This is because, in reality, traditional justice mechanisms employed in post-conflict states also encounter various challenges such as different political atmospheres which traditional justice systems by themselves cannot resolve. There is therefore need for an assessment of the role of traditional justice mechanisms by considering both its potential benefits and limitations.

Given the criticism leveled against international and hybrid tribunals, the ICC as well as national courts that prosecute international crimes as forms of retributive justice mechanisms as outlined earlier, traditional justice systems can offer a valuable alternative to Western-style justice systems, which often do not take into account the cultural context of the conflict by prompting reconciliation, healing the wounds of conflict, rebuilding trust and cooperation, and preventing future conflict.

This propounds the other argument this thesis is propelling that a '*one size fits all approach*' to post-conflict justice is not adequate. *Orentlicher*, in support of this, argues that the different experiences and cultures of countries around the world make it impossible to create a single formula for holistic justice that would be effective in all cases. What works in one country may not work in another, and what is considered just and fair in one culture may not be considered so in another[110]. This argument acknowledges the diverse experiences and cultural contexts of various societies and shows the importance of tailoring justice mechanisms that approach justice through encouraging flexibility and adaptability to promote justice.

It bears more logic that those who have suffered the most during civil conflicts should be the ones leading the reconciliation or healing process. They should not be passive observers of a process that will have a profound impact on their lives. Instead, they should be active

[108] Iliff A, 'Root and Branch'. Discourses of 'Tradition' in Grassroots Transitional Justice' 6(2) *International Journal of Transitional Justice* (2012), 273
[109] Iliff A, 'Root and Branch'. Discourses of 'Tradition' 273
[110] Orentlicher D, 'Settling accounts revisited: Reconciling global norms with local agency', 1 *International Journal of Transitional Justice* (2007), 10-32

participants in shaping the process and determining its outcome[111]. This is in line with the '*bottom up'* approach as a principle in conflict resolution which emphasizes the importance of involving all stakeholders in the conflict resolution process, starting with the most marginalized to the perpetrators, as a way of ensuring sustainable peace. However, this approach simplifies the process of choosing restorative justice approaches to reconciliation, and highlights the need to balance the goals of retributive and restorative justice in delivering accountability.

Wojkowska outlines several reasons driving African communities to favor traditional justice mechanisms. These include the simplicity of the approach, utilization of restorative justice with an emphasis on compensation rather than retribution, the cost efficiency of restorative justice systems, their speed in delivering justice, alignment with local social norms which fosters a sense of ownership, their resilience during violent conflicts, and their geographical accessibility to community members living within their jurisdiction[112].

Kirabira critiques the dominant reliance on criminal accountability as a tool for accountability for serious international crimes is criticized for its failure to take account of diverse conceptions of justice.[113] He advocates for the use of traditional justice mechanisms which are particularly suited in post-war contexts as they foster reintegration.[114] *Kirabira* acknowledges the challenge in practically implementing traditional justice mechanisms, noting that legal pluralism often creates tensions within communities due to conflicting normative orders between formal and traditional justice. [115] However, there is no mention of how traditional systems can work together practically, rather than just existing in parallel, which is the gap this thesis seeks to answer.

Nonetheless, traditional justice systems have not been without criticism. *Wojkowska* also highlights several weaknesses, including susceptibility to political manipulation due to power disparities, unjust and unequal treatment of women and marginalized groups, a lack of accountability, failure to adhere to international human rights standards, particularly regarding

[111] Alie J, 'Traditional justice and human rights in post-war African countries', 99

[112] Wojkowska E, 'Doing justice: How informal justice systems can contribute' accessible at https://www.unwomen.org/en/digital-library/publications/2013/1/informal-justice-systems-charting-a-course-for-human-rights-based-engagement

[113] Kirabira T, The role of NGOs in the domestic implementation of the African Union Transitional Justice Framework: perspectives from Uganda, 5 African Human Rights Yearbook, (2021), 187

[114] Kirabira T, The role of NGOs in the domestic implementation of the African Union Transitional Justice Framework, 188

[115] [115] Kirabira T, The role of NGOs in the domestic implementation of the African Union Transitional Justice Framework, 188

the right to a fair trial, and their inadequacy in effectively addressing all types of crimes, particularly those of an international nature[116].

1.8 Literature gap

This study seeks to answer several gaps in the literature review. First, the international community is biased towards adopting and employing retributive justice mechanisms that are formal in nature to address accountability for serious international crimes in Africa. To remedy this situation, the study seeks to show that while retributive justice mechanisms serve as avenues for accountability by ensuring there is prosecution and deterrence against these crimes, they face challenges in achieving this goal.

Second, the existing predominant literature on communities and societies shows that African societies have used traditional justice systems post-conflict showing that these systems were seen as 'mere partial justice' essentially aimed at peace when juxtaposed against the goal of retributive justice. The literature has shown that although traditional mechanisms primarily focus more on reconciliation as a way of conflict resolution, the way in which they can be integrated into retributive justice mechanisms presents challenges especially on how they can be formally recognized as well as their universal applicability. This study seeks to remedy this concern by addressing the issue of how traditional justice systems can be integrated to run alongside retributive justice mechanisms by recognizing their respective strengths and weaknesses as well as limitations.

Third, the existing predominant literature on addressing serious international crimes is 'Western inspired' which has disregarded Africa's perspectives in general. This study therefore seeks to fill the gap in the existing literature to show traditional justice systems can be embodied in a way that can be deemed legal under international law and adequate to the specific societies by complementing retributive forms of justice and achieving restorative accountability.

1.9 Theoretical Framework

This thesis is pegged on Postcolonial theory as the primary theory that guides its analysis.

[116] Wojkowska E, 'Doing justice: How informal justice systems can contribute' 20-23

1.9.1 Postcolonial theory

Postcolonial theory is a collective term for theoretical approaches and political practices that emerged after the official end of colonialism.[117] This theory focuses on analyzing colonial structures in a broad sense and examines the ongoing effects in the present, focusing on how colonialism has shaped current social, political and cultural dynamics. [118] The theory aims to address cultures affected by the imperial process, from the period when colonization happened to the present day. [119] It does this by reflecting on the continuity and persistence of colonizing practices, as well as the critical limits and possibilities colonizing practices have engendered endangered in the current historical moment.[120]

According to *Robert Young*, the objectives of postcolonialism involve reconstructing Western knowledge formations, reorient ethical norms and turn the power structures of the world 'upside down'.[121] This is because at the core of postcolonial theory is the power dynamics between the West and Third world countries, examining how colonial patterns continue to manifest in different contemporary contexts.[122] 'Non-Western' societies are often acknowledged for their traditional, popular or indigenous systems, but they are seldom recognized as contributors to critical thoughts that hold universal significance.[123] This results in the Third World being portrayed primarily as a symbol of tradition and rebellion, rather than a source of valuable theoretical insights.[124] This hierarchical position often leads to the marginalization of non-western legal traditions seeing in the way in which Western legal systems are placed at the top of a normative hierarchy and Western law is idealized as more developed, pure, and rational as opposed to other legal systems.[125]

Said, one of the main founders of the field of postcolonial theory, is widely acknowledged as the cornerstone of what has evolved into a multifaceted and diverse conceptual framework of

[117] Schacherreiter J, Postcolonial Theory and Comparative Law: On the methodological and epistemological benefits to comparative law through postcolonial theory, 49 *Verfassung und Recht in Übersee / Law and Politics in Africa, Asia and Latin America* 3, (2016, 291
[118]Schacherreiter J, Postcolonial Theory and Comparative Law, 291
[119] Ba O, International Justice and the Postcolonial Condition, 63 *Africa Today* 4, (2017) , 52
[120] Ba O, 'International Justice and the Postcolonial Condition', 52
[121] Young R, 'Postcolonial Remains', *New Literary History* (2012), 20
[122] Young R, 'Postcolonial Remains', 43(1) *New Literary History*, (2012), 20
[123] Slater D, 'Postcolonial questions for global times', *Review of International Political Economy* 5(4), (1998), 660
[124] Slater D, 'Postcolonial questions for global times', 660
[125] Schacherreiter J, 'Postcolonial Theory and Comparative Law: On the methodological and epistemological benefits to comparative law through postcolonial theory', *49(3) Verfassung und Recht in Ubersee/Law and Politics in Africa, Asia and Latin America*, (2016), 299

the postcolonial theory.[126] As one of the main founders of the postcolonial theory, he highlights the division of the West and Non-West through his work on 'Orientalism'.[127] *Said* describes the idea of Orientalism as the way in which the West perceives and represents Non-Western societies in a way that reinforces Western superiority, defining itself as rational, developed and civilized.[128]

The Postcolonial theory is relevant to this study because the theory extends itself to international law. *Eslava* and *Pahuja* take the view that the foundational principles of international law have been shaped by colonial history and are rooted in European political cultural and historical contexts. [129] That even though International law has expanded globally, its foundational concepts remained shaped by European experiences and intellectual traditions, noting that concepts such as 'sovereignty' and 'statehood' originated from European frameworks.[130] *Riegner* while discussing how universal international law adds to this discourse by agreeing that international law historically developed within a European framework, shaping its concepts and institutions in ways that continue to privilege Western perspectives.[131] Due to this, international law has an imperial and counter imperial dimension in that it can be used to both maintain Western dominance and also as a tool for resistance by the Global South, which he dubs to the 'dual quality of international law'.[132]

The theory is therefore relevant as it critiques the universality of international law, particularly how Western legal norms were imposed on Africa, despite these norms being often disconnected from local cultures, values and experiences rendering them less effective in addressing issues within those societies. The imposition of Western legal frameworks especially on African societies during and after colonization was done without giving due regard to African cultural contexts and traditional justice mechanisms. The effect of this imposition was that local systems were rendered less effective in addressing issues relevant to societies.

[126] Burney S, 'Orientalism: The making of the other', *Counterpoints* (2012), 23
[127] Said E, 'Orientalism', Pantheon Books, New York, 1978, 47
[128] Said E, *Orientalism*, 47
[129] Eslava L & Pahuja S, 'Beyond the (Post) Colonial: TWAIL and the Everyday Life of International Law', *Verfassung und Recht in Übersee / Law and Politics in Africa, Asia and Latin America* 45(2), (2012), 196
[130] Eslava L & Pahuja S, 'Beyond the (Post) Colonial', 196
[131] Riegner M, 'How universal are international law and development? Engaging with postcolonial and Third World scholarship from the perspective of its other', *Verfassung und Recht in Übersee / Law and Politics in Africa, Asia and Latin America* 45(2), (2012), 233
[132] Riegner M, 'How universal are international law and development?' 235

Also, a critique of the postcolonial theory highlights the limitations of applying universalized Western legal norms without accommodating the diverse cultural landscapes of postcolonial African nations. Traditional justice systems are deeply rooted in local customs and practices and offer alternative approaches to rendering justice that resonate more with the members of the communities within which they are used. Further, postcolonial legal criticism seeks to challenge how colonialism continues to manifest in both national and international law, and in doing so, highlight the importance of integrating traditional justice systems that align with the cultural and societal realities of postcolonial societies. In turn, this enhances the legitimacy of traditional justice systems to address serious international crimes.

Therefore, in the realm of international crimes and accountability, incorporating traditional justice systems within the framework of international criminal accountability addresses the critique of postcolonial theory, which in this study, illustrates the need to bridge the gap between imposed Western norms that became the legal structures as we know them and traditional and indigenous practices.

The view that international law can also be used as a tool for resistance stems from Third World Approaches to International Law (TWAIL), which arose as a criticism to postcolonialism. TWAIL scholars view international law as a tool that has enabled the neglect and reduced the potential of the Global South and instead focusing on Eurocentric perspectives.[133] TWAIL has been defined to refer to the response to the historical and ongoing legacies of colonialism in international law, emerging from the context of decolonization and the end of direct European colonial rule.[134] *Mutua* and *Anghie* while discussing what is TWAIL view the regime of international law as illegitimate, predatory and a system that legitimizes the plunder and subordination of the Third World by the West, arguing that international law has historically been used as a tool for imperial expansion, subordinating non-European societies to European domination.[135] TWAIL is therefore understood as a dialectic of opposition to international law, viewing international law as a regime and discourse of domination and subordination, and not resistance and liberation.[136]

[133] Eslava L & Pahuja S, Beyond the (Post) Colonial', 196
[134] https://www.geneva-academy.ch/event/human-rights-conversations/detail/319-third-world-approaches-to-international-law-twail-and-human-rights accessed on 7 April 2025
[135] Mutua M and Anghie A, 'What is TWAIL', Proceedings of the Annual Meeting (American Society of International Law), APRIL 5-8, (2000), 31
[136] Mutua M and Anghie A, 'What is TWAIL',31

TWAIL emerged to address the central concern and understand international law through the lived experiences of the Third World and to explore how non-European traditions and systems of governance can contribute to the development and enrichment of international law.[137] It also rethinks the position of the Global South in philosophical and ethical terms, contesting European epistemologies and ontologies.[138] In doing so, TWAIL emphasizes that the history of international law is dynamic and continually evolving. in that the history of international law is dynamic and an expanding area of interest.

TWAIL challenges the global dominance of the West with Mutua particularly challenging the role played by Western powers in shaping institutions like the United Nations (UN), terming is as 'global hegemony' which the UN legitimizes through Western actions.[139] TWAIL regards the structure of the UN, especially its Security Council as been biased and ineffective for often disregarding crises in the Third World countries and exist to serve Western interests.[140] TWAIL advocates for the representation of all voices, particularly those of marginalized groups in the Global South, such as the poor, rural communities, and non-governmental organizations. It calls for the democratization of both national and international governance systems, ensuring that the voices of the powerless are heard and taken into account.[141]

TWAIL contends that colonialism did not end with decolonization but rather evolved into neo-colonialism, where political domination was replaced by by economic domination, mirroring forms of informal imperialism.[142] It further argues that many legal innovations originated during the colonial era and were devised by imperial powers to administer and exploit colonial territories.[143] As such, one way of exposing the continuities of colonialism is by tracing how these legal frameworks were reconstructed in the postcolonial era to achieve similar outcomes under the guise of sovereign independence.[144]

TWAIL is relevant to this study because it critiques the ongoing neocolonial dynamics with the international legal system where Western powers continue to dominate and impose legal frameworks that do not reflect the needs of Africa. Therefore, in the context of accountability

[137] Anghie A, 'Rethinking International Law: A TWAIL Retrospective', *The European Journal of International Law* 34(1), (2023), 32
[138] Anghie A, 'Rethinking International Law', 32
[139] Mutua M and Anghie A, 'What is TWAIL',37
[140] Mutua M and Anghie A, 'What is TWAIL',37
[141] Mutua M and Anghie A, 'What is TWAIL',37
[142] Anghie A, 'Rethinking International Law, 34
[143] Anghie A, 'Rethinking International Law, 34
[144] Anghie A, 'Rethinking International Law, 35

for serious international crimes, TWAIL pushes for traditional justice systems as an alternative to the Western dominated institutions hence recognizing the need for a hybrid approach.

However, while postcolonial theory and TWAIL champions have provided a useful lens through which to interrogate the legacy of colonial domination in law and governance, their limitations become evident when applied to the critique of international law through traditional justice systems. Critics such as *Benita Parry* and *Aijaz Ahmad* argue the postcolonialism suffers from an 'exorbitation of discourse' which they explain to be the tendency to privilege abstract theorizing and critique over tangible political and material realities.[145] They argue that postcolonialism tends to be overly theoretical, abstract and preoccupied with discourse, at the expense of engaging with real world socio-political and economical struggles.[146] This theoretical excess, often disconnected from the lived conditions of African societies, renders postcolonialism inadequate as a sole framework for critiquing international law. Applying this criticism, one finds that using traditional justice systems merely as a rhetorical counterpoint to international legal norms risks reducing them to symbolic tools in a theoretical battle, rather than appreciating them as functional mechanisms rooted in cultural practices. If traditional justice systems are used to only critique the perceived bias of international law without considering their actual capacities, limits or evolving roles in contemporary justice contexts, they become caught in the very trap postcolonial critics caution against, which is discourse without transformative substance.

Moreover, critics such as *Ella Shohat* and *Adebayo Williams* highlight how postcolonialism often glosses over structures of global capitalism and neo-imperialism, which are deeply entwined with the enforcement and limitations of international law.[147] Thus, a critique grounded only in colonial legacies may obscure the current systemic and institutional power dynamics shaping international criminal justice. In this sense, framing traditional justice systems primarily as oppositional to international law within a postcolonial framework may overlook opportunities for constructive legal pluralism and reform that engage both systems meaningfully.

Therefore, while postcolonial insights can enrich the understanding of how colonial histories have influenced international legal norms, the approach required is one that evaluates

[145][145] Krishnaswamy R, 'The criticism of culture and the culture of criticism: At the intersection of postcolonialism and globalization theory', *Diacritics* 32(2), (2002), 112,113
[146] Krishnaswamy R, 'The criticism of culture and the culture of criticism', 113
[147] Abrahamsen R, 'African Studies and the Postcolonial Challenge', *African Affairs* 102 (407), (2003), 191, 192

traditional justice systems on their own merits, limitations, and evolving roles, rather than as mere rhetorical devices in a theoretical discourse.

1.10 Limitations of the study

This study is limited entirely to the review of literature on the subject. It is also faced with time constraints as it is conducted within a limited period of time because it forms part of the coursework for the requirements of the award of the Masters of Law. Also, due to both financial and time-related restrictions, doing fieldwork is not an option even though it is recognized that this would have delivered a deeper perspective on the issue.

1.11 Research Methodology

This study adopts a descriptive research design, aimed at systematically describing how traditional justice systems have been utilized to address accountability in post-conflict African societies. The study is conducted through a review of the literature on the subject, which is an analysis of primary and secondary sources of literature on the subject. The research method utilized is socio-legal as the main research question goes beyond a purely doctrinal dimension and requires engagement with broader social, historical and political contexts.

The primary sources of literature for review are the documents that form the law that establishes international courts like the ICC, ICTR and the SCSL. These are the Rome Statute, the UN Security Council Resolution 955 (1994) establishing the ICTR and the Statute of the Special Court for Sierra Leone. For the *Gacaca* courts, this thesis reviews Organic Law No. 40/200 setting up the Gacaca courts.

The methodology also entails a detailed review of the literature on the use of traditional justice mechanisms including the *Gacaca* courts in Rwanda, the *Acholi* traditional justice systems of Uganda, the *Magamba* spirits of Mozambique and the *Fambul Tok* of Sierra Leone, as case studies contained in books, journals, articles and official reports on how African societies have addressed accountability under the comparative law methodology. These case studies are examined using a comparative legal approach, allowing the research to draw critical lessons on how traditional justice systems have been employed to foster accountability, reconciliation, and justice.

Ultimately, the research then makes appropriate recommendations for policy considerations.

Chapter Breakdown

Chapter 1 serves as the introduction to the study that is further divided to cover the statement of the problem, justification of the study, research objectives, and questions, literature review, methodology, and limitations.

Chapter 2 includes an examination of the existing justice mechanisms employed in handling serious international crimes and their role in addressing accountability and fighting impunity. It outlines the historical background of international criminal law by discussing the law relating to the obligation of States with respect to serious international crimes to achieve accountability. It then discusses the justice mechanisms used in Africa and consider whether their use in various African states have contributed to accountability by discussing their mandates and whether the same was implemented fully.

Chapter 3 explores the role of traditional justice mechanisms applied in selected African countries and review how they have contributed to ensuring there is accountability for international crimes. It does so by analyzing selected case studies of applied traditional justice systems in various African countries by discussing the framework under which those traditions were applied and implemented. In doing so, the challenges encountered are discussed.

Chapter 4 focuses on how traditional justice systems bridge the gap for accountability for serious international crimes. It also discusses key lessons the international community can learn from the experiences of post-conflict countries in Africa that applied traditional justice systems in ensuring there is accountability for international crimes

Chapter 5: Conclusions, findings and recommendations. It concludes the study and makes appropriate recommendations for policy considerations in using traditional justice mechanisms to address serious international crimes.

Chapter Two

An analysis of the existing international and national mechanisms employed in handling serious international crimes

2.1 Introduction

The judicial component in post-conflict societies is very vital. In the aftermath of conflict, establishing robust judicial mechanisms is essential to address serious international crimes, ensure accountability, and combat impunity. States have the primary responsibility for the prosecution of international crimes.[148] The international community only steps in when a State is unwilling or unable to discharge this obligation. This obligation to prosecute serious international crimes forms the basis of ensuring there is accountability through the prosecution of persons responsible for committing serious international crimes and is discussed in this chapter.

Both international and national systems play pivotal roles in this endeavour. International mechanisms, such as tribunals and courts, provide frameworks for prosecuting perpetrators when national systems are unwilling or unable to do so. Concurrently, national mechanisms, grounded in domestic legal traditions, facilitate localized justice processes that resonate with affected communities. This analysis delves into the existing international and national approaches to handling serious international crimes, evaluating their effectiveness in promoting accountability and deterring future violations.

The existing justice mechanisms include *inter alia* the ICTR and SCSL as the *ad hoc* and hybrid tribunals specifically formed to prosecute serious international crimes commissioned in Rwanda and Sierra Leone respectively, the ICC as the international court responsible for prosecuting international crimes as well as national forms of criminal accountability that were pursued by Kenya, Uganda and Cote d'Ivoire. These countries are discussed because they promoted the fight against impunity by enacting laws that allowed the implementation of the Rome Statute in their jurisdictions in the prosecution of perpetrators of serious international crimes.

This Chapter therefore discusses the mandate and jurisdiction of these justice systems with the aim of establishing their effectiveness as the existing justice mechanisms responsible for ensuring there is accountability for serious international crimes in Africa. In the same vein, the

[148] Jallow H, 'Prosecuting International Crimes in Africa', 184

chapter discusses case law perspectives as well as scholarly criticisms and perspectives regarding the effectiveness of these mechanisms.

2.2 Domestic prosecution of serious international crimes in national courts

Domestic investigations and prosecutions, when conducted effectively, are considered to be the most effective means of ensuring accountability for international crimes. This is because States typically have better access to evidence and witnesses and established enforcement mechanisms. Moreover, domestic prosecutions can foster a greater sense of local ownership, which may in turn enhance the local impact of trials and their deterrent effect within a community.

While the ICC still serves as the principal institution mandated to prosecute serious international crimes, the primary responsibility for investigating and prosecuting such crimes remains with individual states. The ICC operates on the principle of complementarity, intervening only when national jurisdictions are unwilling or unable to carry out genuine proceedings.[149]

The Rome Statute grants primary jurisdiction over core international crimes to national courts, with the ICC remaining to be a court of last resort. While the Preamble of the Rome Statute emphasizes the duty of states to prosecute such crimes, this obligation is not legally binding.[150] However, to effectively fulfil their primary role within the ICC's justice framework, states are encouraged to adopt domestic legislation that adequately addresses these crimes, both substantively and procedurally, regardless of whether they follow a monist or dualist legal system.[151] Also, prosecuting international crimes within ordinary criminal law is not efficient since most 'ordinary' criminal law provisions are not well suited to prosecute these crimes since they are not 'ordinary' in nature. [152]

In response, a number of African countries enacted domestic legislation to implement the Rome Statute within their jurisdictions as a way to prosecute international crimes. Selected countries

[149] Lugano G, 'Examining the domestic legal framework in Selected African States that form part of the situational docket of the International Criminal Court',1 *African Journal of International Criminal Justice*, (2023) accessed at https://www.elevenjournals.com/tijdschrift/AJ/2023/1/AJICJ_2352-068X_2023_007_001_002 at 20 February 2025

[150] Paragraphs 4 and 6, Preamble, *Rome Statute*

[151] Lugano G, 'Examining the domestic legal framework in Selected African States that form part of the situational docket of the International Criminal Court'

[152] Lugano G, 'Examining the domestic legal framework in Selected African States that form part of the situational docket of the International Criminal Court'

including Kenya, Uganda and Côte d'Ivoire implemented the relevant provisions of the Rome Statute and defined core international crimes in domestic law in ways compatible with their laws.

Kenya enacted the International Criminal Act[153] to make provision for the punishment of genocide, crimes against humanity and war crimes, granting Kenyan court's jurisdiction to try these crimes and punish perpetrators, following the 2007 post election violence that led to mass killings.[154] The High Court of Kenya in its decision *in Republic (through Cabinet Secretary, Ministry if Interior and Coordination of National Government) v Paul Gicheru & another* affirmed that the ICC exercises its jurisdiction through the principle of complementarity and should first consult Kenya as a State Party on whether it is willing to prosecute the Respondent, since Kenya has the jurisdiction to try serious international crimes under the Constitution of Kenya 2010 and the International Crimes Act.[155] However, despite the enactment of the Act, the issue arose as to whether the International Crimes Act could prosecute crimes committed during the post-election violence between 2007 and 2008. However, due to the principle that Statutes in Kenya do not apply retrospectively, there have been no convictions of serious international crimes under the International Crimes Act in the national courts of Kenya.

Uganda on the other hand established the International Crimes Division in 2008 which is a special division of the High Court of Uganda through Legal Notice No. 10 of 2011.[156] The court's primary jurisdiction to try international crimes by determining offences related to genocide, crimes against humanity, war crimes among other international crimes. [157] This followed the enactment of the International Criminal Court Act 2010 enacted to give effect to the Rome Statute of the International Criminal Court as well as provide offences to be tried under the Law of Uganda corresponding to the offences under the Rome Statute, underscoring its determination to ensure there is accountability.[158] In August 2024, the High Court rendered judgment in *Uganda v Kwoyelo* where the accused, a former commander and colonel in the Lord's Resistance Army (LRA) was convicted of 44 counts of crimes against humanity and war crimes.[159] During the prosecution of Kwoyelo, Dominic Ongwen was also transferred to

[153] International Crimes Act (Act No. 16 of 2008)
[154] Sections 6,7, and 8, *International Crimes Act*
[155] *Republic (through Cabinet Secretary, Ministry if Interior and Coordination of National Government) v Paul Gicheru & another* [2017] eKLR
[156] Legal Notice No. 10 of 2011, The High Court (International Crimes Division) Practice Directions, 2011,
[157] Practice Direction 6, *The High Court (International Crimes Division) Practice Directions, 2011*
[158] The Preamble to the *International Criminal Court Act* (2010)
[159] *Uganda v Kwoyelo* (HCT-00-ICD-CR-SC 2 of 2010) [2024] UGHCICD 10 (13 August 2024)

the ICC for trial, making Uganda one of the countries that exercised parallel proceedings at both national and international levels for serious international crimes. This decision demonstrates how national courts of States can prosecute international crimes where a country's legal system aligns the same. However, the conviction was only against Kwoyelo as one of the Lord's Resistance Army Generals and not the persons to whom Kwoyelo was exercising command authority. It is appreciated that these persons were not charged before the High Court because the prosecution of persons charged with international crimes requires thorough investigations and prosecutions, hence why not many perpetrators are charged before the High Court. Nevertheless, the conviction marked a pivotal moment especially for victims since retributive justice was served.

Despite the efforts by Kenya and Uganda to domesticate the Rome Statute to facilitate domestic prosecution of serious international crimes, domestic prosecutions of these crimes face challenges. While both countries have made efforts to domesticate the Rome Statute and prosecute international crimes within their domestic legal frameworks, several limitations persist, reducing the overall impact on achieving justice and accountability.

In Kenya, the lack of a specialized division within the High Court to address international crimes was a major impediment to prosecuting such crimes effectively. Without the appropriate legal structures in place, the prosecution of serious international crimes has often been treated as ordinary criminal cases, which do not possess the complexity required for such severe offenses. This has limited the capacity of domestic courts to deliver the justice needed for such high-profile crimes.[160]

Moreover, the lack of political will to prosecute serious international crimes is also a challenge that affects such domestic prosecutions. For example, in Kenya, the Kenyan parliament's rejection of constitutional amendments that would have enabled the creation of a tribunal dedicated to prosecuting international crimes in Kenya highlights some of these political challenges. This reluctance can largely be attributed to the fact that high ranking government officials at the time, the president and vice president had been accused of perpetuating serious international crimes during the post-election violence.[161]

[160] Kweka G, 'International Criminal Justice at Domestic level in Kenya: Reality on the Ground', 42(2) *Eastern Africa Law Review*, (2015), 14
[161] Kweka G, 'International Criminal Justice at Domestic level in Kenya: Reality on the Ground', 15

Another significant challenge in Kenya is the issue of insufficient investigations arising from poor investigation of criminal cases arising from serious international crimes. The investigation of serious international crimes is not similar to the investigation of ordinary crimes.[162]The complexity of investigating international crimes requires specialized training, resources, and expertise elements that are often lacking in national systems. Investigators may not possess the necessary skills to handle such sensitive and high-stakes cases, resulting in ineffective investigations and the lack of actionable evidence. Furthermore, the fear of reprisal often prevents witnesses from coming forward, further hindering the process of securing convictions.[163] Despite recommendations by the Judiciary Service Commission of Kenya (JSC) to establish an International and Organized Crimes Division (IOCD) to handle such matters, these reforms have not been implemented, underscoring the systemic failures to address these challenges in a timely and effective manner. [164]

In Uganda, while there have been some notable efforts to prosecute individuals like Kwoyelo, the scope and scale of prosecutions have remained limited. The focus has largely been on a small number of individuals, and many of those in positions of command, such as those who led the Lord's Resistance Army, have not faced charges. This limited scope reflects the broader issue of insufficient investigations and the inability to target all perpetrators of serious international crimes.

Also, despite the establishment of an International Crimes Division (ICD) within Uganda's High Court, procedural limitations hinder its ability to effectively prosecute serious international crimes. One key limitation is the division's lack of its own rules of procedure and evidence specifically tailored to handle prosecutions of crimes against humanity, war crimes or any other crimes that fall within its mandate.[165] This procedural gap undermines the Division's ability to carry out complex international criminal proceedings in a manner that aligns with international standards. Furthermore, though the ICD exists, it being a division of

[162] Kweka G, 'International Criminal Justice at Domestic level in Kenya: Reality on the Ground', 17
[163] Kweka G, 'International Criminal Justice at Domestic level in Kenya: Reality on the Ground', 15
[164] Kweka G, 'International Criminal Justice at Domestic level in Kenya: Reality on the Ground', 15
[165] Tadeo A, 'Effecting Complementarity: Challenges and Opportunities: A case study of the International Crimes Division of Uganda', A paper presented at a regional forum on international and transitional justice organized by Avocats Sans Frontieres-Uganda Mission and the Uganda Coalition of the International Criminal Court at Imperial Botanical Beach Hotel, Entebbe on 30th July 2012

Uganda's High Court limits it, since it lacks the status of being an international court, that is competent to prosecute serious international crimes.[166]

Another limitation which is also a challenge lies in the protection of victims and witnesses. The ICD lacks robust physical protective measures and logistical protocols necessary to ensure the safety of individuals participating in trials. While non-disclosure of witness identities before trial is a common measure used by the prosecution, it falls short of the comprehensive protective strategies typically available in international or hybrid tribunals.[167] Anonymity is extremely important to guarantee the protection of victims and witnesses during a trial.

In conclusion, while domestic prosecutions have the potential to contribute to accountability for serious international crimes, their effectiveness is hampered by the limitations discussed above. These limitations have restricted the ability of national courts to hold perpetrators of serious crimes fully accountable for these crimes. As such, while domestic prosecutions can play an important role, their current capacity remains insufficient to ensure there is accountability.

2.3 International prosecution of serious international crimes in Africa

2.3.1 Special Court of Sierra Leone (SCSL)

On June 12, 2000, Ahmad Tejan Kabbah, the President of Sierra Leone at the time, addressed a letter to the United Nations Security Council, seeking assistance from the UN and the global community to establish a 'special court for Sierra Leone.' [168]In his correspondence, President Kabbah emphasized the need for a strong judicial body to prosecute the leaders of the Revolutionary United Front (RUF), who orchestrated a decade-long civil war marked by widespread atrocities against civilians. [169] He reiterated that such a court was essential to restore and maintain peace and security in Sierra Leone and the surrounding region noting that without international support, Sierra Leone would be unable to deliver justice to victims of the war.[170]

[166] Tadeo A, 'Effecting Complementarity: Challenges and Opportunities: A case study of the International Crimes Division of Uganda', 9
[167] Tadeo A, 'Effecting Complementarity: Challenges and Opportunities: A case study of the International Crimes Division of Uganda', 9
[168] Jalloh C, 'Special Court for Sierra Leone: Achieving Justice?', 32 *Michigan Journal of International Law*, (2011), 398
[169] Jalloh C, 'Special Court for Sierra Leone: Achieving Justice?', 398
[170] Jalloh C, 'Special Court for Sierra Leone: Achieving Justice?', 399

The UN Security Council endorsed the request by Sierra Leone and through Security Resolution 1315 adopted on 14th August 2000,[171] the SCSL was formed, drawing on the initial framework proposed by President Kabbah. Therefore, unlike the ICTR that was created by way of a United Nations Special Resolution, the SCSL was created by way of a Treaty between the United Nations and the Government of Sierra Leone signed in Freetown between the two parties on 16th January 2002.[172]

Despite being created by way of Treaty and not a UN Resolution, the SCSL is not a national court of Sierra Leone and does not also form part of the judicial system of Sierra Leone[173], but nevertheless, remains to be an international tribunal. The legal framework creating the court is one for a 'mixed court' featuring both local and international elements.[174]The Tribunal is mandated to function as per the provisions of the Statute of the Residual Special Court for Sierra Leone. The jurisdiction of the Tribunal is limited to persons who bear the greatest responsibility for serious violations of international humanitarian law.[175]

The Tribunal was mandated to try persons who committed crimes against humanity as well as violations of Article 3 common to the Geneva Conventions and of Additional Protocol II as well as other serious violations of international humanitarian law and crimes under Sierra Leonean law[176]. The Tribunal also has jurisdiction to prosecute individuals who have committed offences provided for under Sierra Leonean law concerning the abuse of children under fourteen years old drawn from the Prevention of Cruelty to Children Act of 1926 and the offence of arson provided for under the Malicious Damage Act of 1861.[177]

Article 6 provides for individual criminal responsibility for the crimes provided for under Article 5 with the tribunal having concurrent jurisdiction with the national courts of Sierra Leone. The Tribunal is therefore mandated to try individuals who bear the greatest responsibility for severe breaches of international humanitarian law and Sierra Leonean Statutes within the borders of Sierra Leone since 30 November 1996 including those leaders

[171] UNSC Resolution 1315 (2000) adopted on 14 August 2000 UN Doc S/RES/1315
[172] Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, UN Doc. S/2002/246, 16 January 2002, Appendix II (hereinafter referred to as the UN Sierra Leone Agreement)
[173] This was also reaffirmed by the Court in Prosecutor v Taylor [2004] 5 LRC 590
[174] Jalloh C, 'Special Court for Sierra Leone: Achieving Justice?', 401-402
[175] Article 1, *SCSL Statute*
[176] Articles 3, 4 and 5, *SCSL Statute*
[177] Article 5, *SCSL Statute*

who in committing such crimes, threatened the establishment of and implementation of the peace process in Sierra Leone[178].

The Tribunal successfully convicted eight individuals in the cases known as the Armed Forces Revolutionary Council (AFRC)[179] case, the RUF[180] case and the Civil Defense Forces (CDF)[181] case since the three-armed forces were the main antagonists of the Sierra Leone armed conflict.

The most notable conviction by the Tribunal was in its decision in *Prosecutor v Charles Taylor* where the accused was convicted for having committed serious international crimes and having substantially contributed to the attacks leading to the commission of crimes as provided for under Articles 2,3 and 4 of the SCSL Stature.[182] The prosecution of Charles Taylor helped to give a full account of the history of the war, which is necessary in maintaining long term peace and promoting justice.[183]

The Tribunal's location has been advantageous for the court in that the fact that the trials were held in the country where the serious crimes took place meant that victims were able to see justice at play. This also meant the Tribunal was accessible to the Sierra Leon people contributing to the success of its outreach by ensuring information on the activities of the tribunal reached more Sierra Leonean citizens.[184]

However, the nature of the Tribunal's jurisdiction meant that only the most senior commanders of leaders were the ones indicted and prosecuted. Many mid-level commanders who actively participated in, and ordered the commission of the crimes were not tried before the Tribunal.[185] Jalloh in criticizing the Tribunal's decision to pursue selective prosecutions where only 13 persons were indicted who were commanders meant that other mid-level persons were left out, hampering the Tribunal's quest to end impunity.[186]

The tribunal has also been criticized due to the Government of Sierra Leone pushing for its establishment as a hybrid court through international assistance only to neutralize the Revolutionary United Front and other rebel groups, hence using the court to only target these

[178] Article 1, *SCSL Statute*
[179] *Prosecutor v. Brima, Kamara & Kanu*, Case No. SCSL-04-16-A, Judgment of 22 February 2008
[180] *Prosecutor v. Sesay, Kallon & Gbao*, Case No. SCSL-04-15-T, Judgment of 2 March 2009
[181] *Prosecutor v. Fofana & Kondewa*, Case No. SCSL-04-14-T, Judgment of 2 August 2007
[182] *Prosecutor v Charles Taylor*, SCSL-03-01-T Judgment of 18 May 2012
[183] Ibrahim Tommy, "Lessons from the Special Court for Sierra Leone in the fight against impunity" Regional Forum on International and Transitional justice organized by Avocats Sans Frontières-Uganda Mission and the Uganda Coalition of the International Criminal Court, Entebbe, presented on 31st July 2012
[184] Ibrahim Tommy, "Lessons from the Special Court for Sierra Leone in the fight against impunity"
[185] Ibrahim Tommy, "Lessons from the Special Court for Sierra Leone in the fight against impunity"
[186] Jalloh C, 'Special Court for Sierra Leone: Achieving Justice?', 420,421

groups.[187] This shows how justice systems can be manipulated for political objectives rather than for purely ensuring there is accountability for serious crimes and ensuring that there is justice served.

The SCSL was instrumental in ensuring there is accountability for the serious international crimes committed during the Sierra Leone Civil War. By prosecuting key individuals responsible for those crimes, the SCSL delivered indictments that reaffirmed its commitment as a retributive justice mechanism to hold perpetrators of serious international crimes accountable for these crimes, regardless of their status. However, the SCSL's role in achieving this accountability was faced with limitations. Despite its successes, its shortcomings, especially in failing to engage directly with local communities who were the victims, meant it failed to address the root causes of the conflict. This led the communities in Sierra Leone to turn to traditional justice systems, which allowed for a communal approach to accountability and promoting reconciliation, which are further discussed in Chapter 3 of this discussion.

2.3.2 The International Criminal Tribunal for Rwanda (ICTR)

Following the genocide that happened in Rwanda, the UN Security Council passed Resolution 955[188] establishing the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and other serious violations of international humanitarian law. The international tribunal had power to prosecute and to hold accountable persons responsible for serious violations of international humanitarian law occurring within the territory of Rwanda as well as Rwandan nationals liable for such violations committed in neighboring States between 1 January 1994 and 31 December 1994.[189] The jurisdiction of the ICTR to prosecute persons who committed the crime of genocide is therefore limited to the territory of Rwanda and neighboring states, and the jurisdiction only applies to crimes committed between 1st January 1994 and 31st December 1994.

Article 2[190] and 3[191] provides for genocide and crimes against humanity as the serious international crimes that the Tribunal has power to prosecute the persons accused of committing these offences. Genocide is specifically defined to mean any acts committed with

[187] Chipaike R, Tshuma N and Hofisi S, 'African move to withdraw from the ICC: Assessment of Issues and Implications',4
[188] UN Security Council, Security Council Res. 955 (1994) on the Establishment of the International Criminal Tribunal for Rwanda, S/RES/955 (1994), 8 November 1994
[189] Article 1, *ICTR Statute*
[190] Article 2, *ICTR Statute*
[191] Article 3, *ICTR Statute*

intent to destroy in whole or in part, a national, ethnical, racial or religious group by killing members of such a group, causing serious bodily or mental harm or deliberately inflicting acts on such groups of people calculated to bring about its physical destruction.[192] Similarly, the Statute provides a definition of crimes against humanity which the Tribunal also had power to prosecute, defining such crimes as crimes committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds.[193] These crimes are specifically given to be murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecution on political, racial and religious grounds as well as other inhumane acts.[194] The Statute also mandated the Tribunal to prosecute the crime of genocide as a violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II.[195] These violations included violence to life, health and physical or mental well-being of persons, collective punishments, taking of hostages, acts of terrorism, violations of personal dignity, pillage and passing sentences or carrying out executions without previous judgment.[196]

The structure of the ICTR consisted of three organs: The Chambers comprising two trial chambers and an appeals chamber comprising of 16 permanent independent judges; The prosecutor; and the registry.[197] Upto the the date when the ICTR was closed on 31st December 2015, the Tribunal indicted 93 individuals and concluded proceedings for 82 accused persons.[198] 61 persons were sentenced and 28 are currently serving their sentences.[199]

Articles 5[200] and 6[201] lay the basis for accountability and individual criminal responsibility. The Tribunal had personal jurisdiction over persons by providing for individual criminal responsibility in that any person who planned, instigated, ordered or otherwise committed the crime of genocide. The decision of The *Prosecutor -vs- Jean Paul Akayesu*[202] was the first decision by the Tribunal where the principle of individual criminal responsibility was determined with the Tribunal holding that the accused was a principal perpetrator hence

[192] Article 2(1) and 2(2), *ICTR Statute*
[193] Article 3, *ICTR Statute*
[194] Article 3, *ICTR Statute*
[195] Article 4, *ICTR Statute*
[196] Article 4, *ICTR Statute*
[197] Article 11, *ICTR Statute*
[198] https://unictr.irmct.org/sites/unictr.org/files/publications/ictr-key-figures-en.pdf on 17 February 2025
[199] https://unictr.irmct.org/sites/unictr.org/files/publications/ictr-key-figures-en.pdf on 17 February 2025
[200] Article 5, *ICTR Statute*
[201] Article 6, *ICTR Statute*
[202] *Prosecutor -vs- Jean Paul Akayesu (1998)* ICTR-96-4-T, Decision of 2 September 1998, International Criminal Tribunal of Rwanda

individually criminally responsible for the death of persons having committed crimes of genocide and crimes against humanity as serious international crimes under the ICTR statute.

The *Akayesu* decision was monumental as the accused person was charged and convicted of the crimes of genocide and crimes against humanity as serious international crimes under the ICTR statute and held individually accountable for these crimes. The *Akayesu* decision was also monumental because the Trial Chamber of the Tribunal applied the provisions of Articles 23 of the Statute and Rule 101 of the Tribunal's Rules of Procedure and Evidence[203] to sentence the accused to life imprisonment for the crime of genocide and crimes against humanity, and the sentence affirmed by the Appeals Chamber of the Tribunal.[204]

Another notable decision where an individual person was held criminally responsible for the crime of genocide is the decision in The *Prosecutor -vs- Michael Bagaragaza*[205] where the accused was charged with individual criminal responsibility pursuant to Article 6(1) of the Statute for substantially contributing to the killing and massacre of more than 1000 members of the Tutsi ethnic group under the charge of complicity to genocide. Even though the accused entered a guilty plea, the Trial Chamber of the Tribunal still found the accused to have been individually criminally responsible for being complicit in committing the crime of genocide[206]. In its sentencing, the Trial Chamber was categorical enough to distinguish that higher sentences are imposed on the principal perpetrators of serious crimes as opposed to accomplices.[207] The Trial Chamber considered the accused, *Bagaragaza,* to be an accomplice and sentenced the accused to 8 years imprisonment.

The above demonstrates the retributive nature of the ICTR as a justice mechanism, also discussed by the Trial Chamber of the Tribunal in *The Prosecutor -vs- Jean Kambanda*[208] where the Tribunal emphasized that penalties imposed on accused persons found to be guilty must be directed at retribution of such an accused person as well as ensuring there is accountability through deterrence to dissuade others in the future who attempt to perpetrate such atrocities.[209] *Kambanda* as an accused person was sentenced to life imprisonment having entered a plea of

[203] International Criminal Tribunal for Rwanda, *Rules of Procedure and Evidence*, 29 June 1995, UN Doc. ITR/3/REV.1
[204] *The Prosecutor-vs- Jean Paul Akayesu*
[205] *Prosecutor -vs- Michael Bagaragaza*, (2009) ICTR-05-86-S, Sentencing Judgment of 17 November 2009, International Criminal Tribunal of Rwanda
[206] *The Prosecutor -vs- Michael Bagaragaza*
[207] *The Prosecutor -vs- Michael Bagaragaza*
[208] *The Prosecutor -vs- Jean Kambanda* (1998) ICTR 97-23-S, Judgment and Sentence of 4 September 1998, International Criminal Tribunal of Rwanda
[209] *The Prosecutor -vs- Jean Kambanda*

guilty on committing the crimes of genocide and crimes against humanity[210]. This need to ensure there was retribution and deterrence followed the decision by the Tribunal in the *Akayesu case* where the Tribunal held that penalties imposed on accused persons found guilty by the Tribunal must be towards ensuring there is retribution and accountability to show the lack of tolerance of serious violations of international humanitarian law.[211]

The above discussion also demonstrates that the ICTR ensured there was deterrence for serious international crimes and ensured there was accountability,.[212] *Barria* and *Roper* point out that Resolution 955[213] that created the ICTR gave the Tribunal a threefold mandate which was (1) to contribute to the maintenance of peace, (2) to ensure that such violations are halted and effectively redressed, and (3) to lead to a process of national reconciliation.[214]. The ICTR has therefore provided accountability specific through deterrence by imprisoning individuals convicted of genocide and crimes against humanity, thereby preventing them from committing further offenses. However, while the ICTR imprisoned the main perpetrators of the crimes, the broader threat of renewed violence still remained to be a possibility as the Hutus remained a real threat, even after the genocide stopped.[215] Therefore, while the ICTR played a significant role in delivering justice, its primary contribution lay in promoting accountability. , By prosecuting high-level perpetrators and establishing a historical record of the crimes, the Tribunal underscored the importance of holding individuals responsible for mass violence. However, the limitations of relying solely on judicial mechanisms became evident, particularly s to achieving lasting peace.

The Prosecutor of the Tribunal specifically charged those individuals who were in power or alleged to have been in leadership positions in Rwanda in 1994 and bore the gravest responsibility for the crimes committed. This is illustrated by how the Tribunal issued judgments against 25 persons who include one prime minister, four government ministers, two prefects, five *bourgmestres*, as well as media and military leaders.[216] The ICTR therefore succeeded in arresting and trying high level perpetrators of genocide, preventing their return to

[210] *The Prosecutor -vs- Jean Kambanda*
[211] *The Prosecutor-vs- Jean Paul Akayesu*
[212] https://unictr.irmct.org/en/news/international-criminal-tribunal-prosecutors-conclude-conference-arusha at 22 April 2024
[213] UNSC S/RES/955 (1994)
[214] Barria L & Roper S, 'How effective are International Criminal Tribunals? An analysis of the ICTY and the ICTR', 9 (3) *The International Journal of Human Rights*, (2005), 357
[215] Sadat L, 'The Legacy of the International Criminal Tribunal for Rwanda', *Whitney R. Harris World Law Institute*, 2012, 1-19ing
[216] Mose E, 'Main Achievements of the ICTR' *Journal of International Criminal Justice* 3, 2005, 932

Rwanda and allowing for a transition to peace.[217] For context, the accused in the *Kambanda Case* was the Prime Minister of the Interim Government of Rwanda from April 1994 to July 1994 and was found to have abused his authority and trust of the people of Rwanda, by personally participating in the genocide and failing to stop his subordinates from committing serious international crimes.[218] The Tribunal also brought to justice several senior military commanders in such decisions as in *Alfred Musema v The Prosecutor*[219], *The Prosecutor -vs- Muvunyi*[220], *The Prosecutor vs. Theoneste Bagosora* et al[221] et al, *Prosecutor vs Augustin Ndidiliyimana*[222] et al). Another important case is *The Prosecutor -vs- Nahimana* ("the Media Case") which was the first conviction where a court examined the role of the media in the context of the serious international crimes committed and held the accused guilty and individually criminally liable for using the media to commit serious international crimes.[223]

However, despite the ICTR having as its aim prosecuting persons responsible for committing serious crimes to contribute to the process of national reconciliation and restoration and maintenance of peace, it has not been able to do so.[224] *Kamatali* argues that this is because deterrence by itself is not a form of justice because although it is an ingredient in the promotion of international peace and cooperation, it is directed more towards building the future than restoring the past. [225] *Kamatali* notes that the ICTR pursued justice for wrongdoers and peace in general, hence focusing on broader goals such deterrence and peace rather than ensuring there is individual accountability for the crimes committed and fostering reconciliation.[226]

Therefore, by focusing more on retributive justice, the ICTR was unable to bring justice to the Rwanda people and members of its communities affected by serious international crimes because retributive justice is not enough to ensure there is justice as well as reconciliation.[227]

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[217] Labuda P, 'The International Criminal Tribunal for Rwanda and Post-genocide Justice 25 years on', 31(3) *European Journal of International Law*, (2020), 1113-1131
[218] [218] *The Prosecutor -vs- Jean Kambanda*
[219] *Alfred Musema v The Prosecutor*, ICTR-96-13-A, Appeals Chamber, Judgment of 16 November 2001
[220] *Prosecutor v Tharcisse Muvunyi*, ICTR-2000-55A-T, Judgment of 12 September 2006
[221] *Theonete Bagosora, Anatole Nsengiyumva v The Prosecutor*, ICTR-98-41-A, Appeals Chamber Judgment of 14 December 2011
[222] *Augustine Ndindiliyimana, Francois-Xavier Nzuwonemeye & Innocent Sagahutu v The Prosecutor*, Appeals Chamber Judgment of 11 February 2014
[223] *Prosecutor -vs- Nahimana*, Case No. ICTR-99-52-t, Judgment and Sentence of 2 December 2003
[224] The Preamble to UN SC Res. 955
[225] Kamatali J, 'From the ICTR to ICC: Learning from the ICTR Experience in Bringing Justice to Rwandans', *New England Journal of International and Comparative Law* 12(1), (2005), 99
[226] Kamatali J, 'From the ICTR to ICC', 99
[227] Kamatali J, 'From the ICTR to ICC', 99

Jalloh also argues that the ICTR's mandate was very limited to prosecuting only those perpetrators who committed serious violations.[228] Therefore, even though the Tribunal was only able to prosecute the major perpetrators, there remained a large number of the thousands of perpetrators involved in the genocide that were not prosecuted before the Tribunal.[229] Though the ICTR Statute provided for concurrent jurisdiction to run with that of national courts to prosecute persons for serious international crimes committed in Rwanda, the Tribunal still had primacy over the national courts.[230]

This is also largely due to the location of the Tribunal which was based at Arusha, Tanzania. *Kamatali* points out that if the goal is to ensure meaningful accountability through retributive justice, then such processes must be situated closer to the affected populations and its effect felt in the home territory of where the atrocities occurred.[231] This then ensures ongoing prosecution makes the threat of punishment to prevent commission of such offences in the future stronger for those living in the country.[232] However, *Kamatali* notes that for the majority of the Rwandan community who were the victims, the Tribunal remained inaccessible to them, denying them the opportunity to participate.[233] Participation by victims is one of the ways in which reconciliation is achieved hence ensuring there is restorative justice. *Kamatali* argues that the Tribunal's location in Arusha Tanzania as opposed to been situate in Rwanda posed to be a procedural weakness of the Tribunal since for there to be accountability, prosecutions and investigations happening where the genocide took place would have played a bigger role in fostering a sense of justice and responsibility among the affected communities. [234]

By having the court located further away from Rwanda, the visibility of ensuring that justice is being done reduces and in effect, weakens the sense of accountability. *Katamali* argues that sentences by persons convicted of international crimes should be served in the States where the crimes were committed to promote accountability.[235] This further shows how the ICTR as a court deprived the rural communities in Rwanda of seeing 'justice to be seen' despite the persons of Rwanda being the most affected by the genocide.

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[228] Jallow H, 'Prosecuting International Crimes in Africa: Lessons from Rwanda and Reflections on the Future',179
[229] Jallow H, 'Prosecuting International Crimes in Africa: Lessons from Rwanda and Reflections on the Future',180
[230] Article 8, *ICTR Statute*
[231] Kamatali J, 'From the ICTR to ICC, 92
[232] Kamatali J, 'From the ICTR to ICC', 92
[233] Kamatali J, 'From the ICTR to ICC', 94
[234] Kamatali J, 'From the ICTR to ICC',94
[235] Kamatali J, 'From the ICTR to ICC', 98

2.3.3 The International Criminal Court (ICC)

Following the creation of the ICTR as an international tribunal, in 1994, the United Nations General Assembly decided to establish an international criminal court following the presentation by the International Law Commission of a draft statute proposing the establishment of a more permanent court.[236] In 1998, a conference was convened in Rome where what became known as the Rome Statute of the International Criminal was adopted, with 120 States voting for the Statute to be a final draft.[237] The statute required 60 ratifications for the statute to be in operation. This was achieved in 1st July 2002 and this marked the date when the ICC was established.[238] The court can therefore only exercise its jurisdiction over states that are member parties to the Rome Statute. The exception to this however lies within the provisions of Article 13(b) of the Rome Statute where the United Nations Security Council may pass a resolution authorizing the court to exercise its jurisdiction to the territories of nationals of States that are not member States to the Rome Statute.[239]

The court's primary mandate is to prosecute individuals responsible for committing the most serious international crimes.[240] This means that its jurisdiction is limited to the to the crimes of genocide, crimes against humanity, war crimes and the crime of aggression.[241]The court can also prosecute these crimes in only three circumstances; if a situation where one of the crimes has been committed is referred to the Prosecutor by a State party, referral to the Prosecutor by the UNSC and when the Prosecutor initiates an investigation *proprio motu*.[242] These are the three ways in which prosecution before the court begins.

Initially, during the negotiations leading to the creation of the court, a majority of states had proposed that the court be granted universal jurisdiction over serious international crimes, but this was opposed by more powerful States, including the United States.[243] However, once a State becomes a party to the Rome Statute, it accepts the jurisdiction of the court with respect to the serious international crimes referred to under Article 5 of the Statute. [244] Since a State

[236] Schabas, *An Introduction to the International Criminal Court*, 6 ed, Cambridge University Press, Cambridge, (2020), 16
[237] Pillay S and Scanlon H, 'Peace Versus Justice? Truth and Reconciliation Commissions and War Crimes Tribunals in Africa', 22 *Centre for Conflict Resolution*, (2007), 36
[238] Pillay S and Scanlon H, 'Peace Versus Justice?, 36
[239] Schabas, *An Introduction to the International Criminal Court*, 161
[240] Article 1, *Rome Statute*
[241] Article 5, *Rome Statute*
[242] Articles 13, 14 and 15, *Rome Statute*
[243] Shamsi N, 'The ICC: A Political Tool? How the Rome Statute is susceptible to the pressure of more power states', 24(1) *Willamette Journal of International Law and Dispute Resolution*, (2016), 85
[244] Article 12, *Rome Statute*

cannot be forced to ratify a treaty, the provision that the Rome Statute only applies to member States means not all States are subject to the jurisdiction of the court.[245] This then limits the court in that the jurisdiction of the court is only limited to the territory within which the crime occurred and the nationality of the perpetrator of the crime. This then grants nationals of nonmember States the liberty to commit serious international crimes within its territories without fear of prosecution.[246]

The court's jurisdiction is also only limited to natural persons, where if a person whose member state falls under the jurisdiction of the court, such a person is individually criminally responsible and liable for punishment.[247] Like the ICTR, the ICC targets major criminals responsible for large-scale atrocities. The majority of individuals brought before the International Criminal Court (ICC) are not the direct perpetrators of crimes but rather those who have facilitated, organized, planned, or incited serious international offenses.[248] Some notable decisions include the decision in *The Prosecutor v Bosco Ntaganda* where the appeals chamber of the court affirmed the Trial Court's decision which found the accused guilty of 18 counts of war crimes and crimes against humanity in Congo committed between 2002-2003, with the accused being sentenced to 30 years imprisonment. [249] Similarly, in *The Prosecutor v Dominic Ongwen*, the Appeals Chamber also confirmed the Trial Chamber's decision finding the accused guilty of a total of 61 crimes comprising of crimes against humanity and war crimes committed in Northern Uganda between 2002 and 2005, sentencing him to 25 years imprisonment.[250] Another notable conviction for serious international crimes by the court was in The *Prosecutor v Germain Katanga* where the accused was found guilty as an accessory to crimes against humanity specifically murder and four counts of war [251]crimes, and sentenced to 12 years imprisonment.

The Prosecutor of the court then initiates investigations, with the Rome Statute granting the Prosecutor duties and powers to establish the truth and whether there is criminal

[245] Bonsu H, 'The ICC, International Criminal Justice and International Politics', 40(2) *Africa Development*, (2015), 37
[246] Bonsu H, 'The ICC, International Criminal Justice and International Politics'37
[247] Article 25, *Rome Statute*
[248] Schabas, *An Introduction to the International Criminal Court*, 228
[249] Situation in the Republic of the Congo, *In the case of The Prosecutor v Bosco Ntaganda*, ICC-01/-4-02/06 A A2, Judgment of 30 March 2021
[250] Situation in Uganda, *In the Case of the Prosecutor v Dominic Ongwen*, ICC-02/04-01/15A, Judgment of 15 December 2022
[251] Situation in the Democratic Republic of the Congo, *In the Case of The Prosecutor v Germain Katanga*, ICC-01/04/07, Judgment pursuant to article 74 of the Statute 0n 7 March 2014

responsibility.[252] State parties are also under a general obligation to cooperate with the court in its investigation of the crimes.[253]

There is also a significant emphasis on the central role of complementarity within the court, described as the underlying principle and cornerstone of the Rome Statute, permeating the entire structure and operations of the Court[254]. Article 1 of the Statute is very specific in stating that the court is complementary to the national criminal jurisdictions of its member states.[255] This sentiment was echoed during the ICC Review Conference in Kampala, where the Assembly of States Parties highlighted the primary responsibility of states to investigate and prosecute the most serious international crimes, stressing their obligations in this regard[256]. Therefore, unlike the ICTR which had primacy over national courts, the ICC's jurisdiction is complementary, meaning that a case is inadmissible before the court if its being investigated or prosecuted by a State which has jurisdiction over it.[257] This is also affirmed in the Preamble of the Rome Statute which affirms that measures must be taken at the national level of countries to ensure serious international crimes do not go unpunished.[258]

Article 17 of the Rome Statute dictates that the court cannot pursue a case if it is already being investigated and prosecuted by a State with jurisdiction unless that State is considered unwilling or unable to genuinely carry out the proceedings[259]. Though the Rome Statute does not explicitly define what 'complementarity' means, the principle of complementarity functions as a barrier to the exercise of the court's jurisdiction by regulating when the court can exercise its jurisdiction. [260] Article 17 thus embodies the principle of complementarity, aiming to safeguard national sovereignty in the administration of justice for crimes under the Court's jurisdiction. It mandates that the Court must deem a case inadmissible if the conditions outlined in the Article are met.[261]

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[252] Articles 53 and 54, *Rome Statute*
[253] Article 86, *Rome Statute*
[254] Akhavan P, 'The Rome Statute's Missing Half; ; Towards an Express and Enforceable Obligation for the National Repression of International Crimes', 8(5) *Journal of International Criminal Justice* (2010), 1245
[255] Article 1, *Rome Statute*
[256] Akhavan P, 'The Rome Statute's Missing Half, 1246
[257] Arriaza N, 'Institutions of International Justice', 52(2) *Journal of International Affairs*, (1999), 486
[258] Preambular, Paragraph 4, *Rome Statute*
[259] See Article 17, *Rome Statute* on Issues of admissibility
[260] Benzing M, 'The Complementarity Regime of the International Criminal Court: International Criminal Justice between State Sovereignty and the Fight against Impunity', *Max Planck UNYB 7*, (2003), 594
[261] Kevin Jon Heller, An Overview of the Principle of Complementarity, Opinio Juris https://opiniojuris.org/2024/05/24/an-overview-of-the-principle-of-complementarit/#:~:text=Complementarity%20requires%20the%20ICC%20to,a%20court%20of%20limited%20jurisdiction. on 19 February 2025

The provisions of Article 17(2)(c)[262] states the situations that make a case inadmissible before the court. It involves two steps where the court is required to evaluate whether the case is being investigated or prosecuted by a State that has jurisdiction over it. If the State in question is inactive with regard to the case, the Prosecutor can proceed with the investigation.[263] Conversely, when a state is actively handling a case, the Office of the Prosecutor (OTP) must defer to the national proceedings unless it determines that the state is 'unwilling or unable genuinely to carry out the investigation or prosecution'.

The Appeals Chamber of the court in its decision in the *Situation in the Republic of Kenya* determined the issue of when a case becomes inadmissible under Article 17 of the Rome Statute if a State is actively investigating the specific suspect to whom ICC warrants of arrest have been issued and taking concrete steps towards advancing the investigation.[264] Therefore, it is only upon establishing such unwillingness or inability can the Court proceed with its own investigation. Therefore, although Article 17 implies that States are expected to be willing and able to prosecute such crimes, the ICC may only intervene only if a state is genuinely unwilling or unable to do so.

Article 17 therefore underscores the complementarity between the ICC and national jurisdictions, emphasizing the role of national criminal justice systems in international criminal justice[265]. It aims to bolster national jurisdiction over serious international crimes, improve national legal systems to handle such crimes, and maintain state sovereignty in addressing these offenses. Given the ICC's respect for state sovereignty when states are capable and willing to address international crimes, it should similarly respect a state's decision to utilize any form of justice mechanism, whether formal or informal, as long as they meet the necessary standards.

Additionally, the right to a fair trial is one also observed before the court, with Article 64(2) mandating the court to ensure that trials are fair and conducted expeditiously.[266] The rights of a suspect and the rights of an accused person also form part of the right to a fair trial. The Rome Statute safeguards the rights of accused individuals by providing a comprehensive set of procedural protections.[267] Article 55 specifically outlines these rights during investigations,

[262] Article 17 (2), *Rome Statute*
[263] Kevin Jon Heller, An Overview of the Principle of Complementarity, Opinio Juris
[264] Situation in the Republic of Kenya, *The Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, ICC-01/09-02/11 OA, Judgment of 30 August 2011, 14,15.
[265] Chembezi G, 'Traditional Justice and States Obligations for Serious Crimes under International Law: An African Perspective', Unpublished LLM Thesis, University of the Western Cape South Africa, 2010,
[266] Article 64(2), *Rome Statute*
[267] Schabas, *An Introduction to the International Criminal Court*, 221

ensuring that individuals are not compelled to self-incriminate, subjected to coercion or torture, and are entitled to free assistance from a competent interpreter if needed.[268] Similarly, Article 67 also provides for the rights of an accused person This Article is modeled on Article 14(3) of the International Covenant on Civil and Political Rights, one of the principal human rights treaties. [269]

The court has ensured that it upholds the right to a fair trial, with notable decisions such as in the *Prosecutor v Bemba* where the Appeals Chamber acquitted the accused for among other reasons, by holding the Trials Chamber convicted the accused for specific criminal acts that were outside the scope of the charges confirmed.[270] Similarly, in *The Prosecutor v Uhuru Muigai Kenyatta*, the court declined to grant the Prosecution's request for further adjournment, noting that such adjournments could only be granted if they did not infringe the right to a fair trial of the accused[271]. Due to this, the charges against Uhuru Kenyatta were withdrawn due to the Prosecutor's failure to obtain evidence in support of the charges against him.

The court has thus far received 32 cases, issued 60 warrants, and has been able to issue 11 convictions and 4 acquittals[272]. The court has ensured there is accountability for serious international crimes having issued convictions against accused persons in various decisions.

By issuing such convictions, the court's impact on ensuring there is deterrence as a goal of retributive justice has been felt in countries like the Democratic Republic of Congo and Uganda through the convictions of *Lubanga*[273], *Katanga*[274] and *Ntaganda* for committing war crimes and crimes against humanity mainly committed in the DRC. This played a critical role in the prevention of war crimes in the country. Therefore, the issuance of these convictions by the ICC as a retributive justice mechanism demonstrates the ability of such a court to hold perpetrators accountable, contributing to the procedural strengths of formal justice systems.

Also, the court has been lauded as contributing towards ensuring that the culture of impunity does not prevail, especially in Africa by bringing perpetrators of serious international crimes

[268] Article 55, *Rome Statute*
[269] International Covenant on Civil and Political Rights, (1996) 999 UNTS 171
[270] Situation in the Central African Republic, *In the case of the Prosecutor v Jean-Pierre Bemba Gombo*, ICC-01/05-01/08 A, Judgment of 8 June 2018
[271] *Prosecutor v. Uhuru Muigai Kenyatta*
[272] https://www.icc-cpi.int/about/the-court#:~:text=The%20judges%20have%20issued%2011%20convictions%20and%204%20acquittals.&text=Is%20there%20a%20problem%20with%20this%20page%3F on 19 February 2025
[273] *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06
[274] *The Prosecutor v. Germain Katanga*, ICC-01/04-01/07

to justice. Out of the eight Situations before the ICC, four arose from state party referrals as provided for under Article 13 of the Rome Statute; Uganda, DRC, the Central African Republic (CAR), and Mali.[275] Two referrals are as a result of UNSC resolutions; Sudan (Drafur) and Libya. The remaining two Situations, Kenya and Cote d'Ivoire are the result of *proprio motu* investigations commenced by the Office of the Prosecutor (OTP).[276] In the majority of these countries, without the ICC's interventions, the perpetrators would not have been brought before court to answer for their crimes.

The court's quest for accountability has however not been linear and continues to encounter challenges. One of the challenges has been delayed trials while providing justice. The right to a fair trial and to be tried without undue delay is provided for in the Statute.[277] Before the court, the *Lubanga case* was the first case to be heard by the court with the Prosecutor of the court receiving criticism for failing to handle this case expeditiously.[278]*Vos* posits that this case demonstrates the intricate balance between the right of an accused person to a fair trial and the Prosecutor's need to protect witnesses.[279] Lubanga was arrested in 2006[280] when warrants of address were issued against him. In 2008, just before the trial was due to commence, the Trial Chamber ordered a stay of proceedings of Lubanga's trial on the grounds that the accused's right to a fair trial had been violated. This culminated in various proceedings that delayed the beginning of the trial, resulting in Lubanga's trial commencing in 2010.

The court has also received criticism for failure to have enough resources to prosecute all perpetrators, due to its location. *Chipaike, Tshuma* and *Hofisi* argue that the ICC faces a huge task when it comes to obtaining evidence, which is done through complex investigations in countries located far away from the ICC, and which may still be navigating volatile security situations, making evidence collection to be more difficult, and in some cases, impossible.[281]

Also, the location of the court has been deemed to be a weakness of the court. *Katamali* argues that prison sentences handed to accused persons convicted in the court are not served in the

[275] Article 13(a) of the Rome Statute provides that the ICC may exercise its jurisdiction with respect to crimes if a Situation where such crimes appear to have been committed is referred to the Prosecutor by the State party.
[276] Okafor O, 'The International Criminal Court as a 'Transitional Justice' Mechanism in Africa: Some critical reflections', 9(1) *International Journal of Transitional Justice*, (2015), 90-108
[277] Article 67, *Rome Statute*
[278] Vos C,'Prosecutor V Lubanga 'Someone who comes between one person and Another':Lubanga, local cooperation and the Right to a fair trial', 12 *Melbourne Journal of International Law*, (2011), 1
[279] Vos C,'Prosecutor V Lubanga', 2
[280] Prosecutor v Lubanga (Warrant of Arrest), Pre-Trial Chamber I, Case No ICC-01/04 01/06-2-tEN, Decision of 10 February 2006
[281] Chipaike R, Tshuma N and Hofisi S, 'African move to withdraw from the ICC: Assessment of Issues and Implications', *India Quarterly* (2019), 1

countries where the atrocities happen, and the effect of this is that this affects justice and also, leads to there being no accountability.[282] *Katamali* posits that sentences by persons convicted of international crimes should be served in the States where the crimes were committed to promote accountability. Again also, this undermines the deterrent effect of ICC as a justice system.

The Rome Statute provides that the seat of the Court is at the Hague, but further states that the Court may sit elsewhere whenever it considers it desirable as provided for in the Rome Statute.[283] However, as a matter of practice, despite the ICC determining Situations from countries such as Uganda, DRC, Kenya and Central African Republic (CAR), it may be more desirable if the court organized to have some court sessions held in these countries rather than in the Hague, which is considered too far off and victims do not get to interact with the court.

The ICC also has a strained relationship with African States over the past few years. In 2017, countries such as South Africa, Burundi and Namibia passed resolutions to withdraw from the ICC due to allegations that the ICC is selective in its prosecutions and undermines the sovereignty of African states.[284] This move was sparked by two major happenings. The first was the failure by South Africa to arrest Sudan President, Omar Al-Bashir who was wanted before the ICC in 2015 and handed him over, despite South Africa ratifying the Rome Statute.[285] The African Union (AU) Summit was happening in South Africa and the AU had requested South Africa to restrain from arresting President Al Bashir.[286]

This resulted in the ICC issuing a ruling against South Africa under Article 87(7) of the Rome Statute for its noncooperation. [287] The second trigger was the arrest of President Uhuru Kenyatta, with the AU noting that such arrests show the bias of the ICC towards Africa, with criticism being levelled that the ICC targets African countries, instead of failing to address impunity.[288] These events culminated in the AU passing a resolution calling for a mass

[282] Kamatali J, 'From the ICTR to ICC: Learning from the ICTR experience in bringing justice to Rwandans', 98
[283] Article 3 of the Rome Statute
[284] Chipaike R, Tshuma N and Hofisi S, 'African move to withdraw from the ICC: Assessment of Issues and Implications', 2
[285] Bashir was attending the AU Summit Sudan's president
[286] https://www.coalitionfortheicc.org/news/20170407/south-africa-tells-icc-it-was-not-obliged-arrest-sudanese-president-prosecution at 23 April 2024
[287] Situation in Darfur Sudan, *The Prosecutor v. Omar Hassan Ahmad Al Bashir,* ICC-02/05-01/09-302; Decision Under Article 87(7) of The Rome Statute On The Non-compliance By South Africa With The Request By The Court For The Arrest and Surrender of Omar Al-Bashir
[288] Chipaike R, Tshuma N and Hofisi S, 'African move to withdraw from the ICC: Assessment of Issues and Implications', 8

withdrawal of member states from the ICC.[289] This again demonstrates how political factors also strain the ability of the ICC as a justice system to ensure there is accountability.

Also related to the above are the allegations of bias, partiality and selective justice against the court. The ICC has received criticism for being biased due to handling crimes committed in Africa and being completely powerless to act against other non-African states. This is fueled by the fact that most of the investigations before the ICC target Africans. *Mutua* argues that most of the Africans charged before the ICC are from weakened African states such as the Democratic Republic of Congo (DRC), Libya, Mali, and Burundi thereby drawing criticism of being racially biased and undertaking selective prosecution[290].

This is further compounded by the fact that since the ratification of the Rome Statute in 2002, all of the ICC trials and the resultant eight convictions have been of African nationals. Five of the convictions happened in the *Bemba*[291] *case*, with the other three convictions happening in *the Lubanga Case*[292], the *Katanga*[293] *decision* and in the *Al Faqi Al Mahdi*[294] *case*. In that regard, the ICC has been criticized for using geopolitical considerations while practicing selective prosecution, with allegations that the ICC targets Africa and fails to prosecute countries like the USA, Syria, Iran, Afghanistan, the United Kingdom, and Israel for atrocities committed.[295] Criticism has been leveled against the UN Security Council(UNSC) which has expressly referred two Situations in Africa, Darfur, and Libya, to the ICC. Such allegations affect the credibility of the ICC as a judicial body.

Manipulation by the UNSC is a legal and procedural limitation of the court. Legally it undermines the ICC's independence and impartiality which are principles for ensuring fair and effective international justice. This manipulation raises concerns about the politicization of the court's proceedings and the unequal application of international criminal law to all States

[289] https://www.bbc.com/news/world-africa-38826073 at 23 April 2024
[290] Mutua M, 'A problem of Utopia: Human Rights and Transitional Justice', *Legal Studies Research Paper Series*, University of Buffalo, 2023
[291] See The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido, Judgment Pursuant to Article 74 of the Statute, ICC-01/ 05-01/13-1989-Red, 19 October 2016) and The Prosecutor v. Jean-Pierre Bemba, Judgment on the appeal of Jean-Pierre Bemba Gombo against Trial Chamber III 'Judgment Pursuant to Article 74 of the Statute', ICC 01-05-01-08 A, 8 June 2018
[292] The Prosecutor v. Thomas Lubanga, Judgment Pursuant to Article 74 of the Statute, ICC-01/04-01/06, Judgment of 14 March 2012
[293] Germain Katanga in The Prosecutor v. Germain Katanga, Judgment Pursuant to Article 74 of the Statute ICC-01/04-01/07-3436, Judgment of 7 March 2014
[294]The Prosecutor v. Al Faqi Al Mahdi, ICC-01/12-01/15-171, Judgment and Sentence of 27 September 2016.
[295] Chipaike R, Tshuma N and Hofisi S, 'African move to withdraw from the ICC: Assessment of Issues and Implications' 7

thereby compromising the court's credibility and legitimacy, which in turn affects its ability to prosecute perpetrators of international crimes and to hold them accountable.

Other procedural weaknesses that undermine the ICC's ability to carry out its mandate include the lack of extradition powers to bring perpetrators to justice. Since the ICC lacks treaties that force nations to surrender offenders. This in turn compromises the court's credibility and legitimacy.

2.4 Conclusion

This Chapter has shown that justice systems in Africa have made great strides when it comes to promoting accountability and ending impunity for serious international crimes. However, their effectiveness in delivering justice is contingent upon them addressing their inherent challenges and limitations, hence the need for a more holistic approach to justice. Such an approach is one where traditional justice systems are integrated to bridge the gap towards ensuring there is accountability as is discussed in Chapter 3.

Chapter Three
Analysis of traditional justice systems in selected African countries following conflict

3.1 Introduction

This Chapter puts into perspective traditional justice systems adopted in selected countries that have experienced conflict in Africa. To achieve this objective, the study explores the role of traditional justice mechanisms applied in selected African countries and reviews how they have contributed to ensuring there is accountability for international crimes. The Chapter does this by discussing the nature of traditional justice systems applied in Africa following colonization and how this affected their integration into law in various African countries.

The study then analyzes selected case studies of applied traditional justice systems in Rwanda, Uganda and Mozambique by discussing the framework under which those traditional systems were applied and implemented. In doing so, the challenges encountered in the implementation of these traditional justice systems to ensure there is accountability for serious international crimes are discussed. In doing so, the Chapter provides a perspective on whether these traditional systems can be integrated into the current existing framework of ensuring there is accountability for serious international crimes.

3.2 The nature of traditional justice systems in Africa

The traditional justice systems in Africa can be traced back to the pre-colonial era when they were used by local communities to resolve disputes until the 1960s when a majority of African countries attained independence.[296] Following independence, most African countries retained and adopted the formal system of justice modelled on those of their former colonial powers , but the African societies continued operating within their traditional justice framework guided by traditional laws, practices and principles such as inclusivity, consultation and consensus.[297] In traditional African societies, conflict resolution was grounded in culturally recognized customs and behavioral norms.[298] These practices highlighted the deep cultural heritage of

[296] Olawale E F, Hooi Y K & Balakrishnan, 'The dynamics of African traditional justice systems, 230
[297] Olawale E F, Hooi Y K & Balakrishnan, 'The dynamics of African traditional justice systems, 230
[298] Oyeniyi A, 'Conflict Resolution in the Extractives: A consideration of Traditional Conflict Resolution Paradigms in Post-Colonial Africa' 25 *Willamette Journal of International Law and Dispute Resolution*, 1 (2017), 62

African traditions and values and were regarded as the character and disposition of Africans widely acceptable amongst all.[299]

Also, in these traditional African societies, customary practices and culturally recognized behavioral norms were central to conflict resolution as these values were believed to embody the essence of African identity.[300] Conflict resolution principles were rooted in the African approach to maintaining social order and justice, emphasizing mutual trust and cohesion, which reinforced public morality and customary values. [301]Key elements of these principles included forgiveness, truthfulness, social justice, and community coherence, all contributing to mutual respect in pre-colonial African life.[302]

So, in traditional conflict resolution, disputing parties would present their narratives, often supported by oral arguments from their representatives.[303] Elders, serving as arbiters, would deliver judgments informed by their wisdom and experience whose decisions were typically final, as elders held authoritative positions, and their discernment was respected and unquestioned.[304] Communities were organized communally by clan, village, tribe, or ethnicity and the social cohesion, shared values, norms, and beliefs within these groups granted elders the legitimacy to oversee disputes.[305] Disputes that were considered serious were resolved by a Council of Elders, who would gather testimonies and, at times, hear arguments from agents representing the disputants.[306]

These conflicts were typically resolved effectively, with the disputants/parties of the society adhering to decisions without resistance. Members of the society complied partly because of the belief in the consequences of non-compliance, reinforced by practices such as oath-swearing invoking the power of deities.[307] Truth-telling was also central to the process of adjudication of disputes, because it fostered forgiveness, and healing for individuals and the broader community, thereby restoring social harmony.[308] These communal dispute resolution methods encouraged open dialogue, free from formal legal procedures like adjournments and

[299] Oyeniyi A, 'Conflict Resolution in the Extractives', 62
[300] Oyeniyi A, 'Conflict Resolution in the Extractives', 62
[301] Oyeniyi A, 'Conflict Resolution in the Extractives', 62
[302] Oyeniyi A, 'Conflict Resolution in the Extractives', 63
[303]Oyeniyi A, 'Conflict Resolution in the Extractives', 58
[304] Oyeniyi A, 'Conflict Resolution in the Extractives', 58
[305] Oyeniyi A, 'Conflict Resolution in the Extractives', 58
[306] Oyeniyi A, 'Conflict Resolution in the Extractives', 58
[307] Oyeniyi A, 'Conflict Resolution in the Extractives', 61
[308] Oyeniyi A, 'Conflict Resolution in the Extractives', 61

objections, which often hinder justice.[309] Post-conflict peace and justice thrived in communities that prioritized rebuilding and restructuring, supported by institutions like an independent judiciary and enforcement mechanisms.[310]

Traditional justice systems practised across various African communities tend to be diverse, reflecting Africa's rich cultural heritage. As noted by *Kariuki*, these systems are deeply rooted in the customs and practices of individual ethnic groups, leading to variations in their structure and application. *Kariuki* notes that this diversity arises because African customary laws developed from the unique customs and practices of people as a response to their specific circumstances and challenges in life.[311] Therefore, it cannot be assumed a single custom is followed by all African communities; thus, what constitutes African customary law, varies from one ethnic community to another[312].

Traditions are also not static or an absolute phenomenon; they are dynamic, fluid and subject to change.[313] This adaptability allows traditional justice mechanisms to evolve in response to societal shifts, ensuring their continued relevance.[314] However, traditional justice mechanisms are distinct from customary laws where, though both are based on longstanding practices, customs vary significantly between communities to preserve each community's unique culture. This highlights the importance of understanding and respecting the specific contexts in which traditional justice systems operate within different societies in Africa. [315]

Traditional justice systems vary widely across different cultures and regions, but they share some common characteristics and features. First, traditional justice systems often function independently of state legal frameworks. While some may be structured and organized, they typically operate outside formal legal institutions, often drawing on principles and procedures considered by their users to be more legitimate and appropriate than those offered by the formal system.[316]

Second, there is an absence of state sanctions which means the functionality of traditional justice systems is entirely dependent on their acceptance by the members of the society. In

[309] Oyeniyi A, 'Conflict Resolution in the Extractives', 62
[310] Oyeniyi A, 'Conflict Resolution in the Extractives', 62
[311] Kariuki F, 'Customary Law Jurisprudence from Kenya Courts', 1
[312] Kariuki F, 'Customary Law Jurisprudence from Kenya Courts', 1
[313] Kariuki F, 'Community, customary and traditional justice systems in Kenya',12
[314] Kariuki F, 'Community, customary and traditional justice systems in Kenya',12
[315] Kariuki F, 'Community, customary and traditional justice systems in Kenya',12
[316] Macfarlane J, 'Working towards restorative justice in Ethiopia', 489

communities that have strong social cohesion and social enforcement systems, adherence to communal norms is maintained without the need to rely on formal state sanctions, diminishing the need for centralized enforcement of rules and penalties.[317] However, if there are weak social ties, traditional authority is challenged and hence the absence of a central authority may eventually weaken the effectiveness of the existing traditional justice system.[318]

Third, traditional justice systems have persons in authority with the credibility of the effectiveness of traditional justice systems significantly resting on the respect afforded to the people in authority based on how they are appointed and based on the roles they play.[319]

Fourth, and tied to the above feature is that enforcement of sanctions within traditional justice systems is not automatic, but dependent on public acceptance or submission, whether voluntary or coerced.[320] There has to be a minimum level of acceptance for traditional justice systems to be effective.

Fifth, traditional justice systems tend to be perpetuated by traditions of oral history, contributing to their adaptability and flexibility in application and development. Their less bureaucratic nature allows for local variations and incremental changes in how they are practiced.[321] These systems are characterized by community leaders serving as decision-makers, public participation, and proceedings aimed at reconciliation and maintaining harmony.

Despite cultural, historical, and political differences, common themes emerge, including the widespread use of these forums in Africa and their central role in dispute resolution. These forms of traditional conflict resolution eventually came to be part of Africa's justice system, as discussed before, their recognition happening, albeit coming secondary to the legal system in play.

3.3 Traditional justice systems applied in Africa following conflict

When it comes to addressing post-conflict wars, three African countries recognized the use of traditional justice systems to ensure there is accountability. This study discusses these three countries, Rwanda, Uganda and Mozambique because it appreciates that these countries

[317] Macfarlane J, 'Working towards restorative justice in Ethiopia', 491
[318] Macfarlane J, 'Working towards restorative justice in Ethiopia', 491
[319] Macfarlane J, 'Working towards restorative justice in Ethiopia', 491
[320] Macfarlane J, 'Working towards restorative justice in Ethiopia', 491
[321] Macfarlane J, 'Working towards restorative justice in Ethiopia', 492

adopted the use of these traditional mechanisms within a framework, which is further discussed within the case studies.

3.3.1 Gacaca courts in Rwanda

The Rwandan genocide was a sad and violent chapter in the history of Rwanda as a nation[322]. The number of deaths was so high, that a definite number of deaths is still not ascertained, although an estimated number of around 800000 were massacred in what has been largely deemed to be an ethnically motivated genocide[323].

After the 1994 genocide, Rwanda found itself unequipped to handle the situation, because it was yet to implement the Convention of the Prevention and Punishment of the Crime of Genocide, despite ratifying the treaty in 1975[324]. Also, the state of Rwanda's courts and judiciary system bore serious defects, due to a nonfunctioning judiciary system, where infrastructure and equipment had been destroyed and majority of the judicial staff and lawyers having been killed, fled the country after genocide, or even implicated as having committed genocide[325]. The effect of this was the Courts were unable to deal with the large numbers of persons arrested and accused of genocide. *Schabas* further propounds this state of events by arguing that at that point, Rwanda was incapable of meeting its obligations under international human rights law and international criminal law to ensure there was accountability for the crime of genocide[326].

One of the ways in which the Rwandan government sought to promote reconciliation and ensure there was justice was through the implementation of *gacaca* courts, with the courts mainly promoting reconciliation and restoration of balance in the community by reintegration of the perpetrators back to the society[327]. Historically, *gacaca* courts were a dispute resolution system used at the local level to administer justice, but the system became obscure due to colonization by the Germans and subsequently, Belgians, who imported European justice law during colonization[328].

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[322] Haberstock L, 'An analysis of the effectiveness of the Gacaca Court System in Post- Genocide Rwanda', 8(4) *Global Tides*, (2014), 3
[323] Westberg M, 'Rwanda's use of traditional justice after Genocide', 335
[324] Fierens J, 'Gacaca Courts: Between fantasy and reality', 3(4) *Journal of International Criminal Justice*, (2005), 896-919
[325] Barett J, 'Balancing Pragmatism and Principle: UNICEF, Child Rights and Child Genocidaires', 18(1) *Human Rights Law Review*, (2018), 31-59
[326] Schabas W, 'The Rwandan Courts in Quest of accountability-Genocide Trials and Gacaca Courts', 3(4) *Journal of International Criminal Justice*, (2005), 879-895
[327] Haberstock L, 'An analysis of the effectiveness of the Gacaca Court System in Post- Genocide Rwanda', 3
[328] Schabas W, 'The Rwandan Courts in Quest of accountability-Genocide Trials and Gacaca Courts', 892

The term '*gacaca*' is derived from the *Kinyarwanda* word for 'grass' and is a traditional form of dispute resolution that is a local and participatory legal mechanism used to preside over persons who committed genocide in Rwanda[329].

In customary Rwandan society, the extended family known as the '*umuryango*' served as the primary unit of socialization, with status distinctions based on age and gender.[330] Elders in pre-colonial Rwanda convened and sat on grass together to settle disputes aiming to restore social harmony, seek truth, punish perpetrators and provide compensation to victims.[331] The legitimacy of the *gacaca* was rooted on the willing and voluntary participation of both the involved parties and the broader community.[332] Traditionally, the village elders would gather all the parties involved in a crime or conflict to a crime and mediate a resolution, often involving reparations or acts of contrition.[333] This participatory justice system is what is known as '*gacaca*,' symbolizing communal gathering and exemplifies an important move in the restorative justice paradigm.[334]

In 1995, the Rwandan government convened an international conference[335] to explore how accountability for the crimes committed in Rwanda may be achieved, with one of the suggestions being the establishment of *gacaca* courts as a way of resorting to participative justice. This was followed by a workshop organized for members of parliament by the Minister of Justice in 1996 justifying the creation of gacaca courts and presented five reasons being: (i) establishing the truth on the number and identity of the victims as well as their lost possessions; (ii) punishing all those who bear a part of responsibility for the events of 1994; (iii) speeding up trials and simplifying judicial procedures; (iv) encouraging the population to participate in the administration of justice; (v) facilitating the gathering of evidence and decreasing travel for witnesses; (vi) reconciling Rwandans on the basis of such truth and the punishment of perpetrators.[336]

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[329] Rettig M, 'Gacaca Truth, Justice and Reconciliation in Post conflict Rwanda?', 51(3) *African Studies Review*, (2008), 25-50
[330] Oyeniyi A, 'Conflict Resolution in the Extractives', 68
[331] Oyeniyi A, 'Conflict Resolution in the Extractives', 68
[332] Oyeniyi A, 'Conflict Resolution in the Extractives', 68
[333] Oyeniyi A, 'Conflict Resolution in the Extractives', 68
[334] Oyeniyi A, 'Conflict Resolution in the Extractives', 68
[335] The Conference was a colloquium held in Kigali from October 31 to November 5 1995 and was themed 'The Struggle against Impunity: A dialogue for National Reconciliation.
[336] Letter from the Vice-President of the Transitional National Assembly no. 105/AN/96 of 12 June 1996 and records of the Transitional National Assembly Nos 208/AN/96, 210/AN/96–213/AN/96, 728/AN/2000 and 729/AN/2000 (unpublished)

Eventually, these objectives were incorporated into Organic Law No. 40/2000 of 26 January 2001[337] which created the *gacaca* courts and the organization of prosecutions of crimes constituting the crime of genocide or other crimes against humanity committed between 1 October 1990 and 31 December 1994[338]. This law was amended and subsequently replaced by Organic Law No. 16/2004.[339]

The 2004 Organic law mandated participation of all Rwandans in the courts, with participants being grouped into six categories[340]: (1) citizen spectators; (2) judges; (3) witnesses; (4) prisoners who have confessed to acts of genocide; (5) prisoners who have not confessed to their crimes; and (6) survivors[341]. The trials were conducted by judges known as '*Inyangamugayo*[342] and presided over genocide trials in the communities where genocide occurred. The *Inyangamugayo* were local community members, who presided over the *gacaca* courts as judges, who did not necessarily have a legal background, but were nominated by the community as persons with 'good morals and conduct.'[343]

The gacaca courts had jurisdiction over crimes against humanity and genocide committed between October 1 1990 and 31 December 1994, and/or other offences as provided for in the Penal Code[344]. The *gacaca* courts were primarily designed to expedite the prosecution of offenders, in order to achieve justice and reconciliation not only through punishment, but also through reconciliation.

In terms of jurisdiction, *gacaca* courts operated like national courts. Categories of criminals were threefold: Category One offenders included planners of the genocide and crimes against

[337] Organic Law N° 40/2000 of 26/01/2001 Setting Up "Gacaca Jurisdictions" And Organizing Prosecutions For Offences Constituting The Crime Of Genocide Or Crimes Against Humanity Committed Between October 1, 1990 And December 31, 1994, Official Gazette Of The Republic Of Rwanda, N°6 (15 March 2001).
[338] Fierens J, 'Gacaca Courts: Between fantasy and reality', 902
[339] Organic Law No. 16/2004 Of 19 June 2004 Establishing The Organization, Competence And Functioning Of Gacaca Courts Charged With Prosecuting And Trying The perpetrators of the crime of genocide and other crimes against humanity, committed between 1 October 1990 and 31 December 1994,. Official Gazette of the Republic of Rwanda, Special Edition (19 June 2004)
[340] Article 29 of Organic Law No. 16/2004 of 19 June 2004 establishing the organization, competence and functioning of Gacaca courts charged with prosecuting and trying the perpetrators of the crime of genocide and other crimes against humanity, committed between 1 October 1990 and 31 December 1994, Official Gazette of the Republic of Rwanda, Special Edition (19 June 2004),
[341] Thomson S, 'Law, Power and Justice: What Legalism fails to address in the functioning of Rwanda's Gacaca courts', 5(1) *International Journal of Transitional Justice*, (2011), 11-30
[342] Meaning 'those who detest dishonesty' in Kinyarwanda
[343] Brehm H, 'We came to realize we are Judges: Moral careers of elected lay jurists in Rwanda's Gacaca Courts', 14(3) *International Journal of Transitional Justice*, (2020), 443-463
[344] Article 1 of the Organic Law No. 16/2004 establishes the organisation, competence and function of Gacaca courts charged with prosecuting and trying the perpetrators of the crime of genocide and other crimes against humanity

humanity, perpetrators who held positions of authority in the government, army, militia, political parties or religious denominations, at the time of the commission, person who committed torture, rape and persons who committed dehumanizing acts on bodies[345]. Category Two offenders included persons who participated in the killing or injuring of others among killers or serious attackers causing death, or with the intention to kill, and persons who aided in the commission of the acts, while Category three offenders included persons who committed property-related offences.[346]

The *gacaca* courts were structurally organized. Trials were conducted as provided for under the provisions of the Organic Law which was done in several stages. The cell level *gacaca* courts met in weekly general sessions that all community members were required to attend. Initially, the community gathered weekly for general sessions, which were initially voluntary but later became mandatory due to attendance issues during the trial phases. The initial phase involved documenting all the killings and other crimes committed during the genocide within the community. Lists of individuals suspected of involvement were compiled, and they were categorized accordingly. Participants were encouraged to confess their roles in the genocide in exchange for reduced sentences, provided they were deemed completely honest and implicated others.[347]

Subsequently, the trial phase commenced, during which the panels of *Inyangamugayo* heard testimonies against accused individuals and handed down sentences to both confessed perpetrators and those found guilty of genocidal acts such as orchestrating the genocide, carrying out killings with particular brutality, or involvement in rape, were referred to the classical court system, but less serious crimes, ranging from participating in killing under the command of others to property crimes, were adjudicated in the gacaca courts[348].

The trials typically took place in the accused person's village. Judges read aloud the case file, which consists of the compiled testimonies from the accusers. During these proceedings, judges present the case file containing testimonies from accusers, and they also allow statements from the accused, accusers, and any other relevant individuals from the community. After deliberation, the judges publicly announce the verdict. Convicted individuals can appeal their cases, which are reviewed by a gacaca appeal court at the sector level, comprising judges from

[345] Article 51 of Organic Law No. 16/2004 of 19/6/2004
[346] Article 51 of Organic Law No. 16/2004 of 19/6/2004
[347]Longman T, 'An Assessment of Rwanda's Gacaca Courts', 21(3) *Peace Review*, (2009), 308
[348] Longman T, 'An Assessment of Rwanda's Gacaca Courts',308

the same locality. For category-three property offenses, an alternative dispute resolution process is available, where the involved parties can negotiate a settlement regarding restitution, supervised by the judges who ratify the agreement if deemed appropriate.

Another important part of the *gacaca* system is sentencing. Because the *gacaca* courts seek truth and reconciliation, confessions are taken into consideration in sentence determination. Confessing before appearing on a list of suspects reduces the sentence by even more time. As of April 2009, the *gacaca* courts had completed 1.1 million cases, the vast majority of which were completed after the formal opening in 2005. This figure is contrasted to the number of cases handled under the civil justice system which handled 10,026 cases from 1997 to 2004 and the ICTR which by April 2010, had only concluded 50 trials.[349]

The *gacaca* courts have been recognized as a success particularly for their role in promoting reconciliation in Rwanda. The primary objective of the *gacaca* courts was to foster social harmony among different lineages and maintain social order within Rwandan tribal affiliations.[350] They effectively achieved this by operating successfully at the community level.[351]

First, the *gacaca* courts were lauded for reducing the burden on the courts and prison systems by expediting the prosecution of cases.[352] These courts were therefore able to save on costs, , as opposed to costs associated with formal criminal courts, since they took place in the neighborhoods and communities of where genocide took place. Additionally, judges in gacaca courts were not paid higher salaries, as they were viewed as playing a role in the reconciliation process.[353].

Furthermore, the *Gacaca* courts promoted participatory justice and encouraged community involvement in proceedings. Since the judges of gacaca courts are also members of the community, victims could attend courts, confront the accused persons and even testify against them. This approach fostered an environment where the community could hold its members accountable for their actions.[354]

[349] Westberg M, 'Rwanda's use of transitional justice after genocide: the gacaca courts and the ICTR', 346
[350] Oyeniyi A, 'Conflict Resolution in the Extractives', 69
[351] Oyeniyi A, 'Conflict Resolution in the Extractives', 69
[352] Oyeniyi A, 'Conflict Resolution in the Extractives', 69
[353] Westberg M, 'Rwanda's use of transitional justice after genocide: the gacaca courts and the ICTR', 346
[354] Westberg M, 'Rwanda's use of transitional justice after genocide: the gacaca courts and the ICTR', 349

Another notable success of the gacaca courts was their efficiency in delivering justice faster as opposed to national courts, which would have taken longer to complete the trials. Due to this, most accused persons charged and convicted before the courts were able to serve out their sentences within a shorter period of time, hence ensuring they reintegrated back to the society[355].

Reintegration of the accused persons is also lauded as a success of the courts, since part of rebuilding Rwanda included forgiveness between the Hutu and the Tutsi to enable economic and social reintegration. By encouraging open sittings where victims openly talk about wrongs committed, it helps in moving forward towards unity[356].

The *gacaca* courts however experienced criticisms, mainly identified as legal weaknesses while serving as a system for ensuring there is accountability.[357] First, critics pointed out that the system of the courts was structured to deliver speedy penal justice but lacks the requisite due process safeguards.[358] Given that Rwanda ratified the International Covenant on Civil and Political Rights, then as a state party to the Treaty, it was obligated to guarantee that the gacaca courts conformed to the judicial standards outlined therein such as the right to due process and the presumption of innocence.[359] Also, the African Commission on Human & People's Rights in its Dakar Declaration of September 11, 1999[360] pointed out that traditional courts are not exempt from the provisions of the African Charter on Human and People's Rights relating to a fair trial.[361] For this reasons, critics like *Bava* argued that the *gacaca* courts failed to respect the universally recognized fair trial standards.[362] Lack of following due process rights, which are universal rights amounts to violation of human rights, is a valid concern when it comes to determining the success of the *gacaca* courts[363].

Secondly, the courts have also been criticized for failing to achieve reconciliation, despite this being the main objective of their creation.[364]One reason for this is because the *gacaca* judges were empowered to issue sanctions and sentences to the accused persons appearing before it,

[355] Westberg M, 'Rwanda's use of transitional justice after genocide: the gacaca courts and the ICTR', 348
[356] Westberg M, 'Rwanda's use of transitional justice after genocide: the gacaca courts and the ICTR', 349
[357] Bava J,'The Gacaca Courts: victory for transitional justice? 11(2) *Columbia Undergraduate Law Review*, (2016), 31
[358] Oyeniyi A, 'Conflict Resolution in the Extractives', 69, 70
[359] Bava J,'The Gacaca Courts: victory for transitional justice?', 31,32
[360] Dakar Declaration on the Right to a Fair Trial in Africa, African Commission on Human and People's Rights (Dakar, Senegal, September 1999)
[361] Oyeniyi A, 'Conflict Resolution in the Extractives', 70
[362] Bava J,'The Gacaca Courts: victory for transitional justice? 34
[363] Westberg M, 'Rwanda's use of transitional justice after genocide: the gacaca courts and the ICTR', 356
[364] Oyeniyi A, 'Conflict Resolution in the Extractives', 70

whittling away its goal of achieving truth and reconciliation.[365] *Bava* argues that the concept of introducing retributive justice to the courts made it impossible for the courts to promote reconciliation.[366]

The *gacaca* judges were also criticized for failing to have legal training beyond the basic course on how to run the gacaca courts despite adjudicating serious international crimes.[367] Critics like *Bava* argue this, noting instances where the *gacaca* judges were given ability to issue search warrants to gather evidence but instead ended up simply relying on witness testimony. [368]This proved problematic since most judges did not adequately identify witness bias, instead relying on hearsay then imposing hefty and unfitting punishments.[369] Additionally, a number of the *gacaca* judges were accused of lacking integrity, with some being found to have also committed acts of genocide, despite being tasked with upholding justice, contributing to the criticism levelled against the legitimacy of the gacaca courts.[370]

Another critical weakness noted has been the interference by the national government of Rwanda in the due process of the courts, hence undermining their legitimacy. The Rwandan government has been accused of using the gacaca courts to bring false charges against political opponents for its own interests[371]. Other challenges, included conceptual and operating issues which were the inability of the court's jurisdiction to handle reparations and the overwhelming case load[372].

A majority of these criticisms reflect external perspectives, particularly grounded on legal justification mainly because no legal system can be deemed to be perfect. It would be therefore unfair or too much to expect or assume that more than 12000 courts operating within various geographical areas in a country can be perfect. *Clark* argues that the *gacaca* courts represent a hybrid means of pursuing justice by combining retributive, deterrent and restorative justice, with restorative justice being the ultimate outcome.[373]Therefore, criticism against the courts for failure to meet procedural requirements fails to recognize this hybrid approach as a holistic

[365] Bava J,'The Gacaca Courts: victory for transitional justice?,40
[366] Bava J,'The Gacaca Courts: victory for transitional justice?,40
[367] Westberg M, 'Rwanda's use of transitional justice after genocide: the gacaca courts and the ICTR', 349
[368] Bava J,The Gacaca Courts: victory for transitional justice?, 31
[369] Bava J,'The Gacaca Courts: victory for transitional justice?,31
[370] Westberg M, 'Rwanda's use of transitional justice after genocide: the gacaca courts and the ICTR', 354
[371] Westberg M, 'Rwanda's use of transitional justice after genocide: the gacaca courts and the ICTR', 356
[372] Tuyisenge, S, 'Gacaca Courts as An Alternative Dispute Resolution Mechanism in Rwanda (2022), 1-19 available at SSRN: https://ssrn.com/abstract=4002506 or http://dx.doi.org/10.2139/ssrn.4002506
[373] Clark P, 'The Gacaca Courts, Post-Genocide Justice and Reconciliation in Rwanda: Justice without Lawyers', *Cambridge University Press*, Cambridge, (2010), 829

response to ensuring there is accountability for genocide.[374] There is therefore need to ensure that the criticisms levelled against the *gacaca* courts do not overpower its numerous benefits in international law, especially the role played by the courts in ensuring there has been accountability for serious crimes.

3.3.2 Acholi traditional justice in Northern Uganda

Since gaining independence in 1962, Uganda has been plagued by violence driven by ethnic tensions and political manipulation, often described as a history of "cycles of revenge and mistrust."[375] In 1985, Yoweri Museveni overthrew the government of Milton Obote using his party known as the National Resistance Movement (NRM). [376]However, when the NRM gained power, its political legitimacy was dented majorly due to its failure to protect the properties and lives of Ugandan citizens.[377] The failure by the NRM Government led to the creation of a vacuum that was exploited by different actors seeking political power and opportunities.[378] One of those emerging groups was the Lord's Resistance Army (LRA) led by Joseph Kony which emerged as a manifestation of the Ugandan government's loss of legitimacy for failing to protect its citizens against the atrocities committed by NRM, with Kony's LRA challenging and contesting NRM's authority.[379]

The conflict in Northern Uganda therefore traces back to 1986 when there were uprisings in the Acholi region of Uganda to remove President Museveni from power, with the affected people living in Acholiland been forced to abandon their homesteads for another life. Between 1994 and 1996, traditional leaders and elders of the Acholi people began to explore ways to pursue peace in northern Uganda. While this was happening, in 2003, the Ugandan government made a referral to the ICC, after which the ICC commenced investigations.[380]

Following this referral to the ICC by the Government of Uganda in 2003, warrants of arrest were issued in 2005 for the arrest of Joseph Kony, the leader of the Lord's Resistance Army as

[374] Clark P, 'The Gacaca Courts, Post-Genocide Justice and Reconciliation in Rwanda', 824
[375] Latigo O J, 'Northern Uganda: tradition-based practices in the Acholi region' in Huyse L & Salter M, *Traditional Justice and Reconciliation after Violent Conflict Learning from African Experiences*, International Institute for Democracy and Electoral Assistance, 2008, 85
[376] Latigo O J, 'Northern Uganda: tradition-based practices in the Acholi region',87
[377] Latigo O J, 'Northern Uganda: tradition-based practices in the Acholi region',90
[378] Latigo O J, 'Northern Uganda: tradition-based practices in the Acholi region',90
[379] Latigo O J, 'Northern Uganda: tradition-based practices in the Acholi region',91
[380] Latigo O J, 'Northern Uganda: tradition-based practices in the Acholi region',98

well as several other rebels, who became the first suspects to be tried before the ICC.[381] Local leaders countered this by mounting a campaign stopping the ICC investigation, declaring themselves capable of dealing with the LRA leaders using traditional Acholi justice practices, seeing as Kony was also an Acholi.[382] The leaders claimed that using this justice system would facilitate reconciliation, restore positive community relations, and ensure sustainable peace.[383]

In 2007, the LRA and the Ugandan Government signed the 2008 Agreement on Accountability and Reconciliation following the Juba peace talks[384] to promote national arrangement, using formal and non-formal institutions and measures for ensuring justice and reconciliation with respect to conflict.[385] These non-formal measures were categorized as alternative justice mechanisms, with the Agreement defining these to be those mechanisms not being administered in the formal courts established under the Constitution.[386] The Agreement emphasized on the need to ensure that proceedings conducted under the Agreement promoted reconciliation and ensure individuals are encouraged to take personal responsibility for their conduct.[387]

To ensure there was full accountability, the Agreement also explicitly recognized the existing complementary alternative justice mechanisms in Uganda, affirming that Uganda has institutions and mechanisms, customs, and usages recognized under its national laws, capable of addressing the serious crimes committed in Uganda during the conflict.[388]These alternative justice systems as defined in the Agreement, refer to those justice mechanisms that are not currently administered in the formal courts established under the Ugandan Constitution.[389]

The Agreement emphasized the importance of integrating and promoting Acholi traditional justice mechanisms practiced by communities such as *Culo Kwor*, *Mato Oput*, *Kayo Cuk*, *Ailuc* and *Tonu ci Kika* into the central framework in ensuring there is accountability and reconciliation.[390] The Acholi tradition is a traditional justice system practiced by the Acholi

[381] Ensor M, 'Drinking the Bitter Roots: Gendered Youth, Transitional Justice and Reconciliation across the South Sudan-Uganda Border' 3 *African Conflict and Peacebuilding Review* 2, (2013), 184
[382] Ensor M, 'Drinking the Bitter Roots', 184
[383] Ensor M, 'Drinking the Bitter Roots', 184
[384] Agreement on Accountability and Reconciliation between the Government of the Republic of Uganda and the Lord's Resistance Army/Movement,Juba, Sudan, 29 June 2007 (hereinafter referred to as the "*Agreement*")
[385] Clause 2.1, *Agreement*
[386] Clause 1 Paragraph 1, *Agreement*
[387] Clause 3.2, *Agreement*
[388] Clause 5.1 and 5.2, *Agreement*
[389] Clause1, Paragraph 2, *Agreement*
[390] Clause 3.1, *Agreement*

people of northern Uganda. It blends restorative and retributive elements, conceiving retribution as an appropriate part of the process of forgiveness itself.[391]

Some of the traditions mentioned above include *Culo Kwor* which means the compensation to atone for homicide as practiced in *Acholi* and *Lango* cultures and any other forms of reparation for any other purposes after full accountability.[392] *Mato Oput* refers to the traditional ritual performed by the Acholi after full accountability and reconciliation has been attained between parties formerly in conflict, after full accountability.[393] *Kayo Cuk* was defined to mean the traditional accountability and reconciliation processes practiced by the Langi communities after full accountability and reconciliation has been attained between parties formerly in conflict, after full accountability.[394] *Ailuc* refers to the traditional rituals performed by the *Madi* to reconcile parties formerly in conflict, after full accountability[395] while *Tonu ci Kika* is defined to refer to the traditional rituals performed by the Madi to reconcile parties formerly in conflict, after full accountability.[396]

The Agreement promoted the use of the above traditional justice mechanisms, while also acknowledging and recognizing the importance and necessity of applying formal and civil justice measures on persons found to have committed serious crimes, and provided for them to be prosecuted following independent and impartial investigations on such individuals.[397] This integrated approach allows formal legal systems to prosecute serious international crimes in Uganda, ensuring perpetrators are held accountable under international law. Concurrently, Acholi traditional justice systems focus on upholding individual responsibility, considering victims' needs and facilitating community reconciliation.[398] By combining these methods, the Agreement addressed the legal aspects of accountability and the social context within which these crimes occurred, promoting both justice and the restoration of social harmony.[399]

[391] Jeffery R, 'Forgiveness, amnesty and justice: The case of the Lord's Resistance Army in Northern Uganda' 46 *Cooperation and Conflict* 1, (2011), 88
[392] Clause 1, Paragraph 5, *Agreement*
[393] Paragraph 9, Clause 1, *Agreement*
[394] Paragraph 8, Clause 1, *Agreement*
[395] Paragraph 1, Clause 1, *Agreement*
[396] Paragraph 11, Clause 1, *Agreement*
[397] Clauses 4.1 and 4.2, *Agreement*
[398] Lajul W, 'Justice and post LRA War in Northern Uganda: ICC versus Acholi Traditional Justice System', *IAFOR Journal of Ethics, Religion & Philosophy* 3(2), 2017, 29
[399] Lajul W, 'Justice and post LRA War in Northern Uganda', 29

The Government of Uganda was also obligated to adopt an appropriate policy framework for implementing the terms of the Agreement.[400] This was done in 2008 when the Parties to the Agreement signed an Annex to the 2007 Agreement to implement the 2007 Agreement.[401] The Annex primarily provided for the establishment of a special division of the High Court of Uganda to try individuals alleged to have committed serious international crimes.[402] The special division of the court was to have legislation specifically providing for the recognition of traditional and community justice processes in proceedings.[403] The Annex also provided that traditional justice mechanisms would be applied, in addition to the role played by the special division of the High Court, to address serious international crimes.[404]

The Government of Uganda however received criticism for failing to ensure there was accountability of the serious crimes committed, despite the signing of the Agreement with the LRA. In its report, Amnesty International concurred that the Agreement played a role in ensuring there was peace, but criticized the Government of Uganda for failing to meet its legal obligation to ensure there is prosecution of the serious crimes committed.[405] In particular, whether the use of the Acholi traditional mechanisms was meant to supplement or replace prosecutions, since such mechanisms only play a supplementary role, and not to replace criminal proceedings before formal courts.[406] *Jeffery* however rebuts this critique, arguing that the Acholi traditions promote forgiveness, which involves acknowledging that a wrong has been done.[407] This acknowledgment translates into an act of justice that condemns the injustice. and the translation of that judgment into an act of justice reflects condemnation of that wrong.[408] Also, the Acholi traditional justice mechanism incorporates both retributive and restorative forms of justice in that while forgiveness is restorative in nature, the State may still punish the perpetrators, hence in this way, both forms of justice are incorporated together.[409]

The negotiating team in the ongoing Juba peace talks agreed in principle that the application of this traditional rite is one of the mechanisms used to ensure there is accountability and

[400] Clause 14.3, *Agreement*
[401] Appendix II: Annexure to the Agreement and Reconciliation, 19 February 2008
[402] Clause 7 of Appendix II, *Annexure to the Agreement and Reconciliation*
[403] Clause 9 (e) of Appendix II, *Annexure to the Agreement and Reconciliation*
[404] Clause 23 of Appendix II, *Annexure to the Agreement and Reconciliation*
[405] Amnesty International, *Uganda: Agreement and Annex on Accountability and Reconciliation Falls Short of a Comprehensive Plan to end Impunity*, AFR 59/001/2008, 1 March 2008,
[406] Amnesty International, *Uganda: Agreement and Annex on Accountability and Reconciliation Falls Short of a Comprehensive Plan to end Impunity*, 18
[407] Jeffery R, 'Forgiveness, amnesty and justice',91, 92
[408] Jeffery R, 'Forgiveness, amnesty and justice',92
[409] Jeffery R, 'Forgiveness, amnesty and justice',92

reconciliation.[410] Although the Agreement provided for the promotion of several traditional justice mechanisms to ensure there is full accountability and reconciliation, the most common traditional justice employed was the *mato oput* tradition. *Mato oput* represents a justice system within the Acholi culture of the Acholi people of Uganda with the term *mato oput* meaning 'drinking the bitter root'[411]. It is a reconciliatory process that involves several steps that an individual must make before rejoining the community, with such steps involving standing outside the village and speaking the names of family, confessing to the crime, the elders taking collective responsibility and finally doing the ritual of drinking the bitter root.[412]

The *mato oput* justice system is mainly used in situations involving accidental or purposeful killings as a system of justice in which the principles of truth, accountability, reparation, and reconciliation play significant roles in the process of justice.[413]. In the strict sense of the term, *mato oput* can therefore be said to be a justice mechanism system used to address cases of both international and accidental killings by relying on the intervention of local elders as arbitrators of disputes among conflicted parties[414].

The Acholi believed that man is a sacred being whose blood ought not to be spilled and the killing of human beings being forbidden.[415] Where such killings happen, it was believed that a supernatural barrier between the clan of the killer as the perpetrator and the clan of the person who was killed as the victim was created, with the barrier remaining in force until the killing is atoned for and a religious rite of reconciliation performed to cleanse the taint.[416]

In all cases of deliberate or accidental killing, the community mandates that the perpetrator's clan pays 'blood money' to the victim's clan as compensation.[417] The process is facilitated by a mediator appointed by the Council of Elders who is expected be impartial in coordinating the payment of the blood money.[418] After payment of the blood money as compensation, the elders organize for a reconciliation ceremony to restore harmony between the clans, where specific rituals are performed; the perpetrator provides a ram and a bull and the victim's next of kin

[410] Latigo O J, 'Northern Uganda: tradition-based practices in the Acholi region',103
[411] It is called 'drinking bitter roots' because the process entails consuming beverage from the oput tree that grows in Acholiland, where the bitter roots of the tree are ground and mixed with a local brew called 'kwete'.
[412] Beitzel T and Castle T, 'Achieving Justice through the International Criminal Court in Northern Uganda', 13
[413] Baines E, 'The Haunting of Alice: Local approaches to justice and reconciliation in Northern Uganda', 105
[414] Ensor M, 'Drinking the Bitter Roots'171-194
[415] Ogora L, 'Traditional Justice: A significant part of the solution to the question on Accountability and Reconciliation in Northern Uganda', 2
[416] Latigo O J, 'Northern Uganda: tradition-based practices in the Acholi region',103
[417] Latigo O J, 'Northern Uganda: tradition-based practices in the Acholi region',103
[418] Latigo O J, 'Northern Uganda: tradition-based practices in the Acholi region',104

provides a goat, again in a bid to ensure there is reconciliation. In a new vessel, the masters of ceremony mix pounded extract from the roots of the oput tree with an alcoholic drink, and the perpetrator and next of kin of the victim drink from the vessel simultaneously.[419] The head of ram brought in by the killer is then cut off and given to the victim's family while the goat's head is also cut off and given to the perpetrator's family. This act signifies that the two clans of the perpetrator and victim have reconciled, in this way making good the damage caused by the spilling of the sacred blood of human beings.[420]

In practice, the Acholi traditional justice system was applied in steps by following Acholi rituals which first involves '*nyono tong gweno'* which means the rite of 'stepping on the egg'. This ritual is described as a welcoming ritual aimed at cleansing persons who have been away from home, with the LRA soldiers expected to individually undergo the ritual before they enter their actual homesteads during the process of reintegration.[421] This is then followed by the *mato oput* ceremony which is a process and ritual ceremony used to redress crimes that involve loss of life or bloodshed.[422]

In ensuring there is accountability, the *mato oput* ceremony of the Acholi traditional justice system upholds the individual responsibility principle, where if a crime is committed by an individual against the members of one's community, it is the individual or the immediate family that bears the responsibility.[423] Further, the Acholi traditional justice systems promote reconciliation by accepting members of the LRA back into the community. The unique importance of Acholi traditional justice systems is that the perpetrators of atrocities remain in society, with both the perpetrators and victims and their respective families live together.[424] Acholi traditional justice systems, more particularly the *mato oput* ceremony also provided a justice mechanism that fostered participation and ownership, by taking place between clans, as opposed to being limited only to the individuals involved.[425]

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[419] Latigo O J, 'Northern Uganda: tradition-based practices in the Acholi region',105
[420] Latigo O J, 'Northern Uganda: tradition-based practices in the Acholi region',105
[421] Ogora L, 'Traditional Justice: A significant part of the solution to the question on Accountability and Reconciliation in Northern Uganda', *Uganda Law Reform Commission, Uganda Living Law Journal*, (2008) https://www.researchgate.net/publication/339676669_A_Case_Study_of_the_Acholi_Local_Justice_Mechanism_of_Mato_Oput_in_Northern_Uganda_Uganda_Law_Reform_Commission on 3 March 2025, 2
[422] Ogora L, 'Traditional Justice: A significant part of the solution to the question on Accountability and Reconciliation in Northern Uganda', 2
[423] Lajul W, 'Justice and post LRA War in Northern Uganda', 28
[424] Latigo O J, 'Northern Uganda: tradition-based practices in the Acholi region',117
[425] Ogora L, 'Traditional Justice: A significant part of the solution to the question on Accountability and Reconciliation in Northern Uganda', 7

A notable limitation of the Acholi traditional justice systems is the challenge of expanding these local traditional practices to take on a national outlook, akin to Rwanda's approach, through the codification of these local traditions into Uganda's legal framework.[426]

Nevertheless, the discussion has pointed out that there is need for a multifaceted approach to dealing with the crimes committed in Uganda. While the Acholi traditional justice systems such as *mato oput* played a significant role in promoting reconciliation, they may not fully address the gravity of serious international crimes committed during the conflict. Therefore, integrating such traditional justice mechanisms with other formal retributive justice processes is essential to ensure there is accountability.

3.3.3 The Community Courts and Magamba Spirits in Mozambique

Mozambique has also employed traditional justice mechanisms following the war that rocked the nation from 1976 to 1992.On 4th October 1992, a General Peace Agreement 'the Rome Agreement' was entered into between the Mozambique Government (FRELIMO) and RENAMO. The Agreement effectively ended the civil war in Mozambique and focused more on establishing peace, but failed to address accountability for serious international crimes committed during the conflict, leaving a gap in the reconciliation process and accountability. After the signing of the Agreement, the Mozambique General Assembly promulgated Law 15/92[427] whose effect was that individuals who committed war crimes were given amnesty[428]. The effect of this was that victims and perpetrators had to live with each other in the same communities where war crimes were committed and to forgive and forget as a reference for justice[429]. The underlying logic was that amnesty would facilitate reconciliation in Mozambique by preventing further polarization and allowing for the social reintegration of those with a violent past[430].

Mozambique therefore never pursued any formal justice systems as there was no investigation nor punishment for persons responsible for committing human rights violations as a way of

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[426] https://land.igad.int/index.php/documents-1/countries/uganda/conflict-7/1172-approaching-national-reconciliation-in-uganda-perspectives-on-applicable-justice-systems/file on 3 March 2025

[427] The Law was an amnesty law for crimes committed between 1979 and 1992

[428] Thompson Gyedu K, 'Indigenous Transitional Justice in Perspective: The Case of Mozambique', (2016) as accessedathttps://www.researchgate.net/profile/GyeduKwarkye/publication/311425480_Indigenous_Transitional_Justice_in_Perspective_The_case_of_Mozambique/links/5845800908ae2d2175681677/Indigenous-Transitional-Justice-in-Perspective-The-case-of-Mozambique.pdf on 15 April 2024

[429] Thomson Gyedu K, 'Indigenous Transitional Justice in Perspective', 1

[430] Bueno N, 'Reconciliation in Mozambique: was it ever achieved?', 19(5) *Conflict, Security and Development*, (2019) 427-452

ensuring there was restorative justice. The war in Mozambique was fought across the country, but it was the rural areas that were most affected by the violence.[431] Although the end of the war brought massive relief to the Mozambican people, the Mozambican government did not pursue any form of accountability for crimes committed during the war, instead choosing to maintain a culture of silence, while encouraging victims to forgive and forget to pursue reconciliation.[432]

For the survivors, their right to seek justice for the grave harm suffered was necessary to enable them build their lives, with accountability being central to ensure there was reconciliation.[433] The community members turned to traditional legal systems to offer redress for the atrocities committed against them.[434] In turn, the Government of Mozambique passed Law 4/92[435] creating community courts that were to attend to minor conflicts of a civil nature according to customary practices.[436] For majority of the survivors, the community courts were considered as the principal adjudicator in resolving civil war conflicts.[437] These community courts were used to resolve disputes arising from the war and to facilitate reconciliation and conflict resolution.[438]

The mandate of the community courts was to value and deepen community style justice by taking into account the ethnic and cultural diversity of the Mozambique society.[439] The community court's mandate was to resolve small differences within the community and contribute towards harmonizing the various practices of justice and enriching rules, habits and customs, thus leading to a creative synthesis of Mozambican laws.[440] By enacting Law No. 4/92, FRELIMO successfully integrated community justice practices and cultural norms into Mozambique's legal framework.[441]The community courts played an integral role in enforcing community norms and resolving conflicts. The community courts were composed of eight

[431] Igreja V, 'Traditional Courts and the Struggle against State Impunity for Civil War in Mozambique', 54 *Journal of African Law* 1, (2010), 55
[432] Igreja V & Lambranca B, 'Restorative justice and the role of magamba spirits in post-civil war Gorongosa Central Mozambique' 68
[433] Igreja V, 'Traditional Courts and the Struggle against State Impunity for Civil War in Mozambique', 55
[434] Igreja V, 'Traditional Courts and the Struggle against State Impunity for Civil War in Mozambique', 57
[435] Law 4/92 of 6 May 1992
[436] Law 4/92 of 6 May 1992
[437] Igreja V, 'Traditional Courts and the Struggle against State Impunity for Civil War in Mozambique', 59
[438] Utter M, 'New Rules of the Game: The Politization of Community Courts in Mozambique', 31 *Washington International Journal*, (2021), 151
[439] Preamble, *Law 4/92*
[440] Preamble, *Law 4/92*
[441] Utter M, 'New Rules of the Game: The Politization of Community Courts in Mozambique', 159

judges, five of whom were full members and three being substitutes.[442] The *modus operandi* of the traditional courts offering a combination of procedural, restorative and retributive justice.[443]Individuals represented themselves and presented their case to try and persuade the judges. When culpability is accepted, judges then ask the injured party to determine the reparation they want, and in turn, the judges determined the punishment to be meted, if they regarded the conflict to be serious.[444]The chief judge also emphasized the need to cultivate understanding and forgiveness for both the injured party and the guilty party, who are then urged to shake hands in front of everyone.[445]

In the communal courts, the procedure followed was based on the principle of presumption of innocence, where the judges clapped their hands every time the litigants and defendants talked.[446] The courts operate based on *mutemo* (rules), which are influenced by spirits and customs of the living.[447] These rules determined the seriousness of a breach and the type of resolution that should be followed. Particularly, offenses involving bloodshed or unresolved deaths are deemed unforgivable without proper redress, adhering to the principle that a conflict does not go away until it has been redressed.[448] Traditional judges were sensitive to this principle, and they actively intervened and participated during this session.

Moreover, there's a belief that the malevolent spirits of deceased victims may afflict perpetrators or their kin until the living feel that justice is achieved, underscoring the spiritual dimension of these customs.[449] A similar way in which spirits also intervene is through a practice called *ku pikirira* or *leu temerera* (a dangerous curse), where it was believed that the moment the curse is said out loud, it sets in motion an invisible process that leads to the curse coming to actualization.[450] While such verbal threats are technically illegal, they are utilized to compel offenders to amend their wrongs.[451] Unlike the rigid demands of spiritual rules, the customs of the living offer flexibility, allowing for resolutions through various means, including apologies. This blend of spiritual beliefs and societal customs showcases how

[442] Article 8, *Law 4/92*
[443] Igreja V, 'Traditional Courts and the Struggle against State Impunity for Civil War in Mozambique', 59
[444] Igreja V, 'Traditional Courts and the Struggle against State Impunity for Civil War in Mozambique', 59
[445] Igreja V, 'Traditional Courts and the Struggle against State Impunity for Civil War in Mozambique', 59
[446] Igreja V, 'Traditional Courts and the Struggle against State Impunity for Civil War in Mozambique', 57
[447] Igreja V, 'Traditional Courts and the Struggle against State Impunity for Civil War in Mozambique', 57
[448] Igreja V, 'Traditional Courts and the Struggle against State Impunity for Civil War in Mozambique', 58
[449] Igreja V, 'Traditional Courts and the Struggle against State Impunity for Civil War in Mozambique', 58
[450] Igreja V, 'Traditional Courts and the Struggle against State Impunity for Civil War in Mozambique', 58
[451] Igreja V, 'Traditional Courts and the Struggle against State Impunity for Civil War in Mozambique', 58

traditional courts function, balancing rigid spiritual mandates with adaptable human practices to maintain social harmony.[452]

However, the communal courts proved to be ineffective in addressing impunity and conflicts arising from the war. The Mozambique government codified the customary law that was used in the community courts, which in turn allowed the government to control the operation of these courts thus politicizing the communal courts. [453] In turn, this prompted the Mozambique people to turn to other mechanisms to address the abuses and injustices arising from the war through a restorative justice mechanism of using *magamba* spirits and *magamba* healers.

Gorongosa district in Mozambique was one of the areas that were affected by the war from the onset. The victims of the *Gorongosa* district turned to the use of *magamba* spirits and *magamba* healers as a means of resolving abuses and injustices instead of seeking revenge.[454]*Magamba* are generally perceived to be spirits of dead persons who return to the world of the living to fight for justice but eventually, *magamba* spirits evolved to refer to mean the spirit of any male that was killed during the civil war and is able to return to the world of the living to claim justice.[455] In the *magamba* rituals, the spirit of the dead victims comes back to haunt their killer by possessing them causing them severe afflictions that impede them physically even making them physically disable, become impotent or even die.[456]

Afflictions are believed to result from wrongdoings committed by a family member during the war. The aggrieved individual's spirit, which is the *gamba* spirit returns to the world of the living to reveal the injustice inflicted on them and disclose what happened.[457] The *magamba* healer's role was to identify the afflicted person and facilitate the manifestation of the *gamba* spirit, allowing it to voice its grievances.[458] The *magamba* healer would then mediate between the afflicted individual's family and the deceased victim's family, guiding the accused to

[452] Igreja V, 'Traditional Courts and the Struggle against State Impunity for Civil War in Mozambique', 58
[453] Utter M, 'New Rules of the Game: The Politization of Community Courts in Mozambique', 167
[454] Igreja V & Lambranca B, 'Restorative justice and the role of magamba spirits in post-civil war Gorongosa,Central Mozambique', 67
[455] Igreja V, 'Gamba spirits and the Homines Aperti: Socio-Cultural approaches to deal with legacies of the Civil war in Gorongosa, Mozambique', International Conference Building a Future on Peace and Justice, Nuremburg, 25-27 June 2007, 6
[456] Igreja V, 'Gamba spirits and the Homines Aperti: Socio-Cultural approaches to deal with legacies of the Civil war in Gorongosa, Mozambique',7
[457] Igreja V, 'Gamba spirits and the Homines Aperti: Socio-Cultural approaches to deal with legacies of the Civil war in Gorongosa, Mozambique',7,8
[458] Igreja V, 'Gamba spirits and the Homines Aperti: Socio-Cultural approaches to deal with legacies of the Civil war in Gorongosa, Mozambique',8

acknowledge their actions.[459] This acknowledgment transforms the *gamba* from a restless entity to an accepted ancestral spirit and liberates the accused from affliction. Such rituals enable the accused to transition from being perceived as perpetrators to responsible community members, fostering reconciliation and healing.[460]

The *magamba* ritual ceremony serves as a local tradition for addressing individual and collective violence. When an innocent person dies unjustly, the deceased's spirit is believed to return to haunt their perpetrators, families and communities.[461] Without the *magamba* healers performing the rituals, these individuals and their communities suffer. In this context, the magamba spirits invoke socio-cultural forms of justice and reconciliation, aiding the Mozambique people in reconciliation.[462] Further, the magamba rituals align with the principle of accountability for serious international crimes in how the spirit of the deceased returns and haunts the perpetrator until the ritual is performed. This haunting compels the community to acknowledge and rectify past injustices, thereby restoring social harmony.[463]

Accountability is therefore achieved through spiritual and communal mechanisms rather than formal legal proceedings. While this system effectively addresses accountability within the community, it operates independently of international legal standards and mechanisms designed to prosecute serious international crimes, such as war crimes or crimes against humanity. The *magamba* rituals focus on restoring social order and healing within the community, emphasizing reconciliation over punitive measures. Therefore, while they ensure accountability in a cultural context, they may not align with the formal processes and objectives of international criminal justice systems.

Despite the accomplishment of the magamba spirits of serving as vital traditional mechanisms for addressing injustices and fostering reconciliation, they do not replace formal retributive justice processes.[464] The reconciliation role helped to heal past wounds and start afresh, helping

[459] Igreja V, 'Gamba spirits and the Homines Aperti: Socio-Cultural approaches to deal with legacies of the Civil war in Gorongosa, Mozambique',8
[460] Igreja V, 'Gamba spirits and the Homines Aperti: Socio-Cultural approaches to deal with legacies of the Civil war in Gorongosa, Mozambique',8
[461] Igreja V & Lambranca B, 'Restorative justice and the role of magamba spirits in post-civil war Gorongosa,Central Mozambique', 80
[462] Igreja V & Lambranca B, 'Restorative justice and the role of magamba spirits in post-civil war Gorongosa,Central Mozambique', 81
[463] Igreja V & Lambranca B, 'Restorative justice and the role of magamba spirits in post-civil war Gorongosa,Central Mozambique', 81
[464] Igreja V, 'Gamba spirits and the Homines Aperti: Socio-Cultural approaches to deal with legacies of the Civil war in Gorongosa, Mozambique',12

the people redress their relationships with the dead and heal their suffering[465].The magamba rituals focus on spiritual healing and social cohesion within communities, addressing harms through cultural practices, thus functioning alongside, rather than in place of formal retributive justice mechanisms. . Also, the use of the magamba spirits as a traditional justice mechanism was limited geographically in terms of coverage since they were not used nationally but in select communities, majorly within the Gorongosa area.[466] There is therefore need to ensure that such traditional justice processes are complemented with national and international retributive justice mechanisms to ensure there is full accountability.[467]

3.3.4 Fambul Tok Process in Sierra Leone

As previously discussed in Chapter 2, following the civil war in Sierra Leone, the government of Sierra Leone pursued accountability using the SCSL, which was tasked with prosecuting perpetrators of serious international crimes and the Truth and Reconciliation Commission (TRC), established to get an authoritative record of the events of the war by collecting testimony from survivors and perpetrators.[468]

Given their divergent goals and parallel operations, considerable tension arose between the work of the TRC and the SCSL. A key point of contention was the uncertainty surrounding the legal consequences of participating in the TRC.[469] Many individuals feared that their testimonies could be used against them in future prosecutions, leading to widespread reluctance to testify, hindering the gathering of comprehensive accounts. This disconnect was further compounded by high illiteracy rates, which prevented many Sierra Leoneans from rural areas from engaging with written reports and newspaper coverage of the TRC's work. In particular, the TRC's failure to rebroadcast hearings through accessible and popular media channels further limited public engagement and awareness, ultimately undermining its potential to foster national reconciliation.[470]

It is within this context that the people of Sierra Leone adopted a traditional justice mechanism known as the *Fambul Tok*, a community-based approach to dispute resolution rooted in

[465] Bueno N, 'Reconciliation in Mozambique: was it ever achieved?, 475
[466] Igreja V, 'Gamba spirits and the Homines Aperti: 12
[467] Igreja V, 'Gamba spirits and the Homines Aperti: 12
[468] Iliff A, 'Root and Branch: Discourses of 'Tradition' in grassroots transitional justice', *The International Journal of Transitional Justice* 6, (2012), 262
[469] Iliff A, 'Root and Branch: Discourses of 'Tradition' in grassroots transitional justice', 262
[470] Iliff A, 'Root and Branch: Discourses of 'Tradition' in grassroots transitional justice', 262

indigenous practices.[471] Founded in 2008 by Sierra Leonean human rights activist John Caulker, *Fambul Tok* was established to support reconciliation among rural communities affected by the Sierra Leone civil war. It engages traditional and cultural practices to help individuals confront and heal from wartime experiences.[472]

At the heart of the *Fambul Tok* program is the reconciliation bonfire ceremony, which provides a public platform for victims to share their stories and for perpetrators to seek forgiveness for crimes committed during the war.[473] These ceremonies incorporate traditional and religious rituals—including prayers, dancing, and cleansing rites and often involve multiple villages, reinforcing a collective spirit of healing.[474] *Fambul Tok* exemplifies the indigenous traditions underlying restorative justice. It frames harm not only as an interpersonal issue but also as a communal concern, aiming to mend relationships among victims, offenders, and the broader community. The process mirrors other restorative models by beginning with extensive stakeholder consultations, providing preparatory training for reconciliation ceremonies, and promoting community-led dialogue. Symbolic and spiritually meaningful acts are used to mark key stages of the process.[475]

Community participation is done through inclusion of leadership from women, youth and other marginalized groups, with chiefs playing an important role, of traditional leadership.[476] Fambul Tok's strategy is to balance the authority of the chief with a diversity of leadership from other participants like religious leaders, women and the youth.[477]

Central to *Fambul Tok* is the evening bonfire ceremony, which enables victims and offenders to engage in open truth-telling, apology, and forgiveness. These encounters are followed by communal singing and dancing, symbolizing the community's embrace of reconciliation. Such dialogue allows victims to witness offenders' acknowledgment of harm, and offenders to face the consequences of their actions in a humanized, communal setting. As with peacemaking or

[471] Martin L, 'Deconstructing the local in peacebuilding practice: representations and realities of Fambul Tok in Sierra Leone' *Taylor & Francis Journals 42(2),* (2020),
[472] https://www.c-r.org/accord/west-africa-liberia-and-sierra-leone/fambul-tok-reconciling-communities-sierra-leone accessed at 7 April 2025
[473] Cilliers J, Dube O, Siddiqi B, 'Reconciliation in Sierra Leone: Fambul Tok Analysis Plan', (2012),2
[474] Cilliers J, Dube O, Siddiqi B, 'Reconciliation in Sierra Leone: Fambul Tok Analysis Plan', (2012),2
[475] http://www.inquiriesjournal.com/articles/1055/from-retribution-to-restoration-in-sierra-leone-fambul-toks-drive-to-heal-post-civil-communities accessed at 7 April 2025
[476] Iliff A, 'Root and Branch: Discourses of 'Tradition' in grassroots transitional justice', 263
[477] Iliff A, 'Root and Branch: Discourses of 'Tradition' in grassroots transitional justice',265

sentencing circles, the public nature of the ceremony enables the community to judge the sincerity of apologies and hold offenders accountable for restitution.[478]

Fambul Tok also emphasizes community autonomy, cultural regeneration, and non-punitive forms of justice. It creates space for lay participation in truth-telling and is sensitive to localized legacies of the war. *Fambul Tok* strategically incorporates existing traditional authorities to organize and legitimize grassroots transitional justice processes. Where such authorities retain legitimacy, their involvement enhances both the reach and effectiveness of reconciliation efforts, making them vital actors in sustaining community-driven accountability.[479]

Fambul Tok has been praised for providing a structured framework through which communities in Sierra Leone have pursued reconciliation and healing, by offering essential skills and support, both monetary and psychosocial while facilitating a healing process that is largely locally generated.[480] However, despite it being grounded on traditional practices, *Fambul Tok* is not entirely indigenous. As a non-governmental organization (NGO), it functions as an intermediary actor, and thus cannot be considered to be wholly local in origin.

Nevertheless, *Fambul Tok* has consciously sought to avoid replicating the problematic aspects of pre-war 'traditions' by diversifying the consociational authorities it draws upon for legitimacy. Instead of relying solely on chiefs, the program incorporates a broader range of actors, including religious figures, women, and youth leaders. This inclusive approach represents a deliberate attempt to reformulate the traditional authority structures that underpin the program's legitimacy.[481]

3.4 Conclusion

The discussion above has shown that in the pursuit of justice and reconciliation, African countries emerging from conflict face various challenges. The state-based justice mechanisms grapple with challenges such as lack of judicial capacity or legislation to deal with serious international crimes and resource constraints, hindering their ability to address serious international crimes effectively. Furthermore, the difficulty of achieving justice through state prosecution may further divide the community and create enmity between residents.

[478] http://www.inquiriesjournal.com/articles/1055/from-retribution-to-restoration-in-sierra-leone-fambul-toks-drive-to-heal-post-civil-communities accessed at 7 April 2025
[479] Iliff A, 'Root and Branch Discourses of 'Tradition' in grassroots transitional justice', 265
[480] Iliff A, 'Root and Branch Discourses of 'Tradition' in grassroots transitional justice', 271
[481] Iliff A, 'Root and Branch Discourses of 'Tradition' in grassroots transitional justice', 272

In contrast, the discussion has shown that traditional justice mechanisms offer culturally resonant approaches that promote community involvement, truth-telling, and restorative practices. These traditions are deeply rooted in African communities, where they prioritize the restoration of social harmony and the reintegration of offenders into society. As has been shown, the *Gacaca* courts, despite their limitations, facilitated community-based resolutions and promoted healing by involving the locals in the justice process. Similarly, the *Acholi* of Northern Uganda preferred the use of their traditional justice practices in promoting accountability through forgiveness. Both these traditional systems were recognized under 'principles of general application' in the form of an Organic Law in the case of Rwanda and Agreement for accountability, in the case of Uganda, to serve as norms to guide the attainment of justice following conflict.

Also, the discussion has shown that traditional justice systems incorporate both restorative and retributive justice to achieve reconciliation and accountability. The integration of these traditional justice systems within the formal justice system therefore enhances their legitimacy and ensures they promoted access to justice. It is therefore necessary to recognize and incorporate such systems to address the challenges faced by post conflict societies in Africa.

Chapter Four

Bridging the gap for accountability for serious international crimes using traditional justice systems

4.1 Introduction

In Chapter 3, Rwanda, Uganda and Mozambique as countries emerging from conflict pursued traditional justice systems due to political, social, economic and cultural contingencies that made it impossible to fully pursue prosecutions in ensuring there is accountability.[482] The discussion showed that the use of traditional justice systems is possible. This chapter discusses how traditional justice systems that are based on traditions and practices facilitate conflict resolution and promote reconciliation in addressing serious international crimes.

4.2 Practical blend of traditional and retributive justice

Traditional justice systems integrate elements of both restorative and retributive justice systems. The discussion on the *gacaca* courts in Rwanda demonstrates how *gacaca* as a traditional justice system is not a static traditional institution, but rather a hybrid of traditional and modern elements, undergoing an evolution that enabled the courts deliver both retributive and restorative justice.[483] Traditional justice systems also pursues the same objectives as retributive formal justice systems with the difference been that formal justice systems operate within established laws and procedures, while traditional justice systems draw more from customs and traditions.

Despite the emphasis on the restoration of social harmony, there is an accountability component to the employed traditional justice systems.[484] For the communities in Rwanda, Uganda and Mozambique that adopted the use of reconciliation ceremonies, the traditional systems had an element of requiring the offender to acknowledge their guilt in order to be redeemed.[485] In the *gacaca* courts, an accused person had to give a detailed description of the offense and how it was carried out, after which, such a person would be required to issue an apology or be punished, depending on the severity of the acts done.[486] Therefore, though the

[482] Huyse L, 'Introduction: tradition based approaches in peacemaking, transitional justice and reconciliation policies' in Huyse L and Salter M, *Traditional justice and reconciliation after violent conflict*, International Institute for Democracy and Electoral Assistance, Stockholm, (2008),2
[483] Clark P, 'Hybridity, holism and traditional justice', 787
[484] Allen T and Macdonald A, 'Post-Conflict Traditional justice', 11
[485] Allen T and Macdonald A, 'Post-Conflict Traditional justice',11
[486] Article 57, *Organic Law No. 16/2004*

gacaca courts were originally borne out of being traditional courts that were used to promote reconciliation, they eventually became conventional courts, combining restorative features of traditional justice systems and retributive features of the formal criminal justice system. [487] Similarly, among the Acholi people of Northern Uganda, punitive measures were common, depending on the crime and the perpetrator.[488]

This is important within African societies because the majority of the communities are more concerned with the restoration of broken relationships.[489] Restorative justice has its roots in community origins, with the African understanding being not so much to punish, but to redress or restore a balance in a way that is restorative to the dignity of the people.[490] The goals of restorative justice are four-fold; the acceptance of responsibility by offenders, reparation of harm, strengthening the connections of victims and offenders to the community and the promotion of more stable and peaceful communities.[491]

This pinpoints the central element of restorative justice to be the facilitation of dialogue and reconciliation among victims, offenders and community operating under three principles; responsibility, restoration and reintegration.[492] Further, the underlying rationale for restorative justice focuses on the establishment of truth rather than individual liability.[493]

Among the Acholi people of northern Uganda practising Acholi traditional justice, restitution and reconciliation are important factors as they are considered crucial in restoring harm done to a victim. This was also evident among the people of Mozambique who invoked the use of the *magamba* spirits to promote accountability and reconciliation.The international community can also adopt the concept of restorative accountability applied by traditional justice systems in delivering restorative justice which emphasizes on the need for the perpetrator of a crime in a conflict to acknowledge and repair the harm they caused.[494] This approach not only holds perpetrators accountable, but also promotes healing and reduces the likelihood of the

[487] Haile D, 'Rwanda's Experiment in People's Courts (gacaca) and the Tragedy of Unexamined Humanitarianism: a normative/ethical perspective', Institute of Development Policy, Discussion Papers, Universiteit Antwerpen, (2008), 34

[488] Allen T and Macdonald A, 'Post-Conflict Traditional justice',11

[489]Mekonnen D, 'Indigenous legal tradition as a supplement to African transitional justice initiatives', 108

[490] Mekonnen D, 'Indigenous legal tradition as a supplement to African transitional justice initiatives',108, 109

[491] Mekonnen D, 'Indigenous legal tradition as a supplement to African transitional justice initiatives',109

[492] Mekonnen D, 'Indigenous legal tradition as a supplement to African transitional justice initiatives',109

[493] Mekonnen D, 'Indigenous legal tradition as a supplement to African transitional justice initiatives',110

[494] Baderin M, 'International criminal justice and accountability in Africa: Balancing legal idealism and legal realism' in Manjoo R, Mystris D and Baderin M, *Criminal Justice and Accountability in Africa*, Pretoria University Press South Africa (2022), 29

perpetrator committing an offence again, therefore addressing the underlying causes of such behavior.

The discussions on the *mato oput* and *gacaca* also shows that these traditional justice systems operated on full acceptance of a perpetrator's responsibility for the crimes committed.[495] Redemption was predicated on this voluntary admission of wrongdoing and the acceptance of responsibility. The *magamba* spirits when used in Mozambique demanded that the possessed person had to acknowledge any past wrongs done. The *gacaca* courts were established with the aim of expediting justice for persons who committed genocide. For accused persons appearing before the *Inyangamugayo* judges, they were required to give a detailed and accurate description of the crime and events in question, name all co-perpetrators and apologize for the crimes they committed.[496] These requirements further contributed to ensuring that uncover the truth on what happened during the genocide and therefore contributing to truth telling.

As such, this sense of accountability shows that traditional justice systems demand for individual criminal responsibility where persons are held accountable for crimes committed. This is in line with the duty under international criminal law to investigate and prosecute serious crimes by holding persons accountable for the offences committed showing that informal systems can be used under international criminal justice to meet its objectives.

4.3 Ability of traditional justice systems to adapt to political, social and cultural circumstances

The discussion in Chapter 3 demonstrates the uniqueness of traditional justice systems in how they can evolve and adapt to changing circumstances leading to revalued traditional justice systems and in turn function in line with the socio-cultural habitat of the population.[497]

African communities have historically governed themselves using systems that are distinct from the Western approach.[498] These communities have their own practices, customs, institutions including justice systems, which help maintain their social and political order that governs their relationships and meant to keep the society together.[499]

[495] Huyse L, 'Introduction: tradition based approaches in peacemaking, transitional justice and reconciliation policies' 12
[496] Kirkby C, 'Rwanda's Gacaca Courts: A preliminary critique', 50(2) *Journal of African Law*, (2006), 94-117
[497] Mekonnen D, 'Indigenous legal tradition as a supplement to African transitional justice initiatives',115
[498] Szpak A, Indigenous and Tribal Mechanisms of Transitional justice: Filling the gaps in formal justice systems?' in Manjoo R, Mystris D and Baderin M, *Criminal Justice and Accountability in Africa*, Pretoria University Press South Africa (2022), 43
[499] Szpak A, 'Indigenous and Tribal Mechanisms of Transitional justice', 43

Importantly, these practices are not static; they evolve and adapt to changing political, social and cultural circumstances to address contemporary and emerging challenges.[500] *Kariuki* argues that practices considered traditional can be codified into law, particularly when they are based on and derived from longstanding traditions. [501] This evolution leads to the emergence of what can be termed modern tradition, illustrating how traditional justice systems can be used to respond to current circumstances. [502]

A notable example of this evolution is the *gacaca* courts. The pre-genocide *gacaca* courts were based on the *gacaca* tradition of 'justice in the roots' where members of the *gacaca* sat on the grass to adjudicate disputes before them.[503] The *gacaca* courts that were used after the genocide, though based on gacaca traditions, were modernized by the Rwandan government and given jurisdiction to try the perpetrators of genocide and crimes against humanity within an enacted and sanctioned law.[504] Having passed the Organic Law on the Organisation of Prosecution for offences constituting crimes against humanity, Rwanda was able to ensure that the Gacaca courts, although based on traditional justice norms, were able to conduct hearings to prosecute genocide as a serious international crime under a law that provides the procedure as to how the *gacaca* courts would operate.

The courts therefore draw their unique strength from its combination of indigenousness and state involvement, because although it has been co-opted and altered by the Rwandan government, they retained their traditional roots and communal style, allowing the Rwandan people to retain a sense of ownership and comfort.[505]

Traditional justice systems can therefore be adapted and strengthened by establishing them within a legal framework that allows them to address serious international crimes. Countries emerging from conflict can learn from this and see how traditions practised within various communities can be adapted and modernized to address serious international crimes.

[500] Szpak A, 'Indigenous and Tribal Mechanisms of Transitional justice', 45
[501] Kariuki F, Community, Customary and Traditional Justice Systems in Kenya', 12
[502] Kariuki F, Community, Customary and Traditional Justice Systems in Kenya', 123
[503] Sarkin J, 'The tension between Justice and Reconciliation in Rwanda: Politics, Human rights, Due process and the Role of the Gacaca courts in dealing with Genocide', 45 *Journal of African Law* 2, (2001), 159
[504] Article 1, *Organic Law No. 16/2004*
[505] Wierzynski, A, 'Consolidating democracy through transitional justice: Rwanda's gacaca courts' *New York University Law Review* 79(5), (2004), 1958

4.4 The use of reconciliation as a traditional justice resolution mechanism to ensure there is accountability for serious international crimes

Traditional justice systems consider conflict under different contexts, and manage the conflicts through appropriate methods. For most traditional justice systems, reconciliation is the most significant aspect of conflict management, because it is an end product of mediation. Mediation is a process of conflict management where conflicting parties gather to find solutions to a conflict, with the guidance of a third party who facilitates the discussions and aids parties to reach into an agreement.[506] Once a solution is found and the parties to a dispute forgive each other, peace and harmony are restored, which is the essence of reconciliation.

The international community and countries emerging from conflict can draw lessons on how traditional justice systems promote reconciliation and truth telling. *Gacaca*, *mato oput* and the *magamba* spirits *and Fambul Tok* all placed more emphasis on reconciliation as the main mechanism of ensuring there is accountability for the serious international crimes committed. Reconciliation remained central and operated as the more common objective. *Clark* notes that reconciliation involves rebuilding fractured individual and communal relationships after conflict, to encourage meaningful interaction and cooperation among antagonists[507]. In that regard, reconciliation refers to the process that involves '*rebuilding fractured individual and communal relationships after conflict, with a view towards encouraging meaningful interaction and cooperation among former antagonists'*[508].*Mato oput* was predicated on acceptance of one's responsibility for the crimes committed, while *magamba* spirits involved acknowledgment of guilt by the offender. Similarly, Gacaca courts also aimed for the restoration of harmony as one of its goal.[509]

This demonstrates that reconciliation can be achieved where serious international crimes have been committed through traditional justice systems. Despite the different characteristics of traditional justice systems in their cultural application, the common theme and primary focus for all is reconciliation. This is what differentiates traditional justice systems from formal

[506] Muigua K, 'Promoting justice and reconciliation through mediation and alternative justice systems' at https://kmco.co.ke/wp-content/uploads/2024/09/Promoting-Justice-and-Reconciliation-through-Mediation-and-Alternative-Justice-Systems.pdf on 6 March 2025
[507] Clark P, 'Hybridity, holism and traditional justice', 770
[508] Clark P, 'Hybridity, holism and traditional justice', 770
[509] Huyse L, 'Introduction: tradition based approaches in peacemaking, transitional justice and reconciliation policies' 12

judicial systems in that they seek to preserve social harmony in order to facilitate reconciliation and eventually, judgment passed that is favourable to community members.[510]

4.5 Victim centered approach for justice through community participation

Traditional justice systems have a communal dimension on how they address conflict, as concepts of guilt, punishment, victimhood and reparation are often viewed collectively in most African societies. This makes the process community based.[511] The aspect of resolving conflicts communally is important in addressing serious international crimes because when the community is actively involved, the accountability process for perpetrators of serious crimes becomes more credible. The community plays an active role in resolving disputes, serving as a local mechanism for healing and conflict resolution that is both affordable and accessible.[512] Typically, when traditional justice systems are implemented, members of the society tend to have some degree of confidence in the system because they can observe judges and community members resolving disputes in close proximity to where they live.[513] The Rwandan government retained the traditional characteristics that defined the *gacaca* courts which included requiring members of society to testify and to participate in hearings showing the courts were community based.[514]

In determining disputes and resolving conflicts using traditions, judges and leaders do so on the basis of cultural norms and societal values which are known and understood by the community, therefore creating home grown legitimacy which is accorded to such judgments.[515] This legitimacy is hinged on social cohesion, harmony, transparency, participation, respect and tolerance, an attribute that contrasts to the use of international courts and tribunals, which by being adversarial in nature, fails to encourage participation of the communities in the trial process.[516]

Other ways in which traditional justice systems promote community participation is through the *use of local languages* whereby the language used in is local and familiar to the persons living in that community. This is in contrast to formal retributive systems which use the official

[510] *Human Rights and Traditional Justice Systems in Africa,* UNHCR Doc HR/PUB/16/2
[511] Huyse L, 'Introduction: Tradition-based approaches in peacemaking, transitional justice and reconciliation policies', 13
[512] Sarkin J, 'The tension between Justice and Reconciliation in Rwanda, 159
[513] Sarkin J, 'The tension between Justice and Reconciliation in Rwanda, 159
[514] Wierzynska A, 'Consolidating democracy through transitional justice: Rwanda's Gacaca courts', 79(5) *New York University Law Review* (2004), 1934-1970
[515] Oyeniyi A, 'Conflict resolution in the extractives, 71
[516] Oyeniyi A, 'Conflict resolution in the extractives, 71

language of the state, which in most times, tends not to be the language used by all persons who mainly live in the rural communities[517]. Also, most traditional justice systems are located in rural villages that tend to be *geographically accessible* to them, as opposed to formal retributive justice systems that are mostly located in capital cities of a state, or even regional capitals. They thus tend to be geographically remote from people living in rural areas[518].

Traditional justice systems also tend to carry out their proceedings in a manner that is more familiar and easily understood by the members of a community, hence culturally relevant to the community. In that regard, they are better placed to fit to the needs of members of the community by meeting and fitting the priorities of a community and adapt to address the local conflicts in a community as opposed to formal judiciary systems that tend to have formal legal proceedings which tend to be more complicated[519].

4.6 Principles that form the foundation of traditional justice systems

Although traditional justice systems differ across communities, they share common principles. First, conflict resolution is rooted in social and cultural values, norms and beliefs that are widely recognized and accepted by the community. This enhances their legitimacy and ensures there is a high level of compliance with decisions.[520]

Secondly, there is a strong emphasis on truth, along with a belief in ancestral powers, superstitions, charms and sorcery which play a significant role in resolving conflicts and preventing disputes in traditional African societies.[521] Truth telling is an integral part of traditional justice systems. For the Acholi of Uganda, one of the objectives of the Acholi traditions was to establish a common view of the conflict in Northern Uganda. The specifity of the *mato oput* ceremony through the use of ritualistic procedures- stepping on an egg, drinking bitter roots- were all pursued to tell the truth and restore broken relationships. Similarly, truth seeking through public ritual narratives was important in Mozambique where through the use of *magamba* spirits, perpetrators and victims were afforded an opportunity to engage with the past.

[517] Alie J, 'Traditional Justice and Human Rights in Post-war African countries', 101

[518] Alie J, 'Traditional Justice and Human Rights in Post-war African countries' 101

[519] Alie J, 'Traditional Justice and Human Rights in Post-war African countries' 101

[520] Kariuki F, 'African traditional justice systems', accessed at https://kmco.co.ke/wp-content/uploads/2018/08/African-Traditional-Justice-Systems.pdf on 7 March 2025

[521] Kariuki F, 'African traditional justice systems',6

Third, African highly value respect for elders, ancestors and community members as this is deeply embedded within their customs, traditions, taboos and social norms.[522] Among the Acholi people, traditional leaders/elders in keeping with their cultural roles, provided guidance to the community and were significant actors in the pursuit if peace in northern Uganda.[523] The intercession of elders brings two sides together, leading to the acceptance of responsilbity and indication of repentance.[524]

Fourth, the communal spirit of sharing and reciprocity plays a vital role in African societies as it promotes mutual exchanges of privileges, goods, favors, and obligations, thereby fostering peaceful coexistence. This collective approach minimizes the likelihood of disputes and conflicts, strengthens relationships, and nurtures a sense of unity. Since conflicts have the potential to disrupt the social fabric, African cultural norms and values are designed to prevent them and ensure that, when they do arise, they are resolved amicably. For the Acholi people of northern Uganda, when performing the *mato oput* traditional ceremony, traditional elders acting as conciliators were present during the reconciliation ceremony where the next of kin of the victim provides a goat that is handed over to the perpetrator.[525] This ritual was done to make good the damage caused by the perpetrator who killed the victim hence restoring social harmony.

From the above discussion, the key principles that guide traditional justice systems in conflict resolution include social cohesion, harmony, transparency, participation, peaceful coexistence, respect, tolerance, and humility.[526] Nearly all African communities uphold these values, which explains why traditional Justice Systems emphasize reconciliation and social justice.[527] This stands in sharp contrast to Western dispute resolution models like litigation and arbitration, which tend to be individualistic and adversarial.[528]

4.7 Challenges and limitations of using traditional justice mechanisms to bridge the accountability gap

Despite traditional justice systems playing a role in ensuring there is accountability for serious crimes, there are still challenges encountered in ensuring the effectiveness and legitimacy of

[522] Kariuki F, 'African traditional justice systems',6
[523] Latigo O J, 'Northern Uganda: tradition-based practices in the Acholi region',97
[524] Latigo O J, 'Northern Uganda: tradition-based practices in the Acholi region',107
[525] Latigo O J, 'Northern Uganda: tradition-based practices in the Acholi region',104, 105
[526] Kariuki F, 'African traditional justice systems',7
[527] Kariuki F, 'African traditional justice systems',7
[528] Kariuki F, 'African traditional justice systems',7

these justice systems.[529] The effectiveness of traditional justice systems is determined based on whether these systems have a wide reach when determining the scope of their application. Several circumstances limit the scope of traditional systems of justice.

First, traditional justice systems are limited in their scope and applicability. This is because they are confined to specific cultural, ethnic or regional communities. As a result, this restricts their reach, making it difficult to address crimes involving multiple communities of groups or those conflicts that cross regional and international boundaries. For instance, in northern Uganda, the Acholi community have succeeded in using its own cultural heritage to cope with the legacy of widespread bloodshed. But war crimes have often been committed between Acholi and Langi people and between people of the north and of the south of Uganda. In those cases, some of the victims or perpetrators are out of reach of the Acholi *mato oput* ceremony.

Second, they are susceptible to political manipulation in that traditional justice practises can be exploited for political purposes, potentially shielding certain perpetrators, particularly high-ranking members of society and even the military from accountability.

Third, the impact of conflict on traditional justice systems can severely undermine the capacity of these systems to deliver justice. The case studies discussed in Chapter 3 have demonstrated convincingly how war, genocide and oppression have a devastating effect on the capacities of traditional leaders to deliver justice and promote reconciliation through rituals for serious international crimes. This development also casts doubts on their ability to adapt the original design of the mechanisms to the intricate task of dealing with mass human rights violations.

Fifth and perhaps the biggest criticism against traditional justice systems is their lack of upholding international human rights such as following the due process of the law, the right to a fair trial which encompasses the right to be tried by a competent, impartial and independent tribunal, the right to have legal representation, participation of victims in proceedings as well as presumption of innocence for the accused persons.[530] This is majorly because traditional justice mechanisms employ standard practices used by members of a community and handed down from generation to generation as demonstrated by the Acholi people and the Mozambique

[529] Huyse L, 'Conclusions and recommendations' in Huyse L and Salter M, *Traditional justice and reconciliation after violent conflict*, International Institute for Democracy and Electoral Assistance, Stockholm, (2008),188
[530] Sullo P, 'Beyond Genocide: Transitional justice and Gacaca courts in Rwanda', 20 *International Criminal Justice Series*, (2018), 159-183

people of *Gorongosa* district. On the other hand, formal judicial systems use the standards that are recognized in international law and observed by states in ensuring there is justice.

However, a discussion on the processes used for example by the Acholi people and the use of the *magamba* spirits by the Mozambique community, as well as the *gacaca* courts has demonstrated that even though these mechanisms do not have rights that are spelt out, they nevertheless recognize individual rights i.e political, social, economic and cultural rights, which is seeing by the need for perpetrators to admit guilt, take responsibility for their crimes, and to request for forgiveness from the victim's family or even the community, and later pay reparations.[531]

While by and large these systems do comply with the requirement of due process and full public hearing, they may infringe on the requirements of judicial competence, independence, and impartiality[532]. The *gacaca* courts received criticism for the lack of basic training offered to the judges to affirm their independence and impartiality, which made the judges susceptible to judicial bias and corruption.[533] The lack of accused persons having a defense counsel also raised fears of false convictions since the maximum penalty issued under the *gacaca* courts was 30 years. However, given the sheer large number of persons appearing before the Gacaca courts, it becomes hard to guarantee counsel for all the accused persons appearing before the court, considering that a majority of the legal professionals in Rwanda lost their lives in the genocide.

The undoing of these systems is therefore their failure to make a distinction of individual rights, by ignoring the rights of vulnerable groups like women (especially women who have been victims at the hands of perpetrators and suffered violent sexual abuse) children, disabled and the elderly people. Traditional justice systems have also been criticized for failing to look into violations such as rape or forced marriages thereby forcing victims of these crimes to seek redress elsewhere. Such practices are what makes traditional justice systems to be deemed to fail to apply the minimum standards recognized universally to deal with serious international crimes.

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[531] Approaching National Reconciliation in Uganda, Perspectives on Applicable justice systems at https://land.igad.int/index.php/documents-1/countries/uganda/conflict-7/1172-approaching-national-reconciliation-in-uganda-perspectives-on-applicable-justice-systems/file on 24 April 2024

[532] Bennet T, ZTSz'W12 Access to Justice and Human Rights in the Traditional Courts of Sub-Saharan Africa in Bennet T, Brems E, Corrad G, Nijzink L and Schotsmans M (eds.) *African Perspectives on Tradition and Justice*, Intersentia, 2012, 26

[533] Kirkby C, 'Rwanda's Gacaca Courts: A preliminary critique'109

Nevertheless, the case study of *gacaca* courts in Rwanda demonstrates how the limitations of traditional justice systems can be navigated through the establishment of a clear legal framework. Rwanda enacted Organic Law No. 40/2000 setting up the *gacaca* courts as a legal framework that provided a statutory basis that defined the scope of crimes to be prosecuted. To further enhance their effectiveness, Rwanda revised its Organic Law 40/2000 through Organic Law 16/2004 [534] to broaden the jurisdiction of the *gacaca* courts to include a broader category of perpetrators including the planners and organizers of genocide. Though *gacaca* courts were grounded on traditions, following enactment of the Organic Law, the *gacaca* courts were formalized through legislation to complement the ICTR and national courts in prosecuting serious international crimes. By embedding *gacaca* within a legal framework, Rwanda was able to clarify the jurisdiction and competence of the *gacaca* courts, therefore ensuring there was no ambiguity on their operation and reinforced their legitimacy as a traditional justice system that contributed meaningfully to ensuring there is accountability for serious international crimes.

In Uganda, the government through the Juba Agreement formally recognized the Acholi traditional justice system. This move was a significant step towards integrating Acholi customs into a national legal framework, thereby affirming the importance of legal recognition in the application of traditional justice mechanisms. This recognition demonstrates that for traditional justice systems to effectively contribute to accountability for serious international crimes, the foundational step must be their formal acknowledgment within a country's legal and policy architecture.

Furthermore, though traditional justice systems differ across communities and cultures, their underlying typology remains the same. Mechanisms such as Rwanda's *gacaca* courts, Uganda's *Mato oput* ceremonies, Mozambique's invocation of the *magamba* spirits and Sierra Leone's *Fambul Tok* are all grounded in customs and traditions that emphasize community participation. Typically, parties to a dispute who include victims, offenders and their families would appear before village elders, chiefs or traditional judges to address the harms resulting from the commission of serious international crimes. Also, central to these traditional justice systems is that reconciliation is not a secondary outcome, but an integral and the final phase in ensuring there is accountability for serious international crimes. The parties were reconciled through various customary rites, such as the symbolic act of 'stepping on the egg,' in the Mato

[534] Organic Law No. 16/2004 of 19th June 2004

oput ceremony, or the ritual return of the *gamba* spirit among the Mozambique communities showing communal efforts to restore balance and justice. These rituals demonstarte a shared belief that crimes of such gravity disrupt the moral and social order of the entire community. Therefore, the response is collective, emphasizing restorative justice and social harmony. In this sense, traditional justice systems offer a culturally grounded path to accountability through reconciliation, affirming that healing and justice are inseparable in the aftermath of mass atrocities.

In addition to the above, the legal framework within which the *gacaca* courts of Rwanda operated significant in navigating the diversity of community customs. The enactment of Organic Law No. 40/2000, and its subsequent revisions, provided a formal structure for the organization, jurisdiction, and functioning of the *Gacaca* courts as a traditional justice system. This framework included key guiding principles that ensured consistency, legitimacy, and inclusivity across Rwanda's varied localities. By embedding traditional mechanisms within a national legal framework, Rwanda was able to clarify the applicability and scope of traditional justice, aligning customary practices with broader principles of justice and accountability. This approach demonstrates that, where traditional justice systems operate within a clearly articulated legal structure, it becomes easier to harmonize customary practices with the demands of post-conflict accountability, even in culturally diverse contexts.

This suggests that when traditional justice systems are integrated within a legal framework, they can more effectively complement formal justice systems. A well designed legal framework can accommodate cultural and religious diversity by formally recognizing the legitimacy of various traditional justice systems, whether rooted in clan customs, tribal law or religious principles such as Islamic traditions. Rather than impose uniformity, such a framework would enable context-specific application, while ensuring adherence to universal legal and human rights standards. In doing so, it addresses the challenge of general applicability by promoting inclusivity.

The existence of a legal framework also plays a crucial role in mitigating the limitations on the failure of traditional justice systems to align with international human rights standards. In Rwanda, Organic Law 40/2000 not only established the jurisdiction and organization of *Gacaca* courts, but also explicitly outlines the rights of accused persons throughout the proceedings. This includes the right to be heard, the right to a defense, and the right to appeal decisions. Furthermore, the law provides for the election of women who are included to seat in

the cell of a *gacaca* court showing gender inclusivity and community represenation.[535] Also, by requiring *gacaca* judges to uphold the rights of the accused during proceedings, the presence the Organic Law as a legal framework demonstrates how traditional justice systems can be legitimized through the integration of human rights standards, increasing their effectiveness and credibility in addressing serious international crimes.

4.8 Conclusion

The discussion above on the key lessons learnt from case studies on the *gacaca* courts in Rwanda, *mato oput* in Uganda, and *magamba* in Mozambique has shown that traditional justice systems offer valuable insights into achieving accountability for serious international crimes. African communities emerging from conflict prefer the use of traditional methods to handle conflicts, rather than fully relying on judicial systems of justice.

First, traditional justice systems are deeply rooted in local customs and practices, therefore ensuring that justice processes resonate with community values. In turn, this cultural alignment fosters acceptance and community participation from the members. Traditional justice systems therefore provide a cultural remedy that is quick, affordable and easily accessible. Second traditional justice systems focus on restorative justice, emphasizing reconciliation and restoration of social harmony.

Third, the use of these systems to address crimes committed after conflict shows that African countries have used their traditional justice systems to address serious crimes. This is per the requirement of ensuring there is accountability for international crimes and ending impunity. However, to achieve justice, the same must be construed to be done in a holistic and integral manner by embracing traditional justice systems that pursue restorative justice as a complementary approach to formal judicial justice systems that pursue retributive justice.

The discussion in this Chapter has also demonstrated that for a majority of Africans living in post conflict societies and communities, traditional justice systems provide a cultural remedy that is quick, affordable and easily accessible. This shows that the use of traditional and/or customary systems as justice systems is not something that can be extinguished. The solution therefore lies in assessing these systems and identifying how they can be used to ensure there is accountability for perpetrators of serious international crimes.

[535] Article 11, Organic Law No. 40/2000

However, challenges persist in how traditional justice systems can be integrated to address serious international crimes, but nevertheless, their role is still essential in the fight against humanity. The discussion has nevertheless demonstrated that traditional justice systems can effectively overcome key limitations by formalizing their structure thus enhancing their legitimacy and accountability. Furthermore, when grounded in law, traditional justice systems can address serious international crimes, while remaining rooted in community values and reconciliation.

Chapter Five

Findings, Recommendations and Conclusion

5.1 Introduction

This chapter outlines key findings, provides recommendations and concludes the study on whether traditional justice systems can be used to bridge the gap for accountability for serious international crimes.

Having analyzed the strengths and limitations of both systems under chapters 2 and 3 of this research, this study has identified the key challenges that hinder the realization of accountability for serious international crimes in Africa. This chapter seeks to answer the research questions as enumerated in Chapter 1 as well as recommend specific approaches that if implemented, allows States recovering from conflict in Africa to harness the benefits that come with using mechanisms that offer both retributive and restorative justice in ensuring there is accountability for serious international crimes. The recommendations are mainly drawn from the discussion on the strengths and weaknesses of each system as discussed under Chapters 2 and 3 as well as key lessons discussed in chapter 4.

In addressing the questions set out in the study, findings have been arrived based on the questions. The recommendations are drawn from the key lessons discussed in chapter 4. The study findings are discussed as below:

5.2 Key findings

5.2.1 The existing international and national mechanisms employed to prosecute serious international crimes have limitations that hinder them from delivering full accountability for such crimes

In the literature review of the study and while discussing formal judicial systems under chapter 2, it emerged that formal judicial mechanisms that adopt and employ retributive justice to prosecute serious international crimes in Africa have largely been the creation of the international community. However, even after the establishment of international tribunals like the ICTR in Rwanda, the SCSL in Sierra Leone and eventually the creation of the ICC as a permanent international criminal court, there remains a battle between ideals and reality in pursuing international criminal justice in Africa, with the ideal being full accountability and delivering justice but the reality being criticisms against their effectiveness as mechanisms for delivering justice. These formal justice mechanisms are plagued with limitations in their

enforcement mostly attributed to them being excessively formalistic and burdened with technical rules of procedure and evidence. Some of the reasons for these limitations can also be attributed to the failure of the international criminal justice community to examine how accountability mechanisms are best implemented in Africa.

5.2.2 Failure of States to domesticate the Rome Statute hinders their ability to prosecute serious international crimes domestically

The discussion in chapter 2 shows that despite States ratifying the Rome Statute creating the ICC and becoming member states, the majority of States within Africa have yet to domesticate the Rome Statute to enable the courts enforce serious international crimes domestically. The Rome Statute encourages domestic prosecution of serious international crimes at the national level by giving member states an opportunity to redress crimes committed within the framework of their own domestic legal systems before the same can be done at the ICC.[536] The requirement to exhaust local remedies reaffirms the notion of complementarity as provided for in the Rome Statute which gives primacy of jurisdiction of serious international crimes to domestic trials.[537]

5.2.3 The necessity for the use of traditional justice systems due to limitations of international and national mechanisms to address accountability

The study has established that due to the limitations faced by retributive justice mechanisms in achieving justice and accountability through prosecuting serious international crimes, African communities in Rwanda, Uganda, and Mozambique turned to the use of traditional justice mechanisms to deal with conflicts, with the main aim being to promote reconciliation. As noted in chapter 3, African communities have their own traditions that were in use even before colonization because they reflect their local traditions and values. The analysis in chapter 3 revealed that traditional justice systems were used after conflict and these systems imposed a duty on the society to ensure that there was accountability for serious crimes committed during the conflict.

5.2.4 Acknowledgement of the role of traditional justice systems

Key to the success of the use of traditional justice systems in African societies is the recognition of the role they play in the fight against impunity for serious international crimes. As discussed

[536] The Preamble, *Rome Statute*
[537] Article 17, *Rome Statute*

in chapter 3 of the study, the key to why traditional justice systems were used in the three case studies was because the governments of Rwanda, Uganda and Mozambique acknowledged the role traditional justice systems play in the delivery of justice within its communities. It is important that traditional justice systems are recognized because they have in their nature the capacity to discuss the causes of conflict and promote reconciliation and healing to achieve restorative justice.

5.2.5 Key findings on how traditional justice systems can bridge the gap for accountability

Chapter 4 of the study discussed the effectiveness and extent to which traditional justice systems can bridge the gap for accountability for serious international crimes. In answering the question as to whether traditional justice systems have the capacity to address serious international crimes, the study finds that the international community can learn key lessons from the various traditional justice systems applied in post-conflict countries in Africa to address serious international crimes.

First, the study finds that traditional justice systems play a role in ensuring there is accountability for serious international crimes due to their unique features that promote reconciliation as well as deliver deterrence in the form of punishments for perpetrators of serious international crimes.

Second, the study finds that traditional justice systems are not static and in that they evolve and adapt to changing political, social and cultural practices. Traditional justice systems are based on traditions that can be altered and reshaped to address current needs of the society. For instance, the *gacaca* courts were altered and reshaped by the Rwandan government as a response to prosecuting persons responsible for committing genocide

Third, the study finds that though that though traditional justice systems have common features, they cannot be uniformly applied in all African societies. The study observes that traditional justice systems used in Rwanda, Mozambique and Uganda were applied differently within their various communities.

Fourth, the study has established complementary as a path to ensuring there is accountability by integrating restorative justice systems and retributive justice systems. For the longest time, international criminal law presented the concept of justice that accountability for serious crimes was through prosecution of perpetrators of serious crimes through the mechanisms discussed in chapter 2. However, the discussion in Chapter 3 has shown that traditional justice systems

that offer restorative justice have the capacity to handle serious international crimes given their nature and procedures that promote truth telling, healing and reconciliation. In reality, formal judicial systems and traditional justice systems pursue similar objectives, albeit to different degrees, with the biggest difference been in procedures employed to attain the objectives of each system, as opposed to substance.

Fifth, the study finds that traditional justice systems are limited in the extent to which they are effective in addressing accountability for serious international crimes. The study further observes that various factors such as limitation in their scope and applicability, susceptibility to political manipulation and their lack of upholding international human rights processes hinder their effectiveness in addressing the limitations of retributive justice mechanisms.

Finally, the study finds that traditional justice systems are easily accessible to local and rural communities as their proceedings are conducted in the local language, held within close proximity, and follow simple procedures that do not require legal representation. Additionally, they avoid the delays typically associated with formal judicial mechanisms. In most cases, the form of justice they provide—focused on reconciliation, reparation, restoration, and rehabilitation—is more suitable for close-knit communities, where maintaining social and economic cooperation among neighbors is essential.

5.3 Recommendations

5.3.1 The need for a traditional justice systems framework and/or Policy to govern the use of traditional justice systems to prosecute serious international crimes

Once African states enact domestic legislation to try serious international crimes, then the next step is to come up with a Framework or policy to be used by the national courts when prosecuting serious international crimes. Such a framework is developed within the scope of legal pluralism that allows the existence and operation of more than one legal system in a State. The framework developed for traditional justice systems should be a 'fit for purpose' meaning that it should be context specific when it comes to responding to the use of traditional justice systems to address serious international crimes, as opposed to being standard in its approach. This means that it should be realistic in its approach and scalable to ensure the main stakeholders in the justice sector of a State being the judiciary and the prosecution are able to use it while handling serious international crimes.

The framework will detail the importance of the two justice systems complementing each other and also provide for the procedures governing the use of traditional justice systems that allow the upholding of the international human rights principles on the right to a fair trial including the right to be heard, the right to legal representation, presumption of innocence and the right to appeal decisions.

The policy and/or framework should be one that focuses not only on retributive justice but also looks at justice as a wider concept. The policy should link reconciliation, accountability and responsibility by acknowledging the use of traditional justice systems by communities. while also embracing the characteristics of traditional justice systems of acknowledging responsibility, showing remorse, asking for forgiveness, reparations and reconciliation.

5.3.2 Need for capacity building of the traditional justice system framework

To ensure traditional justice systems are able to address serious international crimes, there is a need to ensure that all persons pursuing justice using traditional justice systems are able to have their cases determined within this justice system. This is one of the ways in which access to justice for all is delivered. This therefore means all actors in traditional justice systems such as traditional community leaders are trained to uphold the international principles of human rights and human rights practices. They should also be trained on how to build their skills in adjudicating such disputes just as formal courts by learning skills such as proper evidence taking, documentation and filing. Furthermore, they should also be trained on the importance of upholding the rule of law.

5.3.3 Need for existing justice mechanisms to improve their outreach programs

There is a need for international courts such as the ICC to increase their outreach programs, especially to the victims of international crimes, so that they are aware of their rights and also ability to know how best to access justice to ensure that justice is seeing to be done. Outreach programs also play a crucial role in ensuring that society holistically understands what role a justice mechanism plays and that members of the society which also includes victims, also have access to information on what is happening with the court.

5.3.4 Capacity strengthening

This study affirms that international criminal justice is multifaceted and there is need to embrace both retributive and restorative justice systems. More specifically, there is need for African states to utilize both systems as part of capacity strengthening. Capacity strengthening

is particularly important because it ensures that where one system is weak, then another system can supplement its weaknesses with its strengths. Rwanda's use of the *gacaca* courts, the ICTR and the national courts to prosecute the crime of genocide has shown how the limitations of one system can be addressed by another if they all work together. The discussion in chapters 2 and 3 has shown that pursuing accountability for prosecutions only and punitive measures does not guarantee justice. The limitations of each system permit one to turn to the other where one has not succeeded or would be inappropriate. Chapter 3 also demonstrated that traditional justice systems have been viewed as more of a 'supplementary' mechanism of justice as opposed to an equivalent form of justice to formal justice mechanisms. The combination of both strengths of retributive and restorative justice systems therefore present an opportunity for intrinsic African justice.

5.4 Conclusion

The study analyzed whether traditional justice systems in Africa can be used to bridge the gap for accountability in Africa. The study sought to answer the question of whether traditional justice systems have the capacity to handle serious international crimes by considering the effectiveness and extent to which traditional justice systems can be used to ensure there is accountability for serious international crimes. The objectives of the study were to; examine the existing justice mechanisms employed in handling serious international crimes, to explore the role of traditional justice systems applied in post-conflict countries in Africa by analyzing selected case studies, and to examine how traditional justice systems can bridge the gap for accountability and identify key lessons for the international community. By setting out to answer these questions, the study hypothesized that to effectively ensure there is accountability in Africa's international criminal justice, retributive and restorative justice systems should work in a complementary manner to ensure there is justice. The study proceeded to answer the questions of the study through analysis and review of the literature in prosecution of serious international crimes. The study made findings and recommendations, which are the subject of this chapter. Each objective was examined in separate chapters of the study and conclusions were drawn.

Chapter 2 of the study provides an analysis of the existing justice mechanisms employed in Africa. It concludes that due to the retributive nature of these mechanisms that only pursue prosecution and deterrence, they have been unable to ensure there is full accountability, hindered by their limitations, hence the need for a more holistic approach to justice.

Chapter three of the study explores the role of traditional justice mechanisms applied in post-conflict countries in Africa. To achieve this objective, the chapter analyses select case studies of applied traditional justice systems in Rwanda, Uganda and Mozambique. The three traditional justice systems considered are the gacaca courts of Rwanda, Acholi traditional justice systems in Uganda and the use of communal courts and *magamba* spirits in Mozambique. The study appreciates the role played by these traditional justice systems and concludes they offer culturally resonant approaches that promote community involvement, truth telling and offer restorative justice. The study established that traditional justice systems are also preferred because they incorporate both restorative and retributive justice to achieve reconciliation and accountability.

Chapter 4 focuses on how the traditional justice systems used in Africa bridge the gap for accountability for serious international crimes. The study appreciates that traditional justice systems have unique features that grant them ability to adapt to various circumstances which strengthens them to address serious international crimes. The study nevertheless notes that traditional systems also face challenges and limitations that limit their scope and applicability. The study however points out that for majority of African communities, traditional justice systems provide a remedy that is quick, affordable and easily accessible.

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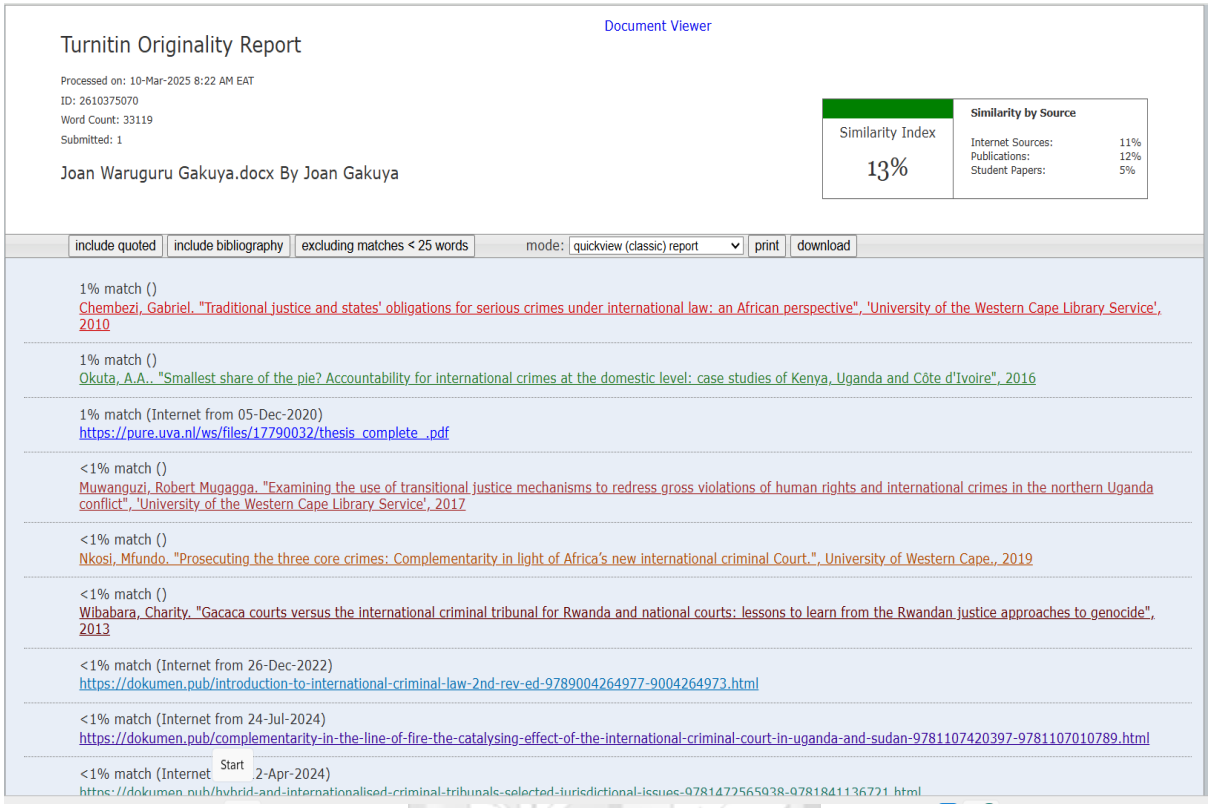
Appendices

Appendix A: Similarity Report



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Appendix B: Amended Ethical Clearance Confirmation

Strathmore UNIVERSITY

14th March 2025

Ms Joan Gakuya,
joan.gakuya@strathmore.edu

Dear Ms Gakuya,

REF: SU-ISERC2708/25 (*AMENDMENT*) PROPOSAL **"Re: Bridging the gap for accountability for serious international crimes using traditional justice systems in Africa"**

I refer to your application for the approval of a proposed amendment submitted on 21th February 2025. We acknowledge receipt of the following submitted documents for amendment.

a) Amendment Cover letter
b) Amended Study Proposal
c) Informed Consent Form and document outlining participation conditions
d) Study budget
e) Study tools
f) CV(s) of investigators

The committee noted the following amendment

1. ***Protocol amendment:***
   - *The topic has changed from "Examining Informal Justice mechanisms as complementary measure to formal justice mechanisms in addressing accountability for international crimes: An African perspective' to "Bridging the gap for accountability for serious international crimes using traditional justice systems in Africa".*
   - *The statement of the problem, Justification of the study, research objectives and hypothesis have changed to reflect the new topic of study.*

The Committee concluded that the suggested amendments are justified and will not increase the participants' risk. The proposed changes have therefore been approved for implementation. You may continue with your study.

Ole Sangale Rd, Madaraka Estate. PO Box 59857-00200, Nairobi, Kenya. Tel +254 (0)703 034000
Email admissions@strathmore.edu www.strathmore.edu

Strathmore UNIVERSITY

You are required to submit any further changes to this protocol version to SU-ISERC for review and approval before implementing any additional changes.

Yours sincerely,

Mr Ambrose Rachier,
Chairperson; SU-ISERC