THE CONVERGENCE BETWEEN PEACE AND JUSTICE IN CONTEMPORARY TRANSITIONAL JUSTICE: A CRITICAL ANALYSIS OF THE SITUATION IN THE POST CONFLICTING BURUNDI

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A DISSERTATION SUBMITTED IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE DEGREE OF MASTER OF LAWS IN INTERNATIONAL CRIMINAL JUSTICE OF THE OPEN UNIVERSITY OF TANZANIA

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CERTIFICATION

The undersigned certifies that has read and hereby recommends for acceptance by the Open University of Tanzania a thesis titled **"*The Convergence between Peace and Justice in Contemporary Transitional Justice: A Critical Analysis of the Situation in the Post Conflicting Burundi,"*** in fulfillment of the requirements for the degree of Master of Laws in International Criminal Justice of the Open University of Tanzania.

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Dr. Damas Daniel Ndumbaro

Supervisor

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DECLARATION

I, **Kubwera, Gerald J**, do hereby declare that this dissertation is my own original work and it has not been submitted for any award of degree in any other University or Institution for any other similar purpose.

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Date

DEDICATION

This dissertation is dedicated to all African Post-Conflict Societies whom just knowing that there are some people who would like to see peace and justice being enshrined in their countries is worthy to count.

I also dedicate this work to my beloved mother and my late beloved father, Esther Izengo and Makaranga Kubwera.

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ABSTRACT

This study is addressed into five chapters. It cuts across the central question aimed at looking the convergence of peace and justice in restoring a peaceful situation in Burundi transitional justice from the past atrocities. The study traces the background of the problem since when the country attained her independence. It shows the groups that were in disputes and the initiatives taken under regional and international level. The study is on the theoretical and legal framework of Peace and Justice. This paves a way for the discussion on the concept of transitional justice and its elements: prosecution, truth telling or truth commission, traditional justice methods, reparation and institution. This work also covers the concept of justice and peace. It discusses how the concept of justice and peace have been undertaken together towards resolving conflict by taking experience from other countries like Argentina and Yugoslavia. Then, it shows how the two concepts complement each other. The study further provides a thorough overview of transitional justice in Burundi and the steps taken by the East African Community and International instrument to deal with the conflict. The EAC appointed leader like President Yoweri Museveni and former president of United Republic of Tanzania, Benjamin William Mkapa to try to mediate the conflicting parties. The same was done by the UN through the *Kalomoh* report which came with recommendations on how to resolve the conflict as well as currently the initiatives taken by the UN Commission on Human Rights through the UNIIB with purpose of finding a way to peaceful society by investigating the matter. Finally, the study provides for research findings and discussion, and whereas the last part deals with conclusion and recommendation following the discussion undertaken in this study basing on the raised issues.

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Regional Legal Instruments

The Constitutive Act of the African Union of 2001/2002

Charter

African Commission on Human and Peoples' Rights. OAU Doc. CAB/LEG/67/3 rev. 5; 1520 UNTS 217; 21 ILM 58 (1982).

LIST OF ABBREVIATIONS AND ACRONYMS

ACHPR	African Commission on Human and People's Rights
AU	African Union
CNARED	National Council for the Respect of the Arusha Agreement and the Rule of Law
CNDD-FDD	Defence of Democratic Forces for the Defence of Democracy
EAC	East African Community
FNL	Forces Nationales de Libération
FRODEBU	Forces re'publicaines du Burundi
GCA	Global Ceasefire Agreement
ICC	International Criminal Court
IJCI	International Judicial Commission for Inquiry
NGOs	Non-Governmental Organisations
OHCHR	Office of the High Commissioner for Human Rights
PCRD	Post Conflict Reconciliation and Development
RED-TABARA	Re'sistance pour un Etat de droit au Burundi(Resistance for the Rule of Law in Burundi)
ST	Special Tribunal
TJS	Traditional Justice System
TJM's	Transitional Justice Mechanisms
TRC	Truth Reconciliation Commission
UN	United Nations
UNIIB	United Nations Independent Investigation on Burundi

CHAPTER ONE

1.0 INTRODUCTION

1.1 Background to the Research

The post conflict Burundi has experienced several cycles of violence since the country's independence in 1962. In 1965 an unsuccessful coup d'état by a group of Hutu gendarmes triggered retribution by the Tutsi dominated national army. This pattern repeated itself several times in the following decades. In 1972 a Hutu led insurrection, caused by the more or less systematic exclusion of Hutu from government institutions, triggered a violent response by the national army and led to the killing and disappearances of many Hutu intellectuals.[1] In 1988, there was an outburst of violence and around 20,000 Hutu were killed by the national army. After democratization efforts at the beginning of the 1990s, a civil war broke out in 1993 with the assassination of the first democratically elected president, Melchior Ndadaye.[2]

In August 2000, political parties in Burundi signed the Arusha Peace and Reconciliation Agreement[3], but it did not end the violence, as the Hutu dominated rebel movements at the time, the Defense of Democracy Forces for the Defense of Democracy (CNDD-FDD) and the Forces Nationales de Libération (FNL *Palipehutu*), were not included in the peace negotiations.[4] The agreement included

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[1] Uvin P, *Life after Violence: A People's Story of Burundi*, Zed Books, London and New York, 2009.
[2] Daley P, The Burundi Peace Negotiations: An African Experience of Peace-making, in: *Review of African Political Economy*, 2007, Pg. 34, 112, 333-352.
[3] Arusha Agreement, Arusha Peace and Reconciliation Agreement for Burundi, 2000. Available at: https://www.issafrica.org/cdburundipeaceagreements/No%201%20arusha.pdf. (Accessed on May 01, 2016)
[4] Sculier C, *Négociations de paix au Burundi: Une justice encombrante mais incontournable*, HD Report, Geneva: Centre for Humanitarian Dialogue, 2008.

provisions on transitional justice namely, a Truth Reconciliation Commission (TRC), which would shed light on the truth about grave violence, promote reconciliation and forgiveness, and clarify the entire history of Burundi.

The International Judicial Commission of Inquiry (IJCI) was aimed to be set up to investigate and establish the facts relating to genocide, war crimes and crimes against humanity. Based on its findings regarding the occurrence of such acts, an international criminal tribunal was also on the way to be set up to implement trial processes and punitive measures for those held responsible Arusha.[5] While the TRC and IJCI were meant to be set up during the transitional period between the year of 2001 and 2005, neither of them has been established so far. The transitional government did not consider transitional justice a priority; instead, its preoccupation was with ending the violent hostilities, integrating the rebels into the state structures and preparing the elections and the new constitution. This also holds true for the armed groups like the CNDD-FDD and FNL, as they did not focus on talking about truth, but rather on obtaining a position of strength through their integration into the government and state structures.

In 2004 the Parliament of Burundi passed a law on the establishment of the TRC, but it was never implemented.[6] In the same year, the United Nations (UN) sent an international assessment mission to evaluate the advisability and feasibility of the IJCI.[7] The resulting *Kalomoh* Report of 2005 called for a reconsideration of the

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[5] Supra note 3

[6] Vandeginste S, *La Commission Vérité et Réconciliation et la qualification des faits: une question à première vue purement technique*, 2011, Available at www.arib.info/index.php?option=com_content&task=view&id=3772 (accessed on July 19, 2016).

[7] Vandeginste S, Le processus de justice transitionnelle au Burundi a l'epreuve de son contexte politique, in: *73 Droit et Société 3*, 2009, Pg. 591-611.

Arusha formula that is the TRC, IJCI and the international criminal tribunal and proposed a twin mechanism, consisting of a TRC and a judicial process. Following the endorsement of the *Kalomoh* Report, the UN and the new CNDD-FDD dominated government negotiated the implementation of the report's recommendations in 2006 and 2007. The main issues of disagreement were the question of amnesty for war crimes, crimes against humanity and genocide; the independence of the special tribunal's prosecutor; and the interrelationship between the TRC and the tribunal.[8] In 2007, the negotiating parties eventually agreed to hold popular consultations on transitional justice. These consultations on the modalities and composition of the TRC and the tribunal were finally conducted in 2009.[9]

In June 2011 the Burundian president nominated a Technical Committee, whose responsibility it was to draft the law that would establish the TRC and its functions. As of November 2012, the draft law was expected to be studied soon by the Council of Ministers and the National Assembly.[10] However, the judicial mechanism, the special criminal tribunal, has as of today not yet been conceptualized, and when and whether this mechanism will be established remains unknown. Thus, twelve years after the signing of the Arusha agreement, none of the transitional justice provisions have been implemented. This has led practitioners and advocates of a global transitional justice policy[11] to argue that there is no political will by Burundian

[8]Ndikumasabo M, and Vandeginste S, Mecanismes de justice et de reconciliation en perspective au Burundi, 2007, in: Stefaan Marysse, Filip Reyntjens, and Stef Vandeginste (eds.), *L'Afrique des Grands Lacs:Annuaire,* Paris: L'Harmattan, *2006-2007*, Pg. 109-133.
[9] Comité de Pilotage Tripartite (CPT), *Les consultations nationales sur la mise en place des mécanismes de justice de transition au Burundi*, Bujumbura, 2010.
[10] IWACU, *L'avant-projet de loi régissant la CVR bientôt en conseil des ministres*, Bujumbura, November11, 2012.
[11] Nagy R, Transitional Justice as Global Project: Critical Reflections, in: 29*Third World Quarterly2*, 2008, Pg. 275-289.

leaders to establish the TRC and the special criminal tribunal.[12] Therefore, underlying from this claims, they provide for an assumption that, political actors are likely to contest the principles of transitional justice due to the fear that they could be held responsible for past crimes. A transitional justice process, particularly criminal prosecution, is seen by many political actors as a direct threat. If they would be investigated and or put on trial, political actors' reputations would be at risk.

They might also experience a loss of their power or political position if they are found responsible for human rights violations, not to mention long prison sentences if a special tribunal finds them guilty of having committed certain crimes. Such arguments of a lack of political will to deal with the past according to international transitional justice norms all stem from logic of rational choice. Consequently, advocates of a global transitional justice policy argue that actors who do not benefit from transitional justice or who may face consequences because of it are likely to act as spoilers, who will try to circumvent or manipulate it to meet their needs.[13] The intuitive assumption is that the more power actors hold, the more capable they are of shaping transitional justice mechanisms in a way that serves their interests. The power relations influence any transitional justice process and that the resulting institutional design is an outcome of prevailing power constellations.[14] Since the Arusha peace talks took place, power constellations have undergone considerable

[12] Human Rights Watch, *Selling Justice Short: Why Accountability Matters for Peace*, New York: Human Rights Watch, 2009.
[13]Vandeginste S, *Stones Left Unturned: Law and Transitional Justice in Burundi*, Antwerp, Oxford, Portland: Intersentia, 2010, As quoted from Subotić J, *Hijacked Justice: Dealing with the Past in the Balkans*, Ithaca and London: Cornell University Press, 2009.
[14]Rubli S, *Power and Words: Power Constellations and Discourses in Transitional Justice Processes*, Presentation at Transitional Justice Local Conflicts, Global Norms Conference, Marburg: Philips University, 2010 As quoted from Sieff, Michelle, and Leslie Vinjamuri Wright, Reconciling Order and Justice? New Institutional Solutions in Post−Conflict States, in: *52Journal of International Affairs2*, 1999, Pg. 757-779.

changes in Burundi. The former rebel groups CNDD-FDD and FNL, which were not included in the negotiations in Arusha, transformed themselves into political parties in 2005 and 2009, respectively. The power balance between different political parties may be largely determined by their representation in the government and the parliament. The first post-transition elections in 2005 were won by the CNDD-FDD; however, the UPRONA and the FRODEBU held a combined thirty per cent of the seats in the National Assembly.[15]

In 2010 the CNDD-FDD won the elections with a majority, and UPRONA was represented by only seventeen seats in the National Assembly. Other political parties, among them the FRODEBU and the FNL, boycotted the presidential and parliamentary elections. Forming a coalition, they claimed that the communal elections were rigged.[16] They are no longer represented in the government and parliament.[17] Due to its electoral victory, the CNDD-FDD currently holds a powerful position and could in principle impose its stance on transitional justice to the detriment of other political parties. Nevertheless, the approach to transitional justice taken by the CNDD-FDD dominated government appears to be in line with the global transitional justice paradigm. Certainly factors of path dependency of the transitional justice policy as it was enshrined in the Arusha agreement strongly influenced by the FRODEBU and the UPRONA, the two strongest parties during the peace talks and pressure from international donors may play a role in shaping

[15]African Elections Database, *Elections in Burundi*, 2011. Available at http://african elections.tripod.com/bi.html (Accessed on July 18, 2016).
[16] ADC-Ikibiri .(2010).*Mot liminaire de la conférence de presse tenu par la coalition ADC-Ikibiri, 10 août 2010*, Press Conference, Bujumbura, 2010.
[17] Supra note 15

Burundi's official policy.[18] It is difficult to judge the extent to which the CNDD-FDD's position influenced and is reflected in the government's policy on transitional justice. However, such an analysis would go beyond the scope of this article, which primarily focuses on political parties.

The Politics of Transitional Justice in Burundi has shown for the case of the former Yugoslavia, the alleged adherence to the global transitional justice model might be guided by ulterior political motives, including obtaining financial aid or international legitimacy. Although claims of attempts to manipulate and framing are widespread, relying on such an analysis is short-sighted.[19] The social actors not only are driven by interests including securing advantages for specific individuals including themselves and groups, but in addition, their actions might be motivated by reason, passion and/or emotions which is highly subjective and it should be kept in mind that is the impartial consideration of the common good or of universal rights.[20] Hence, it would be wrong to assume that political parties simply manipulate transitional justice institutions to suit the party members' interests; instead it is likely that they are motivated by normative considerations as well.

1.2 Statement of Research Problem

The post conflict societies prefer peaceful negotiations as the first mechanism to end violence. The completions of peaceful negotiations give a room for justice to be undertaken. Though, the advancement in the international legal obligations and the

[18] Subotić J, *Hijacked Justice: Dealing with the Past in the Balkans*, Cornell University Press: Ithaca and London, 2009.
[19] Elster J, Coming to Terms with the Past: A Framework for the Study of Justice in the Transition to Democracy, in: *European Journal of Sociology*, 1998, Pg. 39, 7−48.
[20] Ibid.

sophistication of the international justice building do consider the question of peace and justice as complementing each other in the process of resolving conflicts. This was stated by the UN General Secretary who emphasized on the importance of integrating justice into the process peace seeking.[21] Therefore, both peace and justice are fundamental steps to end violence and preventing its recurrence.[22] If peace would be dissociated from justice, would not address the fundamental structural causes of conflict.[23]However, in the case of Burundi both peace and justice have been dissociated from each other, and at the same time and still there is no consensus between the conflicting groups to deal with past atrocities. Hence, this study aimed at looking in depth the convergence of peace and justice towards ending past atrocities and ensuring harmonic situation in Burundi.

1.3 Objective of the Study

1.3.1 General Objective

The core goal of the study is to examine the convergence of peace and justice towards rebuilding a peaceful society from past atrocities.

1.3.2 Specific Objectives

i. To examine how the convergence between peace and justice in restoring the past atrocities would lead into restoration of a peaceful society.

ii. To examine how mechanisms to be employed in the process of resolving the past atrocities would succeed.

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[21]Draft report Wilton Park Conference, "Transitional Justice and Rule of Law in Post-Conflict Societies: The Role of International Actors", 2005, Pg. 24-26 .

[22]African Union Panel of the Wise, "Peace, Justice and Reconciliation in Africa: Opportunities and Challenges in the Fight against Impunity" *The African Union Series*. IPI: New York, 2013, Pg. 9.

[23] Jeong H, *Peace and Conflict Studies: An Introduction*, Ashgate: Aldershot, 2000.

1.4 Research Questions

i. Whether the convergence between peace and justice in resolving the past atrocities would lead into restoration of a peaceful society?

ii. Whether mechanisms to be employed in the process of resolving the past atrocities would succeed?

1.5 Significance of the Study

a. The study will be of a great improvement to the national, regional and international facilitators to a dispute as it will equip them with better way to resolve the conflict.

b. The study will help the government in ensuring the proper way to resolve conflicts by recognising the role of traditional methods.

c. The study will be useful in creating policies and strategies to deal with past atrocities in Burundi move beyond the creation of a Truth and Reconciliation Commission (TRC) and an Special Tribunal (ST) as well as comprehensive reparations programs that fully integrate gender concerns which would be established, either independently or linked to the TRC and the ST, to address the rights of the victims and alleviate their continued suffering and destitution.

1.6 Literature Review

Matsuo, M[24] the author in this paper attempts to trace the development of the concept of peace in peace studies, by an examination of studies on the peace concept and

[24] Matsuo M, Concept of Peace Studies: A short Historical Sketch, *Institute for Peace Science*, Hiroshima University, 2005, Pg. 1- 26. Available at home.hiroshima_u.ac.jp/heiwa/Pub/E20/conceptopeace.pdf (Accessed on October 23, 2015)

definitions of peace by peace researchers, from two perspectives of peace value and peace sphere. It shows that the concept of peace employed in peace studies has been expanded both in peace value and peace sphere to include more than one peace value and peace sphere.[25] This paper is utmost important as it helped to understand the concept of peace in wider situation though this study base on the convergence of peace and justice in contemporary transitional justice.

Rubli, S[26] the author highlights divergent conceptualizations of key elements of transitional justice that are part of the current contestation of the dealing-with-the-past process in Burundi. Speaking to the emerging critical literature on transitional justice, this article attempts to look beyond claims that there is a lack of political will to comply with a certain global transitional justice paradigm.[27] In this article, transitional justice is conceived of as a political process of negotiated values and power relations that attempts to constitute the future based on lessons from the past.
The author in this article argues that political parties in Burundi use transitional justice not only as a strategy to protect partisan interests or target political opponents, but also as an instrument to promote their political struggles in the course of moulding a new, post-conflict society and state. The article has given the clear picture of the conflict in Burundi and the initiatives that have been undertaken to avoid the recurrence of the future conflict though that was not adhered as in 2015 when the country experience the political conflicts between different groups.

[25] Ibid
[26] Rubli S, National Consultations on Transitional Justice: The Inclusion of Civil Society in Transitional Justice in Burundi a paper presented at the 6th ECPR General Conference, Reykjavik: Iceland, 2011, Pg. 25- 27. Available at https:ecpr.eu/file store/paper proposal/5af408c−5c3a−41cd−ac27−e1cddc668142.pdf .(Accessed on August 11, 2016)
[27] Ibid

Therefore this study aimed at using peace and justice models to bring harmony in the country. The Commissioner for Human Rights,[28] through this paper it deals with the process of post-war justice and the efforts aiming to establish durable peace in the region of the former Yugoslavia, following the armed conflicts in the 1990s characterised by ethnic cleansing and atrocities unseen in Europe since the Second World War. The paper focused on four major components of post-war justice: the necessary measures for the elimination of impunity; provision of adequate and effective reparation to war victims; the need to establish and recognise the truth concerning the gross human rights violations and serious violations of international humanitarian law that occurred in the region; and the guarantees of non-repetition through necessary institutional reforms.[29] The paper is of significance to this study by helping to understand how other post conflict societies dealt with the past atrocities.

The United Nations High Commissioner for Human Rights,[30] this research study produced by the United Nations Office of the High Commissioner for Human Rights (OHCHR), which is the main UN entity working on issues of human rights and transitional justice, is designed to contribute to discussions on these themes in Juba, in Ugandan society and internationally. These narratives are intended to inform wider public consultations on how best to redress past abuses, violations and deep-seated social and economic inequalities by engaging formal and informal processes

[28] Commissioner for Human Rights, Positions on Post−war justice and durable peace in the former Yugoslavia, Council of Europe, Strasbourg, 2012, Pg. 1− 8. Available at https://wcd.coe.int/viewDoc.jsp?id=1904893 (Accessed on May 16, 2015)

[29] Ibid

[30] The Office of the United Nations High Commissioner for Human Rights, *Making Peace Our own: Victims' Perceptions of Accountability, Reconciliation and Transitional Justice in Northern Uganda,* United Nations, 2007, Pg.1, Available at www. Uganda. Ohchr.org/content/ Publications/making%20Peace% 20Our%20 Own.pdf (Accessed on April 8, 2016)

of justice and reconciliation.[31] The research study provide that consultations will advance victims' perspectives together with the views of other relevant stakeholders to ensure that affected individuals and communities can come to term with the past and build a just society. The study highlights the message of taking one's own place in the process of establishing peace in northern Uganda.[32] In which the prevailing message was greatly expressed by many of the respondents positively. The notion of peace, for the people who have been most adversely affected by the conflict, carried a strong sense of setting things right; encompassing the crucial yearning to end violence; a desire to return to their lands and to become self-sustainable; and a profound need for an accounting and redress of the misdeeds committed during the protracted cycle of violence. As they repeatedly voiced, these elements will go a long way toward restoring their human dignity.[33]

Therefore, the research study undertaken in Uganda is helpful in the study at hand as would be of assistance in the process of finding a way to a just society in Burundi by taking examples of how they succeeded to restore the peaceful situation in that area. The United Nations,[34] the UN is aimed at assisting societies devastated by conflict or emerging from repressive rule to re-establish the rule of law and come to terms with large-scale human rights violations, especially within a context marked by broken institutions, exhausted resources, diminished security, and a distressed and divided population, presents a daunting challenge. The UN has acquired significant experience in developing the rule of law and pursuing transitional justice in States

[31] Ibid
[32] Ibid, at Pg. 3
[33] Ibid, at Pg 4 -68
[34] United Nations, Guidance Note of the Secretary− General: UN Approach to Transitional Justice, March 2010, at Pg.3.

emerging from conflict or repressive rule.[35] The experience has demonstrated that promoting reconciliation and consolidating peace in the long-term necessitates the establishment or re- establishment of an effective governing administrative and justice system founded on respect for the rule of law and the protection of human rights.[36] It should be noted that the transitional justice processes and mechanisms are a critical component of the UN framework for strengthening the rule of law.[37] And it consists of both judicial and non-judicial processes and mechanisms, including prosecution initiatives, truth-seeking, reparations programmes, institutional reform or an appropriate combination thereof. Hence, whatever combination is chosen must be in conformity with international legal standards and obligations. Transitional justice should further seek to take account of the root causes of conflicts and the related violations of all rights, including civil, political, economic, social and cultural rights.[38]

Therefore, by striving to address the spectrum of violations in an integrated and interdependent manner, transitional justice can contribute to achieving the broader objectives of prevention of further conflict, peace building and reconciliation.[39] Thus, despite the clear challenge of addressing complex issues such as land inequality, the link between transitional justice and development could potentially ensure a more complete and effective approach for political and economic reforms that advance the case of redistributive justice and the pursuit of equality within post-conflict

[35] Ibid
[36] Ibid
[37] Ibid, at Pg. 2
[38] Ibid, at Pg. 3
[39] Ibid

society.[40] The UN rule of law and transitional justice activities include developing standards and best practices, assisting in the design and implementation of transitional justice mechanisms, providing technical, material and financial support, and promoting the inclusion of human rights and transitional justice considerations in peace agreements.[41] This was found helpful as the foundation of how the conflict in Burundi can be resolved by taking consideration of what has been given by the UN.[42] Though the matter at hand rely on the convergence of peace and justice but finding a way out from a root cause would be of significance towards the complimenting peace and justice to resolve conflicts.

Zyl, P.V[43] the author embodies transitional justice as an attempt to build a sustainable peace after conflict, mass violence or systemic human rights abuse. The author provides that transitional justice involves prosecuting perpetrators, revealing the truth about past crimes, providing victims with reparations, reforming abusive institutions and promoting reconciliation.[44] The author provides that this require a comprehensive set of strategies that must deal with the events of the past but also a look to the future in order to prevent recurrence of conflict and abuse. Thus, transitional justice strategies are often crafted in situations where peace is fragile or perpetrators retain real power, they must carefully balance the demands of justice

[40] Selim Y & Murith T, Transitional Justice and development: Partners for Sustainable Peace in Africa, *6 Journal of Peacebuilding2*, 2011, at Pg. 66

[41] See Also: United Nations Security Council (UNSC), Report of the Secretary− General on the Rule of Law and Transitional Justice in Conflict and Post− Conflict Societies, October 12, 2011, UN DOC. S/2011/634 at Para 10. Where since 2004 the Council has made references to the rule of law and transitional justice in well over 160 resolutions, a marked increase over the same period prior to the 2004 report of the secretary− General, Available at https://www.un.org/rule of law/ files/S_2011_634EN.Pdf (Accessed on May 22, 2016).

[42] Ibid

[43] Zyl P. V, *" Promoting Transitional Justice in Post−Conflict Societies"* in Alan B, and Heiner H (eds.), *Security Governance in Post− Conflict Peace building,* Geneva Centre for the Democratic Control of Armed Forces, Geneva, 2005. Available at www.peacebuildinginitiative.org/indexf0e6.html? Paged=1883 (Accessed on May 12, 2016).

[44] Ibid

with the realities of what can be achieved in the short, medium and long term.[45] Therefore, in times of transition, some time the justice achieved does not necessarily correspond to an ideal of justice and it often represents of trade-off that it reached in order to score peace, or at least the silence of arms.[46] Over the past decade, the field of transitional justice has expanded and evolved in two important respects.[47] **First**, the elements of transitional justice have moved from being aspiration to embodying binding legal obligations.

Where, international law particularly as articulated by bodies such as the European Court on Human Rights, the Inter-American Court on Human Rights and the Human Rights Committee has evolved over the past 20 years to the point where there are clear standards regarding state obligations in dealing with human rights abuse and correspondingly regarding clear prohibitions, for example, blanket amnesties for international crimes. This has been supported by over 100 countries signed and ratified the ICC statute[48] which has both reinforced existing obligations and created new standards, by requiring each signatory to respond appropriately to human rights abuse or face action by the court. A further important development occurred in October 2004; when the UN Secretary General submitted a report to the Security Council setting out for the first time the UN's approach to transitional justice issues in the post− conflict and transitional periods.[49] This is an extremely important

[45] Ibid
[46] Jalie B, Resistance to Transitional Justice Processes: A critical research agenda, 213, Pg. 4
[47] Supra note 42
[48] See htt:// ww.icc_cpi.int/asp/stateparties.html (for list of state parties to Rome Statute, 122 Ratifications as of 15 February, 2013), Accessed on July 21, 2016.
[49] United Nations Security Council (UNSC), Report of the Secretary−General on the Rule of Law and Transitional Justice in Conflict and Post−Conflict Societies, August 24, 2004, UNDOC. S/ 2004/616, at Para 21(that while accounting for the past, building the rule of law and fostering democracy should be long term processes)

development in both operational and normative terms. **Second**, the deepening of democracy in many parts of the world particularly Latin America, Asia, and Africa and the emergence of increasingly sophisticated civil society organisations with expertise in this area has contributed to creating both the institutions and political will required to deal with a legacy of human rights abuse and helped translate policy into action.[50] This increased attention and commitment to transitional justice issues has been mirrored by the allocation of greater resources and international attention to post-conflict peace building. In which it requires sustainable interventions by both national and international actors on several different levels.[51] Therefore, this is concede with the study at hand as the study seeks to find the better way to converge peace and justice for purpose of stopping conflict but on the other side would lead to observation of human rights.

Mobbek, E[52] the author examines issue of transitional justice in post-conflict societies has taken on increasing importance in the last few years. The author provides that in cases where there has been external intervention, there has also been some effort towards establishing different forms of transitional justice.[53] These transitional justice mechanisms are essential to stability and sustainable peace. Transitional justice mechanisms are created to deal with crimes that were committed during a conflict period, at a stage where that society is at the point of transition from a society of conflict to one of democracy and peace.[54] Hence, there are wide-ranging

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[50] Ibid, see Also Kai A, *The Legal framework on Transitional Justice: A systematic Study with a special Focus on the Role of the ICC*, Springer− Verlag, Berlin Heidelberg, 2009, at Pg 34− 36.
[51] Ibid
[52] E Mobbek, *Transitional Justice in Post– Conflict Societies: Approach to Reconciliation,* 2002 at Pg. 261
[53] Ibid
[54] Ibid

options available, to the transitional governments beyond which the dimensions of transition local factors affect the legitimacy of transitional responses.[55] The author have analyzed transitional justice mechanisms that may take a number of forms[56] where most prominently of these include the international criminal court, international tribunals, special courts, truth commissions, local courts and traditional methods of justice.[57] He has examined the forms of transitional justice, where local ownership can be more easily established. Therefore, experience from a number of cases, is build on the assumption that some form of transitional justice is essential for reconciliation, future stability and peace, and moreover it can serve to increase the sense of local ownership of the whole process of post-conflict reconstruction.[58]

Furthermore, the author has given a guide on the means how transitional justice can be achieved in the post conflict and conflicting societies in which Burundi is among them. Therefore, the convergence between peace and justice is not a choice between one and another rather a plurality of complementary ways of reaching continued stability, peace and reconciliation.[59] Thus the contemporary transitional justice model should be encompassed beyond rule of law models so as to overcome the dilemma of how to deal with past atrocities, especially genocide, war crimes, and crimes against humanity.[60] African Union Panel of the Wise,[61] this report proposes a draft Policy Framework on Transitional Justice for adoption by the relevant organs of the African Union (AU) and recommends an advocacy role for the Panel of the Wise in

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[55] R Teitel, "Transitional Justice Genealogy" , *16 Harvard Human Rights Journal 92,*2003, at Pg. 93

[57] Supra note 50
[58] Ibid , at Pg. 262
[59] Ibid, at Pg. 279, 281
[60] Kuwali D, Just Peace: Achieving Peace, Justice, and Development in Post- Conflict Africa, *Africa Peace building Network Working Papers*: No. 2, 2014, at Pg 1
[61] Supra note 22, at Pg. ix

promoting and reinforcing guiding principles on the rule of law and transitional justice across the African continent. Indeed, since the report was first drafted in 2009, the AU has started a process for developing a clear and more coherent understanding of the contemporary application of transitional justice in Africa perhaps as another way of achieving justice through less violence means.[62] This publication of the Panel of the Wise report broaden regional and international access to this research and its accompanying recommendations, and contribute to efforts by African and international actors to address the issue of non-impunity and its relationship with peace, justice, reconciliation, and healing as its main goals.

Vandeginste, S[63] the author provide that to enhance the inclusiveness of Burundi's political dialogue, Ugandan president and East African Community mediator Yoweri Museveni suggested granting temporary immunity to Burundian opponents living in exile, some of whom are wanted by the government for their participation in the May 2015 failed military coup attempt.[64] While from a short-term conflict-settlement perspective this is a valuable suggestion, an analysis of Burundi's previous experience with temporary immunities reveals some longer-term wicked effects. Including the following; First, temporary immunity turned out to be anything but temporary. Secondly, it created an incentive structure that discouraged Burundi's elites from launching a transitional justice process. Thirdly, despite its initial purpose, it benefited both insurgents and incumbents. Fourthly, temporary immunity

[62] Menkel- Meadow C, "To many lawyers? Or should lawyers be doing other things?" in *International Journal of Legal Professional*, 2013

[63] Vandeginste S, Museveni, Burundi and the Perversity of Immunite´ Provisoire, *10International Journal of Transitional Justice3*, 2016, Oxford University Press: London, 2016, Pg. 1–11, Available at http://ijtj.oxfordjournals.org/content/10/3/516/.full.Pdf, (Accessed on July 13, 2016).

[64] Ibid

offered more than mere immunity to its beneficiaries. Finally, it was a stepping stone towards long-lasting impunity for human rights atrocities.[65] These suggestions agree with the UN's transitional justice approach towards post-conflict societies that temporary immunity may lead into repeated atrocities with same perverse effects.[66] Unfortunately, the debate on transitional justice does not focus on importance of development in post- conflict settings but rather on resolving the peace or justice debate. Therefore, if this gap in research and practice is not filled, the factors that cause conflict will remain unaddressed, thereby aggravating the suffering of the victim and endangering the fragile peace.[67] Hence, this study underscores the prerequisites of transitional justice in post-conflict society.

Đukic, D[68] the author provide that transitional justice encompasses a number of mechanisms that seek to allow post conflict societies to deal with past atrocities in circumstances of radical change. However, two of these mechanisms; truth commissions and criminal processes might clash if the former are combined with amnesties. The author examines the possibility of employing the Rome Statute's Article 53 so as to allow these two mechanisms to operate in a complementary manner.[69] He considers three arguments on interpretation of Article 53 in accordance with the relevant rules on treaty interpretation; states' obligations to prosecute certain crimes and the Rome Statute's approach to prosecutorial discretion. And he concludes that Article 53 is ill-suited to accommodate truth commissions in

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[65] Ibid

[66] United Nations Secretary— General, The Rule of Law and Transitional Justice in Conflict and Post — Conflict Societies, UN Doc. S/2004/ 616, August 23, 2004, Pg. 1

[67] Supra note 58, at Pg. 2

[68] Đukic D, Transitional Justice and the International Criminal Court in ''the interests of justice''?. Selected article on international humanitarian law in: *89 International Review of the Red Cross,* The University Centre for International Humanitarian Law: Geneva, 2007,pg.867

[69] Ibid

conjunction with amnesties.[70] These mechanisms also have been discussed in this study as the way to promote long-term reconciliation, peace, democracy, and most of all, deterrence.[71] Rubli, S[72] this paper is mainly based on extensive field research. The author provided a theoretical section explaining why transitional justice as a political process is negotiated among various actors and how the national consultations constitute such a negotiation arena. The description of the Burundian context of transitional justice is followed by a brief overview of the historical evolution of civil society in Burundi.[73] The empirical part of the paper explores the role of civil society in the consultation process.

Civil society has become an active player by forming an alliance between different local and international organisations, gaining specific knowledge on the topic of transitional justice, establishing contacts to the other decision-makers, and finally, by presenting themselves as the legitimate interlocutors to the population.[74] The author conclude by putting the results into the context of the future transitional justice process in post conflicting Burundi which brings in the need to analyse mutual dichotomy of peace and justice in constitutional transformation and power sharing targeting on "how much should be achieved and when" rather than a choice between some and none.[75] This is quite realistic observation because it is true finding experience that prosecution alone would be an incomplete form of justice, as it is noted that peace building contexts require a broad conception of transitional justice

[70] Ibid
[71] Supra note 58, at Pg. 3
[72] Rubli S, *(Re) making the social world: The Politics of Transitional Justice in Burundi, in: Africa Spectrum,* Hamburg University Press: Hamburg, 2013, at Pg. 48, 1, 3−24.
[73] Ibid
[74] Ibid
[75] C Bell, *"New law" of Transitional Justice, Peace and Development* Springer – Verlag Berlin, 2009, Pg 120

that offers many avenues for accountability and justice.[76] Salter, M and Huyse, L[77] the authors analysed and assessed the role and impact of traditional mechanisms in post-conflict settings. They aimed at addressing this gap by examining the role played by traditional justice mechanisms in dealing with the legacy of violent conflict in five African countries Rwanda, Mozambique, Uganda, Sierra Leone and Burundi. These case studies are used as the basis for outlining conclusions and options for future policy development.[78] Their study was intended to serve both as a general knowledge resource and as a practitioner's guide for national bodies seeking to employ traditional justice mechanisms as well as external agencies aiming to support such processes.

It suggests that in some circumstances traditional mechanisms can effectively complement conventional judicial systems and represent a real potential for promoting justice, reconciliation and a culture of democracy.[79] In addition, even in situations where communities are more inclined to demand straight forward retribution against the perpetrators, traditional justice mechanisms may still offer a way both of restoring a sense of accountability and of linking justice to democratic development.[80] At the same time their study also cautions against unrealistic expectations of traditional structures. And it offers a restrained, evidence-based assessment of both the strengths and the weaknesses of traditional conflict management mechanisms within the broader framework of post-conflict social

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[76] Trusteeship Council Peace building Commission, " Justice in Times of Transition" Working Group Concept Note, at Pg. 2
[77] Salter, M and Huyse L, *Traditional Justice and Reconciliation after Violent Conflict: Learning from African Experiences,* IIDEA, Stockholm, 2008, at Pg. i−iv, 1−188.
[78] Ibid
[79] Ibid
[80] Ibid

reconstruction efforts more especially where peace processes does not end violent conflict.[81] Hence, the same traditional methods have been considered in this study in peace seeking process.

1.7 Research Methodology

The research methodology is a way to systematically undertake the research study. It may be understood as a science of studying how research is done scientifically as its scope is wider than that of research methods.[82] In research methodology the focus is not only on the research methods, but also the logic behind the methods used in the context of the research study and explaining why using a particular method or technique and why not using others so that research results are capable of being evaluated either by the researcher himself or by others.[83] In this study, doctrinal type of legal research was used i.e. library based research methodology.

The doctrinal legal research is concerned with the formulation of legal doctrines through the analysis of legal rules. Within the common law jurisdictions legal rules are to be found within statutes and cases but it is important to appreciate that they cannot, in themselves, provide a complete statement of the law in any given situation. This can only be ascertained by applying the relevant legal rules to the particular facts of the situation under consideration.[84] The Doctrinal legal research is therefore concerned with the discovery and development of legal doctrines for publication in textbooks or journal articles. In this case different university libraries

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[81] Ibid
[82] Kothari C.K, *Research Methodology: Methods and Techniques,* 2nd Ed. New Age International Publishers: New Delhi, 2004, Pg. 26.
[83] Ibid, at Pg.31.
[84] Chynoweth P, *'Legal Research'* in Andrew Knight and Les Ruddock (eds), *Advanced Research Methods in the Built Environment,* Wiley-Blackwell, 2008, Pg. 37.

were accessed, such as the Open University of Tanzania, University of Dar es Salaam and the general cross reference to various articles and journals, and report documents found on electronic information available on online libraries played a great role to our research study. However, there were very few helpful books or literature[85] from University of Dar es Salaam library, as most of them were found to be on the general understanding of international criminal law and not on an aspect of transitional justice. This was the same even to Open University at Kinondoni Campus. Therefore, this study relied mostly on online libraries.

1.8 Scope and Area of the Study

This study is confined in Burundi as the post conflict society. This is because the region is among the African states that have a current conflicts experience. Where being in conflict there have been some violations of Human Rights as different groups keep on fighting against the government regime. This study aimed at obtaining relevant information toward rebuilding a way to peaceful society which will be free from conflict.

1.9 Research Analysis Process

The doctrinal legal research mandates the study to locate the required apt statutory provisions and judicial reflections thereon that have bearing on the legal doctrine, concept or rule under inquiry. Such legislative provisions and judicial decisions constitute the basic data for a doctrinal legal researcher. The basic tools of a doctrinal legal researcher are: statutory materials, case reports, standard textbooks and reference books, legal periodicals, Parliamentary Debates and Government Reports.

[85] Such as: Antonio, *International Criminal Law*, Oxford University Press, Great Britain, 2003.

In this study the analysis based on the examination of statutory materials, standard textbooks and reference books and government reports.

1.10 Limitation

No study is open-handed and without limitations.[86] There is no perfect research designs as there are always trade-offs.[87] These are as explained hereunder: First, analysis of the legal principle, doctrine under inquiry, in particular, and of law in general, and the consequential projections of the doctrinal researcher, ultimately, become subjective and exhibit his perception about the inquired subject-matter. A different perception of the same legal principle, concept, doctrine or law by another scholar or scholars of law, therefore, cannot be ruled out.[88] In other words, doctrinal legal research, depending upon the reasoning power and analytical skills of the researcher, may lead to different perceptions and projections of the same legal fact, concept or doctrine when different scholars of law analyse it. Thus, different scholars may perceive a legal fact or doctrine differently with equally convincing logical reasoning.

Secondly, in doctrinal legal researcher, gathers the policy from his own experience, authoritative statutory materials, case reports, and his reflections thereon. His inquiry into a legal principle or concept or law, therefore, does not get any support from social facts or values. His research, undeniably, becomes merely theoretical and

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[86] Binamungu C.S.M, Division of Matrimonial Property in Tanzania: The Quest for Fairness. A Thesis Submitted in Fulfilment of the Requirements for the Degree of Doctorate of Philosophy in Law of the *Open University of Tanzania,* 2013, Pg. 24.
[87] Patton M.Q, *Qualitative Research and Evaluation Methods, 3rd Ed*. Sage Publications: London, 2003, Pg. 223.
[88] Ibid

devoid of any social facts. Consequently, his projections of law and predictions regarding changes in the law are bound to be far from social reality and inadequate.[89] Hence, when law is viewed as an effective instrument of socio-economic transformation, it becomes necessary to see law in the light of social facts and values. It also needs to be studied and analysed in terms of its actual working and consequences and not as it stands in the book. Therefore, in this context doctrinal legal research becomes inadequate and inappropriate.

Furthermore, contemporary social-goal-oriented law requires pre-legislative study to know and appreciate the extra-legal factors that have played significant role, positive or negative, in shaping the legal rule or doctrine in the present form.[90] Whereby, the doctrinal legal research, by its nature, does not bring such pre-legislative issues in its ambit.

Thirdly, the doctrinal legal research does not involve a study of the factors that lie outside law or legal system but have directly or indirectly influenced the operation of the law, a legal rule, concept or doctrine. Sometimes the prevailing stakes and prejudices of a dominant social group may hamper the law's operation and success. A study of such extra-legal factors, interests and prejudices, therefore, becomes necessary for understanding their role and contribution in making the law or doctrine effective, less effective or ineffective in its operation. Such a study also becomes desirable, rather inevitable, to devise appropriate legislative or policy-oriented measures to do away with the factors that are desisting/have desisted the law to be

[89] Ibid
[90] Ibid

effective or to minimize their adverse effects on the law's performance. The doctrinal legal research practically overlooks the need to study these factors. Fourthly, the doctrinal legal researcher puts his sole reliance on, and gives prominence to, traditional sources of law and judicial pronouncements of appellate courts.[91] The actual practice and attitude of lower courts and of administrative agencies with quasi-judicial powers, whose judgments remain unreported, are left unexplored in doctrinal legal research.

1.11 Conclusion

This chapter has looked on the background of the problem, statement of the problem which is the heart of this study, then the objectives and significance of the study. Further, there is research methodology. In this study doctrinal research was employed and later taken a comparative look at limitations of doctrinal legal research as has been explained above, the doubt about value and relevance of doctrinal legal research was appreciated, through legal analysis of statutory provisions and cases, revolves around legal principles and doctrines. In this study a review of literature has shown that the concept of transitional justice sustains a broad concept of peace with diversified justice interests. Hence there are so many challenges to count in post−conflict situation where prosecution could obstruct peace process.[92]

As noted the current practice from the vast literature review, it suffers from a lack of clear rules and criteria which could help to reconcile peace and justice in situations of transition. Thus, focusing on problems of legitimacy and accountability, it is found

[91] Ibid

[92] And this is true where the increasingly difficulties of implementing the rule of law are being seen as key to that Failure, see Also Bell C, *"New law" of Transitional Justice, Peace and Development,* Springer – Verlag Berlin, 2009, Pg. 120

that the existing prosecutorial mechanisms also have a limited and unsatisfying perspective[93] as it can be reaffirmed that peace initiations which sacrifice justice more than often fail to produce stable peace.[94]

This study therefore, underscores a slight aspect that have not widely acknowledged and on other hand wrongly perceived by most of the scholars in this field. The following chapter will be on the theoretical and legal framework of peace and justice.

[93] Greenawalt A, "Justice without Politics? Prosecutorial discretion and the International Criminal Court (*Unknown),* 2007, Pg. 587

[94] Peskin V, "Beyond Victors Justice? The Challenge, of prosecuting the winners at the International Criminal Tribunals for the former Yugoslavia and Rwanda, 4*Journal of Human Rights,* 2005*,* Pg.228

CHAPTER TWO

2.0 THEORETICAL AND LEGAL FRAMEWORK OF PEACE AND JUSTICE

2.1 Introduction

The chapter discusses the theoretical and conceptual framework on Transitional Justice, the elements of Transitional Justice which includes: Criminal Prosecutions, Truth Commissions, Reparations, Institutional Reforms and Traditional Methods of Justice. Further, there is the concept of Justice and the concept of Peace and lastly providing general summary of the chapter.

2.2 The Concept of Transitional Justice

The term was first coined in the early 1990's and has since came to describe an ever expanding range of mechanisms and institutions, including tribunals, truth, truth commissions, memorial projects, reparations and the like to redress past wrongs, vindicate the dignity of victims and provide justice in times of transitional.[95] In a broader context the term refers on how societies are transitioning from repressive rule or armed conflict deal with past atrocities, how they overcome social divisions or seek reconciliation, and how they create justice system so as to prevent future human rights violations.[96] Apart from the given definition above, the United Nations Secretary General, in his 2004 report on transitional justice and rule of law, has given a comprehensive definition for transitional justice as 'the full range of processes and

[95] Zistel S.B & at el, *Transitional Justice: An Introduction*, Third Avenue: New York, 2014. Available at www.corteidh.or.cr/tablas/r32526.pdf (Accessed on May 23, 2017)
[96] Teitel R, Transitional Justice: Post War Legacies, *27Cardozo Law Review4*, 2006, at 1. Also has been defined in the International Centre for Transitional Justice, *What is Transitional Justice?, New York,* 2008, www.ictj.org/static/TJApproaches/WhatisTJ/ICTJ_WhatisTJ_ pa2008_.pdf(Accessed on May 21, 2017)

mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with differing levels of international involvement or none at all and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof.'[97]

The essence of transitional justice under this is the balancing of the immediate need to secure peace with longer term imperatives to establish the rule of law and prevent future conflicts. It includes short, medium and long term local, regional, and international programs that address the peace, reconciliation, and justice needs of the affected populations, prevent escalation of conflicts, prevent further victimization, avoid relapse into violence, combat impunity, foster social justice and democratic participation, and strengthen progress towards the consolidation of peace.[98]

2.3 The Elements of Transitional Justice

The range of transitional justice methods includes individual prosecutions; truth seeking; reparations which includes work on memory, memorials, and memorialisation; and institutional reform which includes vetting and dismissal of staff.[99] Further, there is a traditional method of justice form a significant and growing area in this field. These methods have been elaborated below.

[97] Supra note 41, at Para 8
[98] Supra note 22.
[99] Supra note 41, at Para 8

2.3.1 Criminal Prosecutions

The development of international law has entailed unrelenting pressure from concerned citizens and human rights groups to ensure that individuals responsible for grave human rights violations face the possibility of prosecution and punishment. Prosecution has often been part of efforts to close the impunity gap, restore the rule of law, and build a culture of human rights.[100] The evolution of international justice has led to the creation of a complex set of strategies to deal with massive human rights violations in political environments where actors are either not prepared to confront them or are resistant to punishment.[101]

As noted already, international law is clear about the category of crimes for which there can be no amnesty. In addition, there may be domestic legal constraints, such as constitutional provisions, that may make it difficult to secure amnesty. This is certainly true for those countries that have domesticated a plethora of international and human rights treaties, including 121 countries that are now party to the ICC's Rome Statute. Regardless of what national provisions are adopted, international law precludes amnesty for the most serious international crimes, defined as crimes against humanity, war crimes, and genocide.[102]

2.3.2 Truth Commissions

Truth commissions are justice mechanisms that address the root causes of conflict and offer recommendations for dealing with impunity. The truth commissions have

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[100] Supra note 34, at Pg. 7, also see supra note 22, at pg. 16- 22

[101] United States Institute of Peace, *Transitional Justice: Information Handbook*, 2008, pg. 4. At available at www.usip.org/sites/default/files/ROL/Transitional_justice_final.pdf.

[102] Ibid

become a means to investigate past human rights violations, uncover the repressive machinery of authoritarian regimes, and identify systemic socioeconomic injustices.[103] These commissions have approached truth seeking in various ways that are frequently influenced by their institutional design. Those endowed with subpoena power and large staffs are typically more able to access information, while those empowered to name perpetrators are more likely to secure at least a symbolic measure of accountability. If they have the power to grant amnesty, they risk devolving into institutions that actually support impunity. Example, the South Africa's Truth and Reconciliation Commission offered a conditional amnesty in exchange for full disclosure of crimes, but the power to grant amnesty has historically been rare among truth commission.[104]

Truth commissions have their limitations as they require sustained funding and political support to be effective, and there is a real danger that they are increasingly seen as a panacea, inserted into peace agreements in order to provide options for leaders seeking to avoid criminal accountability.[105] Generally, the truth commissions have a powerful effect when used appropriately and effectively. Once conducted in consultation with local actors, they have the potential to contribute to stability, building a just society, and laying the foundations for deepening the rule of law. At their best, truth commissions can produce influential investigative accounts of human rights violations while providing victims with at least symbolic reparations and accountability. They can support wider peace building efforts example in Sierra

[103] Supra note 22, at Pg. 20-23
[104] Ibid, at 30
[105] Freeman M and Hayner P, "Truth-Telling" in Bloomfield, D et al (eds.), Reconciliation after Violent Conflict, IDEA: Stockholm, 2003, Pg. 129.

Leone, strengthen human rights standards and propose recommendations that address critical issues of institutional reform by taking an example in South Africa.[106] Their findings may not lead to criminal accountability, but if they name perpetrators, human rights activists can campaign to prevent these perpetrators from taking up future positions in government. Thus, when properly executed, truth commissions can be one among a host of mechanisms for restoring the rule of law.[107]

2.3.4 Reparations

The reparations focus on victims and form a critical transitional justice mechanism for repairing relations between national actors and victims. The UN Office of the High Commissioner for Human Rights (OHCHR) accords reparations a special place among transitional justice measures, even as it recognizes the necessary interconnectedness of those measures.[108] The right to reparation is well established in international law and it is found in several multilateral treaties and is now accepted as part of customary international law.

The United Nations General Assembly, in a resolution outlining principles on the right to remedy and reparation, named five components of the right to reparation.[109] The first is restitution which involves returning the victim to his or her situation before the crime was committed and the second is compensation which involves payment for economically measurable damage. The third component is rehabilitation through general medical or social assistance and then the fourth is satisfactions

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[106] Ibid
[107] Shaw R, Rethinking *Truth and Reconciliation Commissions. Lessons from Sierra Leon,* United States Institute of Peace Special Report: Washington DC, 2005.
[108] Office of the United Nations High Commissioner for Human Rights, Rule of law tools for post – conflict states, United Nations, New York and Geneva, 2008, pg. 1- 14
[109] Ibid, at Pg 22 -26

which comprise a broad group of measures that includes access to justice and truth seeking; and lastly is guarantees of non-repetition. Just as they are most useful when paired with other truth and accountability mechanisms, reparations are a step toward truth and justice for victims: they recognize victims as persons unfairly harmed and entitled to compensation. The recognition of victimhood is an important symbolic component of any reparations program. In this sense, truth commissions and prosecutions are also agents of symbolic reparations.[110]

2.3.5 Institutional Reforms

A comprehensive transitional justice approach both identifies individual perpetrators and looks closely at structural deficiencies in institutions that allow for human rights abuses. Institutional reform refers to a broad range of initiatives that aim to re-establish the rule of law, a functioning state bureaucracy, and democratic norms in post-authoritarian or post conflict countries.[111] Common reforms encompass both non-criminal forms of accountability through vetting and lustration programs, and the re-establishment of the rule of law through judicial and constitutional reform. Either types of activity serve the same purpose, or are at least mutually reinforcing in which vetting civil service officials reinforces the rule of law, and judicial reforms may facilitate accountability for officials complicit in corruption or human rights violations. Vetting of public services provide one direct way to clean public administrations of officials responsible for crimes or those associated with a past regime.[112]

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[110] Supra note 105

[111] Supra note 22, at pg. 23- 24. Also see Clara, Transitional Justice: Key Concepts, *Processes and Challenges,* Briefing Paper ,*Institute for Democracy & Conflict Resolution(ICDCR),* Sussex, 2011

[112] Supra note 49, at Para 52

2.3.6 Traditional Methods of Justice

Traditional methods of justice can take many different forms, and vary extensively from community to community. They are generally considered restorative justice, but they can also have punitive functions. However, on a broad and general level they are mechanisms for solving disputes, conflicts and crime at the community level. It is where a village or tribal council, community meeting or council of elders is held to deal with crimes perpetrated towards the community or individuals, or it can focus on resolving conflicts such as marital disputes and domestic violence. The council, elders or group then decide on the punishment for the perpetrator.[113]

The punishment can vary extensively depending upon not only the seriousness of the crime or transgression, but also on the culture of the country and community. It can include public humiliation of the perpetrator, paying fines, community labour, physical punishment or what the community or council determines to be the best solution for the transgression. It is often focused on the fact that the perpetrator is part of the community and although he or she can be punished for the crimes committed, it is not in the sense of incarceration. The perpetrator may serve the community and repay for his or her crimes. This serves the greater good of the community rather than separating the perpetrator from the community.[114] The different variations of traditional justice mechanisms are used all over the world in developing countries. Where there have been long periods of conflict, authoritarian regimes or where the judicial system is perceived to be unfair and corrupt, they are

[113] Supra note 39, pg. Pg. 282
[114] Ibid.

sometimes used more extensively, because of a lack of trust in the system.[115]Unlike truth commissions and the type of ad hoc or hybrid local trials discussed above these mechanisms are in constant use for present crimes and conflict resolution, they are not a mechanism created or developed to deal particularly with past crimes of human rights abuse in a post conflict setting. They can be a valuable mechanism to use in the context of post-conflict transitional justice because of their focus on reconciliation and their both restorative and retributive nature.[116] However, several cautionary notes must be struck before unequivocally embracing all traditional mechanisms in all their forms as ways of dealing with past crimes. The cautionary of traditional mechanisms frequently rely on the denying the perpetrator the rights of a fair trial. The African Commission on Human and Peoples' Rights (ACHPR) has pointed out,

> *'it is recognised that traditional courts are capable of playing a role in the achievement of peaceful societies and exercise authority over a significant proportion of the population of African countries. However, traditional courts are not exempt from the provisions of the African Charter relating to a fair trial*.[117]

Therefore, not only the trial, but also the punishments meted out can be against international human rights law and standards. For example, in Rwanda, one of the judges of the *Gacaca* trials was accused of having used a machete to cut the thigh of a young woman because she had refused to sleep with him, the judge admitted this act and explained that 'it was ok' because she then 'agreed' to live with him.[118] The

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[115] ibid
[116] ibid, also see allen t, post conflict traditional justice: a critical overview , *the justice and security research programme(jsrp),* 2013, pg. 18 -20
[117] huyse, l and mark s, *traditional justice and reconciliation after violent conflict: learning from african experiences*, eds., iidea: stockholm, 2008, pg. 113.
[118] Phil C, Hybrid, Holism and "Traditional" Justice: The Case of the Gacaca Courts in Post- Genocide Rwanda, George Washington International Law Review, 2007, pg. 10- 29, 33- 35.

level of agreement versus that of enforcement is here questionable at best. The ability of some traditional mechanisms to deal with large-scale human rights abuse, because of their own non-adherence to international standards of human rights, is extremely problematic. However, for all its shortcomings, the implementation of the *Gacaca* courts in Rwanda, a local dispute settlement mechanism to address the legacy of the genocide, is recognized world-wide as an emblematic experience and ambitious exercise in mobilizing traditional justice in post-conflict societies.[119]

Also other countries have mobilized traditional mechanisms of conflict resolution in post conflict processes. The most well-known examples are the *mato oput* rituals, part of the *Acholi justice system* in northern Uganda, and the incorporation of traditional leaders in the truth and reconciliation commissions in Sierra Leone and Timor-Leste. Even Kofi Annan, as then UN Secretary-General, officially acknowledged that: '*due regard must be given to indigenous and informal traditions for administering justice or settling disputes, to help them to continue their vital role and to do so in conformity with both international standards and local tradition*'.[120] On the other hand International non-governmental organizations (NGOs) and donor countries have supported and even promoted those traditional justice instruments.[121] However, it is remarked that: it is common place to hear that culture and context matter, and that any intervention peace-building or otherwise must be culturally sensitive.[122]

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[119]Waldorf L, 'Mass Justice for Mass Atrocity: Rethinking Local Justice as Transitional Justice', *79 Temple Law Review1*, 2006, pg.1−88.
[120]Report of the Secretary-General of the United Nations, The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, UN Doc. S/2004/616, 23 August 2004.
[121]Huyse L, 'Introduction: tradition-based approaches in peace making, transitional justice and reconciliation policies', in Huyse Luc and Salter Mark (eds.), *Traditional Justice and Reconciliation after Violent Conflict. Learning from African Experiences,* Stockholm, International IDEA, 2008, pg.1-22.

2.4 The Concept of Justice

Justice is the impartial resolution of disputes arising from conflicting claims.[123]It implies the fair and proper administration of laws. Therefore for the United Nations, justice is an ideal of accountability and fairness in the protection and vindication of rights and the prevention and punishment of wrongs. Justice implies regard for the rights of the accused, for the interests of victims and for the well-being of society at large.

It is a concept rooted in all national cultures and traditions and, while its administration usually implies formal judicial mechanisms, traditional dispute resolution mechanisms are equally relevant. The international community has worked to articulate collectively the substantive and procedural requirements for the administration of justice for more than half a century.[124] Thus it seems natural to think of the concept of justice as distinct from the various conceptions of justice and as being specified by the role which these different sets of principles and conceptions have in common.[125]

2.5 The Concept of Peace

There are various definitions of peace appear in the literature, yet there is no consensus on a conceptually clear definition to guide researchers in developing measurement procedures and indicators.[126] This study proposes the definition of

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[122] Ibid
[123] Curzon, L.B and Richards P.H, *The Longman Dictionary of Law, 7th Ed*, Pearson Education Limited: London, 2007.
[124] Supra note 49, at Para 7
[125] Rawls J, *A Theory of Justice,* The Boo knap Press of Harvard University Press Cambridge, Massachusetts, 1999
[126] Royce A, Peace and Conflict, *2Journal of Peace and Psychology1*, 2004.

peace and develops the guidelines within the parameters of transitional justice in which peace is defined as a two-dimensional construct with both objective and subjective measures that must be studied within specific context. Therefore, Peace includes the absence of war,[127] but much more. It is the absence of violence in all of its forms and the presence of mutually beneficial cooperation and mutual learning.[128] Peace has eight components, where the absence of these four forms of violence is negative peace and the presence of activities to bring relief for past or present violence and to prevent future violence that is positive peace.

These components of peace include the following; the first component requires the absence of direct violence: ceasefires, disarmament, prevention of terrorism and state terrorism, non-violence. The second emphasise on providing a life-enhancing cooperation and prevention of direct violence: peace-building, conflict transformation, reconciliation and reconstruction.

Third component base on humanitarian aid, food aid, alleviation of poverty and misery and fourth is on building a life-sustaining economy at the local, national and global level in which everyone's basic needs are met. While the fifth on liberation from oppression, occupation, dictatorship and ensuring good governance and participation, self-determination and human rights.[129] And the sixth component base on overcoming prejudice based on nationality, race, language, gender, age, class, religion, and seventh on elimination of the glorification of war and violence in the media, literature, films, monuments, as well as the eight to promote of a culture of

[127] Martin E.A, *Oxford Dictionary of Law 5th edn.* Oxford University Press, London, 2003.
[128] Galtung J, *Peace by Peaceful Means: Peace and Conflict*, Development and Civilization, London: PRIO/Sage, 1996
[129] Webel C and Galtung J, *Handbook of Peace and Conflict Studies*, Routledge: Oxon, 2007.

peace and mutual learning; global communication and dialogues; development of peaceful deep cultures and deep structures; peace education; peace and journalism.[130]

2.6 Conclusion

This chapter have looked on different mechanisms or processes that transitional societies may use to address past human rights wrongs caused by conflict, repressive rule or state failure and includes both judicial and non-judicial approaches like trials, truth commissions, memorials and institutional reform initiatives.

Therefore, transitional societies have attempted various approaches to serve justice and to attain either individual or collective accountability for the past human rights violations. These approaches are seen to clarify the human rights records, identify victims and perpetrators, to provide reparations to the former and prosecute the latter. Hence the main issue of this Chapter will be featured in the next Chapter about the convergence of peace and justice in transitional justice of law and practice which will discuss in details on how the elements of transitional justice can be called upon in regard to the situation in Burundi.

[130] Ibid.

CHAPTER THREE

3.0 CONVERGENCE OF PEACE AND JUSTICE IN TRANSITIONAL JUSTICE: LAW AND PRACTICE

3.1 Introduction

The concept of transitional justice is problematic since there is often no clarity regarding the nature or length of the transition. This problem stems in part from the fact that a number of countries with transitional justice mechanisms are usually in situations of on-going armed conflict. In addition, transitional justice is no longer limited to moments of transition from authoritarianism to democracy or war to peace. Although transitional justice can be pursued in various contexts, the underlying objective is to find goals that strengthen stability and diminish opportunities for impunity.[131]

The transitional justice has several overlapping goals: to establish the truth about the past; end impunity for past and continuing human rights violations; achieve compensation for the victims of those violations; build a culture of the rule of law; lay the foundation for long-term reconciliation and political transformation; and prevent the recurrence of such abuses in the future.[132] These goals correspond to numerous obligations on states contained in domestic constitutions, international human rights law, international humanitarian law, international criminal law, and international refugee law, as well as the *Charter of the United Nations*, the *African Charter on Human and Peoples' Rights*, and other regional instruments. These

[131] See Dan Kuwali: Supra note 60, at pg. 3- 5, and Panel of the wise: supra note 61, at pg 10- 12
[132] Ibid

instruments together form the core norms and standards of transitional justice, including the duty to prosecute, the right to the truth, and the right to remedy and reparations.

3.2 Transitional Justice and International Criminal Court

The development in the International community's long struggle to advance the cause of justice and rule of law was the establishment of the International Criminal Court (ICC). The Rome Statute[133] entered into force only on 1 July 2002, yet the Court is already having an important impact by putting would-be violators on notice that impunity is not assured and serving as a catalyst for enacting national laws against the gravest international crimes.

Hence, it is now crucial that the international community ensures that this nascent institution has the resources, capacities, information and support it needs to investigate, prosecute and bring to trial those who bear the greatest responsibility for war crimes, crimes against humanity and genocide, in situations where national authorities are unable or unwilling to do so.[134] On the other hand the Security Council has a particular role to play in this regard, empowered as it is to refer situations to the ICC, even in cases where the countries concerned are not States parties to the Statute of the Court.[135] Although, Burundi has recently withdrawn from the ICC since 26 October 2017, still it will not affect the capacity of the OTP to request the opening of a formal investigation because a state had a duty to cooperate

[133]UN Secretary General, Rome Statute of the International Criminal Court, 2002. Available at http://untreaty.un.org/cod/icc/statute/romefra.htm (Accessed on July 21, 2016).
[134] Supra note 66, at Pg. 13
[135] Ibid, at Pg. 16 - 17

nor it shall not prejudice in any way the continued consideration of any matter which was already under consideration by the court prior to the date in which the withdrawal became effective as provided under Article 127(2) of the Rome statute.[136] As there are no timelines provided in the Rome statute for a decision on a preliminary examination, it just depends on the facts and circumstances of each situation.

This is clear under Article 13(a) of the Rome statute which require either a situation to be referred to the prosecutor by a state party in accordance to Article 14, which require the prosecutor to investigate the situation once requested so as to determine the persons to be charged with the commission of such crimes[137] or the prosecutor to initiate an investigation proprio motu on the basis of 'information' received by reliable sources as provided under Article 13(c) in accordance with Article 15 of the Rome statute. Meaning that the investigation of a situation referred to by a state party or the Security Council is the sole responsibility of the prosecutor, but if the prosecutor acts proprio motu the decision to proceed with an investigation must be authorised by the pre- trial chamber.[138] Thus, the Pre – Trial Chamber III of the ICC has now authorised the prosecutor to open an investigation regarding crimes within the jurisdiction of the court allegedly committed in Burundi or by nationals of Burundi outside Burundi since 26 April 2015 until 26 October 2017 as the state was party from the moment the statute entered into effect for Burundi (i.e. 1st December

[136] Supra note 36, Also overview on section 127(2) of the Rome statute is available at http://dovjacobs.com, Accessed on January 12, 2018.
[137] Ibid, at Article 13 and 14.
[138] Ibid, at Article 15(3). Also see Kai A, International Criminal Justice: A critical Analysis of Institutions and Procedures, 2007, pg 433; in Calvo- Goller, The Trial Proceedings of the ICC, ICTY and ICTR Precedents, 2006, pg. 174

2004) up to when the withdrawal became effective.[139] However, in the light of the scale of the crimes under international law that have been committed with impunity in Burundi, it should be noted that Burundi has ratified a range of human right treaties, including the ICCPR (1990), ICESCR (1990), CAT (1993), and the African Charter on Human and Peoples' Rights (1989). Also, the Constitution of Burundi recognises the right to life (Article 24), the right to be free from torture or cruel, inhuman or degrading treatment of punishment (Article 25) and guarantees the independence of the courts (Article 209). Burundi is a member of Human Rights Council and was a member of the Council when Resolution A/HRC/S-24/1 which established UNIIB was adopted, by consensus.[140] Hence, Burundi carries the primary responsibility to respect, protect and ensure human rights to all people within her jurisdiction.[141]

Ironically, Burundi becomes the first nation to leave the ICC after the initial embrace by some of African leaders, where the relations between the ICC and African states have become increasingly strained by concerns that it has pursued a selective approach to justice by primarily targeting Africans while ignoring other international crimes perpetrated by powerful nations or their allies. These have opened the court to allegations of neo-colonialism; in fact, the court's main detractors in Africa see it as a tool of Western hypocrisy and double standards. Other critics charge that the court's retributive justice devalues traditional methods of dispute resolution that

[139] Fadi El Abdllah, ICC Judges authorize opening of an Investigation regarding Burundi Situation, Public Affairs Unit, ICC, *Press Release*, November 9, 2017.Available at https://www.icc-cp.int ,Accessed on January 12, 2018
[140] Supra note 90, at Para 14 &15
[141] Ibid

emphasize restorative justice.[142] These criticisms have coincided with growing disillusion about the workings of the court among the court's key allies in Africa's civil society and victims' groups. Although strongly supportive of the ICC, they were part of the global campaign to strengthen international justice these actors have been frustrated by the court's direction, prosecutorial policies and strategies, excessive procedural delays, and insufficient evidence for charges, as well as the inadequate participation of victims. The procedural and policy issues raised by victims' groups and their supporters in civil society do raise concerns and require further analysis.[143] The international justice building is thus perceived to be at loggerheads with Africa in a manner that may potentially threaten the pursuit of peace and justice.

3.3 United Charter on Peoples' Rights

The UN charter protects peoples' rights through legal instruments and on several activities. Also different intergovernmental bodies and interdepartmental mechanisms based at the UN address a range of human rights protections[144] to ensure that sustainable peace and accountability through appropriate transitional justice is well achieved.[145] On the other hand the Charter empowers the Security Council to take necessary measures to maintain peace or restore international peace and security.[146] Furthermore, the development of the concept of responsibility to protect (RtoP) ensure that states are institutionalized and reinforcing the sovereign

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[142] Amnesty International, International Criminal Court: Burundi and Liberia - Ratification is an important commitment towards ending impunity, 2004, http://reliefweb.int/report/burundi/international-criminal-court-burundi-and-liberia-ratification-important-commitment. Accessed on July 21, 2016
[143] Supra note 22
[144] World Summit Outcome Document, GA Res. 60/1, October 24, 2005, Para 138 -139
[145] Supra note 30, at Para 6
[146] Article 39 of Charter of the United Nations, 24 October, 1 UNTS XVI, available at: http:www.refworld.org./docid/3ae6b3930. Html [Accessed January 12, 2018]

responsibilities of the state in protecting its citizens.[147] This mean that states can prevent the occurrence of responsibility to protect crimes within their territory hence adoption of resolution 63/308/2009 by the General Assembly during the world summit is one of the example which promote nations adopting targeted measures to prevent atrocity crimes tailored to the national context.[148] In this context it can be seen that Burundi has been reluctant to cooperate with the AU and it is even noted that during the UNIIB visit several government officials were not in a position to provide information. The response considered in a blanket denial of all violations.[149]

3.4 Regional Overview of Transitional Justice

The process of ending impunity has become a collective international enterprise to promote justice, reduce human suffering, and foster amity within and across societies. The International instruments dealing with impunity have evolved alongside the gradual diminution of sovereign rights of states, raising profound questions about the locus of action and responsibility that have blurred the traditional division of efforts between national and the international actors.[150] Thus, the consensus on fighting impunity has, in part, been hindered by the sovereignty claims between nations and international community, morality, and rights.[151]But there are remarkable growing realization that solid institution which restrain justice and reconciliation within the broader framework of democracy and the rule of law are the

[147] The President of the General Assembly, Information note: The Role of Regional and Sub- Regional Arrangements in Implementing the Responsibility to Protect, United Nations General Assembly, July 12, 2011 [A/65/ 877- S/2011/ 393], at Para III(4)
[148] General Assembly Council, Responsibility to Protect: State Responsibility and Prevention, Report of the Secretary- General United Nations, July 9, 2013[A/67/929- S/2013/399], at Para 56
[149] Report of the United Nations Independent Investigation on Burundi (UNIIB) established pursuant to Human Rights Council resolution S- 24/1, Pg. 3

[150] Edward L & Marry B, *Encyclopaedia of Human Rights,*1996, pg. 173- 176
[151] Ibid

weapons for fighting impunity across the nations. Hence, international instruments against impunity have become smoothed because of the intensification of atrocities and in circumstances where civil wars have ravaged the institutions of justice and reconciliation.[152] This is due to a long time experience with wars and violence in Africa with strident attempts to remedy the culture of impunity at the national, regional, and continental levels. Hence, one of the cornerstones of the AU's principles of democracy, human rights, and the rule of law, are joint efforts against impunity enshrined in the organization's charter and the AU Constitutive Act[153] to give moral and political weight to African states.

The AU Constitutive Act pledges to fight impunity, but there is a need to draw lessons from the various experiences across African in the articulation of a set of common concepts and principles that would guide consensus on continental and sub-regional instruments. Part of these initiatives would entail exploration of measures to develop and deepen the AU's capacity for assessing the goals and limitations of various accountability measures to respond to impunity.[154] These efforts could culminate in a continental strategic policy framework on transitional justice that balances the imperatives of peace and justice in conflict and post conflict contexts. Such a policy would provide the AU with the occasion to respond appropriately to the difficult problems of balancing the immediate need to secure peace with the longer term importance of establishing the rule of law and preventing future

[152] Michael F, Africa ending impunity for rights abuses, *Africa Renewal*, January 2007
[153]Constitutive Act of the African Union, Adopted in Lomé, Togo, on 11 July 2000 and entered into force on 26 May 2001. The Assembly of the AU held its inaugural meeting in Durban, South Africa in July 2002.
[154] Jalloh c, Universal Jurisdiction? A preliminary Assessment of the African Union perspective on Universal Jurisdiction, 2010, *Criminal Law Forum21:* 1-65

conflicts.[155] Therefore, most part of the AU's human rights crusade reflected in the struggle against impunity and the quest for justice and reconciliation seek to legitimize various national efforts that have grappled with building democracies, the rule of law, and functional judicial systems with an appearance of impartiality.[156] Equally vital, the AU has embraced declarations against impunity to propagate this norm of justice and reconciliation within its multiple institutions and sub-regional bodies, such as the Regional Economic Communities (RECs).

Hence, the African experiences of managing impunity via justice and reconciliation disclose the importance of institutional innovations that give prominence to participation, impartiality, and the search for truth and healing. The national transitional justice institutions, such as truth and reconciliation commissions, have worked where there is a decisive departure from institutions and practices that underwrite impunity and criminalize organized dissent. The AU as noted for example has adopted a wide range of legal instruments aimed at addressing significant human security objectives.[157] It could be said that the challenge in Africa has been on creation of stable institutions that balance reconciliation with justice in the context of broadening political, social, and economic freedoms. African attempts to deal with justice and reconciliation have reinforced significant principles and norms, in particular the importance of public participation, public hearings, and the restoration

[155] Ibid, at pg 46- 47
[156] Supra note 60, at Pg. 64, also see the objective and Principles under Article 3 & Article 4 of the Constitutive Act.
[157] Supra note 152, at footnote 184: Protocol Relating to the Establishment of the Peace and Security Council of the African Union, July 9, 2002; OAU Cairo Declaration on Border Disputes among African States legitimizing national borders inherited from colonial times, AHG/ Res. 16(I) (1964); OAU The Kampala Document: Towards a Conference on Security, Stability, Development and Co-operation in Africa (CSSDCA) (1991); OAU Cairo Declaration on the Establishment of a Mechanism for Conflict Prevention, Management and Resolution, AHG/DECL.3 (XXIX) (1993).

of civic trust; the right to the truth and reparations for victims; all focusing on institutional reforms.[158] Furthermore, questions of impunity, justice, and reconciliation in Africa have been increasingly mediated by international actors and institutions, some of which are not perceived to be fair, impartial, and just. The emergence of the ICC as the embodiment of international legality on impunity has occasioned deep debates about the prosecution of crimes and atrocities by individuals, irrespective of status and standing. Thirty three of African states are signatories to the Rome Statue that created the ICC and some have made efforts to establish enabling legislation to implement its provisions.

Although the concerns of some African states about the selective application of international justice will not diminish, there is widespread consensus, especially among the citizens of the continent, on the core underpinnings in the fight against impunity.[159] The results of the ICC's judicial intervention both positive and negative are reverberating across Africa. The impact of the ICC, under it's complementarily clause, has propelled some innovative domestic judicial and non-judicial approaches to dealing with impunity. In the same vein, it is apparent that international justice is at a crossroads in Africa.[160] However, to overcome this diverging about international justice in Africa it is important to entrench African values in international accountability mechanisms; and harmonize the global search for peace, justice, and reconciliation. The above discussed aspects relate much to the advocacy of the Panel of the Wise and also the African initiatives for strengthening instruments of justice and reconciliation undertaken in part of this study

[158] Supra note 60, at Pg. 62
[159] Ibid, at 63
[160] Ibid

3.5 United Nations Security Council's outlook on Burundi

It should be noted that TJ is passing through a worrying steps in Burundi because the Truth and Reconciliation Commission was still preparing for public hearings and collective forgiveness addressing crimes committed between 1962 and 2008 when the country engulfed into 2015 crisis,[161] meaning that the mechanisms must have paralysed as for now. However, it is noted that in 12 November 2015 the United Nations Security Council had called on all parties Burundi to engage in peace talks, warning of further actions against those who incite more violence and also adopted a resolution calling on government to protect human rights and cooperate with regional African mediators to immediately convene "an inclusive and genuine inter-Burundian dialogue" to find a peaceful resolution of the crisis that had occurred.[162]

In January 2016, the High Commissioner for Human Rights appointed experts to undertake the United Nations Independent Investigation on Burundi (UNIIB) into violations and abuses of human rights with a view to preventing further deterioration of the human rights situation [163] and it is noted that the government has been cooperative by that time when the UNIIB has compiled a list of alleged perpetrators who were repeatedly named by victims and witnesses as responsible for gross human rights violations.[164] However, it is surprising that the resolution which also involved sending 228 UN Police to monitor the security and human rights situation in Burundi, it has not been implemented despite acknowledging the high risk of atrocity

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[161] Mark K, Transitional Justice Battlegrounds: Another Bad week in Burundi, *Justice Info. Net*, October 24, 2016, available at www.justiceinconflict.org , Accessed on January 12, 2018
[162] UN News Centre, Burundi Security Council calls for Political talks to Resolve Crisis Peacefully. Available at www.un.org, Accessed on January 12, 2018
[163] Supra note 90, Note that UNIIB composed of three experts where two were from the UN and one from the African Union system as joint UN/AU undertakings.
[164] Ibid, at Pg. 1

crimes in Burundi and the UNSC is still divided over a course of action.[165] Therefore, a critical analyse should suppose a similar outlook adopted by the Security Council when establishing the ICTR and ICTY, in which a link shows that a tribunal could be established in Burundi upon justification that there were atrocities committed during the post- election crisis so as to provide satisfaction of those who were mostly injured by those crimes.[166]

3.6 Peace and Justice in the Process of Transitional Justice

Peace without justice cannot be sustainable. It is a dreadful mistake to believe that people will simply forget. Even after a hundred years, unpunished crimes continue to signify huge stumbling blocks in establishing peaceful, normal relations between states.[167]Although there is currently a growing consensus of the nexus between peace and justice, for example the UN Secretary General has emphasised the importance of integrating justice into the peace process.[168]

If peace being dissociated from social justice does not address the fundamental structural causes of war.[169] The post conflict reconstruction faces the deep social inequalities that are common in and endemic to many divided and impoverished countries. Where, political instability is inherent in the failure to reduce gross inequalities and in the lack of policies on poverty reduction. And formal methods of

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[165] Amilcar R, Is the United Nations failing to Prevent Atrocity Crimes in Burundi? Available at www.world policy.org, Accessed on January 12, 2018

[166] Richard J.G, The Role of the United Nations in the Prosecution of International War Criminals, *119 Journal of Law & Policy 5,* 2001, pg. 120

[167] *"European Values and National Interests in the enlarging Europe,"* Keynote Speech by Carla Del Ponte, former ICTY prosecutor, at the International Conference: Values and Interests in International Politics, Talinn, 2006, http://www.riigikogu.ee/public/Riigikogu/Valissuhted/del_ponte301006.doc(accessed on August 13, 2017)

[168] Draft report Wilton Park Conference, *"Transitional Justice and Rule of Law in Post-Conflict Societies: The Role of International Actors",* 2005, pg. 24-26.

[169] Jeong H, *Peace and Conflict Studies: An Introduction*, Ashgate: Aldershot, 2000.

representation and institutional procedures can be a contentious issue without addressing power differentials among social groups and classes. Hence, the development of people's capacity to influence social structures and political processes has to go hand in hand with empowerment of the marginal sectors of society.[170]

The durable peace could not be achieved without the establishment of local, state, regional and international systems of procedural and distributive justice.[171] Procedural and distributive justice can be complementary to each other in the way that participatory mechanisms allow identity groups to express their needs and grievances in a constructive manner. In addition, forming political entities of multiethnic and multicultural configurations would require respect for greater autonomy and diversity in which dominant groups need to be convinced that their own long-term security interests are served by the promotion of a just society.[172]

In this regard, the discussions of transitional justice in Africa focus on how to attain peace and ensure accountability during negotiations, raising the controversial question of whether peace and justice are competitive or complementary goals. Two incorrect assumptions underlie these discussions. The first is the narrow view that assumes that peace processes are solely about ending violent conflicts and the second is the tendency to perceive justice in terms of retributive justice that is, prosecution or criminal accountability.[173]

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[170] Ibid
[171] Peck C, The *United Nations System as a Dispute Settlement System: Improving Mechanisms for the Preventive and Resolution of Conflict*, Kluwer Law International, The Hague, 1996.
[172] Ibid
[173] Supra note 60, at 11

However, these extreme positions ignore the intimate links between peace and justice. It should be acknowledged that a more accurate conception should treats peace and justice as fundamental to ending violence and preventing its recurrence. In which most mediators recognize that building a durable peace involves addressing the underlying causes and sources of violent conflict. Along with concerns about competition for power, marginalization, and identity, most conflicts are outcomes of the flagrant injustices and human rights abuses committed by elites and state institutions, taking examples of indictments and prosecutions helping secure peace by removing spoilers from the peace process, such as in the former Yugoslavia, often both peace and justice cannot be achieved at the same time.[174]

Nevertheless with advances in international legal obligations and an increasingly sophisticated international justice building, mediators can no longer ignore questions of justice. In the quest for justice, the UN has established a binding rule prohibiting its officials from granting amnesties for crimes against humanity, war crimes, and genocide.[175] It was for this reason that the UN envoy to Sierra Leone, at the time of the 1*999 Lomé Peace Accord*, appended the UN's refusal to accept the amnesty clause to the accord that the government and rebels signed. This gesture paved the way for a policy that has influenced subsequent mediation by national, regional, and international actors.[176] Further, overcoming the tensions between peace and justice entails sequencing justice activities, as demonstrated in Argentina in the 1980s can be taken as a cooperative case to this study. Although it was not facing on-going armed conflict, Argentina confronted the dangers of a transition from military

[174] Ibid
[175] Ibid. At 12
[176] Ibid

dictatorship to democracy. The successive democratic governments from 1983 took gradual steps in building peace and justice that involved a mixture of punishment of and amnesty for military officers implicated in human rights abuses during the period of military rule.[177] Therefore, the Argentinean experience reveals that while political realities complicated the search for accountability, multiple truth-seeking initiatives continually exposed perpetrators, and a vigilant array of victims' groups and civil society organizations kept the demand for justice alive. In addition, Argentina's victims' groups used international and regional instruments at critical moments to pressure their government to act. In the end, receptive governments with favourable political climate made the pursuit of justice possible.[178]

Similarly, Argentina's neighbours Uruguay and Chile set justice aside temporarily when their militaries, including previous dictators, threatened reprisals against civilian governments that tried to pursue accountability. But these actions did not lessen public demands for justice, and as the case of General Augusto Pinochet in Chile illustrates, justice finally prevailed.[179] These Latin American experiences demonstrate that peace and justice are compatible and that a variety of accountability mechanisms can be pursued over time in the search for sustainable peace. Subsequently, they do demand a comprehensive strategy of implementation basing on equal, mutually-reinforcing, and non-sequential pillar of states in the fulfilment of their responsibility to protect.[180] Therefore, in sequencing and strategic planning justice, it should be considered that peace and democracy are not mutually exclusive

[177] Ibid
[178] Ibid
[179] Ibid
[180] United Nations Secretary-General, The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, UN Doc. S/2004/616, August 23, 2004, pg. 1- 2

objectives, but rather mutually reinforcing imperatives.[181] Hence, in response to these considerations, there is no transitional justice model approach that can easily be transferred from one situation to another. It is just a post- conflict situation that determines.

3.7 Conclusion

The recovery of a fractured community increases its ability to change the dynamics of the cycle of conflict. Peace building ultimately has to focus on problems attributed to original and new sources of serious conflict. The reconstruction of a broken social and human structure in a war shattered region has to be geared toward promoting human well-being and social justice, which constitute positive peace. Social empowerment and trust building improve the chances of successful reconstruction. Therefore, from what has been discussed in this chapter, the following chapter will confine itself in Burundi as a post conflicting state and as the case study of the research by giving the general overview of its transitional justice.

[181] Ibid

CHAPTER FOUR

4.0 THE GENERAL OVERVIEW OF TRANSITIONAL JUSTICE IN BURUNDI POST CONFLICTING STATE

4.1 Introduction

After attainment of her independence in 1962, Burundi has experienced and passed through several cycles of violence. The settling of accounts for past abuses seems entangled while popular consultations unfold slowly. Provisional immunities could jeopardize prospects of accountability in the absence of a comprehensive redress policy for victims and in light of continuing human rights violations.[182] An opportunity for peace finally arose with the signing of the Arusha Peace and Reconciliation Agreement in August 2000.

4.2 The Arusha Peace and Reconciliation Agreement for Burundi and the Kalomoh

This Arusha Peace and Reconciliation Agreement for Burundi and the *Kalomoh* report provide the basis for dealing with issues of reconciliation and justice for mass atrocities of the past in Burundi. The *Kalomoh* report assessed the advisability and feasibility of the mechanisms proposed in the agreement. The report recommended for the creation of the TRC in accordance with the agreement and, instead of the special tribunal provided for in the agreement, a special chamber within Burundi's court system staffed by national and international members and personnel.[183] The Security Council approved the *Kalomoh* report in Resolution 1606(2005). Since then,

[182] Submission to the Universal Periodic Review of the UN Human Rights Council Third Session: December 1-12, 2008 International Centre for Transitional Justice, 2008.
[183] Supra note 22, at pg 42

the UN and the government have been engaged in protracted negotiations regarding the operational framework for the proposed mechanisms.[184] Although there is a consensus on the hybrid composition of the truth and reconciliation commission and the special chamber, two series of negotiations failed to secure an agreement between the government and the UN on the operational framework. The points of contention relate to the relationship between the truth and reconciliation commission and the special chamber, the independence of the chamber's prosecutor, and the power of the truth and reconciliation commission to grant amnesty.[185]

In November 2007 the government of Burundi and the UN agreed on the creation of a tripartite which comprised of the UN, government, and civil society steering committee to lead national consultations on transitional justice mechanisms. The six-member committee was tasked with collecting Burundians' perceptions of the twin transitional justice mechanisms to be created. Though this process is vital in a context where the mechanisms proposed were designed without sufficient input from the public and civil society, it created conflict between the government and the UN over the outcome.[186]

The UN wanted to embark on consultations with the aim of collecting public views on the modalities of both mechanisms, whereas the government considered consultations as an opportunity to marshal popular support for the exclusive creation of a truth and reconciliation commission, and rejection of the mechanism for setting criminal accountability. All sides in the conflict had previously agreed on some form

[184] Ibid
[185] Ibid, at pg 43
[186] Ibid

of de facto amnesty to avoid prosecution. Although the Arusha agreement prohibited amnesty for serious international crimes, subsequent peace agreements provided provisional immunity to rebel groups to facilitate their return to the country and participation in the political process.[187] A number of constraints have inhibited efforts to address issues of impunity and reconciliation. In August 2010, the six-member committee produced the results of the consultation, but the report has yet to be released to the public.[188] However, neither the TRC nor the judicial mechanism to try those responsible for grave human rights violations has been implemented.

Apart from what has been elaborated above, the transitional justice has become a prominent element of the liberal peace-building approach.[189] And it aims at promoting social and political integration and reconciliation, to enhance the rule of law, to fight impunity and to increase trust in government institutions. This normative model is mainly based on humanitarian law, international criminal law and human rights law.[190] However, Burundi lacks the political will that is necessary to implement such a normative model of transitional justice.[191]The implementation deadlock might be due to the fact that transitional justice touches on fundamental interests, especially those of individuals who have been implicated in past violence. Nevertheless, as provided before, transitional justice in Burundi might also be contested because the political actors' understandings of the basic concepts of

[187] Ibid
[188]Ibid, note that as this report went to press, a truth and reconciliation commission had not yet been established in Burundi.
[189] Sriram C, Transitional Justice and the Liberal Peace, in: Newman, Edward, Roland Paris, and Oliver P. Richmond (eds.), *New Perspectives on Liberal Peace building*, United Nations University Press, Tokyo and New York, 2009.
[190] Bell C, Transitional Justice, Interdisciplinary and the State of the "Field" or "Non-Field", in: *3International Journal of Transitional Justice1*, 2009, pg. 5-27.
[191] Human Rights Watch, *Selling Justice Short: Why Accountability Matters for Peace*, Human Rights Watch, New York, 2009.

transitional justice, such as justice, reconciliation and truth, do not conform to international transitional justice norms or the liberal peace-building model.[192]

4.3 The Constitutional Transformation and Power Sharing

Fifteen years after the signature of the Arusha Peace and Reconciliation Agreement, there is a state of the art of power-sharing in Burundi. Used both for the purpose of war termination and of constitutional transformation, power-sharing played a critical role in Burundi's transition from conflict to peace. With the benefit of hindsight, Burundi has managed to overcome the adoption problem. There is sustainable respect for power-sharing, in particular in its ethnic dimension.

At the same time, the impact of recent developments, including the 2010 general elections, on the erosion of one of the pillars of power-sharing in Burundi.[193] In order to understand its dynamics, power-sharing must be placed in the context of stubborn, context specific historical political and institutional features. Then, on 6 July 2015, President Yoweri Museveni of Uganda was appointed as mediator on the Burundian crisis by the East African Community (EAC). On 28 December 2015, he hosted a political dialogue on the crisis in Burundi at the State House in Kampala. Participants included government representatives, civil society members and representatives of a variety of officially recognized political parties and other political movements based outside Burundi. The presence of the opposition coalition, the National Council for the Respect of the Arusha Agreement and the Rule of Law

[192] Rubli S, Knowing the Truth – What For? The Contested Politics of Transitional Justice in Burundi, in: *27Journal für Entwicklungspolitik3*, 2011, pg. 21-42.
[193] Cori W, Mapping Conflict and Peace in Burundi: An Analysis of the Burundi Conflict Terrain, *University of Pretoria,* ResearchGate, January 2016, pg. 6, at http://www.researchgate.net/publication/31o597931

(CNARED) was deplored by Burundi's Minister of Foreign Affairs Alain-Aime´ Nyamitwe.[194] The Burundian government reaffirmed its position that those responsible for the failed *coup d'e´tat* attempt of 13 May 2015 and for the political violence in Bujumbura before and after the coup had no place at the dialogue. President Museveni, however, insisted that all parties must be able to participate in the talks and called upon the government not to exclude the so called radical opposition, but rather to grant them temporary immunity.

In January 2016, two rebel movements *Forces re´publicaines* du Burundi (Republican Forces of Burundi; FOREBU) and Re´sistance pour un Etat de droit au Burundi (Resistance for the Rule of Law in Burundi; RED TABARA) announced an armed struggle to topple the Pierre Nkurunziza government.[195] As a result, the issue of inclusiveness of the talks and the granting of temporary immunity has become even more complex. Museveni's suggestion to grant *immunite´ provisoire* to the opposition was a clear reference to Burundi's earlier experience with peace talks and temporary immunities. In November 2003, when the main rebel movement National Council for the CNDD-FDD of Nkurunziza signed the Global Ceasefire Agreement (GCA), *immunite´ provisoire* protected the movement's leadership against the risk of judicial prosecution upon its return to Bujumbura. The 2006 peace agreement with the other, last-remaining rebel movement Agathon Rwasa's FNL-Palipehutu also included temporary immunity.[196] The current government established after the strongly contested polls of 2015 is dominated by the CNDD-FDD party of re-elected

[194]Ibid, also see; Ministe`re des Relations exte´rieures, Communique´ de Presse, Décembre 28, 2015
[195] Jordan A, Burundi's newest biggest rebel group, *African Arguments*, October 3, 2017. Available at www.africanarguments.com. Accessed on January 14, 2018
[196] Museveni was one of the international co-signatories and guarantors of both peace agreements

President Nkurunziza and includes representatives of Rwasa's FNL party. Museveni's call to grant temporary immunity to political opponents thus clearly found inspiration in Burundi's recent history and in its, until recently, successful transition to peace after a decade of civil war. Like Nkurunziza and Rwasa before, several current opposition leaders living in exile are the target of arrest warrants and extradition requests. Therefore, from a short-term conflict-settlement-oriented perspective, it seems logical and necessary to grant temporary immunity to opponents invited to the negotiations table. This is by no means unique to the case of Burundi. Mediator Museveni may in fact also have found inspiration in customary international humanitarian law, which includes a rule that:

> *At the end of hostilities, the authorities in power must endeavour to grant the broadest possible amnesty to persons who have participated in a non-international armed conflict, or those deprived of their liberty for reasons related to the armed conflict, with the exception of persons suspected of, accused of or sentenced for war crimes*.[197]

The amnesties and other safeguards against criminal prosecution have been considered a necessary evil for those situations in which a negotiated settlement rather than a military victory is the only viable option.[198] Museveni's suggestion to grant temporary immunity to those allegedly involved in a military coup attempt is therefore, at first sight, not problematic. On 2 March 2016, the EAC heads of state appointed former Tanzanian president Benjamin Mkapa to assist and facilitate the mediation led by Museveni. At a first round of internationally requested[199] dialogues

[197]International Committee of the Red Cross, 'Rule 159. Amnesty,' https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule159 (Accessed on July 20, 2016).
[198]Mark F, *Necessary Evils: Amnesties and the Search for Justice,* Cambridge University Press: Cambridge, 2010.
[199] In early March 2016, the European Union imposed aid sanctions on Burundi under Art. 96 of the ACPEU Cotonou partnership agreement. The steps required to ease those sanctions include the government's participation in an internationally mediated dialogue.

under his facilitation on 22 to 24 May 2016, no meaningful progress was made towards a political solution. As long as there is no mutually hurting stalemate for all parties involved, the crisis and the targeted assassinations and reprisal killings and disappearances that come with it may well linger on. Another scenario in which temporary immunity will not be used is that of an escalation of the crisis into an open possibly even international armed conflict, with one party staging a military victory.[200]

However, in the scenario of a genuine dialogue followed by a negotiated settlement, the issue of temporary immunity is most likely to reappear on the agenda and in the toolbox of international mediators. Because, there are at least three reasons to fear that a new round of temporary immunity may reproduce the same longer-term effects, unless lessons are learned from previous experiences, as follows;[201] First, through learning by doing and trial and error, most of Burundi's political elites who were mostly the same actors involved in previous peace talks have conceptualized politics as a continuous process of balancing their political, security and other interests, if need be at the expense of collective good such as truth and accountability.[202] In all of the previous elite driven settlements, notwithstanding some lip service paid to it, justice was notably absent. There is no reason to assume that they would behave differently this time. Secondly, over the past decade, Burundi's international development partners have tolerated or even encouraged a situation of enough peace, namely, stabilization and control even if that goes hand in

[200]Ibid
[201] Stef V, 'Power-Sharing, Conflict and Transit.ion in Burundi: Twenty Years of Trial and Error,' *44Africa Spectrum 3,* 2009*,* Pg. 63–86.
[202] Ibid

hand with militarized governance, executive control over the judiciary and the gradual closing down of democratic space for civil society.[203] In addition, they may rightly not see any short-term cost of granting seemingly temporary immunity to negotiating parties. Thirdly, domestic voices calling for an end to a longstanding culture of impunity in terms of human rights crimes exist but have never had strong political leverage. Nor have they been able to rely on an independent judiciary. As a result of the crisis, these voices have, on the one hand, been oppressed and silenced by the government and, on the other, politically framed by opposition elites who may well not take them seriously when striking a next deal that includes temporary immunities.[204]

4.4 The United Nations Independent Investigation on Burundi

The United Nations Independent Investigation on Burundi (UNIIB) was established by the Human Rights Council through resolution A/HRC/S-24 of 17 December 2015 which asked the High Commissioner for Human Rights to urgently organize and dispatch on the most expeditious basis possible a mission by independent existing experts as follows:

First, to undertake swiftly an investigation into violations and abuses of human rights with a view to prevent further deterioration of the human rights situation; to make recommendations on the improvement of the human rights situation and on technical assistance to support reconciliation and the implementation of the Arusha Agreement. Second, to engage with the Burundian authorities and all other relevant

[203] Devon C, 'The International Peace building Paradox: Power Sharing and Post-Conflict Governance in Burundi,' *112 African Affairs 446*, 2013, pg. 72–91.
[204] Ibid

stakeholders including United Nations agencies, civil society, refugees, the field presence of the Office of the High Commissioner in Burundi, authorities of the African Union, and the African Commission on Human and Peoples' Rights, in particular with a view of preventing such atrocities in future.[205]

The third mission was to help the State to fulfil its human rights obligations, to ensure accountability for human rights violations and abuses, including by identifying alleged perpetrators, to adopt appropriate transitional justice measures and to maintain the spirit of the Arusha Agreement and fourth, to ensure the complementarily and coordination of this effort with other efforts of the United Nations, the African Union and other appropriate regional and international entities, drawing on the expertise of the African Union and the African Commission on Human and Peoples' Rights to the extent practicable.[206]

The Human Rights Council resolution requested to have a representative of the experts issue an oral update and participate in an enhanced interactive dialogue which was undertaken at its 31st session of March 2016. The resolution asked also the experts to issue a final written report at its 33th session of September 2016 and to participate in an interactive dialogue during the same session. Hence, history may not necessarily repeat itself. At the time of writing this report, it is still not clear whether there will be any inclusive and genuine political dialogue or peace talks that might give rise to another round of temporary immunity.

[205] United Nations Human Rights: Office of the High Commissioner. http://www.ohchr.org/EN/HRBodies/HRC/UNIIB/Pages/UNIIB.aspx (Accessed on July 21, 2016).
[206] Ibid

4.5 Conclusion

Therefore, transitional justice as a political process of negotiated values and power relations that attempts to constitute the future based on lessons from the past. Transitional justice is not a value-neutral process but instead reflects certain normative beliefs and values about what a post-conflict society and state should look like.[207] The production of particular truth narratives and lessons from the past might be used as an instrument for political struggles to construct, forge and mould society and the political apparatus, and/or as a strategy to protect partisan interests to achieve unexpected goals.

[207] Supra note 89

CHAPTER FIVE

5.0 RESEARCH FINDINGS AND DISCUSSION

5.1 Introduction

The study focused on examining the convergence of peace and justice towards resolving past atrocities in transitional society in Burundi. In course of dealing with the study, the study was guided by the following questions. The first was whether convergence of peace and justice would lead to restoration of peaceful society. And the second was whether mechanisms employed in resolving the past atrocities would succeed.

The study used doctrinal legal research in depth dealing with the matter at hand which employed statutory materials, case reports, standard textbooks and reference books, legal periodicals, Parliamentary Debates and Government Reports. These materials paved a way for discussion of the questions provided before in this study. The discussion was made by considering several stages. The first stage involves identifying and analysing facts, and formulating the issues.

5.2 The Convergence of Peace and Justice towards the Restoration of Peaceful Society

To respond on the issue at hand the study taken a look in *Paul Van Zyl's* article *Promoting Transitional Justice in Post-Conflict societies*. The author is of the view that, it is important to accept that tensions exist between peace and justice in the short-term and that in some hard cases it is prudent and defensible to delay justice claims in order to achieve an end to hostilities or a transition to a democratic order.

Nevertheless, justice claims should not be deferred indefinitely, not just because of the likely corrosive effect on efforts to build sustainable peace, but because to do so would be to compound a grave injustice that victims have already suffered. Transitional justice strategies should be an integral part of any effort to build a sustainable peace, but in some circumstances peace and justice may not be completely compatible in the short-term. If justice is deferred, then every effort should be made to ensure that the prospect of achieving accountability in the medium to long-term are preserved and that as much of the transitional justice agenda as can be achieved in the short-term is implemented.

The author pointed out that transitional justice mechanisms should be incorporated into peace agreements if they embody a genuine desire to deal with the past as opposed to a cosmetic effort to avoid accountability. Peace agreements that contain bona fide commitments to deal with the past should strike the right balance between signalling this commitment in the text of the agreement and not overprescribing details that should emerge from a subsequent process of national consultation. The author also provided the state obligations in dealing with human rights abuse and correspondingly clears prohibitions regarding, for example, blanket amnesties for international crimes. This has been supported by the ratification of the International Criminal Court (ICC) which reinforces existing obligations and created new standards, by requiring each signatory to respond appropriately to human rights abuse or face action by the court. A further important development occurred in October 2004; when the UN Secretary General submitted a report to the Security Council setting out for the first time the UN's approach to transitional justice issues.

The report provides the need for complimenting peace and justice in resolving conflict. This is an extremely important development in both operational and normative terms. Hence, strengthening of international legal obligations and a growing normative consensus that gross violations of human rights should be remedied has generally shifted the emphasis away from deciding whether to address the past, to questions of how this should be done. This created extraordinary opportunities to examine the intersection between transitional justice and post-conflict peace building in a number of different contexts and establish good practices based on comparative policy analysis. This process cannot simply transplant a successful model from one context to another but must explore the factors that made that model work and ascertain whether they applicable in other circumstances.

The other response to this issue has been made by the United Nations Security Council report's on *the rule of law and transitional justice in conflict and post-conflict societies***.** The report provide that, peace missions have also helped host countries to address past human rights abuses by establishing tribunals, truth and reconciliation mechanisms and victim reparation programmes. Though, not all peace operations are mandated to address transitional justice. The reports therefore provide that, peace operations must better assist national stakeholders to develop their own reform vision, their own agenda, their own approaches to transitional justice and their own national plans. The most important role the peace operations can play is to facilitate the processes through which various stakeholders' debate and outline the elements of their country's plan to address the injustices of the past and to secure sustainable justice for the future, in accordance with international standards,

domestic legal traditions and national aspirations. In doing so, consideration should be on how to respect and support local ownership, local leadership and a local constituency for reform, while at the same time remaining faithful to United Nations norms and standards. Being faithful is to have directly involvement in the protection of human rights and human security where conflict has eroded as no ad hoc, temporary or external measures can replace a functioning national justice system. Thus, the United Nations objects have to be engaged in helping countries to strengthen national systems for the administration of justice in accordance with international standards.

However, this should be through effective strategies for building domestic justice systems which will give due attention to legislation that is in conformity with international human rights law and that responds to the country's current needs and realities is fundamental. It is hereby, noted that this national justices system will help in the process of prosecuting the perpetrators of the conflict led to violations of human rights. Therefore, peace and justice could be attained at the same time rather than depending on peaceful negotiations without adjudicating the culprits of the conflict.

Also, a report of the AU Panel of the Wise provides that Africa has been grappling with the challenges of implementing creative mechanisms to promote peace, reconciliation, and justice. Though the report is on promoting peace, reconciliation and justice our main consideration in this study is on peace and justice. *Articles* 6 and 14 of the *Protocol Relating to Establishment of the Peace and Security Council* of the AU mandates peacemaking and peace building with respect to restoration of the

rule of law and the establishment of conditions for post-conflict rebuilding of society. This should inevitably include a comprehensive framework on addressing the issue of justice and accountability.

Further, *Article* 31, 32, and 33 of AU Policy Framework on Post Conflict Reconstruction and Development (PCRD) under its Human Rights, Justice and Reconciliation chapter explicitly recognizes the need to protect human rights. It obliges the AU to develop mechanisms to deal with past and on-going grievances; provide space for a context-based approach to PCRD. Also to facilitate mobilization of society to ensure the legitimacy and relevance of the PCRD model adopted and addressing the tension between choices of impunity and reconciliation as well as encourage and facilitate peace building and reconciliation activities from the national to the grassroots levels.

Further, allowing for opportunities to invoke traditional mechanisms of reconciliation or justice, to the extent that they are consistent with the African Charter on Human and Peoples' Rights (ACHPR) and establishing efficient and independent justice sectors and provide for the use of AU structures and other international instruments to reinforce human rights, justice and reconciliation. From what has been explained above, the Panel of the Wise further provide that there should be a *programmatic and normative imperative.* As the embodiment of Africa's determination for peace, justice, and reconciliation, the AU is obliged to engender programs that make possible the realization of the African transitional justice vision and aspirations. Furthermore, given that achieving peace, reconciliation, and justice in the aftermath of mass atrocities is a complex matter which requires extraordinary

measures, it elaborates in a holistic manner the entire continuum of measures required to demonstrate the commitment to peace, justice, and reconciliation, and lays down minimum standards and benchmarks for combating impunity and evaluating compliance. Also it provide that there should be a model that would be adaptable to specific country situations like Burundi and because of its appeal to an African sense of justice, needs, and aspirations, it will empower and encourage affected countries to take the lead in designing appropriate transitional justice mechanisms.

5.3 Different Mechanisms Employed in Resolving the Past Atrocities

In responding to this issue, the United States Institute of Peace through its transitional justice: information handbook provide that: in determining which transitional justice mechanism or combination of mechanisms is appropriate for a given country depends on many factors and the unique circumstances of a period of abuse such as: whether crimes are widespread, or focused on one region or ethnic group, the number of perpetrators responsible, or only a few, whether the crimes acts of the State, or those of insurgents, or both. Whether the perpetrators are still more or less in power, or there has been a clean transition to a new government. And, whether the state has sufficient resources to implement a justice mechanism or the courts are credible and whether the state can afford individual reparations.

Then, depending on the answers, certain options would be more viable than others. The most important point is that a careful assessment must be done about the circumstances of the conflict and the positions and interests of the victims, leaders, and the general public before any transitional justice mechanism is decided. The best

way to determine different groups' needs and positions is through thorough consultations and, ideally, public debate about different transitional justice options. With that in mind, below are some factors that affect the utility of different transitional justice mechanisms. These are not concrete rules, but rather present different ways of looking at the issues.

5.3.1 The First Mechanism is Prosecution

Prosecutions should provide the most direct form of accountability, and work best when there are credible courts under national, international, or hybrid which would be available to hold trials. Because the number of potential defendants implicated in past abuses is often quite large, and prosecuting them all would generally be beyond the financial, human and political capacity of the state, the number of perpetrators who can be prosecuted is typically small. There must be strong political will to sustain prosecutions, which is often lacking when perpetrators or their political partners are still sharing power. Prosecutions take significant time and money to conclude, and only address the crimes of individual defendants. But in many ways, successful prosecutions make the strongest statement against impunity and signal to victims that the new government is willing to make a clean break with an abusive past. Thus, the United States Institute of Peace provide that, prosecutions should serve to deter future crimes and be a source of comfort to victims by reflecting a new set of social norms, and begin the process of reforming and building trust in government institutions.[208] It is important however to recognise that criminal justice systems are designed for societies in which the violation of the law is the exception

[208] Roht-Arriaza N, *.Impunity and Human Rights in International Law and Practice*(ed.), Oxford University Press, Oxford, 1995.

and not the rule. When violations are widespread and systematic, involving tens or hundreds of thousands of crimes, criminal justice systems simply cannot cope. This is because the criminal justice process ought to demonstrate a scrupulous commitment to fairness and due process and this necessarily entails a significant commitment of time and resources.[209] It is important to emphasise that recognising criminal justice systems' structural inability to cope with mass atrocity, should not be construed as a de-legitimisation of the role of prosecution or punishment in dealing with past crimes.

Therefore, the criminal justice is part of the response to massive human rights violations and works best if combined with other mechanisms of transitional justice. If domestic prosecutions are possible, they can signal a break with the past, foster renewed public trust in institutions and restore the dignity of victims. At the same time, prosecutions generally face many hurdles and require significant resources and a high commitment to fairness, transparency and public consultations. A clear prosecutorial strategy helps to make the best use of limited resources.

5.3.2 The Second Mechanism is Truth and Reconciliation Commission

The TRC are suitable for analysing widespread and longstanding patterns of abuse, or for cases in which atrocities: whether committed in secret by the State or in remote areas or are relatively unknown. The aim of a TRC is to ascertain the facts and causes of systemic abuse in the most objective way possible, and not necessarily to directly punish individuals involved. As official investigative bodies, TRC require significant political will to implement, and generally are not effective unless the

[209] Supra note 60, at Pg. 16-17

commissioners are truly independent of the parties to the conflict or abuse. The TRC are not simply closed academic inquiries, but serve as a way for all of society to explore exactly what kind of abuses occurred and why, and how to prevent their recurrence in the future, but in a non-criminal context. They should therefore be formed on the basis of extensive public consultations and often work best when their activities include significant public outreach and engagement.

The United States Institute of Peace[210] further provide that, truth-seeking processes assist post-conflict and transitional societies to investigate past human rights violations and are undertaken by truth commissions, commissions of inquiry, or other fact finding missions. The TRC is a unique institution, but their core activities usually include collecting statements from victims and witnesses, conducting thematic research, including gender and children analysis of violations including their causes and consequences, organizing public hearings and other awareness programs, and publishing a final report outlining findings and recommendations. The commissions of inquiry and other fact-finding mechanisms similarly seek to unravel the truth behind allegations of past human rights abuses, but generally operate under more narrowly defined mandates.

From what has been explained above, the TRC have the following limitations: that the TRC require sustained funding and political support to be effective, and there is a real danger that they are increasingly seen as a panacea, inserted into peace agreements in order to provide options for leaders seeking to avoid criminal

[210] United States Institute of Peace, *Transitional Justice: Information Handbook*, September 2008, pg. 1- 22

accountability. Though overall, truth commissions can have a powerful effect when used appropriately and effectively. When conducted in consultation with local actors, they have the potential to contribute to stability, building a just society, and laying the foundations for deepening the rule of law. At their best, TRC can produce influential investigative accounts of human rights violations while providing victims with at least symbolic reparations and accountability. They can support wider peace building efforts, example in Sierra Leone, strengthen human rights standards, and propose recommendations that address critical issues of institutional reform example in South Africa. Their findings may not lead to criminal accountability, but if they name perpetrators, human rights activists can campaign to prevent these perpetrators from taking up future positions in government. Thus, when properly executed, TRC can be one among a host of mechanisms for restoring the rule of law.

Therefore, TRC can foster a common understanding and acknowledgement of an abusive past, and if they are effectively embedded in a comprehensive justice perspective, they can provide a foundation for building a strong and lasting peace. Carefully structuring and implementing a truth commission process is crucial to its having this positive impact.

5.3.3 The Third Mechanism is the Traditional Justice System

This mechanism has been discussed through the book by the International Institute for Democracy and Electoral Assistance.[211] Its provide that the TJS should be a drawing on traditional structures, local initiatives may avoid some of the pitfalls of international institutions imposed from above, particularly the lack of ownership and

[211]Huyse L & Salter M (ed),Trditional Justice and Reconciliation after violent Conflict: Learning from African Experience, IIDA, 2008, 109- 115

consultation. This is a shift from state-level to community-level processes of accountability for example the *Bashingantahe* in Burundi, in the absence of a judicial system still it offered a process from below that sought reconciliation without losing sight of justice. Hence, it often referred to as a hybrid tribunal because of the mix of national and international staff by referring cases of serious crimes to that body.[212]

Therefore, this local justice initiatives offer rich possibilities and by their nature are closer to victims' groups. But in most instances they work well when they are part of a holistic strategy to seek and publicize the truth, restore broken relations, and pursue justice for serious crimes. They are also increasingly being offered as solutions in peace agreements. The TJS provide an array of options available to address accountability; every society has to find its own formula that adheres to international standards and best practices.

Though, both transitional justice mechanisms discussed in this study possess their own strengths and weaknesses, this is not to say that both are equally effective or equally *ineffective* for that matter of resolving the conflict. One may, in fact prove far better suited than the other in regards to certain situations. However, the purpose of this study in this issue is not to make a normative suggestion regarding the superiority of one method versus the other. Rather, this study would prefer to suggest the recognition that there may not be an appropriate manner wherein to prescribe one or the other at this time. It is becoming clearer that the choice of action through legal response must be weighed carefully and implemented in combination

[212] Ibid

with other appropriate forms of intervention.[213] It is therefore much more pertinent to discuss these strategies as they relate to context. Therefore, from the above investigation the key findings of this study can be identified summarily into two: first is when peace and justice could be attained at the same time without prosecution of the perpetrators, and second is where TJM's vary depending on the unique circumstances and gravity of abuse. The following part is going to give a general conclusion and recommendations which have been seen from the discussion undertaken in this chapter.

5.4 Conclusion

There is a need for sequencing Peace and Justice: the study provides that peace and justice are interconnected, mutually interdependent, and equally desirable. However, it is also equally self-evident that in an on-going conflict the most urgent desire of the affected population is to cease hostilities, restore peace and security. Nevertheless, when stability is restored and victims protected, there is need for concerted action to strengthen institutions, including creating new ones to deliver justice and hold certain categories of perpetrators accountable to consolidate the pursuit of sustainable peace.

Also, there should be complementarily between the African countries with the International justice (ICC) as the AU has commitments to fighting impunity as well as recognizing that the ICC has an important role to play. It is critical that the necessary adjustments and amendments be made to the ICC Status, in line with the

[213] Fletcher L.E and Weinstein H.M, "Context, Timing, and the Dynamics of Transitional Justice: A Historical Perspective," *31Human Rights Quarterly*, 2009, at 163-220.

recommendations of the ministerial preparatory meeting on the Rome Statute, held in Addis Ababa on November 6, 2009, as endorsed by the Assembly of the Union at its 14th Ordinary Session held in Addis Ababa in January 2010. This marked the beginning for a positive complementarily between Africa and international justice, as there was no overarching framework in Africa to harmonize the pursuit of justice and accountability in Africa making enforcement and implementation of international justice controversial. To contribute to development of international norms, all measures under this framework including initiatives by the AU to combat impunity, would build on the obligation of furthering international human rights and accountability under the United Nations Charter, the AU Constitutive Act, the African Charter on Human and Peoples' Rights, and the Genocide Convention.

There should be a need to merge those peace agreements and Security Council resolutions and its mandates. The country should give priority attention to the restoration and explicitly mandating support for transitional justice, particularly where UN support for judicial and prosecutorial processes is required. The country should respect, incorporate by reference and apply international standards for fairness, due process and human rights in the administration of justice as well as rejecting any endorsement of amnesty for genocide, war crimes, or crimes against humanity, including those relating to ethnic, gender and sexually based international crimes, ensure that no such amnesty previously granted is a bar to prosecution before any United Nations created or assisted court. The country also should ensure that the United Nations does not establish or directly participate in any tribunal for which capital punishment is included among possible sanctions. Further it should make a

requirement that all judicial processes, courts and prosecutions be credible, fair, and consistent with established international standards for the independence and impartiality of the judiciary, the effectiveness, impartiality and fairness of prosecutors and the integrity of the judicial process.

There should be recognition and respect of the rights of both victims and accused persons, in accordance with international standards, with particular attention to groups most affected by conflict and a breakdown of the rule of law, among them children, women, minorities, prisoners and displaced persons, and ensure that proceedings for the redress of grievances include specific measures for their participation and protection. It should avoid the imposition of externally imposed models and mandate and fund national needs assessment and national consultation processes, with the meaningful participation of Government, civil society and key national constituencies to determine the course of transitional justice and restoration of the rule of law.

Further, where mixed tribunals are envisaged for divided societies and in the absence of clear guarantees regarding the real and perceived objectivity, impartiality and fairness of the national judiciary, consider mandating a majority of international judges, taking account of the views of various national groups, in order to enhance the credibility and perceived fairness of such tribunals among all groups in society. It should insist upon full governmental cooperation with international and mixed tribunals, including in the surrender of accused persons upon request.[214] Also adopt an integrated and comprehensive approach transitional justice, including proper

[214] Supra note 22, at Pg. 64

sequencing and timing for implementation of peace processes, transitional justice processes, electoral processes and other transitional processes and consider the establishment of national human rights commissions as part of transitional arrangements.[215]

5.5 Recommendations

The study is of the view that, there should be a need of leading the Country to Reconciliation by Establishing the Truth about the Origins and Nature of the Conflict. National reconciliation was considered to be the cornerstone of peace building in Burundi. *Article* 8 of Protocol I stipulates that a national commission known as the National Truth and Reconciliation, shall be established to fulfil the following main functions: first, to undertake investigation of the killings and all human rights abuses committed; second to control Arbitration and reconciliation; and third to ensure clarification of history to offer one reading of Burundi's history. In the spirit of the Arusha Agreement, the National Truth and Reconciliation Commission was expected to be created without delay. *Article* 8; *Section* 2 (b) states that Members of the Commission shall be appointed by the transitional Government in consultation with the Bureau of the transitional National Assembly. As discussed in *Section* 2, transitional institutions were expected to last three years. So, it was expected that the TRC would be created within three years following the beginning of the transitional period which started about one year after the signing of the Arusha Agreement. However, to date, the TRC has not started its work. Moreover, in addition to the problems associated with its creation it is highly likely that the current

[215] Ibid, at Pg. 6-63

political upheaval in Burundi will not permit the TRC to start its work in its current composition. If the current conflict opposing the president with the civil society, the opposition, and a segment of the population is not resolved quickly, members of the TRC will most probably resign or be changed; alternatively, if the conflict persists, the country will be dealing with another crisis and the conditions will not be conducive for truth telling and reconciliation.

In terms of policy sequencing, the establishment of the TRC should have been among the first institutions created to lay the ground for a genuine process of reconciliation so as to find a lasting solution to the recurring civil war. Hence the need to find out why it has taken so long to create the TRC and whether the leadership really want a TRC as described in the Arusha Agreement. While answers to these questions could only be speculative, it is inconceivable that the ruling party would allow that some of its prominent leaders be investigated for crimes they might have committed during the civil war.

In this sense, the recent establishment of the TRC could have been just a political act to appease the population and the international community.[216] Indeed, the period to be covered by the Commission under *Article* 6, from independence on 1 July 1962 to 4 December 2008, comprises not only a time when CNDD-FDD was in power but also a period when it was engaged in a civil war and might have been involved in acts falling under the jurisdiction of the Commission. It is likely that fearing a backlash from the process, the ruling party might have avoided creating this

[216]Vandeginste S, 'Burundi's Truth and Reconciliation Commission: How to Shed Light on the Past While Standing in the Dark Shadow of Politics?' *6 International Journal of Transitional Justice 2*, 2012, at Pg.355–365.

commission and, later, under pressure, decided to create it but impairing it from its inception. Therefore, it appears that the ruling elite has chosen to continue with the old policy of protecting suspected criminals from within its ranks, a practice that started in 1965.

Judging by the way other recent commissions established to probe cases of extrajudicial killings have been conducted, there is reason to doubt that the TRC will meet the expectations of the public, particularly those who have lost loved ones during Burundi's past conflicts. In all recent commissions established by the government to bring to light circumstances surrounding some major crimes, the fact that government agents were among the main suspects meant that the commissions either never ended their work or were carried out in a way that covered rather than uncovered the suspected criminals. This, again, is the continuation of a practice that started well before the current leaders came to power. Presidents Pierre Buyoya who was in power when the Arusha Agreement was signed until 2003 and Domitien Ndayizeye who was president from 2003 to 2005 could have created the TRC.

Further, there is a need of proposing an institutional framework for transition that would bring about the conditions for democratic renewal through equitable power sharing. Measures under this rubric were evidently in favour of the former Hutu rebels as they were the ones who had been politically side-lined by previous regimes. These arrangements were immediately implemented in the aftermath of the Arusha Agreement with the formation of transitional governments that were required to include a specific number of representatives from the two main groups under

Protocol II, Chapter II, *and Article* 15. For example, the first transitional government was formally inaugurated on 1 November 2001. It had fourteen Hutu ministers and twelve Tutsi ministers. This measure was relatively easy to implement as the practice of including ministers from the two groups had started even before the 1993 civil war. The only difference was that following the Arusha negotiations, the quota system was codified and even included in the country's constitution.

Also, a determination to enhance global accountability and install African values, where the international norms and standards of accountability for international crimes are evolving rapidly but without the essential African input and voices. While Africans also share aspirations for these global accountability norms, some contexts in Africa make their implementation impossible. In such circumstances sequencing is necessary. The traditional practices and customary norms in Africa like Ubuntu in South Africa, *Gacaca* in Rwanda, and *Mato Oput* in Uganda have proven to be useful to complement the need for criminal prosecutions for certain categories of crimes.

In Burundi transitional justice can serve as a complementary element to existing judicial structures that have either broken down or been rendered ineffective by the conflict and the painful experiences of many. As a traditional institution for managing conflict the institution of *bashingantahe* can act as a safeguard guaranteeing community harmony and reconciliation. Culture does not change overnight. Mindful of this, once it is back on its feet the institution of *bashingantahe* can play its full social and political regulatory role in the maintenance of peace and

social cohesion and as a moral and cultural reference point. Additionally, it can play a significant role in the process of reconciliation in a society which has torn itself apart in the course of recent years, but is today committed to the path of reconciliation and reconstruction.

Therefore, institutionalizing these norms and integrating generic African practices to international norms would further enhance international commitment to end impunity and promote peace and justice.

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